

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

In the Matter of the Appeal of:

**GRAY CONSTRUCTION, INC.
dba JAMES N. GRAY COMPANY
10 QUALITY STREET
LEXINGTON, KY 40507**

Employer

Inspection No.

1606843

DECISION

Statement of the Case

Gray Construction, Inc. (Employer) is a construction contractor. Beginning July 8, 2022, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Michael Burgess, conducted an inspection of Employer's worksite at 3322 Avenue 320 in Visalia, California in response to a complaint.

On November 10, 2022, the Division cited Employer for exposing employees, working at grade, to the risk of impalement from unprotected metal forming stakes. Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, and the proposed penalty is unreasonable. Employer also asserted a series of affirmative defenses.¹

This matter was heard by Jennie Culjat, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) in Sacramento, California, via the Zoom video platform on April 22 and 23, and May 2, 2025. Eugene F. McMenamain of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. represented Employer. Lauren H. Ocadiz, Staff Counsel, represented the Division. Each party submitted a closing brief on July 7, 2025. The matter was submitted for decision on that day.

Issues

1. Were employees working at grade exposed to the hazard of impalement from exposed metal forming stakes?

¹ Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017).)

2. Did Employer establish that it acted with due diligence with regard to correction of the hazard for which it was cited?
3. Did the Division establish that the citation was properly classified as Serious?
4. Did Employer rebut the presumption that the violation 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?
5. Is the proposed penalty reasonable?

Findings of Fact²

1. Employer was the general contractor for the construction of an Amazon facility (worksite).
2. The worksite was approximately 70 acres. The Amazon facility that was being built was approximately 1.6 million square feet in size. In addition to the Amazon facility itself, Employer was also constructing the surrounding parking lots and roadways on the worksite.
3. Employer was responsible for the safety and health conditions on the worksite with the authority for ensuring that hazardous conditions were corrected.
4. Employer used several subcontractors, including Crawford Construction, Inc. Crawford Construction, Inc. in turn subcontracted with Davis & Roberts Construction, Inc. (Davis & Roberts) to perform concrete work at the worksite.
5. On July 8, 2022, a crew of five Davis & Roberts employees were forming a sidewalk that was 10 feet wide and 1,000 feet long, using lumber and metal forming stakes (stakes) to create the form.
6. The stakes used by the Davis & Roberts crew to secure the lumber in place were rigid and protruding approximately 24 to 25 inches above grade.
7. The Davis & Roberts crew was capping the stakes shortly after they were put into use.

² Findings of fact numbers 1, 7, and 14 are stipulations of the parties.

8. At some point, the Davis & Roberts crew stopped capping the metal forming stakes as they moved along with the sidewalk forming work.
9. The Davis & Roberts crew members left the area where they were forming the sidewalk to pour concrete that had just arrived at another location on the worksite, leaving approximately 100 stakes uncapped.
10. The stakes were left uncapped for approximately two hours, during which time Carlos Avila (Avila), Employer's Site Safety Technician, had the opportunity to observe the hazard presented by the exposed stakes.
11. Once Avila observed the uncapped stakes, he immediately contacted a Crawford Construction, Inc. supervisor and instructed that the hazard be abated.
12. Avila was the only safety professional Employer had on the worksite on the day of the inspection, and he was not aware that the Davis & Roberts crew was performing the sidewalk forming work.
13. The hazard of uncapped stakes can cause impalement injuries that result in damage to internal organs and death.
14. The proposed penalty for Citation 1 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Were employees working at grade exposed to the hazard of impalement from exposed metal forming stakes?

California Code of Regulations, title 8, section 1712, subdivision (c)(1),³ provides:

(c) Protection from Reinforcing Steel and Other Similar Projections.

(1) Employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections, shall be protected against the hazard

³ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

of impalement by guarding all exposed ends that extend up to 6 feet above grade or other work surface, with protective covers, or troughs.

In Citation 1, as amended,⁴ the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on 07/08/2022, employees were permitted to work in proximity to unguarded reinforcing steel or other similar projections of less than 6 feet above grade or other work surfaces, exposing them to the hazard of impalement by exposed ends located near the Gray Construction, Inc. trailer parking area. Gray Construction, Inc. was responsible for safety and health conditions at the site and failed to protect the employees of Gray Construction, Inc. and Davis & Roberts Construction, Inc. from accidental impalement on reinforcing steel or other similar projections.

