BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **A. TEICHERT & SON INC.,** **dba TEICHERT AGGREGATES** **35030 County Road 20** **Woodland, CA 95776** Employer	**Docket No. 11-R5D1-1895** **DECISION**

Introduction

Beginning on April 14, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Woodland, California maintained by Employer. On July 15, 2011, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing a civil penalty[1] The serious accident related citation alleges that an employee was struck by a rock falling from an overhead conveyor in violation of section 7030, subdivision (e) which requires employers to guard conveyers in areas where employees may be struck with materials falling from a conveyor.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, and the reasonableness of the proposed penalty. Employer also asserted a series of affirmative defenses. On January 11, 2013, the Division filed a motion to amend the citation to classify the violation as "Willful." On January 31, 2013, the Division's motion was granted.

The matter was set for hearing before Neil Robinson, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on February 7 and 8, 2013, and May 1 and 2, 2013. Ron Medeiros, Esq., of the Robert Peterson Law Firm represented Employer. Allyce Kimerling, Staff Counsel, represented the Division. P. Kim Regalado, Esq., of Marcus & Regalado, LLP, appeared on behalf of the third party employee. The parties presented oral and documentary evidence. The record was left open until July 5, 2013, for the submission of closing briefs. The

[1] Unless otherwise specified, all references are to California Code of Regulations, Title 8.

submission date was later extended to January 15, 2014 by order of the Administrative Law Judge.

Findings of Fact:

1. Employer changed the belt on conveyor 196 at its Woodland, California aggregate plant from a cleated belt to a smooth belt on or about September 28, 2009.

2. From September 28, 2009 through the time of the accident on April 7, 2011, conveyor 196 had only a smooth belt.

3. On April 7, 2011, Albert Billingmier (Billingmier) was hit by a rock or cobble that weighed approximately nine pounds.

4. Employee Rick Smith, while working with Billingmier was struck by the same cobble that struck Billingmier.

5. Billingmier's injury resulted in impairment sufficient to cause a permanent brain injury that has rendered him unable to drive or work significantly reducing his efficiency on and off the job.

6. The safety order cited by the division, section 7030, subdivision (e), is applicable to the hazard because Employer had employees working in an area occupied by employees and below an inclined overhead conveyor.

7. The rock striking Smith and Billingmier was being carried by conveyor 196 before it fell from the conveyor.

8. The guard configuration installed on conveyor 196 did not prevent material from falling on or causing harm to employees working below the conveyor.

9. Employer did not know nor could it have known that cobbles fall from conveyor 196 or that the nine pound cobble that struck Smith and Billingmier could have been conveyed at the time of injury.

10. Employer's safety program includes a system of rewards for suggesting safety ideas that are implemented by the safety committee.

11. Employer's failure to provide adequate guarding of conveyor 196 was inadvertent and not intentional and knowing.

12. Employer engaged in reasonable efforts to eliminate cobbles from falling on employees.

13. Employer immediately abated the hazard of falling cobbles by constructing a top to the conveyor during the two days following the April 7, 2011 accident.

14. For purposes of calculating the penalty, Extent is low, Likelihood is medium, Good Faith is 30 percent and history is 10 percent.

Issues:

1. Does the word "area" in section 7030, subdivision (a) mean that a worker must be directly underneath conveyor 196 for this section to apply or is this section applicable when workers are within the zone of danger caused by materials falling from conveyor 196?

2. Was Employer's conveyor, which had side rails and other engineering devices to keep larger rocks out of the conveyor, "so guarded" to prevent material falling on or harming employees working below the conveyor on April 7, 2011?

3. Did the Division prove, by a preponderance of evidence, that Employer's violation of section 7030, subdivision (e), resulted in a realistic possibility that death or serious physical harm could occur from the hazard created by the violation?

4. Did Employer engage in intentional and knowing behavior or fail to make a reasonable effort to prevent a large cobble from falling onto employees from an overhead conveyor?

Analysis:

1. Does the word "area" in section 7030, subdivision (e) mean that a worker must be directly underneath conveyor 196 for this section to apply or is this section applicable when workers are within the zone of danger caused by materials falling from conveyor 196?

The Division cited Employer for failure to protect its employees from the hazard of materials, in this case the cobbles (or rocks) that Employer cleans, crushes and sorts, from falling on or causing injury to employees. Section 7030, subdivision (e) states:

> Conveyors passing over areas that are occupied or used by employees shall be so guarded as to prevent the material handled from falling on or causing injury to employees.

In its post-hearing submission, Employer argues that section 7030, subdivision (e) does not apply because Billingmier and Smith were not working directly underneath conveyor 196 when they were struck by a cobble. Thus, a careful analysis of "conveyors passing over areas that are occupied or used by employees" and the location of Billingmier and Smith at the time of the accident must be undertaken to determine the applicability of section 7030, subdivision (e) to the circumstances presented in this record.

When used in a statute, words must be construed in context keeping in mind the nature and obvious purpose of the act where they appear, and the various parts of the statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. (*People v. Salcido*, (2008) 166 Cal.App.4th 1303, 1311, *citing People v. Black* (1982) 32 Cal.3d 1, 5.) If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. (*People v. Black,* (1982) 32 Cal.3d 1, 5.) Also, an interpretation that renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in light of the statutory scheme; and if a statute is amenable to two alternative interpretations the one that leads to a more reasonable result will be followed. (*Schmidli v. Pierce,* (2009) 178 Cal.App.4th 305, 311.)

