

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

In the Matter of the Appeal of:

**ROBERT A. BOTHMAN, INC.
1781 Rose Street
Berkeley, CA 94704**

Employer

**DOCKETS 14-R1D4-0387
and 0388**

DECISION

Statement of the Case

Robert A. Bothman, Inc. (Employer) is a licensed general contractor. Beginning August 27, 2013, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Sean Sasser, conducted an accident investigation at a place of employment maintained by Employer at 1781 Rose Street, Berkeley, California (the site). On January 30, 2014, the Division cited Employer for two violations of California Code of Regulations, title 8: (1), failure to maintain a haulage vehicle under positive control during all periods of operation; and (2), failure to ensure that the parking brake of a haulage vehicle was set when it was parked, and that the parking brake of the haulage vehicle was set and the wheels chocked or otherwise prevented from moving by effective mechanical means when parked on an incline.

Employer filed timely appeals for Citations 1 and 2, contesting the existence of the violations, the classifications, and the reasonableness of the proposed penalties. Employer also contested the reasonableness of abatement requirements for Citation 1. Employer asserted a series of affirmative defenses for both citations.

This matter was heard by Kevin J. Reedy, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California, on August 27, 2015, January 21 and 22, 2016, and April 15, 2016. John C. Fox, and Alexa Morgan, Attorneys of the firm Fox, Wang and Morgan P.C., represented Employer. Denise Cardoso, Staff Counsel,

represented the Division. The parties submitted Post-Hearing Briefs.¹ The ALJ, on his own motion, extended the submission date to August 15, 2016.

Issues

1. Did Employer fail to ensure that a haulage vehicle was kept under positive control during all periods of operation?
2. Did Employer fail to ensure that the parking brake of a haulage vehicle was set when the vehicle was parked? And did Employer fail to ensure that a haulage vehicle parked on an incline have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means?
3. Did Employer present sufficient evidence to establish the Independent Employee Action Defense or any other affirmative defense?
4. Did the Division establish rebuttable presumptions that the violations in Citation 1 and 2 were serious?
5. Did Employer rebut the presumptions of serious violations in Citations 1 and 2 by demonstrating that it did not and could not with the exercise of reasonable diligence have known of the existence of the violations?
6. Did the Division establish the accident-related characterization of the violations?
7. Were the abatement requirements in Citation 1, Item 1, reasonable?
8. Were the proposed penalties reasonable?

Findings of Fact²

1. Cal/OSHA Associate Safety Engineer Sean Sasser (Sasser) opened an accident investigation at 1781 Rose Street, Berkeley, California, on August 27, 2013.

¹ The parties stipulated that the Division would be allowed to submit a reply to Employer's brief as Employer had submitted a brief in excess of the size indicated by the ALJ at the hearing.

² Findings of Fact Items 2 through 14, and Item 19, are stipulations of fact made by the parties at the hearing.

2. The truck involved in the August 27, 2013, accident was a 1993 Peterbilt diesel truck (the truck) with Vehicle ID # 1XPFDR9X4PD324007.
3. Employer's truck was a haulage vehicle as defined under section 1404, subdivision (a).
4. There was no person in the cab of the truck when it rolled down the hill on August 27, 2013, killing Oscar Marquez (Marquez).
5. Marquez and Alfonso Pedroza (Pedroza) were employed by Bothman on August 27, 2013, including, but not limited to, at the time of the accident resulting in Marquez's death.
6. Marquez's death was the result of the accident that occurred on August 27, 2013, at Martin Luther King Middle School (the school) involving Bothman's truck running over Marquez.
7. On August 27, 2013, Bothman's truck did not have chocks on board.
8. Bothman employees working at the school on August 27, 2013, did not bring chocks to the jobsite.
9. At no point on August 27, 2013, did Pedroza place chocks behind the wheels of the truck.
10. The October 11, 2013, mechanical inspection on the truck performed by the California Highway Patrol (CHP), Golden Gate Division Multidisciplinary Accident Investigation Team, did not reveal any evidence of pre-existing mechanical conditions or failures of the service brake system or parking brake system that would have affected its safe operation.
11. The gymnasium asphalt area and roadway leading to the school athletic track consists of three distinct parts as follows, starting with the gymnasium wall facing the track: (1), the "flat area" which constitutes a slope of under three percent extending to the "crest" of the hill; (2), the "crest" of the hill dividing the "flat area" from the "nine degree steep hill"; and (3), the "nine degree steep hill" below the crest and leading down to the track.