(This citation is being issued in accordance with Section 336.10 -Multi-Employer Worksites).

To prove a violation of section 1712, subdivision (c)(1), the Division must establish that employees working at grade were exposed to the hazard of impalement from unprotected protruding reinforcing steel (rebar) or other similar projections up to six feet above grade.

a. Existence of Hazard

It is undisputed that stakes were left unprotected on the day of the inspection. On July 8, 2022, a five-person crew for Davis & Roberts was forming a sidewalk that was about 10 feet wide and 1,000 feet long, using lumber and steel forming stakes. The Davis & Roberts foreman, Brian Henson (Henson), testified that the stakes were driven into the ground and used to hold the lumber in place to create the form for the sidewalk. Henson further testified that the stakes were protruding from the ground approximately 24 to 25 inches. Henson explained that, because the stakes were driven into the ground and nailed to the lumber, the stakes were rigid. Employer did not dispute that the stakes were similar to rebar and the parties stipulated that section 1712, subdivision (c)(1), applies in this matter.

Henson testified that the crew had been capping the stakes as they went along but had stopped doing so at some point. Henson further testified that the crew left the area where they were forming the sidewalk to pour concrete that had just arrived at another location on the

⁴ The parties stipulated that the alleged violation description (AVD) in the citation incorrectly listed the date of the incident as July 9, 2022, and the correct date is July 8, 2022. Based on this stipulation, the date in the AVD in Citation 1 is amended from July 9, 2022, to July 8, 2022.

worksite. Henson explained that, due to the nature of pouring concrete, the crew had to immediately go pour the concrete at the other location. Henson estimated that at least 100 stakes were uncapped when the crew left to go pour concrete. As there were uncapped stakes protruding 24 to 25 inches above grade, the Division established the existence of the hazard of impalement pursuant to section 1712, subdivision (c)(1).

b. Employee Exposure to the Hazard

The Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) “Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. [Citation].” (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)

In addition to demonstrating actual exposure, the Division may establish employee exposure by “showing the area of the hazard was ‘accessible’ to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. [Citations].” (*Dynamic Construction Services, Inc.*, *supra*, Cal/OSHA App. 14-1471.) “Under this ‘access’ exposure analysis, the Division may establish exposure by showing that it was reasonably predictable that during the course of their normal work duties employees ‘might be’ in the zone of danger. [Citation].” (*Id.*) The “reasonable predictability standard of access” require[s] some consideration of the ‘likelihood’ of employee access to make sure that exposure determinations [are] not made solely on tenuous theoretical or hypothetical possibilities. [Citation].” (*Id.*)

Here, Employer argues that employees had no reason to access the area of the uncapped stakes. Avila testified that the uncapped stakes were located behind an area where employees parked their vehicles (Ex. C Mod 2 and Ex. 25), and employees had no reason to go past their vehicles into the area of the uncapped stakes. Avila further testified that the area where the sidewalk was being formed was about one and one-half feet higher than the area where the vehicles were parked, which created a raised edge between the two areas. Employer asserted that this created a natural barrier preventing inadvertent employee access to the area where the uncapped stakes were located.

While there may have been some impediments to employees accessing the area of the uncapped stakes, the area was indeed accessible to employees. Despite his testimony outlined above, Avila conceded that there was nothing actually preventing an employee from going into the area of the uncapped stakes. It is logical to conclude an employee could have simply stepped up to access the area of the uncapped stakes. There was no evidence that the area was otherwise

off limits to employees. The fact that employees parked their vehicles near the area of the uncapped stakes evidences that employees were or would be in the area. To be sure, the Davis & Roberts crew started working at 4:00 a.m., suggesting that there may not be many employees on the worksite yet. However, as discussed below, there were employees in the area as Avila called out to employees in order to stop them from moving closer to the area of the uncapped stakes.