Section 7030, subdivision (e) contains the phrase "areas that are occupied or used." The plain meaning of this phrase would include any areas where an employee might be expected to work or be located while at work, and into which debris may or could fall from an overhead conveyor. This safety order does not require that conveyors pass directly over places where workers are present.[2] A narrow interpretation requiring a conveyor directly overhead compels a very narrow interpretation that, on its face, does not appear in the safety order. The Appeals Board is without authority to change the clear terms of a safety order. (*Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (April 18, 1991).)

The word "area" as used in this safety order is unambiguous and conveyors near areas where workers are present and could be struck by falling rocks, is precisely the hazard section 7030, subdivision (a) is designed to prevent. In *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003), the appeals board determined that workers are exposed to a hazard if they are within the "zone of danger" posed by the violative condition. The Board stated, "… exposure may be proven by showing that the area of the hazard was 'accessible' to employees (citations omitted)." In the instant case, section 7030, subdivision (e) would be rendered ineffective if Employer's narrow interpretation of the word "area" were adopted;

[2] This is essentially the argument proffered by Employer when arguing that the circumstances of this case do not fall squarely within the safety order thus rendering application of this safety order a nullity.

the rule protecting workers from material falling from overhead conveyors would only apply to those workers immediately underneath conveyors. Clearly, workers near conveyors are also within the zone of danger posed by falling cobbles, or in the area that poses a hazard.

Here, the evidence establishes these employees were exposed to the hazard of debris falling from an overhead conveyor. On April 7, 2011, Billingmier and Smith were exiting a tunnel, depicted in Exhibits 8 and B, where they had been inspecting the inside of the tunnel for the purpose of engineering a solution to "minimize the rocks coming off the belt."[3] The belt they referred to is the belt of conveyor 196. Immediately following their exit from the tunnel, Billingmier and Smith were struck by the cobble depicted in Exhibit 9 which shows the cobble on a bathroom scale weighing nine pounds.[4] The cobble struck them in the location marked with an "X" on Exhibit 8 that appears to be next to conveyor 196, but not directly underneath the conveyor. Billingmier and Smith were performing their normal work at the time of the accident.

The evidence is clear that overhead conveyors were being operated by Employer and that portions of those conveyors were located in areas occupied or used by employees. That the area of the accident was not directly underneath conveyor 196 or any other conveyor is not determinative because section 7030, subdivision (e) refers to "[c]onveyors passing over areas", that are "occupied or used." Thus, the Division established section 7030, subdivision (e) applies to the work being done on April 7, 2011. The Division has met its burden of proving that section 7030, subdivision (e) applies to the circumstances presented by the instant case. (*Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration (October. 16, 1980), at pp. 2-3; and *Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

2. Was Employer's conveyor, which had side rails and other engineering devices to keep larger rocks out of the conveyor, "so guarded" to prevent material falling on or harming employees working below the conveyor on April 7, 2011?

To uphold the citation, the Division must prove by a preponderance of the evidence that conveyor 196 was either not guarded or was not sufficiently guarded over areas occupied by workers to prevent material from falling off the conveyor. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "'Preponderance of evidence' is usually

[3] Smith testified about what they were doing immediately prior to the accident. Billingmier testified that he did not have any recollection of the events immediately prior to the accident. The portion of the conveyor that is in the tunnel is not overhead so rocks that slide off the end of the conveyor do not pose the same risk to employees that are caused by rocks falling off an elevated conveyor over where workers are customarily working.

[4] No evidence was submitted to demonstrate that the rock weighed more or less than the nine pounds depicted in the exhibit.

defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005), citing *Spaich Brothers, Inc. dba California Prune Packing*, Cal/OSHA App. 01-1630, Decision After Reconsideration (February 25, 2005).

Indirect or circumstantial evidence may allow for the inference of a necessary finding. For example, to establish employee exposure, the location of hazardous equipment in a workplace rendering it capable of being used by employees, or an inspector's observation of an unguarded saw blade with sawdust beneath the blade support an inference that an employee used the unguarded saw, and was thus exposed to the hazard cited. (*Santa Fe Aggregates, Inc.*, Cal/OSHA App. 00-388, Decision After Reconsideration (Nov. 13, 2001), *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135 Decision After Reconsideration (June 21, 1982), *George L. Lively*, Cal/OSHA App. 98-088 Decision After Reconsideration (Apr. 28, 1999), see also, *Avecor, Inc.*, OSHAB 77-733, Decision After Reconsideration (June 29, 1984).). Before applying these general evidentiary concepts to the present case, it is necessary to first consider the type of safety order section 7030, subdivision (e) represents.

California Government Code section 11342.570 defines "performance standard" as … "a regulation that describes an objective with the criteria stated for achieving the objective." In the context of a fall protection safety order, this definition was further refined in *Estenson Logistics LLC*, Cal/OSHA App. 05-2755, Decision After Reconsideration (December 29, 2011): "Its [performance standard] goal is to protect against fall hazards, and it states the way to achieve that goal – providing fall protection – while leaving it to employers to select an appropriate means of doing so, so that the employers can choose the means best suited to the nature of the hazard and the working conditions. (see *MCM Construction, Inc.*, Cal/OSHA App., 94-247, Decision After Reconsideration (March 30, 2000); *Miaden Buntich Construction Co.*, Cal/OSHA App. 85-1668, Decision After Reconsideration (October 14, 1987.)"