12. On August 27, 2013, the truck's engine was on and running when the truck rolled down the hill, killing Marquez.
13. Pedroza did not turn off the engine of the truck when he exited the cab before it rolled down the hill.
14. The parking brake of the truck was not set when it rolled down the hill, killing Marquez.
15. Employer failed to provide necessary training to Pedroza, and failed to adequately supervise Pedroza at the jobsite.
16. There exists a realistic possibility of serious injury or death as the result of being run over by an uncontrolled haulage vehicle.
17. Pedroza's failure to maintain control of the truck during all periods of operation, and to set the parking break when he parked the truck, were the main factors leading to the death of Marquez.
18. Requiring an employer to maintain positive control of a haulage vehicle during all periods of operation to guard against the hazards associated with runaway trucks is a reasonable form of abatement.
19. The penalties associated with the citations, as amended on the Cal/OSHA 10, dated January 21, 2016, were calculated in accordance with the Division's Policies and Procedures. Factors of good faith, size, and history were correctly calculated on the Cal/OSHA 10, dated January 30, 2014 (Exhibit 2).

Analysis

1. Did Employer fail to ensure that a haulage vehicle was kept under positive control during all periods of operation?

Section 1593, subdivision (b), under "Haulage Vehicle Operation," states:

(b) Haulage vehicles shall be under positive control during all periods of operation. When descending grades, the vehicles shall be kept in gear.

In the citation, the Division alleged:

On the inspection of August 27, 2013, the employer did not maintain a three axle dump truck, CA license plate #6C69482

under positive control at all times which resulted in the death of an employee.

When a safety standard includes two or more distinct requirements, if an employer violates any one, it is in violation of the safety standard. (*Golden State Erectors*, Cal/OSHA App. 85-0026, Decision After Reconsideration (Feb. 25, 1987). Also see *California Erectors Bay Area Inc* Cal/OSHA App. 93-503, Decision After Reconsideration (Jul 31, 1998).) Section 1593, subdivision (b), has two such distinct requirements. Therefore, if Employer failed to satisfy either requirement of the safety order it would be in violation of section 1593, subdivision (b).

To prove a violation of section 1593, subdivision (b), the Division has to establish that a haulage vehicle was not under positive control³ during a period of operation.⁴

Tanya Stiller (Stiller) is a garden teacher employed by Edible Schoolyard in Berkeley, California, who was harvesting cape gooseberries in a garden at the school immediately adjacent to the site on the day of the accident. Stiller first observed the parked truck around noon and watched it roll down an incline approximately five to 10 minutes later. Stiller was squatting while picking the berries, at the point marked X on Exhibit 7, when the truck began rolling down an incline approximately 50 feet from where she was positioned. The incline is marked by a purple line on Exhibit 7. The course of travel the truck took is marked by a green line, also on Exhibit 7. Stiller observed the truck roll backward at a fast rate of speed down the incline and hit an embankment and a fence, and then roll on to the track. Stiller observed that no one was in the cab of the truck when it hit the embankment. Stiller testified that the front of the cab of the truck was positioned at a point where she was standing in Exhibit 10, and the rear of the truck was positioned at a point where she is standing in Exhibit 11. The distance between these points measures 28 feet. Exhibit 11 also depicts an incline on the roadway between those two points. Exhibit 12, according to Stiller, depicts Associate Safety Engineer Sean Sasser (Sasser), standing where the front of the truck was parked, as seen from her vantage point at the berry bush.

³ In the instant matter, the Division alleges that the haulage vehicle was not under positive control at all times of operation when an employee parked the truck, failed to set the parking brake, left the engine running, and exited the vehicle, whereupon the vehicle rolled away without an operator in the cab of the truck.

⁴ The second distinct requirement of the safety order, which states that a vehicle must be kept in gear when descending a grade, is not at issue.

Janet Levenson (Levenson) is the Principal of the school. Levenson responded to the accident site and observed a body on the ramp and a "flattened wheelbarrow."