Additionally, the presence of the partially formed sidewalk indicates that employees had been in the area and would return. It is axiomatic that employees had been there to build the sidewalk form and that they would need to return to the area to complete the work. Furthermore, the Davis & Roberts crew was actually exposed to the uncapped stakes as they were working to form the sidewalk but failed to cap the stakes as they progressed.

Based on the foregoing, the Division established by a preponderance of the evidence both potential and actual employee exposure to the uncapped stakes.

c. Multi-Employer worksite

The worksite was a multi-employer worksite, and Employer was cited as a controlling employer pursuant to section 336.10. Section 336.10, subdivision (c), defines a controlling employer as “[t]he employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected....” Employer did not dispute it was the controlling employer. Avila testified that Employer was responsible for safety and health conditions on the worksite with authority for ensuring hazardous conditions were corrected. As such, Employer was a controlling employer pursuant to section 336.10, subdivision (c). A controlling employer may be cited for a violation “regardless of whether their own employees were exposed to the hazard.” (§ 336.10.)

Accordingly, because employees working at grade were exposed to the hazard of impalement from the uncapped stakes, the Division established a violation of section 1712, subdivision (c)(1).

2. Did Employer establish that it acted with due diligence with regard to correction of the hazard for which it was cited?

The Appeals Board has recognized the due diligence defense for controlling employers. (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) (*Harris*)). Where the controlling employer establishes that it exercised due diligence, it is relieved from liability for a violation of a safety order by another employer on a multi-employer worksite. (*Id.*)

The totality of the circumstances must be considered when determining whether a controlling employer acted with due diligence. (*McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (*McCarthy*)). In *McCarthy*, the Appeals Board identified several factors relevant to the determination of due diligence: whether the controlling employer implemented and relied on a functioning testing methodology to monitor subcontractor performance; whether the controlling employer researched the safety history of the subcontractor; whether the hazard was latent and unforeseeable; whether the controlling employer conducted periodic inspections of appropriate frequency; whether the controlling employer implemented an effective system for promptly correcting hazards; whether the controlling employer enforces the other employer’s compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; and the controlling employer’s efforts to provide ongoing safety training to employees.

The Appeals Board noted that “the dispositive circumstances and factors can be expected to vary from case to case.” (*McCarthy, supra*, Cal/OSHA App. 11-1706.) The foregoing factors are not to be applied mechanically. (*Id.*) “Rather, the respective weight assigned to each factor, or combination thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented.” (*Id.*) “‘A controlling employer must exercise reasonable care to prevent and detect violations on the site’ but the extent of measures required ‘is less than what is required of an employer with respect to protecting its own employees.’” (*Id.*, quoting OSHA Directive Number CPL 02-00-124 [2-0.124], effective December 10, 1999.)

a. Whether the hazard was latent or unforeseeable

The Division argues that the uncapped stakes were in plain view. (Division’s Post-Hearing Brief (Division’s Brief), p. 5, ln. 22.) Employer argues that it “cannot be faulted for not observing a unique, discrete condition on the periphery of the project, where no construction activity was in process.” (Employer’s Post-Hearing Brief (Employer’s Brief), p. 3, ln. 22-23.)

“This element of the due diligence defense considers whether a hazard was latent or unforeseeable, rather than ‘readily observable.’” (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022), quoting *McCarthy, supra*, Cal/OSHA App. 11-1706.)

On the morning of the inspection, the Davis & Roberts sidewalk formation work was taking place on the edge of the worksite near Employer’s on-site office and safety trailer. (Ex. 27 Mod.) Davis & Roberts began its work at 4:00 a.m. due to the anticipated high heat. As discussed above, the crew was forming a sidewalk that was 10 feet wide and 1,000 feet long, and at some point, the crew stopped capping the stakes as they progressed with the work. The stakes were in a single line to hold the lumber in place to form the edge of the sidewalk. Henson

estimated that the crew had formed a couple hundred linear feet and approximately 100 stakes were uncapped when the Davis & Roberts crew went to pour concrete that had arrived on the other side of the worksite. Henson estimated that the concrete arrived that morning between 6:00 a.m. and 8:00 a.m.