Similarly, section 7030, subdivision (e) is a performance standard. It requires employers to guard conveyors to prevent materials from falling onto work areas where employees may be struck or harmed but leaves it to the employer to discern how best to achieve this goal. For the Division to meet its burden of proof, it must prove, by a preponderance of the evidence, using direct or circumstantial evidence, that (1) conveyor 196 was not guarded sufficiently well to, (2) prevent material from falling onto employees working, (3) in areas below the conveyor.

The first element is guards. Conveyor 196 was guarded with steel sideboards. Side boards are attached to the frame of the conveyor and extend vertically and perpendicular to the belt, running the length of the conveyor. The purpose of sideboards is to prevent material from spilling over the edges of the conveyor. Some of the sideboards on conveyor 196 were skirted. Skirts cover the base of the sideboards and are made from flexible material such as rubber or polyurethane. Skirting is applied to the sideboards and is intended to enhance the guarding by filling any gap between the belt and the frame of the conveyor.[5]

The photograph in Exhibit A, taken on the day of the accident, depicts the sideboards and skirting affixed to conveyor 196. Exhibit A[6] does not show the entire conveyor, only the upward portion. The sideboards depicted in the photograph are welded and nearly as long as the belt is wide in most places. There is an area on the right side, as seen in Exhibit A, where the sideboard is vertically shorter than the rest of the sideboards seen in the photograph. This shorter section also has skirting attached at the bottom.[7]

Additionally, there were scalping screens (steel strainers with square openings) that sifted the raw material from the mine before the material reached conveyor 196 to be carried to the rock crushing machines. The primary purpose of the scalping screens is to determine the maximum size of material that will be processed in the crushers.[8] If the material is too large, the crushers may not process the material effectively. Employer attempts to prove that the scalping screens also act as guards by filtering material that will travel up the inclined conveyor 196, in theory preventing larger cobbles from traveling to heights where they may become dislodged and roll down the conveyor. The question is not whether the scalping screens are preventing large cobbles from being conveyed, but rather whether the conveyor's themselves are guarded so that materials of any size do not fall from heights onto workers below.

Clearly, there is substantial evidence conveyor 196 included guards on the day of the accident. Whether those guards were sufficient to prevent material from falling in areas occupied by workers is the next question that must be addressed.

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[5] Smith explained that the belt tends to curl at its edges thus creating a gap where rocks may fall though. Thus, the skirting is applied to fill any gap at the edge of the belt.

[6] Mark Longpre (Longpre), Employer's Environmental Health and Safety Field Specialist, testified that Exhibit A depicts conveyor 196 the same way it appeared on April 7, 2011.

[7] Smith testified that the guarding of conveyor 196 was between two and five inches tall which is clearly mistaken based a review of the photographic evidence.

[8] Billingmier testified that allowing larger rocks into the system than intended, "…slows down the procedures." Smith, consistent with Billingmier's testimony, testified that when cobbles larger than intended reach the crushers, they spin around the crusher until they become small enough to be crushed. Smith based this on his direct observations.

The second and third elements are whether conveyor 196 was sufficiently guarded to prevent material from falling onto workers below. Smith testified about the numerous times that he witnessed materials falling from conveyor 196 in the area where the accident occurred.[9] Smith saw cobbles larger than the one involved in this accident fall from conveyor 196. He stated that "the danger of falling rocks from 196 was a long-standing issue. And we tried different techniques to try to engineer out the problem." Smith, however, was not very specific about the time frames during which he noticed rocks falling from conveyor 196, or precisely from where on the conveyor the rocks fell.[10] He was responsible for cleaning them up when they did. Smith testified that he has worked for Employer for 20 years. Smith witnessed many changes to the plant and the way in which material was fed onto conveyor 196 throughout his employment. Smith admits that he did not report rocks falling from conveyor 196 to supervisors, but he nonetheless was in a position as a laborer responsible for cleaning up the area below conveyor 196 to know when cobbles spilled from the conveyor where workers could be struck or harmed.

Billingmier, the plant operator at the time of the accident, testified that during the years of working at the site of the accident, he has personally observed cobbles falling from conveyor 196, although he did not report his observations to his employer at any time relevant to this accident. After the belt was changed from a cleated belt[11] (a belt that has horizontal ridges used to keep material from sliding on the belt) to a smooth belt, Employer had difficulty preventing material from sliding down the smooth belt, especially wet material.[12] Employer, with the assistance of Billingmier, devised a method to deposit dry material on the belt and then wet material on top of the dry material. The dry material adhered to the belt of conveyor 196 and transported the wet material more effectively to the final location without as many rocks sliding down the belt.[13] According to Billingmier very rarely would anyone actually see a rock fall off of conveyor 196, however, the proof that it occurred would be evident from the cobbles that would be located below conveyor 196 in the area depicted in Exhibit 8 where employees sometimes work. At the time of the accident, cobbles would continue to fall from the conveyor, although less often than before because the material is split between wet and dry.[14]

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[9] In Exhibit 8, Smith placed an "X" on the photograph to illustrate the location where he and Billingmier were struck by a rock.

[10] There is testimony from other witnesses that rocks sometimes exit conveyor 196 at the tail pulley which is located at ground level in the tunnel which would not pose a risk to employees from overhead. Those rocks are cleaned removed from the tunnel by Smith as well.

[11] At various times during the testimony the cleated belt was also referred to as the pleated belt.