The truck driver, Pedroza, testified that he was told by Superintendent Martin Arroyo (Arroyo) to park the truck at a flat area above the incline. Pedroza thought that he had driven the truck to a flat area, over the crest of the hill and approximately 10 feet from the school gymnasium. Pedroza testified that he pulled the parking brake lever, got out of the truck while the engine was still running, and started walking down the hill. The truck rolled down the hill five minutes after he exited the truck. Pedroza could offer no explanation as to why the truck rolled down the hill. Later in his testimony Pedroza said that Arroyo never told him to park in the flat area. Pedroza testified that he was thinking of moving the truck a little further up in the shade and that he planned to shut off the engine before the lunch break. Arroyo was operating a vibratory plate to compact asphalt at the lower portion of the hill just prior to the accident. Arroyo testified that the truck rolled down the hill approximately two to three minutes after Pedroza parked the vehicle.

The parties stipulated that the parking brake of the truck was not set and that the engine was running when it rolled down the hill, killing Marquez. The parties also stipulated that a mechanical inspection on the truck performed by the CHP did not reveal any evidence of pre-existing mechanical conditions or failures of the parking brake system that would have affected its safe operation. Stiller testified that she observed the truck roll down the incline and that there was no driver in the cab when it hit the embankment. Pedroza testified that he left the engine running when he exited the cab. Levenson observed the body of Marquez on the incline. These facts are sufficient to establish a violation of section 1593, subdivision (b).

Employer failed to maintain its haulage vehicles under positive control during all periods of operation. The evidence demonstrates that an employee parked the truck, failed to set the parking brake, left the engine running, and then exited the vehicle, exposing other employees at the work site to the hazard of a runaway truck. As such, the Division has met its burden of proof, and the violation of section 1593, subdivision (b), is established.

- 2. Did Employer fail to ensure that the parking brake of a haulage vehicle was set when the vehicle was parked? And did Employer fail to ensure that a haulage vehicle parked on an incline have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means?**

Section 1593, subdivision (h), under "Haulage Vehicle Operation," states:

(h) Parking Brakes. Whenever the equipment is parked, the parking brake shall be set. Equipment parked on inclines shall have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means.

In the citation, the Division alleged:

On the inspection of August 27, 2013, the employer did not ensure that the parking brake was set and the wheels chocked or otherwise prevented from movement by effective mechanical means of a three axle dump truck, CA license plate #6C69482 which resulted in the death of an employee.

To prove a violation of section 1593, subdivision (h), the Division has to establish (1) that the parking brake of a haulage vehicle was not set when the equipment was parked; or, (2) if the equipment was parked on an incline, the Division would have to establish that the parking brake was not set and the wheels were not chocked, or that the truck was not otherwise prevented from moving by effective mechanical means.

A distinct requirement of section 1593, subdivision (h), provides that the parking brake shall be set whenever a haulage vehicle is parked. In the analysis of Citation 1, Item 1, the Division established that the parking brake of a haulage vehicle was not set when the equipment was parked. Pedroza parked the truck, failed to set the parking brake, left the engine running, and then exited the vehicle, exposing other employees at the work site to the hazard of a runaway truck. As such, the Division has met its burden of proof, and the violation of section 1593, subdivision (h), is established.

The second distinct requirement of section 1593, subdivision (h), provides that Equipment parked on inclines shall have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means.

The parties presented the following stipulation:

The gymnasium asphalt area and roadway leading to the school athletic track consists of three distinct parts as follows, starting with the gymnasium wall facing the track: (1), the "flat area" which constitutes a slope of under three percent extending to the "crest" of the hill; (2), the "crest" of the hill dividing the "flat area" from the

“nine degree steep hill”; and (3), the “nine degree steep hill” below the crest and leading down to the track.

Accordingly, Stiller’s testimony places the parked truck on the “nine degree steep hill,” and Pedroza’s testimony places the parked truck in the “flat area” leading to the “crest” of the hill, which has a slope of under three percent.

Associate Safety Engineer Sean Sasser (Sasser) testified that he used an inclinometer⁵ to measure the slopes at two points, where Stiller placed the front end wheels of the parked truck, and where Stiller place the rear of the parked truck. The inclinometer measured a one and one-half degree slope, going down toward the gymnasium at the point of the front end wheels of the truck (Exhibit 26), and an eight degree slope, going down toward the track and field area at the rear of the truck (Exhibit 27).