Avila testified that he arrived at the worksite at 6:00 a.m. and parked his vehicle behind the safety trailer. Avila entered the safety trailer and spent some time performing paperwork and participating in the plan of the day. Avila left the safety trailer to sign off on the work of the various trade partners⁵ and begin his daily inspection at approximately 8:00 a.m. Avila took a path to the Amazon facility that passed near the area of the sidewalk formation work. Avila testified that no one was working in that area, and he did not observe the sidewalk formation work at that time. While Avila was out on his daily inspection, he received a phone call informing him that Division Associate Safety Engineer, Michael Burgess (Burgess), was on site. Avila then traveled back to the safety trailer, again passing near the area of the uncapped stakes, but he did not observe the hazard at that time. Avila testified that his attention was focused in the other direction on the safety trailer looking for Burgess.

Burgess arrived at the worksite at 9:19 a.m. (Ex. 20.) Burgess estimated that he entered the worksite sometime after 9:30 a.m. and met with Avila sometime after 9:55 a.m. After Burgess and Avila met, they exited the safety trailer and walked down the stairs. At this point, both Avila and Burgess observed the uncapped stakes.⁶ Avila testified that Burgess's attention was drawn to the area of the uncapped stakes because employees were walking from the Amazon facility to their parked vehicles. Avila then called out to the employees to stop walking in the direction of the uncapped stakes. Avila immediately contacted a Crawford Construction, Inc. supervisor and instructed that the hazard be abated. Avila testified that, at Burgess's insistence, they both continued to the Amazon facility so that Burgess could conduct his inspection. Upon their return, the exposed stakes had been capped. Henson estimated that he had been on the other side of the worksite pouring concrete between 45 minutes to two hours before he returned to the area of the formation work, at which point the exposed stakes had been capped.

Employer argued that the uncapped stakes were not readily observable from the area in

⁵ Employer calls its subcontractors, including sub-tier contractors, trade partners.

⁶ Burgess testified that he first observed the uncapped stakes when he entered the worksite. However, Burgess did not inform Employer or any other trade partner of the uncapped stakes upon making initial contact. The subject of the uncapped stakes did not arise until both Avila and Burgess walked down the stairs from the safety trailer and saw the uncapped stakes. Employer asserts that Burgess was trying to create a "GOTCHA" situation. (Employer's Brief, at p. 3.) However, although ideally Burgess should have informed Employer of the uncapped stakes immediately, the fact that he did not, does not weigh in favor of or against a finding that Employer exercised due diligence.

front of the safety trailer. Burgess testified that this distance was approximately 40 to 50 feet. Henson testified the form work was about 200 feet from the safety trailer. Employer faults the Division for not taking a photograph of the uncapped stakes, which Employer asserts would have demonstrated that the uncapped stakes were not readily observable. However, the fact that Avila eventually saw the uncapped stakes when he and Burgess came out of the safety trailer establishes that the uncapped stakes were in plain view from the area in front of the safety trailer. Indeed, Avila acknowledged that the uncapped forming stakes were not a latent hazard, and he would have eventually identified this hazard during the normal course of his inspection at approximately 12:00 p.m. when he travelled from the Amazon facility back to the area of the safety trailer.

Employer argued that it did not have time to observe the hazard. The Appeals Board considers the length of time that the hazard was present in determining whether a hazard is readily observable. (*Hanover RS Construction LLC.*, Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2021) (*Hanover*) [finding that a controlling employer did not have the opportunity to observe the hazard of an unsecured floor hole covering because the hazard occurred and was present for only minutes].)

Employer asserts that the uncapped stakes were present for approximately two hours prior to Burgess's arrival. (Employer's Brief, p. 3, ln. 14-15.) The Division asserts that the uncapped stakes were present for at least "two hours, if not more." (Division's Brief, p. 8, ln. 8.) While the uncapped stakes may have been present for more than two hours, using Employer's own estimate of two hours, it cannot be said that the uncapped stakes were unobservable. Avila had the opportunity to observe the uncapped forming stakes within the two-hour timeframe. On at least two occasions, when he left the trailer to start his inspection and when he returned to meet Burgess, Avila took a path in front of the safety trailer that was similar to the path he took when he eventually observed the uncapped stakes. (Ex. 27 Mod 2, Ex. 27 Mod 4, and Ex. 27 Mod 5, and Ex. C Mod 2.) Ultimately, the uncapped stakes were in plain view and present for at least two hours. As such, the uncapped stakes were observable and not a latent hazard.