[12] Other evidence presented at the hearing concludes that the smooth belt was actually more effective in preventing material from sliding than the cleated belt.

[13] It is agreed that these changes occurred prior to the accident on April 7, 2011.

[14] Smith testified about the trommel return belt clogging with material causing the trammel to overflow onto the ground near where the accident occurred. This would be a source of cobbles on the ground near where the accident occurred and not associated with conveyor 196. Smith indicated that on the day of the accident the cobble that

Smith stated that the rock fell on him and Billingmier on April 7, 2011, came from somewhere above them. Smith recalled in his testimony that he felt the rock hit his back as he and Billingmier were exiting the tunnel which is very near conveyor 196, as depicted in Exhibit 8. Billingmier was struck in the head. Because they were in the process of walking out of the tunnel, it can reasonably be inferred that they were in a standing position at the time Smith was struck in the back and Billingmier was struck in the head by the rock. When a rock strikes the head or back of a standing adult male, it is more likely than not that the rock originated from above. In the absence of clear evidence to the contrary, it can be inferred that the rock striking Billingmier and Smith fell from conveyor 196 that was located above the area where Smith and Billingmier were struck.[15] This conclusion is supported by Patterson's testimony in which he methodically rules out possible sources from which the rock originated other than from falling off conveyor 196.[16]

Thus, all three elements of section 7030, subdivision (e) are satisfied.[17] .

3. Did the Division prove, by a preponderance of evidence, that Employer's violation of section 7030, subdivision (a), resulted in a realistic possibility that death or serious physical harm could occur from the hazard created by the violation?

Labor Code section 6432 creates a rebuttable presumption of a serious violation when the Division proves that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." The term "realistic possibility" is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation.*, Inc., Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001) the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but

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struck him could not have come from a trammel overflow situation because when that occurs, the trammel spills a pile of cobbles and not just one. When the trammel overflows, it's obvious, according to Smith.

[15] Other witnesses could not say with certainty that the rock fell from conveyor 196, however, among the witnesses to testify at hearing, only Smith was involved in the accident and was thus an eye witness.

[16] Patterson testified that it is unlikely that the rock came from the trammel return belt, near conveyor 196, because a failure of the trammel return belt results in a rapidly accumulating pile of rocks. There is no evidence of a pile of rocks so the large cobble could not have been come from a failure of the trammel return belt. Other belts shown in exhibit 8 carry material that is already crushed into ¾ inch rocks. A large cobble on those conveyors would have been crushed. The only remaining source of the cobble involved in this accident is conveyor 196 according to Patterson's testimony.

[17] Counsel for the Division cites two cases that purport to describe the impact of materials falling off of conveyors, *Paramount Farms*, Cal/OSHA App. 92-176, Decision After Reconsideration (March10, 1993), and *Warner-Lambert Co*., Cal/OSHAB App 82-052, Decision After Reconsideration (September 28, 1984). Neither case addresses the risks associated with materials falling from overhead conveyors. *Paramount Farms*, *supra*, addresses unguarded machinery attached to an overhead conveyor that caused an injury, and *Warner-Lambert Company*, *supra*, addresses whether a chain and sprocket drive was properly guarded.

only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: "[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) … if such a prediction is clearly within the bounds of human reason, not pure speculation." By adopting the "reasonable possibility" language, which had been in use by the Appeals Board, there is a presumption that the Legislature has approved the Board's definition. (See, *Moore v. California State Board of Accountancy* (1992) 2 Cal. 4th 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798.). When considering the legislative history of the revised Labor Code section 6432, subdivision (a), there is little question that a lower standard of proof was intended when revising the statute from "substantial probability" to "realistic possibility" when this statute was revised effective January 1, 2011.[18]

Patterson addressed the consequences of inadequately guarded overhead conveyors. This record contains an abundance of evidence that Employer also understood the connection between safety and adequate guarding to prevent materials from spilling over onto areas occupied by its employees. Some of this evidence is in the form of safety meetings and documents demonstrating what can happen when material conveyed overhead falls onto employees causing injury or death. Clearly, it is more than mere speculation, if not common sense, that rocks falling from an elevated location actually cause a realistic possibility of death or serious physical harm.

The workplace hazards progressed beyond a mere possibility when on April 7, 2011, Bellingmier and Smith walked from the tunnel depicted in Exhibit 8, and were both struck by the nine pound cobble depicted in Exhibit 9. Bellingmier was rendered unconscious and moved to a safer location by Smith who was not seriously injured. As analyzed above, it is more likely than not that the cobble came from conveyor 196, the conveyor closest to the place where Bellingmier and Smith were standing when struck from above.

Serious physical harm as used in section 6432, subdivision (d) is defined as "any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following: (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 …."

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

Billingmier testified about his condition on February 8, 2013, approximately 23 months after the date of injury. He testified about his post-injury impairment. Billingmier stated that he does not leave his house unless it is to attend a doctor's appointment. He does not drive because his reflexes are slow. Billingmier testified to short-term memory loss. He has orthopedic injuries involving his neck, right arm and shoulder and lower back symptoms that cause him pain. Billingmier testified that he had shoulder surgery. All of these conditions are attributable to the April 7, 2011 injury. In addition to his orthopedic problems, doctors have diagnosed Billingmier to have closed head trauma and post-concussive syndrome. Some physicians have indicated that Billignmier's maladies have reached maximum medical improvement, that state where his injuries have become medically stable, and other doctors have not. Smith testified about his observations of the post-injury behavior of Billingmier, a robust individual who ran Employer's aggregate plant before the injury but is a noticeably changed person since the accident. Based on the findings of the Agreed medical examiner, Dr. Abeliuk[19], Billingmier's symptoms have been well defined by both the medical examiners and the several treating physicians who continue Billingmier's care and corroborate Billingmier's testimony about his medical condition and impairments. Billingmier has never returned to work.

