BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1333620**
PLANT CONSTRUCTION COMPANY, L.P. **300 NEWHALL STREET** **SAN FRANCISCO, CA 94124** **Employer**	**DECISION**

Statement of the Case

Plant Construction Company, L.P. (Employer) is a general contractor in the construction industry. On July 27, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Evan Li, commenced an accident investigation of Employer's work site located at 633 Folsom Street in San Francisco, California (jobsite). On December 12, 2018, the Division issued two citations to Employer. The citations allege: (1) Employer failed to adopt a written Code of Safe Practices which related to its operations; and (2) Employer failed to ensure that all machinery and equipment was not used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations.

Employer filed timely appeals of the citations, contesting the existence of the violations, the classification of the citations, and the reasonableness of the proposed penalties. Employer also asserted, for Citation 1, that the abatement requirements are unreasonable. Additionally, Employer asserted numerous affirmative defenses.[1]

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Jessup conducted the hearing from Sacramento, California, on February 15, 16, and 17, 2022, and March 16, 2022, with the parties and witnesses appearing remotely via the Zoom video platform. Lisa Baiocchi, attorney with the Prince Firm, represented Employer. Lauren Taylor and Nancy Steffan, attorneys for the Division, represented the Division. This matter was submitted for Decision on July 5, 2022.

[1] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Issues

1. Did Employer fail to ensure that all machinery and equipment was not used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations?

2. Did Employer fail to adopt a written Code of Safe Practices which related to its operations?

3. Did Employer demonstrate that the violation of California Code of Regulations, title 8, section 3328, subdivision (a)(2), was unforeseeable?

4. Did the Division establish that Citation 2 was properly classified as Serious?

5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

6. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

7. Did the Division establish that Citation 1 was properly classified as General?

8. Were the abatement requirements for Citation 1 reasonable?

9. Are the proposed penalties reasonable?

Findings of Fact[2]

1. On July 24, 2018, Jie Wang (Wang), Cedric Brown (Brown), and Darwin Rodriguez (Rodriguez) were employees of Employer.

2. Rodriguez was Wang's supervisor, he was the jobsite superintendent, and he was present at the jobsite on the day of the accident.

3. An accident involving Wang took place at the jobsite on July 24, 2018.

4. At the time of the accident, Wang was operating a core drill and Brown was observing Wang.

[2] Finding of fact number 1 is pursuant to stipulations by the parties.

5. Brown, an apprentice, was assigned to work with and learn from Wang.

6. The operator's manual for the core drill requires that the core drill be secured to the work surface before operating the drill.

7. The core drill can be secured using either an anchor bolt or a vacuum system. However, the vacuum system was not available at the jobsite.

8. The core drill itself has signs indicating that it must be secured prior to use.

9. Wang did not secure the core drill prior to operating it on the day of the accident and Wang believed that securing the core drill was optional.

10. Wang did not use the core drill often and did not use it at every worksite.

11. At the time of the accident, Wang was unfamiliar with the task of safely using the core drill.

12. Just prior to the injury, the drill became jammed. When the drill jammed, Wang stepped on the drill and continued drilling. The drill subsequently spun and injured Wang by fracturing his foot and dislocating his ankle.

13. Wang was hospitalized overnight for treatment of his injuries and received treatment in the emergency room.

14. The operator's manual for the core drill proscribes applying downward pressure and continued operation of the drill when the drill is jammed.

15. The core drill involved in the accident had variable drilling speeds.

16. Employer's operations include the use of equipment and tools generally.

17. Employer's written Code of Safe Practices (CSP) has various safety rules pertaining to equipment and tool use.

18. Employer's CSP required that Employer provide employees with accident prevention instructions periodically during employment and when required to perform new or unfamiliar tasks.

19. Employer's CSP required that employees ensure that tools and machines were inspected carefully before use and that employees ensure that all guards and other protective devices were in proper positions, adjusted properly, and operating smoothly.

20. Employer's CSP required that employees pay attention to warning signs and tags.

21. Wang had various titles including that of foreman and assistant superintendent.

22. Wang did not have general jobsite safety responsibilities.

23. Brown worked with Wang as his helper both on the day of the incident and on days prior to the incident.

24. Brown was told what to do by Wang and Wang was teaching Brown how to perform various tasks. Wang trained Brown on safety procedures for various tasks.

