

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

In the Matter of the Appeal of:

**CALSTRIP STEEL CORPORATION**  
7140 Bandini Boulevard  
City of Commerce, CA 90040  
Employer

**DOCKETS 12-R3D6-1998**  
**and 1999**

**DECISION**

**STATEMENT OF THE CASE**

Calstrip Steel Corporation, (Employer), a steel fabrication and processing center, operates a metals service center. On December 8, 2011, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Yancy Yap (Yap) conducted a fatal accident inspection at a place of employment maintained by Employer at 7140 Bandini Boulevard, City of Commerce, California (work site). On June 8, 2012, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in California Code of Regulations, title 8<sup>1</sup>: Citation 1, Item 1, for failing to train its employees in the proper use of an extensible boom platform prior to operating the equipment (section 3638, subdivision (d)); and Citation 2, Item 1, for failure to shut down or lock out a bridge crane while an extensible boom platform was within the path of the bridge crane (section 3657, subdivision (h)).

Employer filed a timely appeal contesting the violation of the safety orders and classification for Citations 1 and 2. Employer also alleged several affirmative defenses (Exhibit 1).

The matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on June 12 -13, 2014 and September 18, 2014. Employer was represented by attorney Ronald Medeiros of the Peterson Law Corporation. The Third Party, the Estate of David Thrasher

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<sup>1</sup> Unless otherwise specified, all references are to sections of the California Code of Regulations, title 8.

was represented by attorneys Phillip Alexander and Ryan Harris of Harris Personal Injury Lawyers and Victor Bressler of the Law Offices of Samuel E. Gabriel & Associates. The Division was represented by Staff Counsel Kathryn Woods and Staff Counsel David Pies. The ALJ extended the submission date to September 30, 2015.

### **ISSUES**

1. Did Employer fail to instruct employees in the proper use of an extensible boom platform prior to operating the equipment?
2. Did the Division correctly classify the cited violation of section 3638, subdivision (d) as a serious violation?
3. Did the Division correctly characterize the cited violation of section 3638, subdivision (d) as accident related?
4. Did the Division propose a reasonable penalty for Employer's violation of Section 3638, subdivision (d)?
5. Did Employer fail to shut down or lock out the bridge crane, which could overrun or otherwise injure the elevated workers?
6. Did the Division correctly classify the cited violation of section 3657, subdivision (h) as a serious violation?
7. Did the Division correctly characterize the cited violation of section 3657, subdivision (h) as accident related?
8. Was Employer's failure to shut down or lock out the bridge crane, which could overrun or otherwise injure the elevated workers, willful?<sup>2</sup>
9. Did the Division propose a reasonable penalty for Employer's violation of Section 3657, subdivision (h)?

### **FINDINGS OF FACT**

1. On December 8, 2011, Employer's employees were installing bird deterrents at Employer's warehouse, which required the use of an extensible boom platform (man-lift) specifically rented for the day.
2. Employer's daily warehouse closing preparation included moving steel coils from the east side of the building to the west side to block access for security of the fork lifts.<sup>3</sup>

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<sup>2</sup> ALJ Hill-Williams granted the Division's motion to amend Citation 2 to a "willful, serious accident related" violation, filed on October 16, 2014.

<sup>3</sup> Employee Robert Luna (Luna) testified that the closing preparation included directing the bridge crane toward the North West wall in order to place multi-ton rolls of steel in the path of the forklifts to prevent the theft of the steel rolls.

