BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1203336**
THREE-D SERVICES CO. INC. **1551 E. MISSION BLVD.** **POMONA, CA 91766** **Employer**	**DECISION**

Statement of the Case

Three-D Services Company, Inc. (Employer) is a demolition contractor. Beginning January 17, 2017, the Division of Occupational Safety and Health (the Division) through Compliance Officer Stanley Rodriguez (Rodriguez), conducted a fatal accident investigation at Employer's worksite located at 11428 W. Sherman Way, in North Hollywood, California (the site).

On July 7, 2017, the Division issued three citations to Employer for four alleged violations of the California Code of Regulations, title 8.[1] Citation 1, Item 1, classified as General, alleges that Employer failed to provide training and instruction to employees on the hazards associated with removing a Kelley brand mechanical dock leveler at the site. Citation 1, Item 2, classified as General, alleges that Employer's Heat Illness Prevention Plan (HIPP) failed to include language indicating that shade would be present when the temperature exceeded 80 degrees Fahrenheit. Citation 2 classified as Serious, alleges that Employer failed to instruct employees on known job site hazards and methods for protection against injury in connection with removing a Kelley brand mechanical dock leveler at the site. Citation 3, classified as Serious Accident-Related, alleges that Employer failed to conduct a survey of the condition of the structure to identify the possibility of an unplanned collapse.

Employer filed a timely appeal contesting the existence of each alleged violation, their classifications, the reasonableness of abatement, and the reasonableness of the proposed penalties. In addition, Employer raised numerous affirmative defenses, including, but not limited to, the Independent Employee Action Defense (IEAD).

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on July 29, 2021, February 1 and 2, and July 7 and 8, 2022. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. Staff

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

Counsel Clara Hill-Williams represented the Division and attorney Jonathan Vick of Atkinson, Adelson, Loya, Ruud & Romo APLC, represented Employer.

During the hearing, the parties resolved Citation 1, Item 2, as set forth in the "Order" section below.

The matter was submitted on September 30, 2022.

Issues

1. Did Employer fail to provide training and instruction to employees on the hazards associated with removing a Kelly brand mechanical dock leveler at the site?

2. Did Employer fail to instruct employees on known job site hazards and methods for protection against injury in connection with removing a Kelley brand mechanical dock leveler at the site?

3. Did Employer fail to conduct a survey of the condition of the structure to identify the possibility of an unplanned collapse?

4. Did the Division correctly classify Citation 1, Item 1, as General?

5. Did the Division establish that Citations 2 and 3 were properly classified as Serious?

6. Did Employer rebut the presumptions that the violations alleged in Citation 2 or Citation 3 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

7. Did the Division establish that Citation 3 was properly characterized as Accident-Related?

8. Did Employer establish any of its affirmative defenses?

9. Are the abatement requirements for Citation 1, Item 1, Citation 2 and Citation 3 reasonable?

10. Are the proposed penalties reasonable?

Findings of Fact

1. On January 17, 2017, Employer's employee Jose Vega (Vega) was a member of a crew assigned by Employer to remove dock levelers at a warehouse building at the site.

2. A dock leveler is a mechanically operated ramp that is welded to the dock of a warehouse loading bay, and which is raised or lowered to facilitate the loading and unloading of cargo to and from trucks. It is constructed of a surrounding frame, a ramp, and various mechanical parts, including tension springs that work to raise or lower the ramp.

3. Removal of the dock levelers requires cutting through four steel welds anchoring each dock leveler to the loading dock. Two of the welds are at the front of the dock leveler, below the lip of the ramp, and the other two welds are on the opposite rear side of the dock leveler. Vega and his crew were going to use a cutting torch to cut through the welds.

4. Employer provides general safety training to its employees at the time of hire.

5. Employer did not provide training to its employees, including Vega, on the hazards associated with removing a dock leveler.

6. Employer did not instruct its employees on the correct procedures for removing a dock leveler, which primarily involved cutting four welded anchor points connecting the dock leveler to the loading dock of the building, and then pulling it out with an industrial truck.

7. Employer did not provide instruction to its employees regarding known job site hazards and methods for protection against injury in connection with removing mechanical dock levelers at the site. Employer provided initial safety training as well as job-specific training to employees and held tailgate meetings to discuss hazards and means for protection against injury, but did not cover the hazards and methods for protection against injury with respect to this operation.

8. Vega suffered fatal injuries when a Kelly brand mechanical dock leveler collapsed onto him while Vega was underneath it (the accident).

9. Vega's accident happened outdoors in an area that was readily visible to Employer.

10. Failing to train employees on how to perform their work correctly and safely in light of the attendant hazards makes it more likely that an employee will suffer a serious occupational injury or illness while performing the work.

11. A dock leveler that is not externally supported in the open position could collapse during demolition and removal, resulting in serious injury or death to employees standing beneath or in close proximity to the dock leveler.

