BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1203336**
Three-D Services Co, Inc. **1551 E. Mission Boulevard** **Pomona, CA 91766** **Employer**	**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 Three-D Services Co, Inc. (Employer).

JURISDICTION

On July 7, 2017, the Division issued Employer three citations, alleging the following violations:

- **Citation 1, Item** 1 asserted a General violation of section 3203, subdivision (a)(7)[1] [failure to establish, implement, and maintain an effective injury and illness prevention program].
- **Citation 1, Item 2** asserted a General violation of section 3395, subdivision (i) [failure to maintain a Heat Illness Prevention Plan with all elements required by the safety order];[2]
- **Citation 2, Item 1** asserted a Serious violation of section 1510, subdivision (c) [failure to instruct employees on the recognition of, and protection from, known job site hazards].
- **Citation 3, Item 1** asserted a Serious, Accident-Related violation of section 1734, subdivision (b) [failure to conduct a survey of a structure, including a mechanical dock leveler, prior to initiating demolition operations, resulting in a fatal injury to an employee].

Employer timely appealed the citations. On October 28, 2022, after five days of hearing, Administrative Law Judge Howard I. Chernin (ALJ Chernin) issued a Decision affirming the citations, including the Serious classifications of Citations 2 and 3.

Employer timely filed the instant petition for reconsideration (Petition), challenging only the Serious classification of Citation 3.

[1] Unless otherwise specified, references are to title 8 of the California Code of Regulations.
[2] The Division and Employer stipulated to the withdrawal of Citation 1, Item 2.

ISSUE

Did the ALJ err in affirming the "Serious" classification of Citation 3?

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 ALJ's Decision was made "without or in excess of its powers"; that the evidence does not justify the ALJ's factual findings; and that the findings of fact do not support the ALJ's Decision. (Lab. Code, § 6617, subds. (a), (c), (e).)[3]

The Board has fully reviewed the record in this case, and has taken no new evidence. Employer makes several arguments in support of its Petition, which the Board addresses seriatim. As explained below, the Board concludes that the Petition must be denied.

DISCUSSION

Summary of Factual Background

Employer is a demolition services company. On January 17, 2017, its employee Jose Vega (Vega) was fatally injured when a mechanical dock leveler collapsed onto him (the Accident). A dock leveler is a mechanically operated ramp welded to the dock of a warehouse loading bay, and adjusted to facilitate loading cargo to and from trucks. It includes a surrounding frame, a ramp, and various mechanical parts, including tension springs that raise or lower the ramp.

At the time of the Accident, Vega and his crew were assigned to remove dock levelers at a warehouse building. Removal of mechanical dock levelers requires using a cutting torch to cut through four steel welds anchoring each dock leveler to the loading dock. Two of the welds are at the front of the dock leveler, below the lip of the ramp, and the other two welds are on the opposite rear side of the dock leveler. As ALJ Chernin found, a dock leveler that is not externally supported in the open position could collapse during demolition and removal, resulting in serious injury or death to employees standing beneath it or in close proximity. Employer does not dispute this finding.

[3] As noted, Employer has challenged only the "Serious" classification of Citation 3, expressly waiving any other challenge to the Decision. (See also, Lab. Code, § 6618.)

The Accident prompted an inspection, followed by the issuance of several citations. The sole citation at issue here is Citation 3. Citation 3 alleged that Employer violated section 1734, subdivision (b), which provides:

> (b)(1) Prior to permitting employees to start demolition operations, a qualified person shall make a survey of the structure to determine the condition of the framing, floors, and walls, and the possibility of an unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked.
> (2) The survey shall be in written form, kept on the job-site and made available to the Division upon request. The written survey shall be maintained for the duration of the demolition project.

The Division's description of the alleged violation, which it classified as Serious, states as follows:

> Prior to and during the course of the investigation, including but not limited to, on January 17, 2016, the employer did not ensure a survey of the structure to be demolished including a Kelley® mechanical dock leveler, Model M738K, serial# 971635, was made to determine its condition and the possibility of an unplanned collapse. As a result, on or about January 17, 2016, an employee suffered a fatal injury when the ramp on the dock leveler collapsed on him.

Employer timely appealed the citations, including the Serious classification of Citation 3.

