BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1349559**
O.C. JONES & SONS, INC. **1520 FOURTH STREET** **BERKELEY, CA 94710**	**DECISION**
Employer	

Statement of the Case

O.C. Jones & Sons, Inc., (Employer) is a construction company specializing in grading and paving operations on public works projects. On September 26, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineers Jeanette Aleta (Aleta) and Fernando Costa Martins (Costa Martins), commenced an accident investigation related to Employer's work site located at the Highway 880 southbound Tennyson off-ramp in Hayward, California (jobsite).

On March 11, 2019, the Division issued two citations to Employer. The citations allege: (1) Employer failed to implement an effective Injury and Illness Prevention Program; and (2) Employer failed to implement sufficient controls for hauling operations to ensure that vehicle operators knew of the presence of workers on foot in the area of operation.

Employer filed a timely appeal of each citation. Employer's grounds for appeal for each citation contest the existence of the violations, the classifications of the citations, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses.[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 conducted the hearing from Sacramento, California, on May 9, 2023, October 10, 11, and 12, 2023, and November 14, 2023, with the parties and witnesses appearing remotely via the Zoom video platform. Fred Walter, attorney with the Conn Maciel Carey, LLP, represented Employer.

[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).)

Quoc-Anh Mitchell Dao, Staff Counsel, represented the Division. This matter was submitted for Decision on February 29, 2024.

Issues

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

2. Did Employer fail to control hauling operations in such a manner as to ensure that a vehicle operator knew of the presence of a worker on foot in the area of the hauling operation?

3. Did the Division establish that Citation 1 was properly classified as General?

4. Did the Division establish that Citation 2 was properly classified as Serious?

5. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

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

7. Are the proposed penalties reasonable?

Findings of Fact

1. On the night of September 13, 2018, Ivan Oswaldo Ochoa Ortega (Ortega), while working on Employer's jobsite, suffered a fracture of his lower left leg resulting in hospitalization for two days.[2]

2. At the time of the accident, both Ortega, an employee of Employer, and Antonio Israel Cazares Pena (Pena), an employee of Employer, were working on foot near an asphalt truck transporting asphalt for Employer and driven by Jaspal Singh Sandhu (Sandhu).

3. At the time of the accident, the asphalt truck drove forward at the same time as Ortega stepped backward toward the truck and Ortega's leg was injured by the truck.

[2] Finding of Fact number 1 is pursuant to stipulation of the parties.

4. At the time of the accident, Ortega was attempting to stay clear of the truck, but was focused on raking asphalt, rather than the actions of the truck.

5. At the time of the accident, Employer did not have a system in place for ensuring that employees remained outside of the area of operation of the asphalt truck.

6. The area where Pena and Ortega were standing near the asphalt truck at the jobsite had less space than was typical for Employer's work sites.

7. At the time of the accident, Sandhu was unaware of the presence of Ortega near the asphalt truck.

8. Employer did not use a system at the jobsite designed to make Sandhu aware of the presence of workers on foot in the area of operation of his vehicle.

9. Employer's Injury and Illness Prevention Program required Employer to identify and correct hazards at its work sites.

10. Ortega was told at Employer's daily meetings, held before work commenced each day, to be careful around large vehicles nearby and to be aware of where vehicles were at all times.

11. Pena was trained to make visual contact with asphalt truck drivers and pay attention when trucks were passing.

12. Ramiro Espinoza, Employer's foreman supervising Pena and Ortega's crew on the night of the accident, went over safety rules at the start of the shift that Ortega was injured.

13. Employer followed the same three-stage procedure for every paving job for decades.

14. Employer did not use spotters for the asphalt trucks at the jobsite.

15. Employer relies primarily upon workers on foot to avoid asphalt trucks.

16. Employer did not use a system to ensure that asphalt truck operators were made aware of workers on foot in the area of operation of their vehicle that the vehicle operators had not seen themselves.

17. Employer did not ensure that Sandhu maintained verbal communication with anyone to advise him of workers on foot around his truck at the jobsite.

18. Employer did not communicate to the asphalt truck operators if workers moved closer to trucks while they were stopped and where the operator did not see the approach of the on-foot workers.

19. Sandhu expected workers on foot would avoid his truck and was not kept informed of the location of workers on foot near his truck.