12. It is feasible for Employer to abate the alleged violations.

13. The Division did not calculate the penalties for Citation 1, Item 1, Citation 2 or Citation 3 correctly.

Analysis

1. Did Employer fail to provide training and instruction to employees on the hazards associated with removing a Kelly brand mechanical dock leveler at the site?

Section 3203, subdivision (a)(7), provides:

(a) Effective July1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
[. . .]
(7) Provide training and instruction:
(A) When the program is first established;
Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
(B) To all new employees;
(C) To all employees given new job 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;
(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Citation 1, Item 1, alleges:

> Prior to and during the course of the investigation, including but not limited to, on January 17, 2016 [*sic*], the employer did not provide training and instruction to employees on hazards associated with removing Kelley® mechanical dock levelers at a demolition site.[2]

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385 and 2386, Decision After Reconsideration (Oct. 7, 2016.) "Preponderance of the evidence" is usually 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. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

Applicability

Section 3203, subdivision (a), provides the minimum requirements for employer Injury and Illness Prevention Programs (IIPP). One requirement is that every employer is required to provide necessary training to its employees to ensure they can safely perform their jobs. There is no dispute that Employer employed Vega, and others, on the date of the incident and was required to comply with section 3203, subdivision (a).

Violation

The Appeals Board has repeatedly found that the purpose of section 3203, subdivision (a)(7) "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through 'training and instruction.'" (*Timberworks Construction*, Inc., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019), quoting *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).) Although the existence of training records may support a conclusion that training occurred, "lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference that no such training was provided." (*Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).)

[2] Undisputed testimony from Rodriguez established that each of the appealed citations contained a typo as to the calendar date, and that the correct date is January 17, 2017.

There is no dispute that Employer was engaged to perform demolition work at a warehouse, and that on the date of the incident, it was going to begin removing dock levelers from the warehouse. A dock leveler is a mechanically adjustable ramp that can be raised or lowered to allow for personnel and industrial trucks to travel between cargo areas on trucks and the dock while loading or offloading goods. There were multiple dock levelers at the site that were scheduled for demolition and removal by Employer. The accident occurred while Employer's employees were attempting to remove the first dock leveler at the site. The parties do not dispute that dock levelers are secured to the loading dock of the warehouse by four welded anchor points, two in the front and two in the back, and that these anchor points must be cut with a torch in order to remove the dock leveler.

Rodriguez testified that he issued Citation 1, Item 1, because during his investigation he concluded that two employees had not received training on the hazards associated with removing a dock leveler. He testified that those hazards included that the dock levelers at the site were old and some had missing or broken parts, and that they could fall and cause someone walking on top to fall such as if a safety bar were not used to prop them open. Rodriguez further testified that the work involved creation of sparks from cutting metal with a torch, thus requiring that employees have access to and use appropriate personal protective equipment to avoid injury. According to Rodriguez, he interviewed several employees and determined that Employer did not have any written procedure at the time of the accident for removal of dock levelers.

Rodriguez interviewed several employees during the inspection, and testified that those interviews led him to conclude that Employer did not provide training on the hazards associated with the removal of a dock leveler. Rodriguez spoke to Justin Bruyneel (Bruyneel), Employer's superintendent, who admitted that he was responsible for assigning duties to the crew under him, and was also responsible for their safety. According to Rodriguez, Bruyneel stated that he assigned employees Vega and Rosario Galaviz (Galaviz) to remove the dock leveler, but Rodriguez did not recall whether Bruyneel stated that he instructed Vega or Rosario on how to perform the work.

Rodriguez's interview notes (Exhibit 5) reflect that Bruyneel told him that Bruyneel conducted safety meetings with his crew every Monday regarding the work they were going to perform, and that he had disciplinary authority over employees on his crew. Bruyneel also told Rodriguez that employees are instructed to brace the dock leveler ramp after it is raised upward, and that this was covered in a safety meeting held on the morning of January 16, 2017. Rodriguez's interview notes further reflect that Bruyneel told him that he had a process for identifying hazards prior to removal of dock levelers that included going out to the site with "a group of guys."

During the investigation, Rodriguez sent Employer a Document Request (Exhibit 3), which requested employee training records and safety meeting records. Employer provided its IIPP (Exhibit A), Code of Safe Practices (CSP) (Exhibit C); and training certification records for employees Jose Vega, Justin Bruyneel, and Rosario Galaviz (Exhibits T, U and V). The records reveal that Vega received Hazard Waste Operations and Emergency Response (Hazwoper) refresher training (see Cal. Code Regs., title 8, § 5192) on March 21, 2015; lead in construction standards (see Cal. Code Regs., title 8, § 1532.1) training on March 21, 2015; and torch cutting training on April 3, 2015. Bruyneel and Galaviz received similar training according to the records provided. None of the training records provided by Employer, however, indicate that Vega, Bruyneel or Galaviz received training on the particular hazards associated with demolishing and removing a dock leveler.

Employer also provided its IIPP during the inspection. Employer's IIPP (Exhibit A) does not specifically mention removal of dock levelers. Although it contains information about the hazards of working in confined spaces, nothing in the IIPP specifically addresses the hazards associated with removing a dock leveler. Similarly, Employer's Code of Safe Practices (Exhibit C) does not address hazards associated with the removal of dock levelers.

