

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

In the Matter of the Appeal of:

LEVY PREMIUM FOODSERVICE  
LIMITED PARTNESHIP dba  
LEVY RESTAURANTS  
29355 Arnold Drive  
Sonoma, CA 95476

Employer

Dockets. 12-R1D5-2714 and 2715

**DENIAL OF PETITION  
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Levy Premium Foodservice Limited Partnership dba Levy Restaurants (Employer).

**JURISDICTION**

Commencing on June 26, 2012 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 7, 2012 the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On May 30, 2014, the ALJ issued a Decision which sustained the two citations, denied Employer's appeal, and imposed a civil penalty.<sup>2</sup>

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

<sup>2</sup> Subsequently the ALJ issued an Erratum which corrected a typographical error in the Summary Table issued with the Decision. The Erratum related back to the date of the Decision.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

### **ISSUE**

Was the ALJ's Decision correct?

### **REASON FOR DENIAL OF PETITION FOR RECONSIDERATION**

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition asserts that the Decision was issued in excess of the ALJ's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Board also finds that the ALJ in his Decision thoroughly and properly analyzed the facts and correctly applied the law to those facts. Accordingly we adopt the ALJ's Decision as our own, attach it hereto, and incorporate it here.

### **INCORPORATED ALJ DECISION**

#### **Statement of the Case**

Levy Premium Foodservice Limited Partnership dba Levy Restaurants (Employer) is a food services provider at entertainment and sports venues. Beginning on June 26, 2012, the Division of Occupational Safety and Health (the Division) conducted an accident inspection at the Infineon Raceway in Sonoma, California (the site). On September 7, 2012, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>3</sup> The citations allege failure to require the use of the seatbelt when operating an industrial truck (forklift), and operation of the industrial truck in an unsafe manner.

Specifically, the Division alleges that an employee was seriously injured in a roll-over accident when he jumped from a Gehl telescopic forklift (forklift) and was pinned to the ground while operating the machine without wearing a seatbelt. Citation 1, Item 1 alleges a Serious violation of section 3650 subdivisions (t)(5) and (33). Citation 2 alleges a serious violation of section 3653, subdivision (a). Employer filed timely appeals contesting the existence of the alleged violations, their classifications, and the reasonableness of the penalties. Employer raised numerous affirmative defenses but withdrew many of them at the time of hearing.<sup>4</sup>

The parties further narrowed the issues by stipulating to some of the penalty related findings. The parties agreed that if Citation 2 is upheld, the Division waives the penalty for Citation 2; those penalties as calculated by the Division are correctly calculated if the classification of Citation 1, Item 1 is determined to be a serious, accident related violation; the penalty calculation factors as set forth in the Division's penalty calculation worksheet are correct; if Citation 1 is affirmed except for the accident-related characterization, good faith and extent are rated as low, likelihood is medium, and severity is high.

This matter was regularly set for hearing before Neil R. Robinson, Administrative Law Judge for the California Occupational Safety and Health Appeals board, at Oakland, California, on July 16, 2013. Ron E. Medeiros, Esq., of the Peterson Law Corporation represented Employer. Allyce Kimerling, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. The record was left open until August 16, 2013, for the submission of closing briefs. The submission date was later extended to November 15, 2013, and once more to February 15, 2014, by order of the Administrative Law Judge.

## **Findings of Fact**

1. At the time of the accident, Employer had over 100 employees.

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<sup>3</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

<sup>4</sup> Employer dismissed defenses 1, 2, 5, 10 and 12.

2. The 1BY form was properly served in both citations.
3. The date of the accident was June 22, 2012.
4. Employee Gary Verrazano (Verrazano) was not wearing a seat belt at the time of the forklift accident.
5. The forklift involved in this accident was equipped with a seat belt from the manufacturer.
6. The forklift involved in this accident was equipped with rollover protection.
7. At the time of this accident, Verranzano had his right leg and arm outside the running lines of the forklift.
8. At the time of the accident, [employee (Verrazano) was a supervisor for Employer.
9. At the time of the accident, employee Margie Ingram (Ingram) was a supervisor for Employer.
10. At the time of the accident, Sterling Teran (Teran) was a supervisor for Employer.