20. Employee exposure to the hazard created by moving asphalt trucks poses a realistic possibility of serious physical harm or death.

21. The proposed civil penalties were calculated in accordance with the Division's policies and procedures.

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,[3] 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:
>
> […]
>
> (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:

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

[…]

(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:

Prior to and during the course of the inspection, including, but not limited to, on September 13, 2018, employer failed to implement an effective Injury and Illness Prevention Program in the following instances:
(1) The employer failed to ensure employees comply with the safe and healthy practices, specifically ensuring employees comply with their night protocols as outlined in their code of safe practices of working near moving equipment. (T8CCR 3203 (a)(2)[.)]
(2) The employer failed to recognize and correct the unsafe practice of employees walking and moving close to moving equipment during the asphalt operations on the Southbound 880 Tennyson off ramp (T8CCR 3203 (a)(4) and (6)[.])

In its post-hearing brief, the Division moved to amend Citation 1, Item 1, by withdrawing instance 1 of the AVD. The Division's motion to amend is granted and instance 1, referencing section 3203, subdivision (a)(2), is withdrawn. Accordingly, the discussion herein will focus on section 1509, subdivision (a), with regard to its reference to section 3203, subdivisions (a)(4) and (a)(6).

Section 3203, subdivision (a), and therefore section 1509, subdivision (a), requires employers 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. Even when an employer has a comprehensive IIPP, the Division may still demonstrate a violation by showing that the employer failed to implement the plan. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP, Tri-State Staffing,* Cal/OSHA App. 12-0378, Decision After Reconsideration (Oct. 5, 2015).) Said another way, a failure to implement constitutes a failure to act in accordance with the terms of the IIPP.

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 citation alleges that Employer failed to identify and correct the "unsafe practice of employees walking and moving close to moving equipment during the asphalt operations on the Southbound 880 Tennyson off ramp." Additionally, in its post-hearing brief, the Division argues that Employer failed to "identify the hazard of the changed working conditions on a narrower work space consisting of one lane of asphalt with a shoulder for truck trailers carrying asphalt to park." The Division's brief asserts that Employer's "'one size fits all' approach to safety did not account for the changed circumstances surrounding freeway off ramps."

Employer's IIPP was submitted as an exhibit during the hearing. (Joint Ex. 1.) Employer's IIPP includes a section on identification and correction of hazards. (*Id.*) The IIPP provides, in part:

> In order to identify and correct workplace hazards, safety inspections will be conducted of all work-sites, materials, company vehicles and procedures on a scheduled and/or unannounced basis.
>
> An inspection may take place during the startup phase of new projects and periodically thereafter, depending on the duration of the project. These inspections will be conducted by qualified personnel. Inspections will be completed using a hazard checklist, "Inspection Certificate" (**Exhibit D**), a job diary entry, or other suitable checklist as may be developed or provided for the specific project. The form will be noted to identify ongoing operations, any safety hazards or unsafe conditions and mitigation measures, and work practices being employed or which need improvement. The date the hazards are to be abated and/or any corrective measures to be taken will also be noted. An additional form may be used, the "Safety Report Corrective Action Form" (**Exhibit E**) or an equivalent form, to document the correction of hazards.
>
> Unscheduled inspections will take place and additional inspections may take place whenever any new substance, process, procedure, or equipment is introduced into the workplace. An inspection and adoption of appropriate safeguards, including

> training and modifications to the codes of safe practice (if necessary) will take place whenever a new or previously unrecognized hazard is noted, or when new substances, processes, procedures, or equipment are introduced into the workplace (see Exhibits I and J).
>
> […]
>
> Minor safety hazards, unsafe conditions and work practices identified by each inspection will be corrected as soon as possible. Serious safety hazards, unsafe conditions and work practices and those presenting an "imminent danger" to employees will be abated immediately. Failing this, all employees, except those correcting the hazard, shall be removed from the area of the imminent hazard until said hazard is corrected.

(Joint Ex. 1, Emphasis in original.)