3. The man-lift operated on December 8, 2011 was involved in a collision with a bridge crane causing fatal and serious injuries at the work site.
4. Employees Hector Cervantes (Cervantes) and David Thrasher (Thrasher) operated the man-lift on December 8, 2011 without going over the man-lift instruction manual. Cervantes was not aware that an instruction manual existed.
5. Employer failed to ensure that the man-lift had a manufacturer's instruction manual.
6. Employer failed to ensure that its employees reviewed a manual before operating the man-lift.<sup>4</sup>
7. There was a hazard of the man-lift colliding with steel beams and colliding with other equipment at Employer's warehouse, which is what, occurred on December 8, 2011, when the bridge crane and the man- lift collided.
8. Employer's lock out and tag out procedures prohibited any man-lift work above floor level if the bridge crane was not locked out.(Exhibit 15, p.6-26)
9. Supervisor Mario Vargas (Vargas) did not know that operating the bridge crane and the man-lift at the same time was a violation of Employer's lock out and tag out procedures.
10. Luna did not shut down or lock out the north bridge crane<sup>5</sup> in Employer's work site (Building P) while Thrasher and Cervantes were operating the man-lift on December 8, 2011<sup>6</sup>.
11. Paul Garcia (Garcia) observed the bridge crane operating at the same time, and at the same elevation of the man-lift above the floor.
12. At the time of the accident Luna operated the bridge crane with a wireless device from the ground level, moving it in a westerly direction toward the man-lift. Luna assumed the man-lift was at higher level than the bridge crane.

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<sup>4</sup> Yap testified that the records received from Employer for Cervantes and Thrasher were in the form of sign-out sheets for lockout/tag out procedures for an aerial lift (Exhibit 16).

<sup>5</sup> Yap testified that the bridge crane was attached to a hoist motor which allows movements up, down and across, and is operated and controlled by a hand held remote.

<sup>6</sup> The parties stipulated that Cervantes and Thrasher were in the man-lift observed by Garcia.

13. On December 8, 2011 the man-lift and bridge crane were operated at the same time, with Luna failing to shut down or lock out the bridge crane when the man-lift was in operation.
14. There was employee exposure to an actual collision hazard because Thrasher and Cervantes were in the man-lift at the time the bridge crane was directed in a westerly direction along the path of the man-lift that was moving in an easterly direction in the northern section of Employer's warehouse.
15. Employer did not intentionally violate the safety order in failing to shut down or lock out the bridge crane, which seriously injured one employee and fatally injured the other employee in the man-lift basket.

### **ANALYSIS**

#### **1. Did Employer fail to instruct employees in the proper use of an extensible boom platform prior to operating the equipment?**

Section 3638, subdivision (d) provides:

Employees shall be instructed in the proper use of the platform in accordance with this Article, the manufacturer's operating instructions and Section 3203, Injury and Illness Prevention Program.

Article Section 3638, subdivision (a) Equipment Instructions and Marking provides:

Each unit shall have a manual containing instructions for maintenance and operations. If a unit is able to be operated in different configurations, then these shall be clearly described, including the rated capacity in each configuration.

Section 3203, subdivision (a)(7) provides, in pertinent part:

Provide training and instruction:

- (C) To all employees given new assignments for which training has not previously been received;
- (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

- (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The Division alleged the following:

On December 8, 2011 the employer did not instruct two workers in the proper use of an extensible boom platform (Genie-S-40) prior to their operating the equipment. The employer did not have records of training the two workers in the equipment's safe operation. The two operators did not receive instruction in the equipment's operation from the rental company (Sunbelt Rentals Inc). The operator's manual (part #133026) supplied with the equipment requires operators to be trained prior to its use and warns against operating the equipment in the path of energized bridge cranes. One of the operators did not know of the existence and location of the operator's manual and denies ever being trained in the equipment's operation. Two workers elevated on the extensible boom platform were seriously injured (one fatally and the other requiring a 24-hour hospitalization) when a moving bridge crane collided with the boom arm of the extensible boom platform.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Clap. 4th 472, 483, review denied.)

The Division must show that Employer failed to instruct its employees in the proper use of the platform in accordance with (1) the safety order; (2) the manufacturers' operating instructions; or (3) in accordance with Section 3203's Injury and illness Prevention Program (IIPP) to establish a violation of section 3638(b).