There is sufficient evidence in this record to conclude that Billingmier's symptoms stemming from his closed head injury and post-concussive syndrome has caused permanent impairment to the function of an organ, Billingmier's brain. Because he is no longer able to work, this impairment has affected him both on and off the job. Employer offered no credible evidence to disprove the extent of Billingmier's impairment.

Thus, it is clear that the Division proved that there is a realistic possibility that death or serious injury could result, and in fact resulted, from a rock falling from an elevated conveyor onto Billingmier and Smith on April 7, 2011. The rebuttable presumption of a serious violation has been established. However, whether employer has rebutted the presumption must now be determined

Labor Code section 6432, subdivision (c) describes how an employer may meet its burden of proof to rebut the presumption of a serious violation. Employer is given the opportunity to prove that it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." Employer may establish this by "demonstrating both of the following:"

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[19] In a workers' compensation case, the Employer and the injured worker may agree to a physician to perform a medical-legal evaluation of an injured worker's medical condition. Dr. Abeliuk, a neurologist, is an agreed medical evaluator. His reports are the business records of his lawyer, Kim Regalado, who also testified about his representation of Billingmier the workers' compensation forum.

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

Labor Code section 6432, subdivision (b)(1), mentioned in subdivision (c)(1) above, directs the Division to consider several delineated factors when issuing citations for alleged serious violations. Those factors most relevant to the present case are:

> (b)(1)(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards;
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> (b)(1)(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.;
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> (b)(1)(C) Supervision of Employees exposed or potentially exposed to the hazard;
>
> (b)(1)(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

The first step in determining whether Employer has met its burden of proof to rebut the presumption created by section 6432, subdivision (a), is to ascertain whether Employer knew or could have known with the exercise of reasonable diligence about the "presence of the violation." The rationale for use of the knowledge requirement in rebutting serious violation classifications is the same today as when the Appeals Board addressed this issue in *Lift Truck Services Corporation*, Cal/OSHA App. 93-384, Decision After Reconsideration (March 14, 1996) prior to the legislature's revision of this statute. The Appeals Board stated, "With the purpose of the Act in mind, the Board reads the knowledge element of Labor Code section 6432 to encourage employers to conduct reasonably diligent inspections for violative conditions in the workplace so that the hazard associated with that condition can be timely

corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty."

This record is devoid of any evidence that Employer had actual knowledge that materials were falling from inclined conveyor 196 endangering workers below. Smith and Billingmier both testified that they did not tell managers about rocks falling off of conveyor 196, prior to the accident, but it was Billingmier's opinion that management knew that rocks sometimes exited the conveyor. No evidence was submitted to prove that employer actually knew about falling rocks in the relevant period of time prior to the accident. Additionally, the testimony of Smith and Billingmier, long term employees, covered many years of changes to Employer's Woodland facility making it difficult to discern when they observed rocks falling from conveyor 196 and under what circumstances.

Charles Pierson (Pierson), a yard truck or water truck driver, works near conveyor 196. He testified that he never saw large cobbles under conveyor 196, but did see rocks as big as an inch-and-one-half near conveyor 196 which he thinks might have fallen off of the 196 belt when the belt stalls. However, he is not a manager and there is no proof that he reported to management this condition. Further, Pierson testified that there were other sources of rock, the size he observed on the ground, but those other sources would not be from an overhead conveyor and that when he is cleaning up by spraying water, the smaller cobbles can be washed into the area below conveyor 196 instead of falling off of the conveyor. Also, Pierson was not asked to specify when he observed rocks around conveyor 196.

Jeremy Skaggs (Skaggs), a repairman, testified that he is responsible for repairing conveyors. There is no evidence that Skaggs was told to repair conveyor 196 because rocks were departing the conveyor above where workers are present. Additionally, Skaggs testified that rocks are washed into this area during cleanup operations, consistent with the testimony of Pierson, and that some rocks fall off at the tail pulley housed in the tunnel (see Exhibit 8) and are swept out of the tunnel into this area during clean-up activities. The tail pulley is located at ground level and not overhead.

Brandon Stauffer, Employer's Northern Region Production Manager, testified that he frequently visits Employer's Woodland facility. He controls the budget for this plant and has seen the plant in operation. When he visits, he converses with both Smith and Billingmier and has done so hundreds of times. There have been many opportunities for employees to tell him that materials fall from conveyor 196 over areas occupied by workers, but no one said this prior to the accident.

Longpre testified that he had regular, at least biweekly, contact with Smith and Billingmier neither of whom told him that materials were falling off

of conveyor 196. On cross-examination, Longpre indicated that he had seen pebbles under conveyor 196, but Longpre did not indicate that those pebbles came from the conveyor. Other witnesses testified about how smaller rocks or pebbles could have been swept to the area below conveyor 196 during the normal clean-up process, sometimes by a water hose.