The ALJ's Decision

As noted, Employer's Petition challenges only the classification of Citation 3, so the following summary is focused solely on that alleged violation.

At the hearing, Employer disputed that it had violated section 1734, subdivision (b) (the safety order). Employer argued that it did not need to include the mechanical dock leveler in its survey, arguing that the mechanical dock leveler was not a "structure" within the meaning of section 1734, subdivision (b). ALJ Chernin rejected this argument, noting that the relevant definition of "structure" is "[t]hat which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner." (Decision, p. 12 [citing section 1504].) Under that definition, ALJ Chernin concluded that the mechanical dock leveler was a structure.

> Here, both testimonial and documentary evidence was offered by the parties at hearing to establish that dock levelers are pieces of work that are artificially built up, as opposed to built up by natural process. Furthermore, uncontroverted testimony from Rodriguez, as well as photographic evidence entered into the record, demonstrated that dock levelers such as the one involved in the accident are

> composed of parts joined together in a definite manner. The dock leveler at issue here was made up of metal framing, a movable working platform, springs, bars, and other parts in a definite manner, which together form the dock leveler. Thus, it is found that a dock leveler is a structure.

(Decision, p. 12.) ALJ Chernin further concluded that, since the mechanical dock leveler was a "structure," Employer was required to perform an engineering survey of it prior to engaging in demolition activity affecting it. (Decision, p. 12.) It is undisputed that Employer's engineering survey did not address mechanical dock levelers. (*Id*. [citing Exhibit H, and the testimony of Employer's superintendent, Justin Bruyneel].) Significantly, Employer no longer disputes the finding that it violated the safety order. Instead, Employer challenges only the "Serious" classification of Citation 3.

ALJ Chernin also upheld the Serious classification of Citation 3. (Decision, p. 13.) Labor Code section 6432 , subdivision (a)(2), sets forth the standard for finding a "Serious" violation, as follows:

> 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.

In finding that the Division established a presumption of a Serious violation, ALJ Chernin noted that "[i]t is generally understood that demolition work is inherently dangerous and that, if done wrong, can lead to structural failure and that anyone standing in close proximity … could be seriously physically harmed or killed by the collapse." (*Id*., p. 15.) Further, since the mechanical dock leveler in question was an old structural device made of steel, it was "appropriate to infer that the condition of the dock leveler could result in an unplanned collapse during demolition, resulting in serious injury." (*Id*.) Indeed, Employer's own witnesses testified that "dock levelers need to be held open by manual means or by the forks of a forklift during demolition." (*Id*.)

In response, Employer repeated its argument that under section 1734, subdivision (b), the mechanical dock leveler was a tool, not a structure. Further, Employer argued, the Division "did not establish how not including the dock leveler on the Engineering Survey would result in serious physical harm or death." (Employer's Post-hearing Brief, p. 21.) The Decision rejected these arguments, reasoning as follows:

> A reasonable employer, aware of the definition of the term "structure" found within the CSOs, would have determined that the dock leveler was a structure. A reasonable employer, having made such a determination, would have included the dock leveler in its survey prior to engaging in demolition of the dock leveler. Employer's specious arguments, which ignore the definition of the term "structure" in the safety order, are insufficient to rebut the Serious classification.

(Decision, p. 16.) Thus, ALJ Chernin found, the Division established a presumption of a Serious violation, and Employer failed to rebut it.

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." An employer may do so by demonstrating that it: (1) "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"; and (2) "took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered." (Lab. Code, § 6432, subd. (c)(1)-(2).)

Employer's Petition For Reconsideration

Employer's Petition, which is expressly limited to the Serious classification of Citation 3, (Petition, pp. 3-4, 6), purports to make seven arguments in support of its assertion that the Serious classification should be vacated. The Board addresses Employer's arguments seriatim.

Employer's **first** and **second** arguments are substantially similar, if not identical. Employer notes that section 1734 requires "a survey of the structure to determine the condition of the structure for unplanned collapse." (Petition, p. 6.) However, Employer argues, "[i]t is undisputed that the Employer prepared a written Survey of the structure as required." (Id. [citing Exhibit H].) Further, despite its undisputed omission of the mechanical dock leveler from the written survey, Employer nevertheless argues that it "actually performed the survey of the structure prior to preparing the written Survey" during its "pre-construction walk-through" of the site. (*Id*., pp. 6-7.)