Section 3638, subdivision (a) states that each unit shall have a manual containing instructions for maintenance and operations. If a unit is able to be operated in different configurations, then these shall be clearly described, including the rated capacity in each configuration. Associate Safety Engineer Yap's investigation, which included an interview of Cervantes, confirmed that the man-lift was operated on December 8, 2011 without first going over the man-lift instruction manual. Cervantes testified that he was not aware that an instruction manual existed for the man-lift. Nor was a copy of the instruction manual provided by Employer

Section 3203, subdivision (a)(7) requires that an employer must provide training and instruction whenever equipment is introduced to the workplace and represent a new hazard (see subdivision (a)(7)(D)) and for supervisors to familiarize themselves with the safety and health hazards for exposed employees under their immediate direction and control (see subdivision (a)(7)(F) above).

Employer was required to provide training on the man-lift equipment. While the man-lift had been used by Employer, it was not part of its daily equipment. Here, the man-lift was specifically rented to install the bird deterrents. Yap requested training records on the man-lift for employees, Thrasher and Cervantes, who were in the man-lift at the time of the accident on December 8, 2011. Yap testified that Employer did not provide documents showing instructions were given to the employees regarding use of the man-lift. While Cervantes testified that he had operated a man-lift 15 to 20 times on previous occasions and when working for other employers, he acknowledged that he had not received specific training from Employer regarding the use of a man-lift. Subdivision (a)(7)(D) requires supervisors to familiarize themselves with the safety and health hazards of operating the man-lift and bridge crane at the same time. Supervisors Vargas and Garcia were aware of Cervantes and Thrasher operating the man-lift, and their installation of bird deterrents. Yet there was not any indication Employer required its supervisors to familiarize themselves with the possible safety and health hazards of operating the man-lift and the bridge crane at the same time. Nor did Employer offer any evidence to rebut the evidence presented by the Division that Employer did not instruct Cervantes and Thrasher on the man-lift unit.

The Division established by a preponderance of the evidence that Employer violated Section 3638, subdivision (a) by failing to provide an instruction manual for the man-lift available to its employees and for failing to give specific training regarding the use of the man-lift as required by Section 3203, subdivision (a)(7)(4).

**2. Did the Division correctly classify the cited violation of section 3638, subsections (d) as serious?**

The legal standard for a serious violation is expressed in Labor Code

section 6432, subdivision (a) which states:

- (a) 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:
  - (1) A serious exposure exceeding an established permissible exposure limit.
  - (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.

The elements of a serious violation are: (1) a violation exists in a place of employment, (2) a demonstration of realistic possibility of death or serious physical harm, and (3) employee exposure to an actual hazard. If elements 1, 2, and 3 are established, there exists a rebuttable presumption that the violation is serious.

The first element requires that “a violation exist in a place of employment”. The first element is established by the evidence discussed above in Employer failing to ensure that the man-lift had a manufacturer’s instruction manual that its employees reviewed before operating the man-lift, and by Employer failing to train Cervantes and Thrasher in the operation of the man-lift.

The second element requires a demonstration of a “realistic possibility” of death or serious physical harm. “Realistic possibility” is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.” Yap testified that a realistic possibility of death or serious physical harm could occur if a man-lift collides by running into a structure or a moving crane. Yap further testified that a man-lift elevated up to 40 feet, tends to jerk which can cause occupants to fall. He

stated there is also the hazard of an elevated power line contacting energized power lines, which can result in electrocution. Based upon Yap's investigation at the work site, he concluded that inside the Omega Building, there was a danger of the man-lift colliding with steel beams and colliding with other equipment, which is what occurred on December 8, 2011, when the bridge crane and the man-lift collided.

The third element, as used in section 6432, subdivision (e) is defined as "serious physical harm" that could result from the actual harm created by the violation. The actual hazard may consist of among other things: (1) A serious exposure exceeding an established permissible exposure limit or (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. Here, Employer allowed Thrasher and Cervantes to operate the man-lift elevated up to 40 feet on December 8, 2011 without safety instructions and failed to provide documentation showing that it trained Thrasher and Cervantes in the operation of the man-lift, which was an unsafe practice.