25. Wang observed Brown performing tasks to ensure that he was doing them safely.

26. Wang was responsible for ensuring Brown's safety while Brown worked as his helper and as an apprentice assigned to learn from him.

27. Employer expected Wang to provide Brown with guidance and instruction on the tasks being performed while working with Wang. Employer also expected Wang to direct Brown and ensure that he was working safely on the jobsite.

28. Employer does not plan on having Wang use a core drill in the future and Wang is no longer using the core drill for Employer.

29. Wang did not heed the signs on the core drill indicating that it must be secured prior to use.

30. Rodriguez did not verify that Wang had adequate training to ensure safe operation of the core drill prior to Wang's operation of the core drill.

31. Injuries that result from a violation of Employer's CSP could result in hospitalization.

32. Employer's injury and illness prevention plan had all necessary components.

33. Employer has more than 100 employees.

Analysis

1. Did Employer fail to ensure that all machinery and equipment was not used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations?

California Code of Regulations, title 8,[3] section 3328, subdivision (a)(2), provides:

> (a) All machinery and equipment:
> […]
> (2) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design.

The Alleged Violation Description (AVD) for Citation 2 provides:

> Prior to and during the course of the inspection, including, but not limited to, on July 24, 2018, the employer failed to ensure employee [*sic*] operate equipment under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations. A Milwaukee core drill was use [*sic*] to cut a hole in the floor without following the manufacturers [*sic*] recommendation [*sic*] use of bolts to secure the core drill to the floor. As a result, an employee suffered a serious injury.

The Appeals Board recently explained in *Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (July 13, 2022):

> The Division holds the burden of proving a violation by a preponderance of the evidence. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018).) The Division also bears the burden of proving employee exposure to a violative condition addressed by a safety order. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 1005890, Decision After Reconsideration (December 1, 2016).) To establish a violation of the cited regulation, the Division must demonstrate (1) the citation concerns a piece of machinery or equipment; (2) the machinery was used or operated; and (3) the use

[3] All references are to California Code of Regulations, title 8, unless otherwise indicated.

> or operation of the machinery was under conditions of speeds[,] stresses, loads, or environmental conditions contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design. (§ 3328, subd. (a)(2).)

In *Guy F. Atkinson Construction, LLC, supra,* Cal/OSHA App. 1332867, the Appeals Board first examined whether the citation concerned a piece of machinery or equipment and whether the machinery or equipment was used or operated. The Appeals Board found that a forklift constituted machinery or equipment and that operation of the forklift by an employee constituted use. (*Id.*) The Appeals Board then identified that the dispute, in that matter, focused on whether the forklift was operated under conditions of speeds, stresses, loads, or environmental conditions contrary to the manufacturer's recommendations. (*Id.*) The Appeals Board explained, after careful deliberation of an evidentiary issue, that the contents of the operator's manual were evidence of the manufacturer's recommendations. (*Id.*) Further, it explained that the manufacturer's recommendation proscribed operating the forklift near soft edges that could collapse. (*Id.*) The Appeals Board then focused its inquiry on environmental conditions, and explained:

> Dictionaries define the word "environmental," in the use relevant here, to mean "the circumstances, objects, or conditions by which one is surrounded" and" "relating to or arising from a person's surroundings." The word "condition" is defined as, relevant here, a "state of being" or "attendant circumstances." Based on the plain meaning of the words within the regulation, it is clear that environmental conditions concerns one's surroundings or surrounding circumstances.

(*Id.*)

The Appeals Board found that the forklift was operated by the forklift operator near a soft edge that could collapse. (*Id.*) Therefore, the Appeals Board concluded that those facts constituted operation in environmental conditions against the manufacturer's recommendations and that the forklift operator was exposed to the hazard under both the actual exposure standard and reasonably predictable access exposure standard. (*Id.*)

In the instant matter, it is found, and there is no dispute, that Wang was operating the core drill involved in the accident. Therefore, the citation concerns equipment and the equipment was in use or operation.