**Issues:**

1. At the time of the accident on June 22, 2012, was Employer's employee Gary Verrazano operating a forklift without using a seatbelt, thus violating section 3650, subdivision (t)(33) and 3653, subdivision (a)?
2. Was there a realistic possibility that an employee would suffer serious physical harm resulting from employer's violation of safety orders?

**Analysis:**

1. At the time of the accident on June 22, 2012, was Employer's employee Gary Verrazano operating a forklift without using a seatbelt, thus violating section 3650, subdivision (t)(33) and 3653, subdivision (a)?

Citation 1, Item 1 issued by the Division alleges a violation of two subdivisions of section 3650, subdivision (t) which requires that industrial

trucks be operated in a safe manner in accordance with certain operating rules. Two of those rules are in subsections 5 and 33 of section 3650, subdivision (t). Specifically, subdivision (5) prohibits employees placing “any part of their bodies outside the running lines of an industrial truck...where shear or crushing hazards exist.” Subdivision (33) requires the use of seatbelts when “an operator restraint system such as a seat belt” is provided by the industrial truck manufacturer.

Citation 2, Item 1, alleges a violation of section 3653, subdivision (a) which requires use of seat belts “...on all equipment where rollover protection is installed”. Because the corrective action needed for violations of sections 3650, subdivision (t) and section 3653 are the same (strict adherence to the rule requiring use of seatbelts); there can be only one penalty for both violations, if sustained. (*JSA Engineering, Inc.*, Cal/OSHA 00-1367, Decision After Reconsideration (December 3, 2002, citing *San Francisco Newspaper Agency*, Cal/OSHA App. 93-319, Decision After Reconsideration (December 20, 1996), and *Color Specialists, Inc.*, Cal/OSHA App. 95-3883, Decision After Reconsideration (June 30, 2000.)) Thus, the parties stipulated at hearing that if a violation of citation 2 is sustained, the Division waives the penalty.

Section 3650, subdivision (33) and section 3653, subdivision (a) were appropriately cited by the Division because both sections require that employees operating industrial trucks wear seatbelts. The forklift in use at the time of the accident was rented by Employer and its employee was injured operating this rented vehicle. The forklift involved in the rollover accident had a seatbelt that was original equipment as noted in the Operator’s Manual (Exhibit 12). There is no evidence to contradict that the installed seatbelt was available for use by the employee operating the vehicle. Moreover, section 3653 requires the use of seatbelts when the equipment has “rollover protection.” Rollover protection is defined by section 3649 as “protective frames and protective enclosures,” which are known as rollover protective structures (ROPS). The photographic evidence in Exhibit 3<sup>5</sup> and the operator’s manual in

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<sup>5</sup> Employer objects to the photographic evidence because it is allegedly hearsay. Exhibit 3, starting on page 2, mostly contains the incident report Harrington acquired from Sonoma Valley Fire and Rescue. Evidence Code section 1280 applies a three part test to determine whether a document may be admissible hearsay: (1) the writing was made by and within the scope of duty of a public employee, (2) the writing was made at or near the time of the act, condition, or event, and (3) the sources of information and method and time of preparation were such as to indicate its trustworthiness. From the face of the document, it is clear that it is documentation of the fire crew’s response to the accident site. This document is the fire department’s recording of the events on the day of the accident from the first call to the fire department to the time the last of the fire department personnel left the scene. The report was dated the day of the accident and authored by Nick J. Silva, (FC). From the content of the document, (FC) is an abbreviation for fire captain. Harrington identified the document as having been received from the fire department after his request. By its very title, Sonoma Valley Fire and Rescue denotes the identity of a public entity. Fire fighters and fire captains working for public entities are public employees. There is no evidence in this record to indicate that the report and photographs in Exhibit 3 are not trustworthy or authored by any person or entity other than Sonoma Valley Fire and Rescue. Furthermore, the diagrams of the vehicle in Exhibit 12

Exhibit 12 clearly depict an operator's station enclosed in a steel cage that clearly meets the definition of rollover protection. Thus, the forklift involved in the event which was the subject of the investigation had rollover protection rendering section 3653, subdivision (a) applicable.