In *Susanville Construction Co.*, Cal/OSHA App. 79-1401 Decision After Reconsideration (Nov. 24, 1981), the Board held that although the lack of training per se may not always be appropriately classified as a serious violation, the facts established a specific hazard in operating a particular piece of equipment, for which the lack of training or experience would likely result in serious injury or death should an accident occur. The Board found the employee's lack of training left the employee unqualified to recognize and deal with the specific hazards unique to the employee's job assignment. As in *Susanville supra*, where the employee was "not adequately trained", here Thrasher and Cervantes were not sufficiently trained in the safe operation of the man-lift.

The Division has established that Employer failed to ensure that Thrasher and Cervantes were properly trained and given instructions in operating the man-lift in the warehouse work site. The Division further established a realistic possibility of serious physical harm or death (which actually occurred on December 8, 2011, exposing Employer's employees to serious injuries and death). Since these elements are established, there is a rebuttable presumption that the violation is serious.

Labor Code section 6432, subdivision (c) establishes the requirements for rebutting the presumption that a violation is classified as serious:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:

- (1) The employer took all of 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.

Here, during Yap's investigation at the work site, one of Employer's supervisors, Garcia, acknowledged (and confirmed in his testimony at the hearing) that he observed Thrasher operating the man-lift earlier in the day, prior to the accident, and observed the bridge crane in operation prior to the accident. Another supervisor, Mario Vargas (Vargas), testified that he became aware of Thrasher and Cervantes operating the man-lift on December 8, 2011, the day of the accident. Vargas clarified that he did not directly supervise Thrasher. However, Thrasher asked if there would be any work on the following Saturday so he could continue his bird deterrent project with the man-lift. Garcia and Vargas, Employer's supervisors acknowledged that they were aware of the operation of the man-lift prior to the fatal accident<sup>7</sup>. By Garcia's and Vargas' observation of Thrasher in the man-lift, Employer is deemed to have knowledge of the violation because Employer failed to identify the employee exposure and failed to evaluate a potential hazard if the man-lift and the bridge crane collided. Here, Employer did not demonstrate that any action was taken to reduce the hazard by meeting with Thrasher and Cervantes regarding the man-lift operations and Luna operating the bridge crane operator in an effort to reduce the hazard of the man-lift and bridge crane colliding. Therefore, the Division has established by a preponderance of the evidence that a serious violation occurred because all of the elements are present: (1) a violation existed at Employer's work site; (2) Yap demonstrated a realistic possibility of death or

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<sup>7</sup> Statements of Supervisors Garcia and Vargas are party admissions. Pursuant to Evidence Code section 1220, evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity.

serious injury; and (3) the employees were exposed to an actual hazard, establishing a rebuttable presumption that Employer failed to rebut. Thus, the serious classification of the citation is established.

**3. Did the Division correctly characterize the cited violation of section 3638, subdivision (d) as accident related?**

The Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury to sustain an accident related characterization. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).)<sup>8</sup> In other words, “where, the evidence establishes that a serious violation caused a serious injury, the violation is properly characterized as “accident-related.” (*Duke Pacific, Inc.*, Cal/OSHA App. 06-5175, Decision After Reconsideration (Mar. 14, 2012), citing *K.V. Mart Company dba Valu Plus Food Warehouse*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).) In order for the penalty reduction limitations of Labor Code section 6319, subdivision (d) to apply to the civil penalty as proposed, the Division must prove that a serious violation caused a serious physical harm or death. (*Southwest Engineering, Inc.*, Cal/OSHA App. 91-1366, Decision After Reconsideration (July 6, 1993).)

Yap classified the violation as accident related based upon the operation of the man-lift without reviewing operating instructions or training that contributed to the collision with the bridge crane resulting in Cervantes’ serious injury and Thrasher’s fatal injury. A nexus is established by the evidence showing Employer’s failure to ensure Thrasher and Cervantes reviewed the manufacturer’s operating instructions and were trained to operate the man-lift at the facility in violating section 3638, subdivision (d), caused the resulting serious injury. Therefore, the Division properly classified the violation as accident-related.