Finally, Employer provided a copy of a weekly safety meeting sign-in sheet (Exhibit G). The document consists of two pages. Rodriguez testified that he did not trust the document because one of the pages was not signed. He did note that while the page with employee signatures, including Vega's, does not mention dock levelers, the second, unsigned page mentioned that Employer discussed bracing the dock leveler before doing work on it. Specifically, it states "if you have to open doc [*sic*] leveler you must brace the doc [*sic*] leveler up".

Employer's president, Greg Gilson (Gilson) testified for Employer. Gilson testified that Employer performs trainings regularly, and gives new hires general safety training, and might give more specific training depending on the initial assignment. Gilson also stated that welding and cutting are topics on which employees receive training. He further testified that he received training with Vega on how to remove a dock leveler, and that employees were trained not to go inside or underneath the dock leveler.

However, Gilson did not specify when the training occurred, what specifically was covered, or who provided the training, nor did Employer provide any documents reflecting the training. He also testified that employees received on the job training on how to remove a dock leveler, but again, did not provide details about the training or any documentation showing when it occurred or who provided it. On cross examination, Gilson mentioned that some training is documented, but not all. Gilson did note that Vega had been doing demolition for well over 20

years, including removing dock levelers, and Gilson had worked alongside Vega five or six times removing dock levelers.

Gilson testified to Employer's procedures for removing dock levelers. First, employees are instructed to release the chain that holds the dock leveler closed. This is performed while standing on top of the dock leveler. Second, the dock leveler is either manually lifted or else a forklift is driven up to the dock leveler, and the forks of the forklift are used to support the working surface of the dock leveler in an open position. This is because sometimes the springs that would otherwise hold the dock leveler open may be broken. Third, once the dock leveler is open and supported (such as by the forklift), an employee will "come underneath" the front of the dock leveler and use the cutting torch to cut the welds at the front of the dock leveler. Fourth, an employee goes inside the building, comes out through the loading dock, and cuts the rear welds connecting the dock leveler to the warehouse while standing above the dock leveler.

Bruyneel testified that he had been trained by someone named Poncho, as well as by Vega, on how to remove dock levelers. Bruyneel testified that he also discussed the hazard of the spring tension in the dock leveler with his crew.

Regardless of whether Employer trained its employees on its *procedures* for removing a dock leveler, sufficient evidence supports a finding that, more likely than not, Employer did not train its employees on all of the *hazards* associated with removing dock levelers. Specifically, it is found that Employer did not provide training or instruction to employees, including Vega, concerning the hazard of going underneath an open dock leveler when it is not supported by external means, such as by a forklift, thereby exposing an employee to serious injuries or death. This finding is based on Rodriguez's testimony as to the hazards associated with removing a dock leveler. It is also supported by the lack of credible evidence that training was provided to employees on the hazards associated with removing dock levelers.

Nobody that Rodriguez spoke to mentioned being trained on the hazards associated with removing dock levelers, including the hazard of standing under the lip of the dock leveler when it is opened. Although hearsay, these statements corroborate the documents that Employer submitted during the investigation and hearing, which lack any mention of training on the hazards associated with removing a dock leveler, except for the January 16, 2017, safety meeting sign-in sheet, which the undersigned deemed untrustworthy because only one page of the document, the page that did not mention removal of dock levelers, was signed. Furthermore, although Employer offered some testimony from its president and its superintendent that training on these hazards did occur, the undersigned views this testimony with distrust. Gilson and Bruyneel, as officers and managers respectively, had motivation to testify that Employer trained its employees as required by the safety order. Employer, however, offered no supporting documentary evidence that this occurred, despite having the opportunity to do so. The testimony

that Employer offered, therefore, is deemed weak when weighed against the stronger evidence provided by the Division. (See Evid. Code section 412.)

Accordingly, for all of the reasons stated above, the Division met its burden of establishing a violation of section 3203, subdivision (a)(7). As a consequence, Citation 1, Item 1, is affirmed.

2. **Did Employer fail to instruct employees on known job site hazards and methods for protection against injury in connection with removing a Kelley brand mechanical dock leveler at the site?**

Section 1510, subdivision (c), states:

> Where employees are subject to known job site hazards, such as, flammable liquids and gases, poisons, caustics, harmful plants and animals, toxic materials, confined spaces, etc., they shall be instructed in the recognition of the hazard, in the procedures for protecting themselves from injury, and in the first aid procedure in the event of injury.

Citation 2 alleges:

> Prior to and during the course of the investigation, including but not limited to, on January 17, 2016 [*sic*], the employer did not instruct employees on recognition [of] hazards, and procedures for protection against injury during removal of Kelley® mechanical dock leveler, model M738K, serial # 971635. As a result, on or about January 17, 2016 [*sic*], on employee suffered a fatal injury when the dock leveler collapsed on him during process of removal.