Employer’s expert engineering witness, Dr. David Rondinone (Rondinone), opined that the truck must have been stopped on a flat section, just past the crest of the hill, when Pedroza exited the truck. Exhibit E-8 is a diagram showing possible stable and unstable positions of the unattended parked truck. Rondinone explained that if the truck had been parked on the steep portion below the crest of the hill, or in the flat area above the crest of the hill, the truck would have rolled away immediately after the driver left the cab.

Rondinone explained that because the truck did not roll away immediately it must have been parked in a stable position as depicted on the top portion of Exhibit E-8. Rondinone explained that the truck was parked for 2 to 10 minutes in a quasi-stable position, while possible external forces, such as wind, the vibrations from the idling engine, or even the vibrations from the vibratory plate, caused the unattended truck to become unstable. Rondinone explained that any kind of external force could have caused the truck to inch toward the point where it became unstable, and as soon as the rear wheels inched over the crest, the truck immediately accelerated due to gravity. Rondinone did not provide testimony as to which external forces actually caused the truck to inch toward an unstable position.

Rondinone describes an incline as a change in height over distance. The safety order does not establish any minimums for a sloped surface to be characterized as an incline. Rondinone testified that the truck was parked in a position where there slope was “essentially zero,” but not actually zero degrees. Rondinone testified that the flat area was, in fact, quasi-flat. In the instant matter, it is found that in any of the truck position scenarios depicted in Exhibit E-8, the truck would have been parked on a measurable incline. It is

⁵ An inclinometer is a gravity device used to measure slope or pitch.

also found that the truck was parked in a quasi-stable position on an incline, and while parked the truck inched toward the steeper portion of the incline, and then accelerated down the hill.

A second distinct requirement of section 1593, subdivision (h), provides that equipment parked on inclines shall have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means. The Division established that Pedroza parked the truck on an incline. The parties stipulated that Bothman employees working at the school did not bring chocks to the jobsite, and at no point did Pedroza place chocks behind the wheels of the truck. Pedroza did not set the parking brake before exiting the vehicle, and failed to prevent the truck from moving by utilizing some other effective mechanical means. As such, the Division has met its burden of proof, and the violation of section 1593, subdivision (h), under the second distinct requirement of the standard, is also established.

3. Did Employer present sufficient evidence to establish the Independent Employee Action Defense or any other affirmative defense?

There are five elements, all of which must be proved for an employer to prevail on a claim of Independent Employee Action Defense (IEAD). Those elements are: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and (5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Element 2 requires that the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments. Pedroza obtained a Class A Commercial Drivers License 25 years ago. Pedroza has worked as a laborer and as a truck driver for Employer. Pedroza testified that he was trained in setting the parking brake by the company for whom he worked 25 years ago, the same company that helped him get his commercial license. According to Pedroza, Bothman has never provided any driver training to him. Pedroza had not reviewed any Bothman parking policies relating to dump trucks. Pedroza did not know if Bothman had any policies related to the use of chocks. Pedroza testified that he was trained in the use of chocks by the company for whom he worked 25 years ago, but has never received such training from Bothman.

Nothing in Employer's Injury and Illness Prevention Program (IIPP) refers to (1), maintaining positive control of a haulage vehicle during all periods of operation; (2), setting parking brakes when parking haulage vehicles; or (3), the use of chocks when parking a haulage vehicle on an incline (Exhibit J). And no such information is found in Employer's "Fleet Motor Vehicle Safety Program" (Exhibit 28), Employer's training logs (Exhibit 29), or Employer's Job Safety Analysis Worksheet (Exhibit 30).

Employer may have a safety program which is well-devised in some aspects, but Employer has failed to include in that program essential training in matters of safety relating to the job assignment of truck driver. As Employer has failed to prove that it was compliant with element 2 of the IEAD, it may not prevail on the affirmative defense. As such, analysis of the remaining four elements is not required.⁶

4. Did the Division establish rebuttable presumptions that the violations in Citation 1 and 2 were serious?

Labor Code section 6432, in relevant parts, states the following:

(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 actual hazard may consist of, among other things: [...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

A rebuttable presumption of a serious violation exists when the Division establishes that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Labor Code section 6432(a).) The term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Associate Safety Engineer Sasser testified that his Division-mandated training is current (Exhibit 18). Therefore, under Labor Code section 6432, subsection (g), Sasser is deemed competent to offer testimony to establish each element of the serious violation, and to offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the

⁶ Employer also failed to present evidence to establish any of the other affirmative defenses listed in its pleadings.

issue of whether the violation is serious under the Labor Code. Sasser has worked for Cal/OSHA for 8 years, as an Associate Safety Engineer. Sasser has conducted over 400 inspections, three of which involved serious crushing injuries.