**4. Did the Division propose a reasonable penalty for Employer’s violation of Section 3638, subdivision (d)?**

Employer stipulated that the penalty was calculated pursuant to the Division’s policies and procedures and the California Code of Regulations as indicated on the Penalty Worksheet (Exhibit 22), which resulted in a penalty of \$14,400, restricting adjustment to a 20 percent size deduction for the number of employees.

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<sup>8</sup> Sherwood’s writ was denied by Ct of App in an unpublished opinion.

**5. Did Employer fail to shut down or lock out the bridge crane, which could overrun or otherwise injure the elevated workers?**

Section 3657, subdivision (h) provides:

Elevating Employees with Lift Trucks:

All bridge cranes and other moving or motorized equipment which could overrun or otherwise injure the elevated worker shall be shut down or locked out.

The Division alleged as follows:

On December 8, 2011 the employer did not shut down or lock out the north bridge crane in Building P. Workers were using an extensible boom platform (Genie S-40) to install bird deterrents at the roof level 35 feet above the ground within the path of a bridge crane (Demag DGTR 25-ton capacity). The extensible boom platform was used concurrently with the bridge crane on December 8, 2011 from 7:30 A.M. to 4:35 PM. Two workers elevated on the extensible boom platform were seriously injured (a fatality and a 24-hour hospitalization) when the moving bridge crane collided with the boom arm of the extensible boom platform. The employer did not practice an existing safety policy requiring the bridge crane to be “locked out” whenever workers are elevated on a man lift. The two extensible boom platform operators (a maintenance supervisor and maintenance assistant) and the bridge crane operator (a team leader) were trained in this lockout safety policy but none of the three made efforts to de-energize the crane while the extensible boom platform was being used.

Pursuant to Section 3657, subdivision (h) bridge cranes and other moving or motorized equipment which could overrun or otherwise injure an elevated worker shall be either shut down or locked out. Employer’s lock out and tag out procedures (Exhibit 15, p.6-26) requested by Yap stated in bold letters that **“IF ANY WORK ABOVE FLOOR LEVEL IS TO BE DONE IN THE CRANE BAY, i.e. WITH A MAN LIFT, THE CRANE MUST BE LOCKED OUT”**. Yap's investigation revealed that Employer did not shut down or lock out the north bridge crane<sup>9</sup> in Employer’s work site (Building P) while Thrasher and Cervantes were working elevated in the man-lift on December 8, 2011<sup>10</sup>. Yap’s interview

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<sup>9</sup> Yap testified that the bridge crane was attached to a hoist motor which allows mounts up, down and across and is operated and controlled by a hand held remote.

<sup>10</sup> The parties stipulated that Cervantes and Thrasher were in the man-lift observed by Garcia.

with supervisor Garcia revealed that Garcia observed the bridge crane operating at the same time, and at the same level of the man-lift. Luna told Yap (and confirmed in his testimony) that at the time of the accident he was operating the bridge crane with a wireless device from the ground level, controlling the bridge crane by moving it in a westerly direction toward the man-lift, but thought the man-lift was at higher level than the bridge crane. Supervisor Vargas acknowledged that he did not know operating the crane and the man-lift at the same time was a violation of Employer's lock out and tag out procedures.

Yap cited Employer for a violation of section 3657, subdivision (h) because the bridge crane should have been shut down or locked out to avoid a collision and in this case prevent a fatality. Yap concluded the bridge crane was in the direct path of the man-lift. A preponderance of the evidence at hearing demonstrated that Employer's lock out and tag out policy was violated because the bridge crane was operated at the same level as the man-lift without locking out or tagging out before operating the bridge crane in the path of the man-lift.

**6. Did the Division correctly classify the cited violation of section 3657, subdivision (h) as a serious violation?**

The elements of a serious violation are: (1) a violation exists in a place of employment, (2) a demonstration of realistic possibility of death or serious injury, and (3) employee exposure to an actual hazard. If elements 1, 2, and 3 are established, a rebuttable presumption is established that the violation is serious, as indicated in Labor Code section 6432 discussed above.