Applicability

Section 1510 is contained within the Construction Safety Orders (CSOs). Section 1502 provides as follows:

> (a) These Orders establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts. These Orders also apply to all excavations not covered by other safety orders for a specific industry or operation.
>
> (b) At construction projects, these Orders take precedence over any other general orders that are inconsistent with them, except for Tunnel Safety Orders or the Pressurized Worksite Standards in Article 154 of the General Industry Safety Orders.

(c) Machines, equipment, processes, and operations not specifically covered by these Orders shall be governed by other applicable general Safety Orders.

Employer did not dispute the applicability of the safety order during the hearing. As mentioned above, Employer was engaged as a demolition contractor at the site for the purpose of removing dock levelers from the loading bays of a warehouse. This activity facially falls within the scope of the CSOs as it involves activities consistent with the alteration, renovation, removal, and wrecking of a fixed structure or its parts. Therefore, the safety order applies.

Violation

Rodriguez testified that he issued Citation 2 to Employer because Employer did not provide its employees with instructions specific to recognition of hazards and procedures for protection against injury from removing a dock leveler. Strong evidence supports a finding that Employer recognized hazards associated with the removal of dock levelers. Although Employer's job hazard analysis (Exhibit B) fails to identify any hazards specific to removing dock levelers, Gilson and Bruyneel both testified to being aware of hazards including going inside a dock leveler when it is not properly supported. Gilson testified that everything Employer does is a hazard. He specifically mentioned that torching should all be done from the outside of the dock leveler, and he acknowledged that a dock leveler must be supported by external means such as a forklift while employees are torching the welded anchor points. Bruyneel testified that the tension of the springs that hold the dock leveler in the open position posed a hazard. Based on the above, it is found that Employer recognized certain job hazards associated with removal of dock levelers, specifically the danger that an unsupported dock leveler could come down and injure an employee working on top of or inside the dock leveler.

As discussed above in regard to Citation 1, Item 1, it is found that, more likely than not, Employer did not provide instructions specific to the hazards associated with the demolition and removal of a dock leveler. Furthermore, the record supports a related finding that, more likely than not, Employer did not provide its employees with instructions specific to protecting against injury while removing a dock leveler. Employer had the opportunity to provide evidence that it provided such instructions, but aside from limited testimony from Employer's president and superintendent, whose testimony was not deemed credible by the undersigned, the record does not reflect that Employer provided such instructions to its employees, including Vega.[3]

The evidence in the record is sufficient to support a conclusion that Employer recognized certain hazards associated with removal of dock levelers at the site but did not provide

[3] Neither party offered any evidence concerning whether Employer provided training on first aid procedures in the event of an injury sustained while demolishing and removing a dock leveler.

instruction to employees for how to recognize the hazards, protect themselves from the hazards, or the appropriate first aid response should an injury occur due to one of the recognized hazards. Accordingly, for all of the reasons stated above, the Division met its burden of establishing a violation of section 1510, subdivision (c). As a consequence, Citation 2 is affirmed.

3. **Did Employer fail to conduct a survey of the condition of the structure to identify the possibility of an unplanned collapse?**

Section 1734, subdivision (b)(1), states:

> Prior to permitting employees to start demolition operations, a qualified person shall make a survey of the structure to determine the condition of the framing, floors, and walls, and the possibility of an unplanned collapse of any portion of the structure. Any adjacent structure where employees may be exposed shall also be similarly checked.

Section 1734, subdivision (b)(2), requires that the survey be in writing, kept at the job site, and made available to the Division upon request.

Citation 3 alleges:

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

Applicability

Section 1734 is found within Article 31 (Demolition) of the CSOs. The parties do not dispute that Employer was performing demolition work at the site on the date of the accident, or that demolition work is covered by the CSOs. The safety order therefore applies to the work that Employer was performing at the site.

Violation

Rodriguez testified that he issued Citation 3 because Employer did not identify the dock leveler in the survey that it prepared for the demolition work at the site. Although section 1734 does not define the term "structure," Rodriguez testified that he felt the dock leveler should be included because it was connected to the warehouse, without referring to any specific definition.

The CSOs define what a structure is. Section 1504 of the CSOs defines a structure as:

> That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.

In *Stacy & Witbeck, Inc*., Cal/OSHA App. 05-1142, Decision After Reconsideration (May 12, 2011), the Appeals Board reasoned that under-street pipelines were structures within the meaning of section 1504 because:

> Under-street water pipelines are pieces of work artificially built up or composed of parts joined together in a definite manner. After they are constructed, the pipelines are not mobile, but fixed.

The evidence here supports a similar conclusion to the one drawn by the Appeals Board in *Stacy & Witbeck, Inc.*, Cal/OSHA App. 05-1142, *supra.* Here, both testimonial and documentary evidence was offered by the parties at hearing to establish that dock levelers are pieces of work that are artificially built up, as opposed to built up by natural process. Furthermore, uncontroverted testimony from Rodriguez, as well as photographic evidence entered into the record, demonstrated that dock levelers such as the one involved in the accident are composed of parts joined together in a definite manner. The dock leveler at issue here was made up of metal framing, a movable working platform, springs, bars, and other parts in a definite manner, which together form the dock leveler. Thus, it is found that a dock leveler is a structure.