Both parties offered evidence of Employer's efforts to correct the hazard posed to workers on foot in the area of operation of hauling vehicles at the jobsite. By way of example, Ortega, the employee injured in the accident at the jobsite, testified that he was told at Employer's daily meetings, held before work started, to be careful around large vehicles nearby and to be aware of where vehicles were at all times. Additionally, Pena, an employee that was approximately three feet away from Ortega at the time of the accident, testified that he was trained to make visual contact with asphalt truck drivers and pay attention when trucks were approaching. Further, Pena testified that the foreman, Ramiro Espinoza, went over safety rules at the start of the shift that Ortega was injured. As such, a preponderance of the evidence indicates that Employer identified the hazard posed by the asphalt hauling vehicles at the jobsite because they warned employees of the danger posed by the trucks.

As noted above, the Division alleged Employer failed to identify a hazard of "changed working conditions on a narrower work space consisting of one lane of asphalt with a shoulder for truck trailers carrying asphalt to park." Although the Division identifies the "changed working conditions" as a hazard, the argument is better characterized as a failure to implement procedures to identify hazards because, on its face, it is not readily apparent that a narrower work area, itself, poses a hazard. Despite these allegations, neither party offered evidence of Employer's inspections of the jobsite for hazards or the forms referenced in Employer's IIPP. Employer's post-hearing brief appears to agree with the Division's assertion that a "one size fits all" approach was relied upon by Employer in paving operations by asserting that Employer followed the same three-stage procedure for every paving job for decades. However, despite this agreement, there was insufficient evidence to conclude that the approach did not include hazard assessments of the various work sites. As such, the Division did not meet its burden of proof to

establish that Employer did not identify hazards in conformance with its IIPP for changing work conditions.

Even though the evidence supports the conclusion that Employer identified the hazard posed to workers on foot in the area of operation of hauling vehicles at the jobsite, the essential question becomes whether Employer's efforts to correct that hazard were effectively implemented. To evaluate this question, it is necessary to consider whether the procedures adopted by Employer kept employees out of the area of operation of hauling vehicles or kept hauling vehicles from operating while workers were on foot in the area of operation and while the vehicle operator was unaware of the presence of the workers.

At the time of the accident, both Ortega and Pena were working near an asphalt truck. Ortega testified that, although he was attempting to stay clear of the truck, he took a large step backward toward the vehicle at the time of the accident because he was focused on his job of raking asphalt rather than the actions of the truck. Pena testified that, at the time of the accident, the area where they were standing was closer to the truck than normal because there was less area available due to the specific conditions of the jobsite. Further, Pena testified that the truck began to move as Ortega stepped backward into the path of the tire and that the two events happened at the same time. Given the nature of the jobsite and the focus on work duties, it is apparent that Employer's efforts to keep employees out of the area of operation of the asphalt truck was ineffective. The evidence adduced through the testimony of Ortega and Pena supports the conclusion that Employer did not have a system in place for ensuring that employees remained outside of the area of operation of hauling vehicles. Indeed, the near simultaneous nature of the accident in this instance supports both the conclusion that employees were on foot within the area of operation of the asphalt truck and that Employer did not correct the hazard posed by the truck by ensuring that employees were kept out of the area of operation. As such, it is necessary to consider whether Employer ensured that hauling vehicles were not operated while workers were on foot in the area of operation and while the vehicle operator was unaware of the presence of the workers.

As an initial matter, the evidence establishes that the asphalt truck driver involved in the accident, Sandhu, was unaware of the presence of Ortega at the time of the accident. Sandhu's testimony, that he started to drive forward and then heard screaming for him to stop moving his truck, supports the inference that he was unaware of the presence of Ortega at the time of the accident. Additionally, it is undisputed that Sandhu was not aware of the presence of Ortega at the time of the accident. As Ortega was injured by the asphalt truck as it drove forward, he was in the area of the truck's operation. Therefore, it is found that at the time of the accident, a worker on foot was in the area of operation of the asphalt truck while the operator, Sandhu, was unaware of the worker's presence. This establishes that Employer did not implement its IIPP to correct the hazard posed by the asphalt truck by ensuring that the truck was not operated while

there were workers on foot in the area of operation and where the driver was unaware of the presence of the workers.