To uphold the citation, the Division must prove by a preponderance of the evidence that the forklift operator was not wearing the provided seatbelt while operating the forklift. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of 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." (*Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005), citing *Spaich Brothers, Inc. dba California Prune Packing*, Cal/OSHA App. 01-1630, Decision After Reconsideration (Feb. 25, 2005).

Indirect or circumstantial evidence may allow for the inference of a necessary finding. For example, to establish employee exposure, the location of hazardous equipment in a workplace rendering it capable of being used by employees, or an inspector's observation of an unguarded saw blade with sawdust beneath the blade support an inference that an employee used the unguarded saw, and was thus exposed to the hazard cited. (*Santa Fe Aggregates, Inc.*, Cal/OSHA App. 00-388, Decision After Reconsideration (Nov. 13, 2001), *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135 Decision After Reconsideration (June 21, 1982), *George L. Lively*, Cal/OSHA App. 98-088 Decision After Reconsideration (Apr. 28, 1999), see also, *Avecor, Inc.*, OSHAB 77-733, Decision After Reconsideration (June 29, 1984).).

Here, sufficient circumstantial evidence supports the conclusion that Verrazano was not wearing a seatbelt on the day of his accident. Verrazano was driving the forklift on the day of the accident over a berm that sloped, according to Division inspector Harrington's measurements, between 37 and 42 degrees. The forklift manual (Exhibit 12), warns against operating the forklift on grades greater than 12 degrees.<sup>6</sup> The consequence of operating the forklift on unsafe steep terrain was a roll-over accident.<sup>7</sup> The forklift landed on its left side pinning Verrazano's right arm and leg under the vehicle. Sonoma Valley Fire and Rescue responded to the accident site and extracted Verrazano from underneath the overturned forklift. The first-responders administered

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corroborate what is seen in the photographs. Whether admissible as a hearsay exception or because Exhibit 3 is corroborated by other evidence, the exhibit may be relied upon to support the findings here.

<sup>6</sup> Harrington took a photograph of the berm which is marked as Exhibit 11.

<sup>7</sup> During Harrington's site visit, Harrington was accompanied by Tueros, a management representative, who showed Harrington the tracks where the forklift had traveled when the roll-over accident occurred and the spot where fluids had leaked from the overturned vehicle creating a stain on the ground.

emergency medical care at the scene of the accident and Verrazano was then transported to higher level care by ambulance. Harrington, according to his testimony, checked the forklift's seat belt during his site visit and found it to be in working order.

Based on the information Harrington collected during and after his site visit, the records from Sonoma Valley Fire and Rescue (Exhibit 3), his knowledge of other forklift accidents, and the mechanism of injury, Harrington was able to reach a conclusion about whether Verrazano was wearing a seat belt. Harrington testified that Verrazano's right arm and leg could be pinned under the left side of the forklift, in a rollover accident to the left, only if he was not secured with a seatbelt.