Prawl testified that he inspects the plant every day he is at work. He neither witnessed nor was he told about cobbles falling from conveyor 196.[20]

Thus, there is no evidence in this record that Employer had actual knowledge of rocks falling off of conveyor 196.[21]

Employer has demonstrated that it did not have actual knowledge of the violative condition, however, pursuant to Labor Code section 6432, subdivision (c), it must also prove that it could not with the exercise of reasonable diligence have known about the violative condition.[22] Employer may demonstrate that it did not know or could not have known about the violative hazard by reliance on Labor Code section 6432, subdivision (c)(1). Employer may demonstrate that it "took all steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation" before the violation occurred. Employer can take into consideration, "the severity of that 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."

Employer took reasonable precautions expected of any similarly situated employer. Employer held frequent regularly scheduled safety meetings. At one safety meeting, Employer provided a Fatalgram that highlighted the hazards of rocks falling from elevated conveyors (Fatalgrams are produced by the Mine Safety and Health Administration (MSHA) and are sent to all mining operations across the United States.) The Fatalgram presented at a safety meeting discussed the death of a surface miner caused by a cobble falling from an elevated conveyor. This fatality occurred at another mine unrelated to Employer's business.

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[20] Patterson testified that had he been in the plant and had only seen pebbles on the ground during an inspection, he would not issue a citation. The inference is that pebbles that fall from a conveyor over where employees may be working is technically a violative condition but not one that is likely to cause serious harm.

[21] The only witness presented by Employer to show that it knew about rocks falling from a conveyor stated that he has seen pebbles on the ground near conveyor 196. Longpre, however, did not conclude that those small rocks emanated from conveyor 196. There is cumulative evidence from the several employer witnesses that materials are routinely moved underneath conveyor 196 from other locations. Although it is logical that a conveyor carrying newly mined aggregate material would spill something regardless of how well guarded, there is no clear evidence that Employer knew that this was occurring.

[22] Labor Code section 6432, subdivision (c) requires employers to "demonstrate that it did not know <u>and</u> could not, with the exercise of reasonable diligence, have known of the presence of the violation." Employers must show both requirements in order to rebut the presumption of a serious violation.

Employer encouraged employees to report safety concerns and in evidence are examples of the forms used for reporting those concerns. Employer had a system in place to make necessary repairs when production or safety concerns arose. Employer conducted regularly scheduled safety audits of the entire plant including the safety of conveyor 196. Those audits did not reveal any safety concerns with the guarding of conveyor 196. Employer, over a long period of time, improved the plant's production capacity while improving safety, and installed new scalping screens approximately two weeks before the accident to prevent larger cobbles from entering conveyor 196. Eventually screens wear out and allow rocks larger than desirable to enter the plant for processing. When the screens were inspected immediately after this accident, they were found to be intact and effective. Replacing screens was primarily for the purpose of preventing larger cobbles than the rock crushers were designed to process from entering the system and not for the purpose of safety guarding. However, Employer also recognized the safety advantage in replacing the screens to help alleviate the hazard of larger cobbles from possibly falling on employees, even though it thought its conveyors were properly guarded.

Furthermore, Employer guarded the conveyor that was likely the source of the errant large cobble that ultimately struck Smith and Billingmier. Longpre and Prawl testified that in their opinion the guarding was adequate under the circumstances presented on the day of the accident. They also doubt that the source of the large cobble was conveyor 196, however, the circumstantial evidence discussed above makes this conclusion of dubious accuracy.

There is no evidence in this record that anyone had ever reported the presence of large cobbles, or any cobbles, falling from conveyors, even though Smith and Billingmier were long term employees who worked underneath and near conveyor 196 thousands of times during many years. The evidence in this record demonstrates that the cobble striking Smith and Billingmier was an aberrant occurrence, not one that could have been anticipated and prevented. The evidence also demonstrates that Employer, by guarding the conveyor from any cobbles from falling where workers are present underneath, took necessary precautions to avoid the hazard. Certainly, the presence of the large cobble causing this accident was an unlikely event that Employer, based on this record as a whole, could not have anticipated. Thus, this accident and violative condition can be described as unlikely, given Employer's efforts to prevent material falling from conveyors.[23]

[23] The Division produced evidence from another facility operated by Employer where walking paths below elevated conveyors were guarded with Quonset hut-type structures presumably to protect workers below from falling material. However, the Division neglected to present evidence this type of guarding would be feasible at the Woodland plant, where the site where Smith and Billingmier were struck by a large cobble appears to be much lower than the space above the Quonset hut guarding depicted in Exhibit 11. (See Exhibit 8.)

Hence, there is no proof that Employer, in the relevant period before the accident had knowledge that rocks were falling from the conveyor where workers underneath the conveyor could be struck or harmed. Similarly, there is insufficient evidence to demonstrate that Employer could have known of this hazard with the exercise of reasonable diligence.

The second element necessary to rebut the presumption is found in Labor Code section 6432, subdivision (c)(2) and requires proof that "Employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered." Employer shut down the plant for the two days following the accident to add additional safety measures to conveyor 196. Stauffer testified that a screen was attached to the top of conveyor 196 for its entire length to prevent even the possibility that cobbles will leave the conveyor striking employees working below. The division did not contest the efficacy of Employer's remedial action[24].

Employer has met its burden of proof to demonstrate that it did not know and had no reason to know, even with the exercise of reasonable diligence, that material was falling off of conveyor 196. Employer has demonstrated that it has taken steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred. It guarded conveyor 196 and did so to protect its employees from material falling from overhead conveyors. Employer clearly appreciated the danger to its employees associated with falling material and did not anticipate an unlikely large cobble entering conveyor 196 that is the unlikely actual cause of serious harm to Billingmier.