The facts above demonstrate that Employer's efforts were ineffective in both keeping employees away from the hazard of operating hauling vehicles and ineffective in keeping hauling vehicles from operating while workers were on foot in the area of operation while the vehicle operator was unaware of the presence of the workers. As such, although Employer identified the hazard posed by the hauling vehicles, it failed to effectively implement its IIPP to correct the hazard. 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 control hauling operations in such a manner as to ensure that a vehicle operator knew of the presence of a worker on foot in the area of the hauling operation?**

   Section 1592, subdivision (e), provides:

   > Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of rootpickers, spotters, lab technicians, surveyors, or other workers on foot in the areas of their operations.

   The AVD for Citation 2 provides:

   > Prior to and during the course of the inspection, including, but not limited to September 26, 2018, the employer failed to control the hauling operations at the jobsite in a manner that vehicle operators ensure they know of the presence of worker [*sic*] on foot, specifically worker [*sic*] not within their line of vision from the operators [*sic*] cab. As a result, on September 13, 2018, an employee working in the blind spot of the haulage vehicle was seriously injured when the vehicle operator ran over the employee's leg as he moved forward.

In order to establish a violation of section 1592, subdivision (e), the Division must establish that an employer failed to implement control procedures for hauling or earth moving operations to ensure an equipment or vehicle operator knew of the location of workers on foot within the area of operation. (*JAFEC USA, Inc.*, Cal/OSHA App. 1290383, Decision After Reconsideration (June 2, 2021), citing *R & L Brosamer, Inc*., Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011).) In *JAFEC USA, Inc.*, *supra,* Cal/OSHA App. 1290383, the Appeals Board explained:

> [P]recedent is clear that under this safety order, the employer has an affirmative obligation to implement a plan to ensure that operators know the location of workers on foot in the immediate area. The Employer may not instead rely on a plan in which workers on foot are responsible for avoiding the shifting danger zones around moving heavy machinery.

Further, in *Teichert Const. v. California Occupational Safety and Health Appeals Bd*. (2006) 140 Cal.App.4th 883, 891-892, the Court explained:

> The hazard contemplated under the regulation is the exposure of workers on foot to dangers of hauling or earth moving equipment. The safety order is designed to protect workers on foot and imposes an affirmative obligation upon an employer to control such operations. Hauling and earth moving operations inherently involve movement of equipment and vehicles in the defined area and the location of such vehicles changes within the area of operation. Only where control measures are used by the employer to ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment.

In *R & L Brosamer, Inc*., *supra,* Cal/OSHA App. 03-4832, the employer implemented a procedure where workers on foot were responsible for avoiding the movement of an excavator boom, relying on a system of communication where the excavator operator was only contacted when operations needed to cease. Further, the safety records in that case demonstrated that the employer's plan relied upon workers attempting to stay out of the way of loads. (*Id.*) The Appeals Board noted that such a plan "in no way 'ensures' the operator 'knows' of the location of the employees." (*Id.*) Further, the plan was found to be insufficient to control earth moving operations to ensure that operators knew of the presence of workers on foot in the immediate vicinity of equipment. (*Id.*)

Additionally, in *HB Parkco Construction, Inc*., Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012), the employer relied on a plan for controlling vehicle operations that required operators and on-foot workers to make eye contact and acknowledge each other through waving or other clear method, but left that to employees to devise. The Appeals Board explicitly noted that in *R & L Brosamer, Inc*., *supra,* Cal/OSHA App. 03-4832, it rejected the employer's argument that placed responsibility on the on-foot employees to inform the operators of their presence as a method of fulfilling the employer's requirement to implement the required control of operations. (*HB Parkco Construction, Inc*., *supra*, Cal/OSHA App. 07-1731.) The Appeals Board explained that the method relied upon by the employer in *HB Parkco Construction, Inc*., *supra*, Cal/OSHA App. 07-1731, was the same ineffective system in place in

R & L Brosamer, Inc., *supra,* Cal/OSHA App. 03-4832, and it did not ensure the operators were actually aware of on-foot workers.

In *JAFEC USA, Inc.*, *supra,* Cal/OSHA App. 1290383, the Appeals Board considered a situation where the employer "primarily relied on a safety policy that placed the responsibility on employees on foot to avoid heavy equipment and machinery, rather than implementing a system to ensure that operators were always aware of nearby workers on foot." The Appeals Board held that the policy, which instructed on-foot workers to watch out for equipment and to communicate with operators through eye contact and hand signals, was insufficient to inform the equipment operator of the location of a worker on foot. Therefore, the Appeals Board found a violation of section 1592, subdivision (e), because it determined that the employer did not implement sufficient control measures to ensure that the equipment operator knew of the worker on foot in the area of the equipment's operation.