Harrington's experienced opinion, having investigated a number of accidents with forklifts, was that it was impossible for a restrained driver to land on right upper and lower extremities in a roll-over accident onto the forklift's left side. One may reasonably infer from the information regarding the slope of the berm, the photographs of the location, and Harrington's testimony, that Verrazano was unrestrained at the time of the accident. Either Verrazano was attempting to leap, or was thrown from the cab. Harrington testified that based on the evidence in the photographs showing the forklift on its left side (Exhibit 3), including the broken glass and other debris from the accident, he concluded that the driver could not have been entirely in his seat when the rollover accident occurred. (See, *Blattner Energy Inc.*, Cal/OSHA App. 12-0911, Denial of Petition for Reconsideration (Aug. 22, 2013).) Thus, it is found that employee Verrazano was operating the forklift without wearing the seatbelt installed on the forklift in violation of sections 3650, subdivision (t)(33) and 3653, subdivision (a).

Because Verrazano was not wearing a seatbelt, he was either thrown underneath the rolling vehicle or he attempted to jump, and then fell or rolled under the vehicle,<sup>8</sup> resulting in the crushing injuries described above. As a result, the Division cited Employer for a second subdivision of section 3650, subdivision (t)(5), for Verrazano having his extremities outside the running lines of the forklift. Whether a result of not being properly restrained or intentionally extending his right upper and lower extremities outside the running lines of the vehicle by attempting to jump as it was rolling to the left, clearly his extremities were extended beyond the running lines of the forklift at the time of the accident.<sup>9</sup>

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<sup>8</sup> Dell'Acqua, an eye witness to the accident, stated in his interview with Harrington according to Harrington's type-written notes, (Exhibit 10): "...I saw the tire fold, then Gary jumped from the Gradeall [forklift] and he was pinned underneath it."

<sup>9</sup> Employer attempts the argument that because Verrazano did not intend to extend his extremities outside the running lines of the vehicle, Employer cannot be penalized. No proof was offered on Verrazano's intent and there is no language in section 3650, subdivision (t)(5) that requires a finding of intent. Thus, Employer's argument, made without citing any authorities, fails.

The operator's manual in Exhibit 12, page 10, confirms the proper procedure for safe operation of the vehicle: "Always wear the seat belt provided to prevent being thrown from the machine. If you are in an overturn: - DO NOT jump! - Hold on tight and stay with the machine! - Lean away from the fall!" The evidence shows that a person restrained by the secured seat belt will be protected by the ROPS in a rollover accident if wearing a seatbelt. Thus, a violation of section 3650, subdivision (t)(5) has been proven.

Moreover, when a safety order has more than one requirement, a violation of any one requirement is sufficient to support a violation of that safety order. (*California Erectors Bay Area Inc., Cal/OSHA App. 93-503, Decision After Reconsideration* (July 31, 1998). Even if the Division was unable to meet its burden of proof to support a violation of section 3650, subdivision (t)(5), there is nonetheless sufficient evidence to uphold a violation of section 3650, subdivision (t)(33). Thus, a violation of section 3650, subdivision (t)(33) is proven even if a violation of subdivision (t)(5) is not.

Employer alleged numerous defenses to the alleged violations but produced no evidence to prove them. There is insufficient evidence presented by the Division to prove any defenses alleged by Employer. Thus, none of Employer's defenses have merit. Both citations are affirmed.

2. Was there a realistic possibility that an employee would suffer serious physical harm resulting from employer's violation of safety orders?

Both Citations 1 and 2 allege serious, accident related violations. Labor Code section 6432 states that there is a rebuttable presumption that a serious violation exists 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." Labor Code section 6432, subdivision (e)(1) defines "serious physical harm" in relevant part as follows: "Inpatient hospitalization for purposes other than medical observation."

The term "realistic possibility" is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation., Inc., Cal/OSHA App. 99-565, Decision After Reconsideration* (Sep. 27, 2001) the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: "[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) ... if such a prediction is clearly within the bounds of human reason, not pure speculation." By adopting the "reasonable possibility" language, which had been in use by the Appeals Board, there is a presumption that the Legislature has approved the Board's definition. (See, *Moore v.*

*California State Board of Accountancy* (1992) 2 Cal. 4th 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798.).