In its post-hearing brief, Employer argues that due diligence does not require perfection, and the two-hour time frame is insufficient, without more, to find that Employer did not exercise due diligence. Employer points to *Angelus Block Co. Inc.*, Cal/OSHA App. 1113026, Decision After Reconsideration (Apr. 25, 2024), where the Appeals Board noted that the "'law does not require perfection of a party, but rather good faith and diligence in the pursuit of his or her actions.'" [Citations]. While this may be true, the two-hour timeframe during which the hazard was present is not alone dispositive. As discussed below, Employer failed to establish all but one of the factors relevant in determining due diligence.

Based on the foregoing, the preponderance of the evidence is that the uncapped stakes

were in plain view and Employer had the opportunity to observe this hazard. Accordingly, this factor weighs against finding that Employer exercised due diligence.

b. Adequate Supervision and Oversight with Periodic Inspections of Appropriate Frequency

“What constitutes adequate supervision and inspection includes consideration of ‘the scale of the project, the number of subcontractors, and the nature of the work.’” (*Signal Energy, LLC, supra*, Cal/OSHA App. 1155042, quoting *McCarthy, supra*, Cal/OSHA App. 11-1706.) The controlling employer “is not normally required to inspect for hazards as frequently, or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired.” (*Harris, supra*, Cal/OSHA App. 03-3914.)

The Appeals Board has found this factor satisfied where a controlling employer of a large construction site had several employees overseeing, supervising, and performing routine inspections of the site. For example, in *McCarthy*, the controlling employer was building a high school on a 10-acre site consisting of multiple buildings. There were approximately 20 subcontractors employing 150 employees. (*Id.*) In finding that the controlling employer engaged in adequate supervision and oversight and conducted inspections of appropriate frequency, the Appeals Board noted that the employer had a safety coordinator who spent 70 percent of their day conducting inspections and, in addition, “several superintendents at the site, who ... were required to check specific areas and ensure the safety and quality of work.” (*Id.*)

In *Hanover*, the controlling employer was the general contractor of a multi-family residential construction site that was 10 acres in size. The Appeals Board found that the controlling employer demonstrated due diligence, in part, because the controlling employer had “three full time employees at the project that spent approximately sixty to seventy percent of their time in the field reviewing, among other things, safety, the progress of construction, and scheduling.” (*Id.*)

In this case, Employer was the controlling employer on a large construction site where an Amazon facility and the surrounding parking lots and roadways were being built. Ned Brown (Brown), Employer’s Director of Safety, estimated that the total area of the worksite was 70 acres. Avila testified that the actual Amazon facility that was in the process of being built was 1.6 million square feet. Avila further testified that there were over 20 trade partners with over 400 employees present at the worksite on the day of the inspection. It is reasonable to conclude that significant oversight and inspection efforts were required due to the scale of the worksite and the sheer number of trade partners and employees present.

Avila testified that, as Employer’s Site Safety Technician, he was responsible for

ensuring the safety and health conditions at the worksite, which included performing daily site inspections. Avila explained that he spent approximately 80 percent, or about 10 hours per day, of his time out in the field conducting daily site inspections. Avila further testified that during his inspections he was focused on ensuring work was being performed safely and that any observed hazards were immediately resolved.

While Employer employed two other site safety technicians for the worksite, Brown testified that they worked in rotation, and Avila was the only safety professional Employer had working on the day of the inspection. Avila testified that Blake Steele (Steele), Employer's Site Manager, who had the authority to identify and correct hazards, was present at the worksite five days a week and on the day of the inspection. However, there were no details provided about Steele's role in supervision or inspections of the worksite. As such, it is found that Employer had only one safety professional, Avila, supervising, overseeing, and inspecting the worksite for health and safety issues.