The uncontroverted evidence shows that Employer did not include the dock leveler in the engineering survey that it prepared in anticipation of the work it was to perform at the site. Employer's engineering survey (Exhibit H) fails to address dock levelers at the site, which was acknowledged by both Gilson and Bruyneel during their testimony. In particular, Bruyneel admitted that dock levelers were not included in the engineering survey because they were viewed "more or less" as a tool, and he provided examples such as a spring-loaded office door or a roll-up door. Bruyneel is Employer's superintendent, and his admission, which goes against his employer's interest, is deemed credible and is given substantial weight.

In conclusion, dock levelers are structures as the term is defined in the CSOs. Section 1734, subdivision (b)(1) provides that a qualified person must perform an engineering survey of a structure prior to any demolition work affecting the structure. Here, the evidence clearly demonstrates that Employer did not perform an engineering survey of the dock leveler prior to engaging in demolition activity affecting the dock leveler. Therefore, for all of the foregoing reasons, the Division established a violation of section 1734, subdivision (b)(1), by a preponderance of the evidence. Consequently, Citation 3, Item 1, is affirmed.

4. Did the Division correctly classify Citation 1, Item 1, as General?

A General violation is defined by section 334, subdivision (b), as "a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." Rodriguez testified that he classified Citation 1, Item 1, as General because a training violation such as he found here does not generally result in a serious injury or illness. Rodriguez's testimony is credited. Although not determined to be of a serious nature, the Division did conclude that the violation bore a relationship to occupational safety and health of employees. Indeed, it is reasonable to infer that employees who not are trained in how to perform their jobs, and specifically on the hazards associated with the performance of their jobs, are more likely to experience an occupational injury or illness than employees who do receive such training. Thus, it is found that this violation bears a relationship to employee occupational safety and health. Employer offered no evidence to controvert the classification. Therefore, it is determined, for all of the foregoing reasons, that Employer correctly classified Citation 1, Item 1, as General.

5. Did the Division establish that Citations 2 and 3 were properly classified as Serious?

Labor Code section 6423, subdivision (a), in relevant part states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.

> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code, § 6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Rodriguez testified that he has been employed as an Associate Safety Engineer with the Division since September 1, 2018. Prior to that, he was an Assistant Safety Engineer from September 1, 2016, to September 1, 2018. Before he gained over 20 years of experience working in private industry in positions that oversaw employee safety. Rodriguez previously held a C-27 landscape contracting license issued by the State of California, but his license is not current. Rodriguez testified that his Division-mandated training was up to date. Rodriguez is found to be competent to testify as to every element of the Serious classification pursuant to Labor Code section 6432, subdivision (g).

Citation 2

Rodriguez testified that he classified Citation 2 as Serious because he determined as part of his investigation that there was a realistic possibility of serious physical harm that could result from failing to instruct employees on known job site hazards and methods for protection against injury in connection with removing a mechanical dock leveler at the site. Rodriguez pointed to the accident that occurred as evidence in support of the Serious classification. During the hearing, Rodriguez credibly testified about various hazards involving removal of dock levelers, including the risk that the adjustable ramp could collapse and hurt an employee. The record shows that Vega received fatal injuries when the dock leveler fell down onto him while he was standing beneath it. Thus, it is found that Vega in fact did suffer fatal injuries when the dock leveler fell down onto him. Moreover, the accident occurred outside a warehouse building and nothing in the record suggests that the loading dock where Vega was working was obstructed from view by Employer. Thus, the record supports a finding that the accident occurred out in the open, in an area under Employer's control and which Employer had the ability to observe.

Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.

Citation 3

Rodriguez testified that he classified Citation 3 as Serious because he believed that the violation created a realistic possibility of a serious injury or death, and that in fact this violation did lead to Vega's death. Section 1734, subdivision (b)(1) requires that a qualified person perform a site survey to identify any potential structural issues that could lead to unplanned collapse during a demolition operation. It is generally understood that demolition work is inherently dangerous and that, if done wrong, can lead to structural failure and that anyone standing in close proximity to the structural failure could be seriously physically harmed or killed by the collapse. Given that the dock leveler was a mechanical device constructed out of steel, and given that the one Vega was working on was old, it is appropriate to infer that the condition of the dock leveler could result in an unplanned collapse during demolition, resulting in serious injury. Employer acknowledges as much, because Gilson testified that dock levelers need to be held open by manual means or by the forks of a forklift during demolition. Presumably, this is to ensure that the dock leveler does not collapse and injure or kill employees.