When considering the legislative history of the revised Labor Code section 6432, subdivision (a), there is little question that a lower standard of proof was intended when revising the statute from "substantial probability" to "realistic possibility" when this statute was revised effective January 1, 2011. Addressing criticism of the pre-amended Labor Code section 6432, subdivision (a), and the difficulty critics felt existed in proving a serious violation, the Assembly Committee on Labor and Employment stated:

Critics also point to other interpretations of the current Appeals Board that make it exceedingly difficult to prove 'serious violation' cases. For example, the Appeals Board has also applied a strict interpretation of the requirements that there be a 'substantial probability' that serious physical harm occur -- at least a 50 percent chance. In fact, in a recent article the Chief of DOSH characterized this interpretation by stating, "that is impractical, unrealistic and calculated to make it almost impossible for us to meet our burden." (Ass. Com. On Labor Standards, on Assem. Bill No. 2774 as amended April 14, 2010, May 5, 2010 date of hearing, (reg. sess. 2009-2010).)

If the Division calculates the proposed penalty according to section 336, subdivision (c)(3), it must prove the serious violation was a cause of a serious injury. Harrington's testimony bridged the causal gap between the safety standard violations and the ultimate injuries suffered by Verrazano. Harrington stated, and the direct and circumstantial evidence supports that the forklift weighted over 23,000 pounds and rolled over onto Verrazano's right upper and lower extremities because Verrazano was not wearing his seat belt.

Verrazano clearly suffered injuries that resulted in hospitalization for more than observation. Verrazano, according to the report of the Sonoma Fire Department, as well as Employer's own information, was transported to Santa Rosa Memorial Hospital after being extracted from the forklift at the accident site. He was later transferred to California Pacific Medical Center (CPMC) in San Francisco. Harrington spoke only briefly with Verrazano while he was at CPMC, in early August 2012, and was unable to gather any information on a prognosis. The crushing injuries which resulted from the violation were to be expected with a forklift of this size and weight, according to Harrington's testimony, and death was a realistic possibility. No evidence was presented that Verrazano was not hospitalized as a result of the accident, or that the hospitalization was less than 24 hours or for other than mere observation. The

totality of the evidence, including the weight of the vehicle and mechanism of injury leads to the reasonable inference that Verrazano was hospitalized and treated for his crushed right leg and arm and that that hospitalization was for more than mere observation<sup>10</sup> and more than 24 hours in length.<sup>11</sup> Aside from Harrington's opinion that an accident in these circumstances would result in serious physical harm to the driver, Verrazano actually experienced serious physical harm as defined by Labor Code section 6432, subdivision (e)(1).

The Labor Code provides the Employer with an opportunity to establish that it did not, and could not, with the exercise of reasonable diligence, have known of the presence of the violation as a means to rebut the presumption of a serious violation when a realistic possibility of a serious physical harm resulting from a violation of a safety order. (See Labor Code 6432, subdivision (c)). Employer has the burden of proof in rebutting the presumption. (see *Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (June 9, 2010).) Employer contends that it had no reasonable opportunity to know, or could not have known with the exercise of reasonable diligence, of Verrazano's conduct. Employer has failed to produce sufficient evidence to rebut this presumption.

A supervisor's knowledge of a hazard is imputed to the employer. (*Webcor Construction LP*, Cal/OSHA App. 08-2499, Denial of Petition for Reconsideration (Oct. 12, 2009).) In *Lift Truck Services Corporation*, Cal/OSHA App. 93-384, Decision After Reconsideration (March 14, 1996) the Appeals Board provided the rationale for the knowledge requirement employers may use to rebut the presumption of a serious injury: "With the purpose of the Act in mind, the Board reads the knowledge element of Labor Code section 6432 to encourage employers to conduct reasonably diligent inspections for violative conditions in the workplace so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty."