Employer's arguments are inapposite to the issue at hand, which is the Serious classification of Citation 3. The ALJ expressly ruled that the dock leveler was part of the "structure" that must be evaluated in the survey. Employer does not argue that its written survey actually included the dock leveler or specifically evaluated any hazards pertaining to it. Indeed, Employer does not dispute that it violated the safety order at issue, which entails that the mechanical dock leveler was part of the "structure" to be surveyed and evaluated. Thus, Employer's first and second arguments neither undermine nor rebut the "Serious" presumption under Labor Code section 6432.

Employer's **third** argument is that the employee working with Vega "recognized certain hazards associated with removal of dock levelers at the site" and that Employer "selected Vega for the task as he was experienced in removing dock levelers." (Petition, p. 6.) Construing this argument in the light most favorable to Employer, the Board interprets Employer's third argument to support a contention 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." (Lab. Code, § 6432, subd. (c)(1).) However, even under this favorable construction, Employer fails to explain how one employee's subjective recognition of "hazards associated with removal of dock levelers" could ever qualify as "all the steps a reasonable and responsible employer in like circumstances should be expected to take." (Lab. Code, § 6423, subd. (c).) Likewise, Vega's experience in removing mechanical dock levelers does not relieve Employer's duty to include it in a pre-demolition survey of the structure. As ALJ Chernin noted, a reasonable employer "would have determined that the dock leveler was a structure" and "included the dock leveler in its survey prior to engaging in demolition of the dock leveler." (Decision, p. 16.)[4] Further, employers may not delegate the duty to ensure safe working conditions to their employees. (See Lab. Code, §§ 6401-6404; *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).) The Board thus rejects Employer's third argument.

Employer's **fourth** argument is that the record evidence does not support the conclusion that "the failure to include the dock leveler on the Survey led to Vega's death." (Petition, p. 8.) Construing this argument most favorably to Employer, it challenges the Decision's finding that "there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Decision, pp. 13-15; Lab. Code, § 6423, subd. (a)(2).) This argument fails as a matter of law. To establish a "Serious" violation, the Division was not obligated to show that "the failure to include the dock leveler on the Survey led to Vega's death." Even if the Board accepted Employer's fourth argument, it would not undermine or rebut the "Serious" presumption under Labor Code section 6423. To affirm the Serious classification, the Board need only conclude that there is realistic possibility that death or serious physical harm could result, not that it actually resulted. Here, the ALJ's Decision made the requisite factual findings to support that conclusion.

Further, the ALJ disposed of this argument in the context of addressing Citation 3's "Accident-Related" classification, which Employer does not challenge. Specifically, for a citation to be classified as Accident-Related, the Division must demonstrate a "causal nexus between the violation and the serious injury." (Decision, p. 17 [citing *RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017)].) ALJ Chernin explained the causal nexus between the violation at issue in Citation 3, and Vega's fatal injury:

[4] Employer repeats and reframes this as its "**fifth**" argument, with additional evidence that Vega was working with another employee who had prior experience removing dock levelers and had suggested they retrieve a forklift before cutting any of the dock leveler welds. (Petition, p. 8.) Employer argues that this individual's experience and subjective recognition of hazards "clearly established that the employer considered the possibility of an unplanned collapse." (*Id.*) Again, this evidence does nothing to relieve Employer of its duty to include the dock leveler in a pre-demolition survey of the structure, and does not show that Employer took all steps that "a reasonable and responsible employer in like circumstances should be expected to take." (Lab. Code, § 6432, subd. (c).)

> Here, the undisputed evidence shows that Vega suffered fatal injuries when a dock leveler that Employer was in the process of demolishing fell onto him. Employer's failure to include the dock leveler in its pre-demolition survey demonstrably set off a chain of events that led to Vega's fatal injuries. Employer did not identify the dock leveler as a structure, and therefore did not consider the possibility of an unplanned collapse such as occurred. Therefore, when demolition began, Employer had not provided training and instruction to employees such as Vega on how to protect themselves from the hazard of an unplanned collapse of the dock leveler. As a consequence, the dock leveler was not adequately supported and fell on Vega while he was standing inside it.