Employer is responsible for a general and not serious violation of section 7030, subdivision (e).

4. Did Employer engage in intentional and knowing behavior or fail to make a reasonable effort to prevent cobbles from falling onto employees from an overhead conveyor?

A willful violation of a safety order is defined by section 334, subdivision (e) as follows:

> Willful Violation - is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a

[24] This requirement is statutorily sanctioned and is not the inappropriate use of a subsequent remedial measure used to prove liability.

> safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

The Appeals Board has interpreted this standard to establish two tests for finding a willful violation. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034.) Under the first test, the Division must demonstrate that the employer has committed an intentional and knowing violation, and is conscious that the action is a violation of the law. (*Id.*) Whether an act was intentional and knowing rather than inadvertent depends on whether the employer committed a voluntary and volitional, as opposed to inadvertent, act, "or in other words, that the act itself was the desired consequence of the actor's intent, and that the employer was conscious that its act violated a safety order." (*A. Teichert & Son Inc., dba Teichert Construction*, Cal/OSHA App. 09-0459, Decision After Reconsideration (November 9, 2012); *Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034, *Id.*) The alternative test requires the Division to show that the employer, even though not consciously violating a safety law, was aware of the unsafe or hazardous condition and made no reasonable effort to eliminate the condition. (*Id.*)

Applying the first test, it cannot be said that Employer's violation was intentional and knowing as opposed to inadvertent. As analyzed above, there is no evidence to show Employer's managers knew debris was able to fall from the conveyor given the existing state of guarding. Management witnesses, namely Prawl and Longpre testified that no employee told them about cobbles falling off of conveyors and neither had witnessed cobbles inappropriately falling from conveyors. Although Longpre stated that he may have seen pebbles underneath conveyor 196, the origin of them is controversial. Both Prawl and Longpre believe that those pebbles were swept there from other locations and did not originate from conveyor 196. Longpre's comment that he may have seen cobbles is not convincing when compared to the balance of the record and the reasonable alternatives that could explain the reason cobbles were present underneath conveyor 196. Without employer knowledge there is no proof of Employer intent.

Further, Prawl testified that he had strict criteria in weighing the adequacy of safety measures taken around the plant, in order to ensure the plant's compliance with Cal/OSHA and MSHA standards. No evidence was presented to prove that violating the safety standard was the desired outcome of Employer's intent to act or failure to act. No evidence was presented to prove that Employer was lax about safety or had not done its best to prevent harm to its employees; conveyor 196 had been guarded and many at the place of employment believed that the guarding was sufficient for employee safety. No evidence was presented to successfully challenge employer's belief that

sufficient guarding was in place. Employer held safety meetings and provided guidance about the hazards associated with material falling from elevated conveyers. No witness presented at hearing could authoritatively state how the cobble that struck Smith and Billingmier managed to make its way through uncompromised and recently installed scalping screens.[25]

As to the second test, testimony from the two employees who were struck by the falling cobble suggests that even if Employer was not consciously disregarding the mandate of section 7030, subdivision (e), Employer was aware that at least from time to time material would be found near conveyor 196. The record also suggests that various engineering solutions were attempted at different points in time to keep larger cobbles off the belt, and also to prevent materials from rolling off the belt, including installing a flap on the trommel, installing skirting, and adding a layer of dry material to the belt.[26] While the Division argues that cobbles were on the ground in the area of conveyor 196, it cannot be said that Employer "made no reasonable effort to eliminate the condition." (See, *A. Teichert & Son Inc., dba Teichert Construction*, Cal/OSHA App. 09-0459, Decision After Reconsideration (November. 9, 2012), citing *Rick's Electric, Inc.*, supra). Indeed, over the course of many years, Employer attempted to engineer solutions on conveyor 196, to prevent material from falling off of the belt. This was done for both safety reasons and production reasons. The Division has not produced substantial evidence showing that Employer failed to undertake reasonable efforts to eliminate the condition. Thus, Employer's acts or failure to act, have not been proven willful.

Penalties

The Division, prior to its amendment of the citation to include a willful serious violation, originally calculated an $18,000 penalty based on section 336, subdivision (c)(1), citing the base penalty for a serious violation. Because Employer has succeeded in rebutting the presumption of a serious violation, the penalty must be based on a general classification. Section 336, subdivision (b) states:

> Gravity of a General Violation – The Base Penalty of a General violation is determined by evaluating Severity (as provided in section 335(a)(1)(A) of this article). If the Severity is:

[25] Numerous witnesses testified that in years past, prior to the time that the new scalping screens were installed, worn and comprised scalping screens did indeed allow larger cobbles than intended to appear on conveyor 196. It is undisputed that these screens were installed during the winter plant shutdown prior to the accident.

[26] When the switch to the smooth belt was made, wet material would more easily slide down the inclined belt thus causing a safety hazard and preventing the plant from operating efficiently. Employer's solution was to place dry material on the belt which was less likely to slide due to increased friction, and then placing wet material on top of the dry material. Prawl testified that this approach was successful.

> LOW – The base Penalty shall be $1,000,
> MEDIUM – The base Penalty shall be $1,500,
> HIGH – The Base Penalty shall be $2,000.