The first element of a serious violation of section 3657, subdivision (h) is established as discussed above by undisputed evidence that the man-lift and bridge crane were operated at the same time, with Employer failing to shut down or lock out the bridge crane when the man-lift was in operation. Employer allowed Thrasher and Cervantes to operate the man-lift elevated up to 40 feet on December 8, 2011 without safety instructions. In determining the second element of whether a realistic possibility of death or serious harm existed, Yap testified that there was a realistic possibility that the bridge crane could collide with the man-lift, which could cause serious injury or death. In determining the third element of employee exposure to an actual hazard, Yap stated there was employee exposure to an actual hazard because Thrasher and Cervantes were in the man-lift at the time the bridge crane was directed in a westerly direction along the path of the man-lift that was moving in an easterly direction in the northern section of Employer's warehouse. As discussed above, once the first three elements are established, there is a rebuttable presumption that the violation is serious. Here, Employer did not offer any evidence to rebut the serious violation. Thus, the Division established that the violation of Section 3657, subdivision (h) was a serious violation.

**7. Did the Division propose a reasonable penalty for Employer's violation of Section 3657, subdivision (h)?**

As stated above, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury to sustain an accident related characterization (*Sherwood Mechanical, Inc., supra*). Yap classified the violation as accident related based upon Luna failing to shut down lock out the bridge crane which contributed to the collision with the bridge crane resulting in Cervantes' serious injury and Thrasher's fatality. Therefore a nexus is established by the evidence showing Employer's failure to ensure its employees practiced lock out tag out procedures for the bridge crane resulted in a violation of section 3657, subdivision (h) causing serious and fatal injuries, that resulted in a serious accident-related as discussed above.

**8. Was Employer's failure to shut down or lock out the bridge crane, which could overrun or otherwise injure the elevated workers, willful?**

In classifying Employer's violation as willful, section 334(e) states a "willful" classification may be established if the evidence shows that: (1) an employer intentionally violated a safety law; or (2) an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it. Both tests require the Division to prove that the employer had a particular state of mind. Here, as discussed above, the evidence is undisputed that Employer was aware that the Bridge crane and the man-lift were operated at the same time. Thus, to establish a willful violation of the safety order the Division must prove that the "employer intentionally violated a worker safety law". (*MCM Construction, Inc., Cal/OSHA App. 92-436, DAR (May 23, 1995), citing Gal Concrete Construction Co., Cal./OSHA App. 87-264, DAR (Apr. 7, 1993), p. 5.*)

The Division asserted several factors justifying a willful classification by showing Employer intentionally violated the safety order and was aware that the violation existed. First, Employer's managers, Garcia (a vice president) and Vargas (a production manager) entered the warehouse work facility numerous times during the course of the day of the December 8, 2011 accident. Garcia acknowledged seeing the crane in operation. Both Garcia and Vargas came into the warehouse and, on at least one occasion, made direct eye contact with Cervantes while he was in the elevated man-lift. Secondly, Luna, the operator of the bridge crane that collided with the man-lift told the sheriff's investigator that he knew that the victim (Thrasher) and Cervantes were in the basket of the man-lift at the time of the accident. He stated that he believed that the basket of the elevated man-lift was lower and not in the path to be hit by the bridge crane. However, at the hearing Luna gave conflicting testimony, stating that he thought Thrasher and Cervantes had gone home for the day just before the collision with the man-lift occurred.