Overall, due to the size of the worksite and the number of trade partners and employees on the worksite, it cannot be said that Employer engaged in adequate supervision, oversight, and inspections. This is so considering *McCarthy* and *Hanover*, where the Appeals Board found it significant that the controlling employers over 10-acre construction sites had more than one safety manager performing daily inspections or had additional staff who were responsible for checking specific areas of the construction site. Here, the worksite was much larger at 70 acres with the Amazon facility itself being 1.6 million square feet with over 20 trade partners and over 400 employees. Brown opined that one safety professional was sufficient because all of Employer's team members were trained to identify hazards. Brown further opined that Avila's inspection was adequate because his inspection was focused on high-risk activities. However, this is insufficient to explain why one safety professional on site was adequate to cover such a large worksite with numerous trade partners and hundreds of employees present.

Indeed, Avila testified that he could not observe all hazards at one time, and he was "one individual, you know, walking around a 1.6 million-square-foot building and, you know, the property outside as well." (Hearing Transcript, Apr. 22, 2025, p. 185, ln. 4-9.) The Appeals Board has found that this is insufficient to establish adequate supervision, oversight, and inspections. In *Savant Construction, Inc.*, Cal/OSHA App. 14-3018, Denial of Petition for Reconsideration (Oct. 19, 2015), the Appeals Board found that a controlling employer's supervision and oversight was insufficient despite its argument that "it cannot be everywhere all the time to check the work it and/or its various subcontractors are doing."

Employer asserted that it also engaged in supervision and oversight by conducting a plan of the day each morning and requiring daily job safety analysis, which Employer called pre-task work plans. Avila testified that the plan of the day consisted of Employer meeting with its

various trade partners to review the daily pre-task work plans to identify and address potential hazards. Avila explained that he reviewed and signed off on the pre-task work plans. Avila further explained that trade partners could not perform work without participating in the plan of the day and receiving a sign-off on a pre-task work plan.

While Employer described its plan of the day and pre-task work plans, Avila testified that he could not recall if anyone from Davis & Roberts was in the plan of the day on the day of the inspection. Brown generally testified that Davis & Roberts complied with the requirements of the daily pre-task work plans. However, Employer offered no details regarding the specific pre-task work plan for the Davis & Roberts sidewalk formation work or that it signed off on this work prior to commencement of the work according to Employer's protocol. Avila testified that there are occasions when trade partners were not required to be in the plan of the day, such as when there is a need for a trade partner to be on the worksite early. The Davis & Roberts crew was at the worksite early on the day of the inspection, but Employer did not explain what measures it took to review and supervise the work that Davis & Roberts arrived early to perform. Avila testified that Employer always had someone on site. However, there were no details that anyone from Employer was on site when the Davis & Roberts crew began working that morning. Indeed, Avila did not arrive at the worksite until 6:00 a.m., two hours after the Davis & Roberts crew began its work.

Furthermore, Avila testified that, while he was aware that Davis & Roberts would be pouring concrete at one location on the worksite, he was unaware that Davis & Roberts would be engaging in the sidewalk formation work. Avila testified that he was unaware of this work because Davis & Roberts began its work early that day. However, Employer did not assert that the sidewalk formation work was unscheduled or work of which Davis & Roberts failed to inform Employer.

Overall, Employer did not demonstrate that one on-site safety professional was sufficient, or that it even had an employee on site with knowledge of the work to know that it needed to be supervised. As such, this factor militates against finding Employer exercised due diligence.

c. Efforts to Identify and Promptly Correct Hazards at the Worksite

“Under this factor, the Board considers evidence that the controlling employer had an effective system in place to identify, evaluate, and promptly correct hazards. [Citation.]” (*Signal Energy, LLC, supra*, Cal/OSHA App., 1155042.)

Avila testified that his main role was to identify and correct hazards, which he did as part of his daily inspections. Avila explained that he had the authority to, and did, instruct subcontractors to immediately correct any safety issue he observed. If for some reason the safety

violation could not be corrected immediately, Avila took steps to ensure that the hazard was guarded or otherwise mitigated to prevent employee exposure to the hazard. Avila asserted that Employer always documented the observation and correction of hazards. In addition, as described above, Employer conducted the plan of the day to identify and address potential hazards, which included the daily completion of a pre-task work plan that was reviewed prior to any work being performed.