Turning next to the manufacturer's recommendations, the Division submitted into the record a copy of the operator's manual for the core drill. (Ex. 4.) The operator's manual for the

drill clearly states "WARNING To reduce the risk of injury always secure the rig to the work surface to help prevent personal injury and to protect the rig. An unsecured rig could rotate during coring and possibly cause injury." (Ex. 4.) Further, the core drill included several warning signs on the device itself instructing operators to both read the operator's manual and to secure the device before operation. (See Ex. 38 and Ex. 40.) Additionally, Rodriguez, Employer's superintendent that was present on the day of the accident, testified that the drill always needs to be secured.[4]

Brown and Wang, the two employees who were percipient witnesses to the accident, testified that the core drill was not secured at the time of the accident. Despite the clear indication in the manual and on the drill itself, Wang testified that, even at the time of hearing, he believed that use of the anchor bolt was optional based on conditions. Further, Wang testified that he did not regularly use an anchor bolt. Wang explained that, where the floor was not smooth, an anchor bolt was needed to "hold the drill tight," but if the floor was smooth, an anchor bolt was not required.[5]

Wang's failure to secure the core drill was not the only manner in which the core drill was operated contrary to the manufacturer's recommendations. The operator's manual also warns, "When the bit is jammed, stop applying downward pressure and turn off the tool. Investigate and take corrective actions to eliminate the cause of the bit jamming." (Ex. 4.) Employer's Accident/Property Damage Investigation Report provides the following:

> Jie was using the core drill to core the concrete slab on the 6th floor of the building. The core drill was not anchored to the floor. As Jie was coring the floor, the core drill started wobbling so Jie put his feet on the core drill base to stabilize it. As Jie continued coring, the drill got stuck and the core drill base started spinning while Jie was still on it with both his feet. As it was spinning [Jie] lost control and got his left foot caught around the base causing injury to his foot and fell.

(Ex. J3.)

As Employer's Accident/Property Damage Investigation Report indicates that the "drill got stuck" while drilling, it is found that the drill had, in fact, jammed at the time of the accident.

[4] Both Rodriguez and the operator's manual described two methods of securing the drill, either by use of an anchor bolt or use of a vacuum system. However, Rodriguez testified that the vacuum system was not available at the jobsite where the accident took place.

[5] Although both the manual and Rodriguez explained that the core drill may be secured using either an anchor bolt or a vacuum system, it is inferred that Wang's testimony regarding optional use of the anchor bolt was meant to explain optional securing of the core drill. This inference is drawn because Wang made no reference to the vacuum system, the vacuum system was not available at the jobsite, and Wang did not secure the drill at the time of the accident.

(Ex. J3.) As noted in Employer's accident report, Wang stepped on the drill when it was jammed. (Ex. J3.) The finding that Wang stepped on the drill and continued to operate the drill is further supported by Brown's account of the series of events that led to the accident. Brown testified credibly that, at the time of the accident, he "came back to [Wang] doing his – doing some work, so [Brown] stood back, let [Wang] do some work, the machine started to rock a little bit, [Wang] put his foot on it and it spun out on [Wang]." Brown's description of the series of events is supported by a written statement made by Brown to the Division's inspector, Evan Li (Li), on July 27, 2018, that he confirmed at hearing to be his own and to be accurate. (See Ex. 7.)

Because Wang stepped on the drill while it was jammed, he failed to heed the instructions to stop applying downward pressure and turn off the drill when the drill jammed.

As discussed above, equipment was in use at the time of the accident and manufacturer's recommendations for that equipment that were not followed. Therefore, it is next necessary to consider whether the operation in question constitutes use under conditions of speeds, stresses, loads, or environmental conditions contrary to the manufacturer's recommendations.

As set forth in *Guy F. Atkinson Construction, LLC, supra,* Cal/OSHA App. 1332867, environmental conditions means the surrounding circumstances. Whether the core drill was secured during operation constituted the surrounding circumstance of the core drill's operation. Therefore, operation of the core drill by Wang while it was unsecured was operation in an environmental condition contrary to the manufacturer's recommendation to always secure the core drill prior to use. (Ex. 4.)

Additionally, the manufacturer's recommendations for the core drill prohibit continued operation of the core drill if it jams and instructs an operator to cease applying downward pressure at the time of a jam. These recommendations pertain to the surrounding circumstances of operation of the core drill. In the instant matter, the evidence demonstrates that the core drill jammed, that Wang continued operation of the core drill, and that Wang failed to cease applying downward pressure by stepping on the core drill when it jammed. This operation constitutes operation of the drill in environmental conditions contrary to the manufacturer's recommendations. (Ex. 4.)