In regard to Citation 1: Employer violated section 1593, subdivision (b), by failing to ensure that a haulage vehicle was kept under positive control during all periods of operation. The hazard created by the violation is that an out-of-control truck may roll away and kill someone. Sasser testified that the violation was ultimately classified as serious because there was a realistic possibility that death or serious physical injury could result if a haulage vehicle was not kept under positive control, it could roll away, and strike someone, causing serious injury or death. The Division established that the haulage vehicle was not under positive control at all times of operation when an employee parked the truck, failed to set the parking brake, left the engine running, and exited the vehicle, whereupon the vehicle rolled away without an operator in the cab of the truck. In the instant matter, Mr. Marquez sustained fatal injuries when a haulage vehicle, not under positive control, rolled over him.

In regard to Citation 2: Employer violated section 1593, subdivision (h), by failing to ensure that the parking brake of a haulage vehicle was set when the vehicle was parked, and by failing to ensure that a haulage vehicle parked on an incline have the wheels chocked and the parking brake set or be otherwise prevented from moving by effective mechanical means. The hazard created by the violation is that if a truck is parked without applying the parking brake, or if the truck is parked on an incline, and the brake not set and the wheels not chocked, the truck could roll away, strike and kill someone. Sasser testified that the violation was classified as serious because there was a realistic possibility that death or serious physical injury could result from the hazard presented, and in this matter, that hazard resulted in the death of Mr. Marquez.

The existence of an employee fatality resulting from violations of both cited safety orders, combined with the actual hazards associated with roll-away haulage vehicles, establishes rebuttable presumptions that the violations were properly classified as serious violations.

5. Did Employer rebut the presumptions of serious violations in Citations 1 and 2 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violations?

Employer appealed the serious classifications of the violations in Citations 1 and 2.

Section 6432, subdivision (c), provides as follows:

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 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.

Failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Davis Development Company*, Cal/OSHA App. 10-3360, Decision After Reconsideration (June 18, 2014).)

Employer provided no evidence that it trained Pedroza in (1), maintaining positive control of a haulage vehicle during all periods of operation; (2), setting parking brakes when parking haulage vehicles; or (3), the use of chocks when parking a haulage vehicle on an incline. This lack of haulage vehicle training is tantamount to failure to supervise. As in *Davis Development Company*, supra, Employer's failure to adequately supervise Pedroza to ensure his safety, the safety of Marquez, and the safety of others at the site was equivalent to failing to exercise reasonable diligence, and does not excuse a violation on a claim of lack of employer knowledge.

As such, Employer failed to demonstrate that it did not, and could not, with the exercise of reasonable diligence, have known of the violations which existed at the time of the investigation. Employer failed to meet its burden to rebut the presumptions that the violations were properly classified as serious. As such, the serious classifications of Citations 1 and 2 are sustained.

6. Did the Division establish the accident-related characterizations of the violations?

In order for a citation to be classified as accident related, there must be a showing by the Division of a “causal nexus between the violation and the serious injury.” The violation need not be the only cause of the accident, but the Division must make a “showing [that] the violation more likely than not was a cause of the injury. (*MCM Construction, Inc.* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016), citing *Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011).)

In this matter, Pedroza’s failure to keep the truck under positive control during all periods of operation was a major factor which led to Marquez’s death. Pedroza’s failure to set the parking brake when he parked the truck was also a major factor leading to the death of Marquez. The Division has met its burden to demonstrate a causal nexus between the violation of section 1593, subdivision (b), and the death of Marquez. The Division has also met its burden to demonstrate a causal nexus between the violation of section 1593, subdivision (h), and Marquez’s death. As such, the accident-related characterizations of Citation 1 and 2 are both sustained.