Severity is determined by section 335(a)(1)(A)(ii) which states as follows:

> When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment Severity shall be rated as follows:
>
> HIGH – Requiring more than 24 hour-hospitalization..

The evidence is that Billingmier has never returned to work, has endured shoulder surgery, and suffered a closed head concussive injury that has necessitated a minimum of 23 months of care.[27] The severity of this injury is therefore "HIGH". The base penalty is $2,000. There is no exact evidence about whether Billingmier actually spent more than 24 hours in the hospital, however, the balance of this record and the clear evidence about his extensive treatment appropriate for the injury he suffered supports a severity of High. Section 335, subdivision (a)(1)(B) states that, "The Severity of a Serious violation is considered to be HIGH." The Appeals Board reiterated this rule in *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012). As noted above, the Division was able to initially prove a serious classification, however, employer rebutted that classification with evidence that it did not know about the violative condition. Thus, because it has been demonstrated that there was a reasonable possibility of serious harm as defined by Labor Code section 6432, subdivision (e) justifying a serious violation, this finding is consistent with section 335, subdivision (a)(1)(B) warranting a severity of "HIGH" despite Employer's effective rebuttal.

Patterson testified at hearing, under cross-examination by Employer's representative, that the Extent of this violation, if it were not serious, accident related, is low. When Extent is low pursuant to section 336, subdivision (b), "25% of the Base Penalty shall be subtracted". Starting with a base penalty of $2000, a 25% reduction is $500 that leaving a $1,500 remaining penalty. Patterson testified that likelihood was "moderate." However, there is no modifier with this label. Interpreting Patterson's testimony that he could have

[27] 23 months is based on the time difference between the date of the accident and the date of Billingmier's testimony at the hearing. That Billingmier's work injury treatment likely continues, the extent of any ongoing treatment is not in this record.

categorized likelihood as "High", it is apparent that Patterson was referring to the modifier "Medium" when he used the term "moderate." No adjustments are made when the modifier is "Medium" pursuant to section 336, subdivision (b). Thus the total gravity based penalty is $1,500 after adjustments.

Further reductions may occur pursuant to section 336, subdivision (d)(1) for size, subdivision (d)(2) for good faith, and (3) for history. If an employer has more than 100 employees, there can be no penalty reduction for size. Employer's size at the time of injury was 221 employees, thus no reduction for size is available. Patterson also testified that Employer should have a penalty reduction for good faith of 30 percent. Reducing the $1,500 remaining penalty by 30 percent leaves a penalty of $1,050. Next, Patterson testified that Employer is eligible for a further reduction of 10 percent for history. A penalty of $1,050 reduced by 10 percent equals $945.

Section 336, subdivision (e) allows for a 50 % penalty reduction for "…the presumption that the employer will abate the violations by the abatement date." Because the citation explicitly states that the violation was abated, and this record verifies that Employer took immediate steps to abate the violation, it is clear that no abatement issues remain and that Employer is entitled to 50% reduction for abatement. The final penalty after all reductions is $470.00

Conclusion

Citation 1 is affirmed. The classification is amended to General, and the penalty is calculated at $470.00, as set forth in the attached summary table.

Dated July 10, 2014

_____

Neil Robinson
Administrative Law Judge

PPENDIX A
Summary of the Record

Documentary Evidence – Division

Exhibit Number	Exhibit Description	Admitted
1.	Jurisdictional Documents including citations	Yes
2.	Notice of Hearing	Yes
3.	Stipulations of Fact	Yes
4.	Proposed Penalty Worksheet	Yes
5.	Aerial Photograph of Plant	Yes
6.	Photograph of scalping screen	Yes
7.	Photograph of trammel and head pulley	Yes
8.	Photograph of tunnel and conveyor 196	Yes
9.	Photograph of cobble	Yes
10.	Billingmier's medical/legal reports	Yes
11.	Photo showing culverts as guards	Yes
12.	Repair Orders	Yes
13.	Photograph of cobbles	Yes
14.	Document request and response	Yes
15.	Injury Investigation dated 4/8/11	Yes
16.	Fatalgram website printout dated 2/7/13	Yes
17.	Holmes Safety Association Bulletin, March 2001	Yes
18.	Incident Review, 3/22/2010	Yes
19.	Safety Suggestion, 8/27/2010	Yes

Documentary Evidence – Employer

Exhibit Letter		
A.	Photograph of Conveyor 196	Yes
B.	Photograph of tunnel and area under 196	Yes
C.	Impact Force from Falling Object calculations	Yes
D.	MSHA Part 46.7 Task Training Record	Yes
E.	Safety Suggestions	Yes

Witnesses Testifying at Hearing

Rick Smith
Albert Billingmier
Douglas Patterson
Charles Pierson
Jeremy Skaggs
Brandon Stauffer
Mark Longpre
Ray Prawl

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

_____ _____

Signature Date

SUMMARY TABLE
DECISION

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

In the Matter of the Appeal of:
A. TEICHERT & SONS, INC. dba TEICHERT AGGREGATES
Docket(s) 11-R5D1-1895

IMIS No. 314445834

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	**FINAL PENALTY ASSESSED BY BOARD**
11-R5D1-1895	1	1	7030(e)	S	[Failure to adequately guard overhead conveyor] **Classification changed to General. Penalty reduced.**	X		$18,000	$70,000	**$470.00**
					Sub-Total			$18,000	$70,000	**$470.00**
					Total Amount Due*					**$470.00**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
PO Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

ALJ: NR
POS: 7/10/14