Moreover, operation of the drill in environmental conditions against the manufacturer's recommendations was not the only concern here. When Wang stepped on the core drill while it was jammed, he added additional stress to the operation of the drill by adding his weight, which is also an additional load. (See *KS Industries, L.P.*, Cal/OSHA App. 1084531, Denial of Petition for Reconsideration (Jan. 10, 2019).) Therefore, stepping on the drill during its operation constitutes an added load or stress to the operation of the drill. As noted above, the manufacturer's recommendations are to stop applying downward pressure and turn off the drill if

the drill jams. (Ex. 4.) Therefore, when Wang added the stress or load of stepping on the drill while it was jammed and continued to operate the drill, the drill was operated under a stress or load that was contrary to the manufacturer's recommendations.

Employer asserts that the drill was not operated at a speed contrary to the manufacturer's recommendations. Employer argues that turning the drill "on" and operating the drill does not constitute a speed of operation and that a speed is distinct from merely being "on" and in operation. Safety orders are given liberal interpretation for the purpose of achieving a safe working environment. (*Carmona v. Industrial Safety* (1975) 12 Cal.3d 303, 313.) Speed is defined, as pointed out in Employer's post-hearing brief, to mean a "rate of motion." (www.merriam-webster.com <accessed 7-19-2022>.) Employer's post-hearing brief states:

> The core drill manual addresses the speed of the core drill under "specifications". (Exhibit 4 at 5.) It states that speeds range from a low of 300 to a high of 1200 (no measurement provided). Notably, there is a warning in the operation section to "not shift speeds when the … motor is on." (Exhibit 4 at p. 10.)

Employer concludes that having the motor simply turned on is differentiated by the operator's manual. However, Employer fails to address the evidence showing that the motor for the drill was not merely "on," but it was also engaged and being operated by Wang. Because the evidence shows that the core drill was in operation at the time of the accident, it is not reasonable to find that it did not have a speed while it was drilling. Further, because the drill spun during the accident with sufficient force to injure Wang, resulting in a broken foot and dislocated ankle, it would be unreasonable to say that the drill merely had the motor on and had no operational speed. (See Ex. J3.) Accordingly, it is concluded that the operation of the drill by Wang was in excess of a manufacturer-recommended speed, as the manufacturer's recommendation proscribed operation of the drill where it was not secured and, when jammed, to "turn the tool off." (See Ex. 4.)

Pursuant to the foregoing, the Division has met its burden of proof to establish that Employer failed ensure that equipment was not operated or used under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations. Accordingly, Citation 2 is affirmed.

2. Did Employer fail to adopt a written Code of Safe Practices which related to its operations?

Section 1509, subdivision (b), provides:

> Every employer shall adopt a written Code of Safe Practices which relates to the employer's operations. The Code shall contain language equivalent to the relevant parts of Plate A-3 of the Appendix.

The AVD for Citation 1 provides:

> Prior to and during the course of the inspection, including, but not limited to, on July 24, 2018, the employer failed to adopt a written Code of Safe Practices that relates to the employer's operations for core drilling. Employers [*sic*] Code of Safe Practices did not contain rules requiring employees to follow manufacturers [*sic*] recommendations or securing the core drill.

In order to establish a violation of section 1509, subdivision (b), the Division must establish (1) that an employer failed to have a written CSP; (2) that the CSP did not relate to an employer's operations; (3) that the employer did not adopt the CSP; or (4) that the CSP fails to contain language equivalent to the relevant parts of Plate A-3 of the Appendix title 8 of the California Code of Regulations.

a. Did Employer have a Written Code of Safe Practices?

In the instant matter, Employer had a written CSP and a copy was submitted to the record as Exhibit J5. The Division did not dispute that Employer had a written CSP, rather, the Division asserted that Employer failed to have a CSP sufficiently related to its operations.

b. Was Employer's Code of Safe Practices Related to its Operations?

Turning to the next element, the Division argues that Employer failed to have CSP sufficiently related its operations because it did not have provisions for the safe operation of the core drill.