Accordingly, the Division established a rebuttable presumption that Citation 3 was properly classified as Serious. [4]

6. Did Employer rebut the presumptions that the violations alleged in Citations 2 and 3 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

In order to satisfactorily rebut the presumption, an employer must demonstrate both that:

[4] Labor Code section 6432 (b) (1) requires the Division, prior to issuing a citation classified as Serious to first "make a reasonable attempt to determine and consider" certain enumerated information. Under subdivision (b) (2), the Division meets its obligation if, "not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision." Here, the Division's IBYs submitted into evidence demonstrates that the Division satisfied Labor Code section 6432 (b), and Employer did not offer any evidence suggesting that the Division failed to comply with this statutory obligation.

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Citation 2

Section 1510, subdivision (c), requires employers to instruct employees in the recognition of known hazards, as well as in the procedures for protecting themselves from injury, and in the first aid procedure in the event of injury. Here, as discussed above, Employer did not provide any such instruction to employees, as evidenced in the hearing record. Although Employer offered some self-serving testimony that such instructions were given, Employer offered no documentary evidence or testimony from non-managerial employees to corroborate the testimony of Gilson and Bruyneel, whose testimony was viewed as lacking credibility based on the totality of the evidence. Therefore, as discussed above, it is found that such instructions were not given. Employers are aware of the instructions that they provide to their employees, so it is reasonable to infer that Employer was aware that it did not instruct its employees on the matters required by this safety order.

Citation 3

Section 1734, subdivision (b)(1), requires a qualified person to survey a structure before demolition work begins on a structure or portion of a structure. Here, Employer acknowledged that it did not include the dock leveler in the survey, out of a belief that a dock leveler is not a structure as the term is used in the safety order. Employer argued that the safety order was vague and that the dock leveler is a mechanical tool, not a structure. A reasonable employer, aware of the definition of the term “structure” found within the CSOs, would have determined that the dock leveler was a structure. A reasonable employer, having made such a determination, would have included the dock leveler in its survey prior to engaging in demolition of the dock leveler. Employer’s specious arguments, which ignore the definition of the term “structure” in the safety order, are insufficient to rebut the Serious classification.

For all of the foregoing reasons, Employer offered insufficient evidence to rebut the presumptions that Citations 2 and 3 were properly classified as Serious. Accordingly, Employer failed to rebut the presumptions that the Division correctly classified Citations 2 and 3 as Serious.

7. Did the Division establish that Citation 3 was properly characterized as Accident-Related?

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". (*RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer." (*id.)*

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

Thus, for all of the foregoing reasons, Citation 3 is properly characterized as Accident-Related.

8. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Independent Employee Action Defense

Employer asserted that it is not liable for the violation alleged in Citation 2 based on the Independent Employee Action Defense (IEAD). In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees 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 against employees who violate the safety program; and

(5)The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

In *Kenai Drilling Limited*, Cal/OSHA App. 00-2356, Decision After Reconsideration (Sept. 23, 2002), the Appeals Board held:

> The [Independent Employee Action affirmative] defense is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).)
> . …
> We do not believe it is wise to elevate the alleged misconduct of an employee to relieve an Employer from liability for a clear violation of its own affirmative obligation under these circumstances. To allow the independent employee action defense in a case where an employer did not discharge a non-delegable safety obligation for which it was cited would not further objectives of the Act which are to promote compliance with safety requirements and encourage employers to provide effective safety devices and equipment at their places of employment.

Here, Citation 1, Item 1, Citation 2 and Citation 3 all allege non-compliance with various non-delegable duties. Citation 1, Item 1, alleges that Employer failed to train employees. Citation 2 alleges that Employer failed to instruct employees on known job site hazards, ways to prevent injury, and appropriate first aid measures. Citation 3 alleges that Employer failed to conduct an engineering survey of the dock leveler prior to beginning demolition activity. These are all duties assigned to Employer, not to its employees, and Employer demonstrably failed to discharge its duties. Employer cannot benefit from any act or omission by an employee, such as Vega, to relieve itself of liability.

Therefore, Employer may not avail itself of the IEAD for any of the appealed citations.

Unforseeability

Employer asserts as an affirmative defense that the violations identified in the citations were unforeseeable. It is not clear from Employer's pleadings whether it was raising the Unforeseeable Extreme Departure Defense (UEDD) or the unforseeability defense articulated by *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd*. (1981) 123 Cal.App.3d 641. Regardless, Employer cannot prevail under either defense based on the hearing record. The

Board recognizes the UEDD, but only in rare cases. In order to establish the defense, an employer must prove:

> 1) employee engaged in an extreme departure from the scope of a reasonable understanding of assigned work duties; 2) employee knew his/her work duties did not encompass the specific activity; and 3) employer did not and could not have known through the exercise of reasonable diligence and supervision the employee would so act.

(*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018, quoting *Blue Diamond Growers*, Cal/OSHA App. 1040471, Decision After Reconsideration (Sept. 24, 2018).)