In the instant matter, Greg Rainey (Rainey), Employer's Risk Engineer who oversees many safety matters for Employer, testified that Employer did not use spotters because it would call for multiple spotters to deal with multiple trucks. Instead, Rainey testified that employees were expected to watch each other and that "when you have workers working together, they would shout to whichever one is close enough to respond quickly." Additionally, Exhibit 12 is a letter from Rainey to Aleta, one of the Division inspectors involved in the issuance of the citation. With regard to employee responsibilities, Exhibit 12 states:

> All of the site employees are reminded constantly that they need to be very careful of where they stand, step, walk and work and that they ALL need to watch out for each other […]. And they are ALL also reminded that *they, themselves,* are always going to be *most in control* of whether or not they place or have placed themselves into a danger zone.

(Emphasis in original.) The foregoing testimony, in conjunction with Exhibit 12, supports the conclusion that Employer primarily relies upon workers on foot to avoid the hauling vehicles, the asphalt trucks.

Employer's post-hearing brief alleges that Pena, who was working nearby Ortega at the time of the accident, could be considered "in the position of a spotter if you will." The post-hearing brief goes on to explain that Pena observed the accident take place and then concludes that Pena had no time to prevent the accident because the movement of the vehicle and Ortega stepping backward occurred nearly simultaneously. The post-hearing brief asserts that Pena's warning to Ortega could not have happened sooner. At hearing, Rainey seemed to come to the same conclusion in his testimony. However, the focus of the regulation is on ensuring vehicle operators are informed of workers on foot in the area of operation. The conclusion relied upon by

Rainey, and asserted in Employer's post-hearing brief, mistakes the sufficiency of warning Ortega with complying with the regulation. Given the particular facts of the case, a warning to Ortega that he was entering the area of operation of the asphalt truck may have avoided exposure to the hazard of the asphalt truck, but once he entered the area of operation of the truck, Employer was required to ensure that Sandhu was kept aware of his presence.

Exhibit 12 also explains that Employer relies upon truck drivers to make themselves aware of workers on foot near their vehicles. Notably, Exhibit 12 states:

> We would and should expect any truck driver that happens to watch any worker walk in front of his truck (where the driver sometimes cannot see the person anymore due to the height of the truck's hood) to NOT move his vehicle until he was absolutely certain that the worker was no longer in front of his truck. Sometimes, the worker may walk right back out where the driver can see him again, but other times the driver would be expected to honk or signal for someone to check it out before moving his truck … or perhaps put his vehicle in park and get out to check for himself. Employers should be able to expect that level of awareness from any driver from any company without specific instruction, and without regard to whether they were commercial/professional drivers or not.

Rainey's testimony, in conjunction with the expectations expressed in Exhibit 12, supports the conclusion that Employer did not employ a system to ensure that vehicle operators were aware of workers on foot in the area of operation of their vehicle that the vehicle operator had not personally seen. Indeed, in this regard Rainey testified that truck drivers are not responsible for maintaining a verbal line of communication at the jobsite. Additionally, Sandhu testified that, once his vehicle is parked at the jobsite, and after he received a communication of where to drop off his load, there is no other verbal communication between himself and Employer's other employees present there. It is inferred, based on the foregoing, that Employer did not communicate to the vehicle operators when workers moved closer to vehicles while they were stopped and where the operator did not see the approach of the on-foot workers.

Pursuant to the foregoing, Employer's safety procedures bear similarities to the safety procedures described in *R & L Brosamer, Inc., supra,* Cal/OSHA App. 03-4832, *HB Parkco Construction, Inc*., *supra*, Cal/OSHA App. 07-1731, and *JAFEC USA, Inc.*, *supra,* Cal/OSHA App. 1290383. As in the aforementioned cases, Employer primarily relied upon workers on foot to avoid the hazard of hauling vehicles and did not ensure a method was in place to keep vehicle operators informed regarding the presence of workers on foot in the area of operation. As discussed above, such safety procedures are insufficient. Accordingly, the Division has met its burden of proof to establish a violation of section 1592, subdivision (e).