California Code of Regulations, title 8, chapter 4, subchapter 4, Appendix A, Plate A-3 (Plate A-3), contains a list of general safety rules and a parenthetical that provides: "This is a suggested code. It is general in nature and intended as a basis for preparation by the contractor of a code that fits his/her operations more exactly." In *Hood Corporation*, Cal/OSHA App. 89-236, Decision After Reconsideration (June 22, 1990), the Appeals Board explained:

> The parenthetical in Appendix A-3 indicates clearly that mere adoption of the rules set forth there is not enough. The Employer must prepare a code that fits its operations more exactly. Section 1509(b) defines the required amount of 'exactness' by mandating that each code must relate to the employer's operations.

(Emphasis in original.)

The Appeals Board has further explained "[s]ection 1509(b) does not contain a litmus test for determining what constitutes an 'operation' for a particular employer. Thus, what constitutes an 'operation' will depend on the facts and circumstances of each case. … The next issue is whether Employer's Code of Safe Practices 'related to' the operation[.]" (*Id.*) For a Code of Safe Practices to relate to the alleged hazardous activity, it must contain rules that "instruct employees how to avoid each of the potentially dangerous tasks[.]" (*Id.)*

Employer's CSP is separated into many different sections. (Ex. J5.) Of note, Employer's CSP provides, in relevant part:

> 1. PLANT CONSTRUCTION COMPANY, L.P.
> General Safety Rules
> …
> - *All employees shall be provided accident prevention instructions* at the beginning of employment, *periodically during employment and when required to perform a new or unfamiliar task.*
>
> …
> - *Inspect tools and machines carefully before using.* If one is defective, do not use it. Remove the tool from the area, turn off the machine and report the problem to your supervisor immediately. Watch out for yourself; watch out for others. *Be alert to ensure that all guards and other protective devices are in proper position, adjusted properly and operating smoothly.*
>
> …
> - *Employees shall be alert to see that all guards and other protective devices are in proper places and adjusted and shall report deficiencies promptly to their supervisor.*
>
> …
> - *Warning signs and tags are for the protection of employees and other workers. Pay attention to signs posted on the job site.*
>
> …

(Ex. J5. Emphasis added.)

Pursuant to the foregoing portions of Employer's CSP, it is evident that Employer's CSP contemplates the use of tools and equipment. Accordingly, the core drill, as equipment or a tool, is contemplated by the CSP as the CSP addresses the hazards associated with the operation of the

core drill. As Employer has a CSP related to its operations, it is necessary to next examine whether Employer adopted its CSP.

c. Did Employer Adopt a Code of Safe Practices?

The next question is whether Employer adopted the CSP within the context of section 1509, subdivision (b). The dictionary defines adopt to mean "to take up and practice or use," or "to accept formally and put into effect." (www.merriam-webster.com <accessed 7-19-2022>.) In contemplation of whether Employer adopted its CSP, it is necessary to consider whether Employer put into effect or practice the various provisions of its CSP.

Employer's CSP sets forth a number of safety rules pertinent to the consideration of whether the CSP was adopted by being put into effect. Because of the importance of the implication of whether Wang was a supervisor to the question of whether the CSP was adopted by Employer, whether Wang was a supervisor should be considered first. Thereafter, each of the rules related to the use of the core drill must be considered to examine whether Employer adopted the CSP.

(1) Was Wang a supervisor within the context of the Occupational Safety and Health Act?

As an important matter in the question of adoption of the CSP, it is necessary to consider whether Wang was a supervisor. A supervisor's violation of a safety rule is attributed to an employer and such a violation supports the conclusion that an employer has failed to enforce its safety program. (*PDM Steel Service Centers, Inc.*, Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) Therefore, if Wang was a supervisor, his actions are imputed to Employer.

In *Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020), the Appeals Board explained:

> The Appeals Board has long held that a supervisor means someone who has the authority or responsibility for the safety of other employees. (*PDM Steel Service Centers, Inc.*, Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) Further, in *City of Sacramento, Dept. of Public Works,* Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998), the Appeals Board discussed a series of prior cases to explain that the determination of supervisor is based on a factually specific analysis and is not determined by title or job description alone. In *Granite Construction Company,* Cal/OSHA App. 84-648, Decision After Reconsideration (Mar. 13, 1986), the Appeals Board held