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<sup>10</sup> At the accident scene, the responding fire department "...assisted ambulance personnel with BLS care, setting IV Bags, and Catheters....." according to the fire department report in Exhibit 3. Obviously this occurred before Verrazano was transported to the hospital. This circumstantial evidence dictates against a finding that Verrazano was merely being observed when he reached the hospital.

<sup>11</sup> Although Employer argues that there is no serious violation because there is no reliable evidence that Verrazano was hospitalized for more than 24 hours for other than observation pursuant to section 336, subdivision (d)(7) (which refers to the definition of a serious injury, not a serious violation in Labor Code section 6302, subdivision (f).) Section 336, subdivision (d)(7) is used to calculate the penalty, whereas the requirements for ascertaining whether there is a serious accident related violation is located in Labor Code section 6432, Labor Code section 6432, subdivision (e) defines "serious physical harm as used in this part," (a serious violation may be found if there is a realistic possibility that death or serious physical harm will occur as a result of a hazard created by the violation of a safety order) as "(1) Inpatient hospitalization for purposes other than medical observation." There is no 24 hour requirement to find a serious, accident related violation, pursuant to Labor Code section 6432. If there is a conflict between the Labor Code and a regulation, the Labor Code takes precedence. (*CA Prison Industry Authority*, Cal/OSHA 08-3426, Decision After Reconsideration (November 8, 2013) citing *In re C.B.* (2010) 188 Cal.App.4<sup>th</sup> 1024, 1033, 1034.

Verrazano's accident was witnessed by two people who identified themselves as supervisors, Dell'Aqua<sup>12</sup> and Ingram.<sup>13</sup> With Dell'Aqua seeing the events leading up to the accident and the forklift overturning, there is no evidence in this record to conclude that he saw Verrazano wearing the seatbelt, and Employer did not call Dell'Aqua to testify at the hearing. Because Dell'Aqua's observations were imputed to Employer, it had a reasonable opportunity to know that Verrazano failed to use the seatbelt available on the day of the accident. Without more evidence, Employer has not rebutted the presumption created by Labor Code section 6432, subdivision (a) based on Employer's theory that there was no reasonable opportunity for it to know that a seat belt was not being used

Employer also argues, pursuant to Labor Code section 6432, subdivision (a) that it could not, with the exercise or reasonable diligence, have known that Verrazano was not wearing a seatbelt. Labor Code section 6432, subdivision (c)(1) provides some guidance to employers seeking to show that they could not have known of a safety violation with the exercise of reasonable diligence. Employer may show that it "...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)."

Labor Code section 6432, subdivisions (b)(1)(A) and (C) contain relevant criteria to assist employers seeking to rebut the presumption of a serious violation. Subdivision (b)(1)(A) suggests that employers produce evidence on "[t]raining for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards." Employers may also submit evidence pursuant to subdivision (b)(1)(C) that considers, "[s]upervision of employees potentially exposed to the hazard."

Employer did not present "all the steps" it took to prevent its employees from operating machinery without using the available seatbelt. Although the Division provided several documents listed by section 6432, subdivision (c)(1), such as records of forklift training courses and a copy of Employer's IIPP, the information is general, and does not address specifically how Employer communicated to employees the hazards of operating machinery without securing the seatbelt. More specifically, there is no evidence to demonstrate that Verrazano had any training on the forklift or the information in the

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<sup>12</sup> Exhibit 10.

<sup>13</sup> Exhibit 13.

operator's manual in Exhibit 12, especially with respect to the admonishment that he wear a seatbelt and that he not jump if the forklift were overturning.

Teran<sup>14</sup> is another supervisor, and is responsible for safety and training. Teran stated that forklift training is done by a company known as RSC. Teran noted that seatbelt use is mandatory and that it "usually don't have problems with operators not wearing seatbelts." If, however, an employee is found not wearing a seatbelt, he will be disciplined by Employer, according to Teran. There is no evidence in this record that indicates Verrazano was disciplined for failing to wear a seatbelt.<sup>15</sup> Thus, Employer has not proven that it could not have known, with the exercise of reasonable diligence that employees were failing to wear seatbelts.