3. Did the Division establish that Citation 1 was properly classified as General?

Section 334, subdivision (b), provides: "General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."

The implementation of an IIPP, by requiring compliance with its rules, has a relationship to occupational safety and health of employees. It is evident from the facts of this case that a failure to effectively implement an IIPP can result in employee injury. As the Division determined that this violation was not of a "serious nature" and neither party addressed this issue in argument or post-hearing briefing, there is nothing to upset that determination. Therefore, the classification of General is affirmed.

4. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a),[4] 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.
> (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

[4] 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.

> 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).)

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

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

The parties stipulated that, on the night of September 13, 2018, Ortega, while working on Employer's jobsite, suffered a fracture of his lower left leg. The parties stipulated that this injury resulted in hospitalization for two days. Hospitalization for the treatment of a fractured leg is serious physical harm, as defined above. Therefore, there is no dispute that Ortega suffered serious physical harm and that it resulted from the hazard caused by the violation of section 1592, subdivision (e). As such, serious physical harm was not merely a realistic possibility, but an actuality.

Additionally, Costa Martins, an Associate Safety Engineer for the Division, testified that he was current on his Division mandated training as of the hearing. Costa Martins testified that the hazard at issue in Citation 2 poses a realistic possibility of death, amputation, fractures, or hospitalization exceeding 24 hours. As such, the Division demonstrated that there was a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

5. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate 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. The evidence demonstrated that Employer did not have a system in place to ensure that Sandhu, as a vehicle operator, was aware of workers on foot in the area of the vehicle's 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 establish 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. However, it is noted that Rainey's testimony and Employer's post-hearing brief, describing a system of requiring drivers to honk their horns before moving to warn workers on foot of impending movement, suggests that Employer still does not employ a system that ensures vehicle operators are aware of workers on foot in the area of the vehicle's operation. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

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

In *Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, the Appeals Board explained:

> In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury."

(Citations omitted.)

Labor Code section 6302,[5] subdivision (h), provides that a "serious injury" includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation. Section 330, subdivision (h), has a substantially similar definition. In the instant matter, the parties stipulated that Ortega suffered a serious injury pursuant to section 330, subdivision (h). Additionally, as noted above, the parties stipulated that, on the night of September 13, 2018, Ortega, while working on Employer's jobsite, suffered a fracture of his lower left leg resulting in hospitalization for two days. The evidence adduced at hearing, and discussed above, supports that a causal nexus exists between the violation, Employer's failure to ensure Sandhu was aware of Ortega's presence within the area of operation of the asphalt truck, and the serious injury. Accordingly, the citation is properly characterized as Accident-Related.

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.) The Appeals Board explained in *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017):

> Generally, where the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2015).)

[5] Labor Code section 6302 was amended effective January 1, 2020. However, the analysis relied upon herein for the definition of "serious injury or illness" uses the definition effective on the date of issuance of the citation, March 11, 2019.

At hearing, the Division offered the proposed penalty worksheet into evidence. Aleta testified that the penalties for Citation 1 and Citation 2 were calculated in a manner consistent with the Division's policies and procedures. Employer did not offer any evidence that the penalties were calculated incorrectly. Pursuant to Appeals Board precedent, the Division has put on sufficient evidence to meet its burden of proof for each citation. Accordingly, the proposed penalty for Citation 1, Item 1, of $560 and the proposed penalty for Citation 2, Item 1, of $18,000 are found reasonable and affirmed.

Conclusion

The evidence supports a finding that Employer violated section 1509, subdivision (a), by failing to implement an effective Injury and Illness Prevention Program. The citation was properly classified as General. The proposed penalty is found reasonable.

The evidence supports a finding that Employer violated section 1592, subdivision (e), by failing to implement sufficient controls for hauling operations to ensure that vehicle operators knew of the presence of workers on foot in the area of operation. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is found reasonable.

Order

Pursuant to the stipulation of the parties by email on January 19, 2024, 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.

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

It is hereby ordered that Citation 2, Item 1, is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Dated: 03/22/2024

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.**