(Decision, p. 17.) Employer does not challenge this finding, thereby waiving any objection to the Accident-Related classification. (§ 391; Lab. Code, § 6618.) In other words, Employer has waived any dispute that there is a "causal nexus" between (i) the violation (Employer's survey failed to identify the dock leveler as a structure, and therefore failed to evaluate the possibility of an unplanned collapse), and (ii) the fatality resulting from an unplanned collapse. Since this *actual* causal nexus is now established, Employer cannot seriously challenge whether there is a "realistic possibility" that the violation at issue here could lead to death or serious physical harm. For this additional reason, the Board rejects Employer's fourth argument.

In its **sixth** argument, Employer attempts to analogize this case with the ALJ's decision in *Sherwood Mechanical Inc.*, 2011 CA OSHA App. Bd. LEXIS 142. (Petition, pp. 8-10.) In that case, the ALJ noted that the employer's "Code of Safety Practices" omitted discussion of hazards resulting from a failure to purge gas lines. While the employer's omission constituted a violation under section 1509, subdivision (b), the ALJ reclassified the violation as General. According to Employer, the ALJ reclassified the violation because "the Division did not show how a lack of a summary of safety rules regarding purging gas lines would result in serious bodily harm or death." (Petition, p. 8.) It was not the omission of the hazards from the Code of Safety Practice, but the *lack of training* on those hazards that could lead to serious injury. (*Id*.) Likewise, Employer argues, "it is the lack of training on the hazards related to the removal of the dock leveler which could lead to the serious injury; [sic] not the failure to write down "dock leveler" on the Survey." (*Id*.)

Employer's sixth argument also fails. First, the ALJ decision Employer cites is not citable authority. [5] A decision issued by an ALJ is neither citable authority, nor binding on the Board, under long-held Board authority. (See, e.g*., Teichert Aggregates,* Cal/OSHA App. 04-2982, Decision After Reconsideration (Jan. 21, 2011); *Home Depot, USA Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).)) Second, even if it were a precedential DAR, the holding in *Sherwood Mechanical Inc.* is irrelevant. An ALJ finding that the Division did not meet its burden on the issue of causation in another case has no bearing on whether the Division met its burden (under Labor Code section 6423, subdivision (a)(2)), in this case. The Board rejects Employer's sixth argument.

[5] The Board ordered reconsideration and issued a DAR in the *Sherwood Mechanical* matter. (See *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012).) However, the Board did not order reconsideration of the citation discussed by Employer's Petition, nor its Serious classification.

Employer's **seventh** and final argument expands on its fourth and sixth arguments regarding causation. Employer argues that "the failure to list the dock leveler on the Survey did not set off a chain of events that led to Vega's fatal injuries." (Petition, p. 9.) Further, "the ALJ concluded that the Employer recognized the hazards related to removal of the dock leveler." (*Id*.) Therefore, "the failure to include the dock leveler on the Survey did not lead to the accident." (*Id*.) Indeed, "[w]hile the failure to provide training in a hazard ***could*** result in a "serious" injury, the omission of an item from the Survey ***does not***." (Petition, p. 9 [emphases added].)

Employer again misconstrues the relevant standard. As noted, to establish a presumption of a Serious violation, the Division need not show that the violation *actually caused* a serious injury or death. Rather, it must show that "there is a ***realistic possibility*** that death or serious physical harm ***could*** result from the actual hazard created by the violation." (Lab. Code, § 6423, subd. (a)(2) [emphases added].) Employer does not argue, as it must, that there is no realistic possibility that death or serious injury could result from its failure to survey the mechanical dock leveler to determine its condition and the possibility of an unplanned collapse. Moreover, as noted above, Employer has already conceded that Citation 3 is "Accident-Related," i.e., that there is a "causal nexus" between the violation at issue and the serious injury or death. (*MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).) Thus, having conceded that an *actual* causal nexus exists, Employer cannot plausibly deny that there is a *realistic possibility* that the violation could lead to death or serious physical harm. The Board thus rejects Employer's seventh argument.

DECISION

For the reasons stated above, the petition for reconsideration is denied, and the ALJ's Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 01/20/2023