This defense fails because, as already discussed, it is found that Employer did not adequately and appropriately train or instruct its employees, including Vega, on the correct, safe way to demolish a dock leveler, and failed to even include the dock leveler in Employer's engineering survey conducted prior to beginning the work. Employer did not establish that Vega's actions leading up to his death were an extreme departure from what he reasonably understood as the scope of his duties, and Employer knew it did not appropriately train Vega and his coworkers and also knew that it did not include the dock leveler in its engineering survey due to an inexcusable misreading of the safety order.

The *Newbery* defense is discussed in *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, which articulated the elements of the defense:

> A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:
> (1) that the employer knew or should have known of the potential danger to employees;
> (2) that the employer failed to exercise supervision adequate to assure safety;
> (3) that the employer failed to ensure employee compliance with its safety rules; and
> (4) that the violation was foreseeable.

(*Gaehwiler v. Occupational Safety & Health Appeals Bd*. (1983) 141 Cal.App.3d 1041, 1045.)

Employer cannot establish the *Newbery* defense because, as discussed above, Employer did not train Vega and his coworkers how to correctly and safely demolish a dock leveler. Employer knew or should have known of the hazards to which Vega and his coworkers were exposed, and Employer's failure to train or instruct on job hazards, avoidance of injury and application of first aid cannot be deemed unforeseeable. Similarly, Employer's failure to include the dock handler in its engineering survey was not unforeseeable, but rather was a volitional act

by Employer based on its own misreading of the CSOs. Accordingly, Employer's *Newbery* defense fails.

To the extent that any of the remaining affirmative defenses raised by Employer in its appeal are recognized by the Appeals Board, Employer did not present evidence to establish any of them, and they are therefore deemed waived. (*RNR Construction, Inc*., *supra,* Cal/OSHA App. 1092600).

Accordingly, for all of the reasons stated above, Employer did not establish any of its affirmative defenses.

9. Are the abatement requirements for Citation 1, Item 1, Citation 2, and Citation 3 reasonable?

In order to establish that abatement requirements are unreasonable an employer must show that abatement is not feasible or is 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, Citation 2, and Citation 3. Employer failed to present evidence sufficient to establish that abatement of the citation was infeasible, impractical, or unreasonably expensive. Employer provided some evidence that it trains employees on various topics. Employer did not offer any evidence to suggest that it would not be able to train employees on the hazards that accompany demolishing and removing a dock leveler. Similarly, Employer offered no evidence that Citation 2 could not be abated. This violation could be abated by providing the required instruction to employees for how to recognize the hazard associated with demolishing and removing a dock leveler, in the procedures for protecting themselves from injury, and in the first aid procedure in the event of injury. Finally, Citation 3 required Employer to prepare an engineering survey of the dock leveler to protect against unplanned structural collapse during demolition. Employer did not provide any evidence that it would be unfeasible, impractical, or unreasonably expensive to include a dock leveler on such a survey.

Thus, for all of the foregoing reasons, Employer did not establish that abatement requirements for Citation 1, Item 1, Citation 2, or Citation 3 are unreasonable.

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10. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence

that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co*., Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

During the hearing, the Division submitted its C-10 proposed penalty worksheet (Exhibit 21).

Citation 1, Item 1

A violation classified as General has a base penalty determined by its Severity. (Section 336, subdivision (b).) Severity is defined by section 335, subdivision (a)(1)(A)(ii), 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:
>
> > LOW-- Requiring first-aid only.
> >
> > MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.
> >
> > HIGH-- Requiring more than 24-hour hospitalization.

Rodriguez testified that he assessed Severity as medium for Citation 1, Item 1, based on the type and degree of the resulting injury caused by the violation. Here, an employee died, and it is reasonable to infer based on the facts of this case and general experience that construction or demolition-related injuries resulting from lack of training could cause injuries requiring medical attention and hospitalization for less than 24 hours. Rodriguez's testimony is credited and,

consistent with the above, it is found that the Division correctly assessed Severity as medium for Citation 1, Item 1.

The base penalty for a medium Severity, General violation is $1,500. The penalty is further subject to adjustment for Extent and Likelihood. Extent is defined by section 335, subdivision (a)(2)(ii), as follows:

> When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:
>
> > LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
> >
> > MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.
> >
> > HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

Rodriguez testified "the extent is based on numbers," and "in this case, the amount of like piece of equipment or machinery that might be in violation or how many employees depending on if it's an illness or an injury." Rodriguez further testified that Extent for Citation 1, Item 1, was based on the amount of employees who were not trained. Rodriguez assessed Extent as Medium. The record supports a finding that Employer did not provide appropriate training to any of its employees on the hazards of demolishing and removing a dock leveler. Thus, the violation affected 100% of the exposed employees. This evidence supports a finding that the Division correctly assessed Extent as Medium for Citation 1, Item 1.

Likelihood is defined by section 335, subdivision (a)(3) as follows:

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:
>
> > LOW, MODERATE OR HIGH

Rodriguez testified that "likelihood is based on the probability of an injury occurring based on the violation of the regulation." He did not, however, testify to the extent to which the violation has in the past resulted in injury to employees based on experience, available statistics or records. Accordingly, Employer is entitled to the maximum adjustment.