There is insufficient evidence in this record to prove that Employer didn't know about the hazard or could not have known with the exercise of reasonable diligence. An employer, who knows about a hazard and does not correct it, has not rebutted the presumption of a serious violation.

As analyzed above, Verrazano suffered a serious accident related injury. The classification of the violation as serious must stand. Because the parties stipulated that in the event there was a finding of a serious accident related injury DOSH calculated the penalties correctly, it is unnecessary to further consider penalty calculations.

### **Conclusions:**

Citation 1, Item 1, and Citation 2, Item 1 are affirmed. Pursuant to the stipulation of the parties,, and consistent with *JSA Engineering, Inc, supra*, the penalty of Citation 2, Item 1 is vacated. The penalty for Citation 1, Item 1, as calculated by the Division is affirmed and set forth in the attached summary table.

DATED: May \_\_\_\_, 2014

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<sup>14</sup> Exhibit 14.

<sup>15</sup> According to *Dunnick Bros., Inc.*, Cal/OSHA App. 06-2870 Decision After Reconsideration (April 13, 2012), Admissions by a party, or its representative, are not made inadmissible by the hearsay rule pursuant to Evidence Code section 1222, an exception to the hearsay rule applicable here to representatives of Employer in their representative capacity. Harrington's interviews with Dell'Acqua, Ingram, and Teran, documented in Harrington's type-written notes, indicate that all three people are supervisors for Employer. No evidence was produced to prove that Dell'Acqua, Ingram, and Teran were not supervisors and thus, incapable of speaking on behalf of Employer. Additionally, although Harrington testified that he copied his hand written notes by transcribing them to typewritten documents and then destroyed his hand written notes, there is no evidence that this practice is inappropriate or spoliation of evidence as claimed by Employer. See *Clark Pacific Precase, LLC*, Cal/OSHA 09-83, Denial of Petition For Reconsideration (October 25, 2012).

Neil Robinson  
Administrative Law Judge

**APPENDIX A**  
**Summary of the Record**

**Documentary Evidence – Division**

<u>Exhibit Number</u>	<u>Exhibit Description</u>	<u>Admitted</u>
1.	Jurisdictional documents including citations and appeals	Yes
2.	Email from Mark Harrington dated August 8, 2012	Yes
3.	Report from Fire Department	Yes
4.	Accident report dated 6/22/2012	Yes
5.	Document Request Sheet 6/22/2012	Yes
6.	Corresponded from Larry Arrington, 6/27/2012	Yes
7.	Employer's 1 <sup>st</sup> report of occupational injury or illness	Yes
8.	Injury and Illness Prevention Program	Yes
9.	Email from Mike Tueros 7/20/12	Yes
10.	Mark Harrington's interview notes (Richard Dell'Aqua)	Yes
11.	Photograph of accident site	Yes
12.	Forklift Instructions/Operation Manual	Yes
13.	Mark Harrington's interview notes (Margie Ingram)	Yes
14.	Mark Harrington's interview notes (Sterling Teran)	Yes
15.	Employee RT Forklift Training Records	Yes
16.	Site Inspection Records 2012	Yes
17.	Forklift Rental Agreement 6/11/12	Yes
18.	Email from Ron E. Medeiros, 7/11/2013	Yes
19.	Email from Ron E. Medeiros, 7/13/2013	Yes

**Documentary Evidence – Employer**

None Submitted

**Witnesses Testifying at the Hearing**

Mark Harrington

**I, Neil Robinson, the California Occupational Safety and Health Appeals Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was periodically monitored during the hearing and constitutes the official record of the proceedings, along with the documentary evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment was functioning normally.**

## **DECISION**

For the reasons stated in the ALJ's Decision, the petition for reconsideration is denied.

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: AUGUST 25, 2014