> that an employee was a supervisor where he was deemed in charge of the work site because he was responsible for controlling the work site, bringing materials to the work site, and where work did not begin until that employee instructed the crew on what was to be done. In *Contra Costa Electric, Inc.*, Cal/OSHA App. 90-470, Decision After Reconsideration (May 8, 1991), the Appeals Board held that it is the cumulative nature of an employee's responsibilities, rather than the traditional power to hire and fire, that determines whether an employee is a supervisor. Finally, in *Jerry W. Winfrey, dba: Jerry's Electrical Service*, Cal/OSHA App. 91-1287, Decision After Reconsideration (July 29, 1993), the Appeals Board found an employee to be a supervisor where he ordered the other employees to work outside a building shortly before an accident, because that employee was empowered by the employer to determine the means to be used to reach overhead conduits and fixtures. In these cases, the Appeals Board has made it clear that it is not necessary for a supervisor to have particular tasks or responsibilities beyond the threshold issue of authority or responsibility for safety of other employees. (*City of Sacramento, Dept. of Public Works*, *supra*, Cal/OSHA App. 13-2446.)

In the instant matter, the issue of whether Wang was a supervisor was in dispute. The parties put on substantial evidence regarding Wang's various titles, including the title of foreman and assistant superintendent. Employer put on evidence from various witnesses to assert that Wang's titles were related to a rate of pay and not job responsibilities. Additionally, the Division put on evidence that its inspector, Li, was initially told that Wang was a foreman by both Rodriguez and Wang. Li testified that he was told by Rodriguez that Wang had the power to send employees home or fire them and that Wang held safety meetings. Li testified that Wang told him during an interview that Wang had control over the jobsite. However, Wang and Rodriguez testified at hearing and refuted that Wang had control over the jobsite. Wang and Rodriguez also refuted that Wang had the ability to send employees home or fire them. The preponderance of the evidence did not support that Wang was generally responsible for jobsite safety for other general employees on the jobsite.

However, there was no dispute that Brown, an apprentice, was assigned to work with Wang on the day of the accident and days prior to the accident. Brown was characterized by several of Employer's witnesses, including Rodriguez and Peter Lucchese (Lucchese), Employer's director of field operations, as a helper for Wang. Rodriguez testified that he would have expected someone like Wang, who had approximately 30 years of industry experience, to be able to provide all the guidance required for someone like Brown, who needed more supervision because he had only two months of industry experience. Additionally, Lucchese explained that it was expected that Wang would communicate in a clear and concise manner to a helper what the helper would be doing on a given day.

Brown testified credibly that "[Wang] would just – basically tell me what to do as a supervisor, you know, showing me things around the jobsite, introducing me to the – to the construction industry, basically just teaching me things, stuff like that." Further, Brown testified that Wang assigned him work and that Wang provided training to Brown for tasks that he did not know how to perform or that were new to him. Brown testified that Wang trained him on safety procedures on how to use the core drill involved in the accident. Brown was asked about how Wang would observe him after Wang provided equipment training to Brown. Brown testified:

> Just - just like as if you were - if you teach somebody how to use something, some of the equipment, you would want to supervise them, so he would always stay around until like, you know, he would always be around like unless somebody called him on another place on the radio somewhere else. If I would use skill saw or anything, he would always supervise and stay around. So, if I was doing it incorrectly, he would - he would correct me. He would fix me and make sure I'm doing it correctly, yeah.

Brown also affirmed that Wang watched him to ensure that he was doing work safely and without risking injury to himself.

Wang clearly refuted having a general responsibility for jobsite safety. However, in distinguishing the difference between a foreman's duties and his own, Wang explained that foremen were generally responsible for ensuring that employees followed Employer's safety procedures. Wang offered that a foreman has to "chase" employees to ensure they wore hardhats or appropriate shoes. When explaining his own duties, Wang testified credibly that he was responsible for ensuring that Brown did "the right thing" and that he would have to "chase" Brown if Brown failed to wear a hardhat or other equipment. Further, Wang testified:

> So when - when anybody new, you know, on the new equipment *so I had to make sure, you know, he can control the equipment before I can let him do the work.* Instead, I had to do the work because I'd never seen him using that type of equipment. So I had to show him how to use - to operate the equipment before I can let him try it. That's what - that's what I understand just, you know, how to teach him, to train him to do whatever, you know, type of work.

(Emphasis added.)