As discussed, the Division correctly calculated the base penalty at $1,500. It correctly assessed Extent as Medium, which results in no change to the base penalty. The Division, however, did not assess Likelihood correctly, and Likelihood is therefore adjusted by the undersigned and a corresponding 25% reduction shall be applied to the base penalty pursuant to section 336, subdivision (b). Accordingly, the resulting gravity-based penalty is calculated as $1,125.

The gravity-based penalty is subject to further adjustment based on good faith, size, and history. The Division assessed Employer's good faith as Fair, which corresponds to an "average safety program" pursuant to section 335, subdivision (c). This is consistent with the evidence, which shows that Employer's safety program lacked training on the hazards associated with core work performed by employees. The Division assessed Employer's size as between 26 and 60 employees, which Employer did not controvert during the hearing. Finally, the Division assessed Employer's history as Fair based on a review of its own records relating to past inspections of Employer. Employer did not provide evidence to dispute the history adjustment.

Thus, the Division, pursuant to section 336, applied a 15 percent adjustment for good faith, a 20 percent adjustment for size, and a five percent adjustment for history. The evidence at hearing supports these adjustments. Applying these adjustments to the gravity-based penalty, the adjusted penalty for Citation 1, Item 1, is assessed at $675. The penalty is further adjusted by 50 percent by applying the abatement credit consistent with section 336, subdivision (e)(1). Applying this credit, the resulting proposed penalty for Citation 1, Item 1, is $337.50, which is further rounded down to $335.00 pursuant to section 336, subdivision (j). A final penalty of $335, therefore, shall be assessed against Employer for Citation 1, Item 1.

Citation 2

Rodriguez testified that he assessed the Severity for Citation 2 as high, because all Serious classification citations are assessed high Severity. Rodriguez's testimony is consistent with section 336, subdivision (a)(1)(B). Rodriguez further testified that he assessed Extent as Medium based on the "portion of the piece of equipment that's in violation." Rodriguez's testimony is found to be consistent with other credible evidence received during the hearing showing that Employer did not instruct its employees on hazard recognition, means of protection from injury or applicable first aid procedures for injuries resulting from exposure to hazards associated with demolishing and removing any of the dock levelers at the site. Rodriguez did not

provide an explanation, however, for why he assessed Likelihood as Medium, and therefore Employer shall receive maximum adjustment for Likelihood.

The base penalty for a Serious classification citation is $18,000 pursuant to section 336, subdivision (c). Employer is not entitled to adjustment for Extent because the Division correctly assessed it as Medium. Applying a 25 percent adjustment for Likelihood, the resulting gravity-based penalty is $13,500. Further adjustments for good faith, size and history consistent with the Division's proposed penalty worksheet yield an adjusted penalty of $8,100. Rodriguez testified that Employer received a 50 percent abatement credit because it changed its procedures following the accident. Applying the abatement credit to the adjusted penalty yields a final penalty of $4,050 for Citation 2, which will be assessed.

Citation 3

Serious classification violations that are deemed to have resulted in serious injury, illness or fatality are not subject to any further adjustment except for size, pursuant to section 336, subdivision (c)(7). Here, Rodriguez credibly testified that Employer should have received a size adjustment of 20 percent, but did not. Applying the 20 percent size adjustment results in a calculated penalty of $14,400, which will be assessed.

Conclusions

The evidence supports a finding that Employer violated section 3203, subdivision (a)(7), by failing to train employees on demolishing and removing dock levelers.

The evidence supports a finding that Employer violated section 1510, subdivision (c), by failing to instruct employees on recognition of job-site hazards, injury prevention, or applicable first-aid in the event of an injury in connection with demolition and removal of dock levelers.

The evidence supports a finding that Employer violated section 1734, subdivision (b)(1), by failing to have a qualified person shall make a survey of the structure to determine the condition of the framing, floors, and walls, and the possibility of an unplanned collapse of any portion of the structure prior to permitting employees to commence demolition work on dock levelers.

The Division correctly classified Citation 1, Item 1, as General and Citation 2 as Serious.

The Division met its burden of establishing that Citation 3 is properly classified as Serious Accident-Related.

Employer did not meet its burden of demonstrating that abatement of any of the violation would be infeasible, impractical or unreasonably expensive.

The Division did not correctly apply the penalty regulations and did not, therefore, propose reasonable penalties for Citation 1, Item 1, Citation 2, or Citation 3.

Orders

Citation 1, Item 1, is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Citation 2, Item 1, is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Citation 3, Item 1, is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Pursuant to the parties' stipulation, Citation 1, Item 2, is vacated, and the associated penalty is vacated as set forth in the attached Summary Table. Furthermore, in regard to Citation 1, Item 2, the parties stipulate that "the settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by employer. Neither Employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board. Finally, Employer agrees to waive any rights it might have pursuant to Labor Code section 149.5 or section 397 to petition for or recover costs or fees, if any, incurred in connection with this appeal."

Howard I. Chernin

Dated: 10/28/2022

Howard I. Chernin
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**