7. Were the abatement requirements in Citation 1, Item 1, reasonable?

In order to establish that abatement requirements are unreasonable an employer must show that abatement is not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

Employer appealed the reasonableness of abatement requirements in Citation 1, Item 1. The cited regulation is clear and provides no exceptions. Employer is required to maintain positive control of haulage vehicles during all periods of operation. Employer failed to present evidence sufficient to establish that abatement of the citation was unfeasible, impractical, or unreasonably expensive. For the above reasons, it is found that requiring an employer to abate practices which can prevent workers from being injured or killed by out-of-control haulage vehicles to be reasonable.

8. Were the proposed penalties reasonable?

Where two penalties address a hazard which can be eliminated by a single means of abatement, it is improper to impose two penalties (*Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2299, Denial of Petition for Reconsideration (March 11, 2013)).

At the hearing, Employer stipulated that the penalties associated with the citations were calculated in accordance with the Division's Policies and Procedures.⁷ Therefore, the \$22,500 proposed penalty for Citation 1, and the \$22,500 proposed penalty for Citation 2 are found to be reasonable.

Both safety orders address the hazards associated with not maintaining control of a haulage vehicle, and the protection of workers from such uncontrolled trucks. The penalty for Citation 2, a violation section 1593, subdivision (h), is eliminated as duplicative of the penalty imposed in Citation 1, a violation of section 1593, subdivision (b). (See *Thyssenkrupp Elevator Corporation, supra.*)

Conclusions

The evidence supports a finding that Employer violated section 1593, subdivision (b), by failing to ensure that a haulage vehicle was kept under positive control during all periods of operation. The Division established the serious classification and the accident-related characterization of the violation. The assessed penalty is reasonable and correctly calculated.

The evidence also supports a finding that Employer violated section 1593, subdivision (h), by failing to ensure that the parking brake of a haulage vehicle was set when the vehicle was parked. The Division established the serious classification and the accident-related characterization of the violation. The assessed penalty, as now modified, is reasonable.

ORDER

It is hereby ordered that Citation 1 is upheld and the associated penalty of \$22,500 is sustained as indicated above and as set forth in the attached Summary Table.

⁷ Exhibit 2, "Proposed Penalty Worksheet," as amended, and dated January 21, 2016. Citation 1, Item 1, was originally issued as a General violation with a proposed penalty of \$7,000, which was subsequently amended to a Serious Accident-related violation with a proposed penalty of \$22,500. Citation 2, Item 1, was also amended to reflect a penalty of \$27,000. Pursuant to the stipulated agreement of the parties the penalty of each citation was correctly calculated at \$22,500, as reflected in Exhibit 2.

It is hereby ordered that Citation 2 is upheld and the associated penalty of \$22,500 is eliminated as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: September 13, 2016
KR:mfr



KEVIN J. REEDY
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

ROBERT A. BOTHMAN, INC.

DOCKETS 14-R1D4-0387 - 0388

**Dates of Hearing: August 27, 2015, and January 21 and 22, 2016, and
April 15, 2016**

Division's Exhibits

Exh. No.	<u>Exhibit Description</u>	
1	Jurisdictional documents	ADMITTED
2	Four Proposed Penalty Worksheets, including final amended copy dated January 21, 2016	ADMITTED
3	16 Joint Pre-Trial Stipulations	ADMITTED
4	Site Plan & Details #1	ADMITTED
5	Photo of Gymnasium area	ADMITTED
6	Photo of truck involved in accident	ADMITTED
7	Site Plan & Details #2	ADMITTED
8	Close-up photo depicting where Stiller was standing on the day of the accident	ADMITTED
9	More distant photo depicting where Stiller was standing on the day of the accident	ADMITTED
10	Photo depicting location of front of truck cab before it rolled down incline	ADMITTED
11	Photo depicting location of back of truck cab before it rolled down incline	ADMITTED
12	Photo depicting where front of truck was before it rolled	ADMITTED
13	Photo depicting road where truck rolled down incline and compressor near bottom of incline	ADMITTED
14	Berkeley Police Department Incident Report	ADMITTED
15	Site Plan & Details #3	ADMITTED
16	Photo depicting fire lane	ADMITTED
17	Witness Declaration of Janet Levenson	ADMITTED
18	Letter dated August 24, 2015, indicating that Sean Sasser is current on his Division-mandated training	ADMITTED
19	Cal/OSHA Accident Report	ADMITTED
20	Site Plan & Details #4	ADMITTED
21	Witness Statements made to Sasser	ADMITTED
22	Photo looking downhill on road at accident location	ADMITTED