Pursuant to the foregoing, the particular facts of this matter demonstrate that both Wang and Brown believed and acted as though Wang had responsibility for Brown's safety while he

was working as Wang's helper and apprentice on the jobsite.[6] Further, it is inferred that Employer expected Wang to act in such a manner as it assigned Brown to work with Wang as a helper to assist in performing tasks at the direction of Wang. Accordingly, it is found that Wang was a supervisor.

(2) Were the rules of Employer's Code of Safe Practices put into effect?

To consider whether the CSP was adopted by being put into effect, it is necessary to examine each rule indicated above as related to the use of the core drill. Therefore, the following questions are posed: (1) whether employees were provided accident prevention instructions periodically during employment and when required to perform new or unfamiliar tasks; (2) whether Employer required that tools and machines were inspected carefully before use and that Employer required that employees ensure that all guards and other protective devices were in proper positions, adjusted properly, and operating smoothly; and (3) whether Employer ensured that employees paid attention to warning signs and tags.

(a) Whether employees were provided accident prevention instructions periodically during employment and when required to perform new or unfamiliar tasks.

Employer's CSP required that employees must be provided with accident prevention instructions periodically and when they were new to a task or unfamiliar with the task. The employees involved in the accident are Wang and Brown. Brown was being trained by Wang in the use of the core drill and new to the task. Although there was testimony that Wang secured the core drill on the day prior to the accident, the failure to secure the core drill on the day of the accident while Wang was still supervising Brown shows that Wang was not operating the core drill safely. Further, stepping on the core drill while it was jammed and continuing its operation, as observed by Brown, was also against the manufacturer's recommendations. As discussed above, a supervisor's actions are imputed to an employer. As such, Wang's training of Brown is imputed to Employer. As the training Brown received was in contravention to the manufacturer's instructions and lead to the accident, it cannot be concluded to constitute accident prevention training in compliance with the CSP.

Turning next to Wang, it is necessary to consider whether Wang received accident prevention instruction for the operation of the core drill. Therefore, the question posed first is whether Wang was unfamiliar with the task of the safe operation of the core drill.[7] Wang had

[6] It is noted that this finding is limited to the particular facts of this case and the fact that Brown was an apprentice working with Wang is not, alone, determinative. Rather, as noted herein, the testimony of Brown and Wang is credited as to the nature of the interaction between Brown and Wang and the additional witness testimony characterizing Brown as a helper receiving instruction and direction from Wang supports the ultimate conclusion.

used the core drill prior to the accident, which was supported by the testimony of Wang and Rodriguez. Indeed, Rodriguez testified that he had observed Wang using the core drill on the day prior to the accident and that Wang had secured the core drill on that day. However, Wang testified that he believed that securing the core drill was optional and he stated that he used the core drill infrequently. This calls Wang's familiarity with the safe operation of the core drill into question. Further, Wang's actions at the time of the accident, standing on the core drill while it was jammed and continuing to operate the drill despite the jam, further demonstrate that Wang was not familiar with the safe operation of the core drill. Finally, Wang testified that he was not familiar with the operator's manual for the core drill. Therefore, it is found that Wang was unfamiliar with the safety requirements for safe operation of the core drill.

As Wang was unfamiliar with the task of safely using the core drill, Employer's CSP required that he receive training prior to performing the task. The record does not support the conclusion that Wang received accident prevention training in accordance with the CSP. Wang's lack of familiarity with the operator's manual and actions at the time of the accident support the inference that Wang did not receive accident prevention training prior to operation of the core drill.[8]

Pursuant to the foregoing, Employer failed to adopt the provision of its CSP regarding providing accident prevention training to employees that were new to tasks or unfamiliar with tasks.

(b) Whether Employer required that tools and machines were inspected carefully before use and that Employer required that employees ensure that all guards and other protective devices were in proper positions, adjusted properly, and operating smoothly.

Employer's CSP required, in pertinent part, that all tools be inspected carefully and that all protective devices be put in proper position. Employer's post-hearing brief acknowledges that "anchor bolts for the core drill are essentially protective devices." Therefore, Wang's failure to secure the core drill constituted a failure to ensure that a protective device was in position. As a

[7] The record was not substantially developed by the parties on the issue of whether Wang received instructions periodically during his employment.