Similar to the above, while Employer described its system for identifying and correcting hazards, Employer did not demonstrate that Davis & Roberts was in the plan of the day or that there was a pre-task work plan for the sidewalk formation work that is the subject of the citation. It is commendable that Avila took immediate action to ensure that the uncapped stakes were abated. However, the fact that Avila, Employer's only safety professional on site, was not made aware of the Davis & Roberts sidewalk formation work suggests that Employer did not have an effective plan in place to identify hazards.

Although it appears that Employer had a system in place for identifying and correcting hazards, it cannot be said that Employer implemented its system in this matter, which weighs against finding that Employer acted with due diligence.

d. Enforcement of Compliance with Safety and Health Requirements with an Effective, Graduated System of Enforcement and Follow-up Inspections

“Evidence of a controlling employer’s system for enforcing subcontractors’ compliance with safety rules is another factor for determining whether the controlling employer exercised due diligence despite failing to correct or address a hazard. [Citation.]” (*Signal Energy, LLC, supra*, Cal/OSHA App., 1155042.)

Both Avila and Brown provided similar testimony that when a trade partner is awarded a contract, a preconstruction meeting is conducted. In this meeting, Employer sets forth the safety requirements that trade partners are expected to follow and provides its policies and procedures to trade partners. Brown testified that this was done for every trade partner, including Davis & Roberts. In addition, as described above, Employer had a system for identifying and correcting safety violations.

Employer used a graduated system of enforcement. Avila testified that Employer’s policy is to start with what it calls an observation, which consists of counseling a trade partner regarding an observed safety violation. Continued safety violations are escalated and may result in the trade partner being removed from the worksite for one to three days, or even permanent removal. Avila testified that this process is documented, and Employer has a zero-tolerance policy for repeat offenders.

In addition to the approximately 100 uncapped stakes at issue in this matter, Davis & Roberts had other instances of failing to cap stakes. Avila testified that the first incident was a single uncapped stake that Employer observed and immediately corrected. The second incident was the uncapped stakes that are the subject of the citation. Avila testified that there was a third incident where Employer observed two or three uncapped stakes during a follow-up inspection that was immediately corrected.

Avila testified that, in response to the third violation, Employer met with Davis & Roberts to inform them that any further violations would result in their removal from the worksite. Avila also testified that after the second incident, which is the subject of the citation, Employer stood Davis & Roberts down and explained that they needed to follow Employer's policy of capping stakes or they could be subject to removal. The record is silent as to what, if any, disciplinary action was taken regarding the first incident. While Avila testified that every observation of a hazard was documented, Employer did not submit any documentation regarding any discipline related to the three incidents of uncapped stakes. Rather, Employer submitted three counselling forms related to other hazards observed on the jobsite. (Ex. I, Ex. J, and Ex. K.)

Employer did not strictly follow its progressive system of enforcement and did not provide documentation of counseling forms related to the uncapped stakes. However, given the fact that Employer engaged in a follow-up inspection regarding uncapped stakes and warned, after the third violation, that removal from the worksite would result if there were continued violations, this factor weighs in favor of finding Employer exercise due diligence.

e. Ongoing Efforts to Provide Safety Training to Employees

In determining whether a controlling employer engaged in ongoing efforts to provide safety training, the Appeals Board has looked to whether an employer has new hire safety orientation training, regular and ongoing safety meetings, and a site-specific Injury & Illness Prevention Program (IIPP). (*Signal Energy, LLC, supra*, Cal/OSHA App., 1155042.)

As discussed above, Employer held a preconstruction meeting with its trade partners to set forth safety expectations before any work could commence. Brown testified that Employer's field safety manual requires a job safety analysis prior to any task being performed. Brown also testified that trade partners were required to do weekly toolbox talks. Brown asserted that, to his knowledge, Davis & Roberts was in compliance with these requirements.

While Brown referenced a field safety manual, except for the above, no other details were provided about the field safety manual. Nor did Employer provide any details as to the content of the weekly toolbox talks. Furthermore, Employer did not offer into evidence its IIPP or field safety manual.