23	Cal/OSHA Document Request Sheet #1	ADMITTED
24	Cal/OSHA Document Request Sheet #2	ADMITTED
25	Photo #1 depicting Magnetic Polycast Protractor	ADMITTED
26	Photo #2 depicting Magnetic Polycast Protractor	ADMITTED
27	Photo #3 depicting Magnetic Polycast Protractor	ADMITTED
28	Bothman Fleet Motor Vehicle Safety Program	ADMITTED
29	Bothman Employee Training Records	ADMITTED
30	Bothman Job Safety Analysis Worksheet	ADMITTED
31	Vehicle Manual Braking System Data	ADMITTED
32	Photo depicting Parking Brake Valve and Trailer Air Supply Valve	ADMITTED
33	Close-up photo of Parking Brake Valve and Trailer Air Supply Valve	ADMITTED
34	Employee Communication Record for Alfonso Pedroza	ADMITTED
35	John C. Fox letter to Denise Cardoso, dated April 8, 2014.	ADMITTED
36	Investigation notes of Sean Sasser	ADMITTED
37	Vehicle Manual Driving Tips	ADMITTED
38	Driver's Daily Vehicle Inspection Report	ADMITTED

Employer's Exhibits

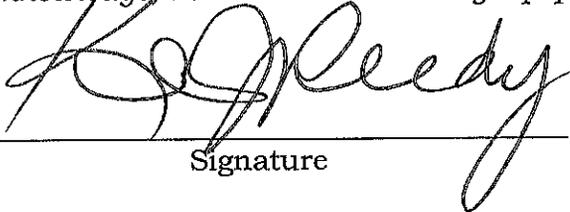
A	Photo depicting the school gymnasium	ADMITTED
B	California Highway Patrol Narrative/Supplemental	ADMITTED
C	Cal/OSHA Documentation Worksheet	ADMITTED
D	David Rondinone, Ph.D., P.E., Curriculum Vitae	ADMITTED
E	Photos depicting accident site, diagrams of truck on grade, and "definitions of flat"	ADMITTED
F	Dr. Rondinone's Accident Evaluation	ADMITTED
G	DMV Authorization for Release of Driver Record Information	ADMITTED
H	Bothman Driver's Daily Vehicle Inspection Report	ADMITTED
I	Photo depicting aerial view of accident site	ADMITTED
J	Bothman Injury and Illness Prevention Program	ADMITTED
K	Bothman Safety Manual	ADMITTED
L	Letter from AON, dated September 3, 2013	ADMITTED
M	Photo depicting front of Bothman Safety Vest	ADMITTED
N	Photo depicting back of Bothman Safety Vest	ADMITTED
O	DMV Driver Record Information	ADMITTED
P	Photo depicting Bothman Safety Award, 2013-2014	ADMITTED
Q	Photo depicting Bothman Safety Award, 2012-2014	ADMITTED

Witnesses Testifying at Hearing

Miguel Osorio
Tanya Stiller
Janet Levenson
Sean Sasser
David Rondinone
Alfonso Pedroza
Martin Arroyo
Richard Gonzalez

CERTIFICATION OF RECORDING

*I, **Kevin J. Reedy**, 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.*



Signature



Date

SUMMARY TABLE

DECISION

<i>In the Matter of the Appeal of:</i> ROBERT A. BOTHMAN, INC. DOCKETS 14-R1D4-0387 ; 0388					ABBREVIATION KEY: Reg=Regulatory G=General S=Serious ER=Employer			DOSH=Division W=Willful R=Repeat		
IMIS No. 317201556										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A F I R M	V A C A T I O N	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R1D4-0387	1	1	1593(b)	S	ALJ affirmed violation	X		\$22,500	\$22,500	\$22,500
14-R1D4-0388	2	1	1593(h)	S	ALJ affirmed violation. ALJ reduced penalty as duplicative of Citation 1, Item 1.	X		\$27,000	\$22,500	\$0
Sub-Total								\$49,500	\$45,000	\$22,500
Total Due*										\$22,500
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> All penalty payments must be made to:					(INCLUDES APPEALED CITATIONS ONLY)					
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 citations or items containing penalties. Please call (415) 703-4291 if you have questions					

ALJ: KR
POS: 09/13/16