In weighing whether Employer intentionally violated a safety law, or had had actual knowledge of an unsafe or hazardous condition that was not corrected, the facts show various activities going on in the warehouse. One of the activities, the installation of the bird deterrents required the use of the man-lift that had been specially rented for the day. There was also the daily preparation of closing down the warehouse by moving the steel coils from the east side of the building to the west side to block access for security of the fork lifts. While there is evidence to show that Vargas, Garcia and Luna were aware of the operation of the man-lift and Cervantes was aware of the bridge crane, there appears to be a lack of coordination and awareness of the safety hazard that existed if the man-lift and bridge crane were operated at the same time. Cervantes did not realize that he and Thrasher (the fatally injured employee), his supervisor, violated the safety order by operating the man-lift at the same time the bridge crane was operated (Exhibit 15). While operating the bridge crane was a daily routine occurrence, utilizing a man-lift to install bird deterrents was not a routine assignment, and the evidence merely demonstrates there was insufficient planning and review of safety hazards before engaging in such activity. Thus the weight of the evidence shows Employer did not intentionally violate the safety order and thus does not support a finding of a willful violation.

**9. Were the proposed penalties for a violation of Section 3657, subdivision (h) reasonable?**

As stated above, Employer stipulated that the calculated the penalties were calculated pursuant to the Division's policies and procedures and the California Code of Regulations as indicated on the Penalty Worksheet (Exhibit 22), which resulted in a penalty of \$14,400. Since the Division did not establish a willful violation, the proposed penalty of \$70,000 as amended by the ALJ (See FN 2) is not assessed. Rather, the penalty is assessed at the original calculation of \$14,400.

**Conclusion**

In conclusion, the Division established that Employer violated Section 3638, subdivision (d) for failing to ensure an instruction manual of the man-lift was available to its employees and for failing to give specific training regarding the use of the man-lift as required by Section 3203, subdivision (a)(4) and that a serious accident-related violation occurred resulting in a fatal and serious injury, with an assessed penalty of \$14,400.

Based upon the evidence presented at the hearing, Employer's lock out and tag out policy was violated, and Employer did not offer any evidence to rebut the serious violation. Thus, the Division established that the violation of Section 3657, subdivision (h) was a serious accident related violation, which

resulted in a fatal and serious injury. However, the weight of the evidence shows Employer did not intentionally violate the safety order to shut down or lock out the bridge crane, which seriously and fatally injured the elevated workers. Thus the penalty of \$14,400 is assessed.

**Order**

It is hereby ordered that Citation 1 and Citation 2 are affirmed and the penalties are assessed as indicated above and as set forth in the attached Summary Table.

Dated: October 30, 2015

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**CLARA HILL-WILLIAMS**  
Administrative Law Judge

CHW: ao

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**CALSTRIP STEEL CORPORATION  
Dockets 12-R3D6-1998 and 1999**

**Date of Hearing:** June 12 - 13, 2014 and September 18, 2014

**Division's Exhibits**

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	X
2	Photo outside warehouse	X
3	Photo – Bridge Crane yellow hanging book, rolls of steel	X
4	Photo – Boom Lift Crane	X
5	Photo – similar to Photo #3: yellow crane hook and steel coil	X
6	Photo Boom Lift involved in the accident	X
7	Photo of Bird deterrents	X
8	Photo – Marking of Boom Lift	X

**Employer's Exhibits**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
A	Omega Steel Bldg. P	X

**Witnesses Testifying at Hearing**

1. Yancy Yap
2. Paul Garcia
3. Hector Cervantes
4. Mario Vargas
5. Roberto Luna

**CERTIFICATION OF RECORDING**

*I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

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Signature

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Date

## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

### CALSTRIP STEEL CORPORATION Dockets 12-R3D6-1998 and 1999

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

IMIS No. 312668825

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E		A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R3D6-1998	1	1	3638 (d)	SAR	<b>Division established an accident related violation</b>	X		\$14,400	\$14,400	<b>\$14,400</b>
12-R3D6-1999	2	1	3328(e)	WIL SAR	<b>Division failed to establish a willful violation. Division established an accident related violation.</b>	X		\$14,400	\$70,000	<b>\$14,400</b>
<b>Sub-Total</b>								\$28,800	\$94,400	<b>\$28,800</b>

**Total Amount Due\***

**\$28,800**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must be made to:**

Accounting Office (OSH)  
Department of Industrial Relations  
P.O. Box 420603  
San Francisco, CA 94142

\*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: CHW/ao  
POS: 10/30/2015