Brown's generalized testimony is insufficient to establish this factor, and therefore, this factor weighs against a finding that Employer exercised due diligence.

f. Familiarity with Subcontractor's Experience and History

“[T]he steps a controlling employer takes in deciding which company or companies to retain as subcontractors is an element in determining whether the controlling employer acted with due diligence.” (*Savant Construction, Inc., supra*, Cal/OSHA App. 14-3018.)

Brown testified that Employer has a prequalification process in place to evaluate the safety background of its trade partners. Brown explained that potential trade partners were required to provide information regarding their recordable incident rate, lost time incident rate, health and safety citations, and workplace fatalities for the previous five years. Once this information was submitted, Employer reviewed and verified this information.

Brown testified that Davis & Roberts's safety background was vetted through this process. Brown explained that he reviewed Davis & Roberts's OSHA 300 logs and there was nothing unusual about Davis & Roberts's recordable incident rate and lost time incident rate. Through the vetting process, Employer learned that Davis & Roberts had received a health and safety citation in the previous five years. Brown explained that trade partners are given the opportunity to explain the circumstances surrounding any citations, and what steps the trade partner has in place to ensure the violation will not occur again. However, Brown gave no specific information regarding the citation or any mitigating circumstances. While it appears that Employer had a system for determining its trade partner's safety records, again, Employer presented insufficient evidence that it followed this procedure in this case as it is unclear how the citation impacted Employer's determination that Davis & Roberts had a good safety record. As such, this factor weighs against a finding of due diligence.

In sum, this case presents a close question of whether Employer exercised due diligence. Employer provided generalized testimony about the overall measures it took to exercise due diligence. However, it fell short of establishing that it implemented many of these measures in this case. Although no single factor is dispositive in this matter, the factors, in combination, do not support a finding that Employer acted with due diligence. This is especially so considering that the uncapped stakes were in plain view, Employer had the opportunity to observe the uncapped stakes, and Employer provided no reason, let alone a reason that was outside of its control, as to why it had no safety personnel on site with knowledge of the sidewalk formation work. It would be illogical to conclude that Employer acted with due diligence in regard to work of which it was not even aware.

Accordingly, Employer failed to meet its burden to establish that it exercised due

diligence to relieve it of liability for the violation of section 1712, subdivision (c)(1), and the citation is affirmed.

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

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

There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

[...]

- (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes 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 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. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation, Inc.* Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

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.

In this case, Burgess testified that he was current on his Division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citation as Serious. The hazard created by the violation was impalement. Burgess testified that impalement may result in injuries that require hospitalization, such as damage to internal organs and loss of an eye. Burgess further testified that impalement injuries can also result in death. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

4. Did Employer rebut the presumption that the violation 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.

(Lab. Code §6432, subd. (c).)

Labor Code section 6432, subdivision (b), provides that the following factors may be

taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence and will not excuse a violation on the claim of lack of employer knowledge. (*Gateway Pacific Contractors Inc.*, Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).) “[T]o prove that an employer could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it.” (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2003).)

As discussed above, the uncapped stakes were in plain view and Employer had the opportunity to observe the uncapped stakes. While Employer eventually observed the violation, it had been present for nearly two hours prior to this observation and Employer had the opportunity to observe the violation in that timeframe. Furthermore, there was nothing to establish that Employer had anyone on site who knew of the sidewalk formation work. Again, there was no assertion that Davis & Roberts failed to inform Employer of the work or that the work was unplanned. Given these circumstances, it cannot be found that Employer engaged in adequate supervision of the work.

Based on the foregoing, Employer provided insufficient evidence to establish that it took steps that a reasonable and responsible employer in like circumstances would be expected to take, before the violation occurred, to anticipate and prevent the violation. Therefore, Employer failed to rebut the Division's classification of the citation as Serious.

5. Is the proposed penalty 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures. Accordingly, the proposed penalty of \$6,750 is found to be reasonable.

Conclusion

The evidence supports a finding that Employer violated section 1712, subdivision (c)(1), by failing to protect employees working at grade by guarding the exposed metal forming stakes that presented an impalement hazard. Employer failed to establish the due diligence defense. The violation was properly classified as Serious. The proposed penalty is found reasonable.

Order

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

/s/ Jennie Culjat

Dated: 08/01/2025

Jennie Culjat
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.