[8] The training of Wang to safely operate the core drill is called into further questions by Wang's testimony regarding the discipline record that was issued to Wang as a result of the accident. (See Ex. N.) Employer submitted a discipline record for Wang that report the corrective action for the misuse of the drill included retraining, but Wang testified that he had not been retrained on the use of the core drill. Further, Wang testified that no one had spoken to him about the proper use of the core drill. Although Employer put on evidence that it does not plan on having Wang use a core drill in the future, an explanation was not provided as to why the discipline record indicates retraining where retraining on the drill was not provided.

supervisor to Brown, engaged in training Brown at the time of the accident, Wang's failure to follow Employer's CSP is imputed to Employer.

As discussed above, Employer additionally failed to ensure that Wang was familiar with the requirement to always secure the core drill and, thereby, failed to ensure that Wang would use the protective device, the anchor bolt. Rodriguez testified that, prior to obtaining the core drill for Wang's use, he merely asked Wang whether Wang had used the core drill previously. The record does not support that Rodriguez, as Wang's supervisor, took action to ensure that Wang was trained on the use of the core drill, familiar with the operation manual, or otherwise ensure that Wang was aware of the manufacturer's recommendations. Therefore, Employer did not ensure that Wang would follow the requirement to secure the core drill before its operation.

(c) Whether Employer ensured that employees paid attention to warning signs and tags.

Employer's CSP required that it ensure employees heed all warning signs and tags. The drill had clear warning signs printed on it indicating that the drill should be secured prior to operation. (See Ex. 38 and Ex. 40.) As Wang was a supervisor, training Brown, his failure to heed the warning signs is imputed to Employer.

Additionally, the drill signage indicates that the operator's manual should be consulted before using the drill. (See Ex. 38 and Ex. 40.) Employer failed to provide Wang with the operator's manual and ensure his familiarity with the manual prior to his operation of the drill. Therefore, Employer failed to ensure that Wang could comply with the warning signs.

Accordingly, the Division has met its burden of proof to establish that Employer failed to adopt its written CSP by failing to put into effect or practice the safety rules contained within the CSP. As such, Citation 1 is affirmed.[9]

3. Did Employer demonstrate that the violation of California Code of Regulations, title 8, section 3328, subdivision (a)(2), was unforeseeable?

In *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, the Court of Appeal recognized that where an employee's violation of a safety order was unforeseeable, the employer was not held responsible for the violation. In *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045, the elements of the defense recognized in *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.*, *supra,* 123 Cal.App.3d (*Newbery* Defense), were articulated. As explained by the Appeals

[9] It is noted that the fourth element considering whether the CSP has rules sufficiently equivalent to the appendix is not discussed herein because the failure to adopt the CSP is sufficient to sustain the violation and the parties did not submit arguments as to the equivalence of the CSP to the appendix.

Board in *Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013):

> 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.

As a preliminary consideration, the *Newbery* defense is unavailable where the violation is caused by a supervisor. In *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445, the Appeals Board explained:

> However, an employer cannot utilize the *Newbery* defense when a supervisor commits the violation. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243 [employer necessarily fails the second prong of the *Newbery* defense when a supervisor violates a safety order].) The Board has also previously considered this issue and denied the Newbery defense when a supervisor committed the violation. (See *Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) [*Newbery* defense fails since supervisor's knowledge is imputed to employer].)

As discussed above, Wang was a supervisor. As such, a violation by Wang establishes that Employer failed to exercise supervision adequate to ensure safety and therefore, Employer cannot establish that it exercised adequate supervision to establish element 2 of the *Newbery* Defense.

Additionally, regarding element three, Employer's efforts to ensure employee compliance with its safety rules were insufficient. As discussed above with regards to the CSP, Wang's actions as a supervisor are imputed to Employer. Therefore, Employer failed to ensure that Brown was trained in a manner to ensure compliance with Employer's safety rules. Moreover, even if Wang were not a supervisor, as discussed above, Rodriguez, as Wang's supervisor, failed to ensure that Wang was trained on the use of the core drill, that he was familiar with the operation manual, and that he was otherwise familiar with the requirement to always secure the

core drill and the procedure to follow when the core drill jams. The failures to adopt the CSP, discussed in more detail above, establish that Employer did not ensure compliance with its safety rules.

Finally, the violation was foreseeable. Wang was unfamiliar with the operator's manual for the core drill and, even at the time of hearing, believed that securing the core drill was optional. Wang's lack of familiarity that persisted through to the time of hearing demonstrates that Employer failed to ensure employee compliance with safety rules and heed the manufacturer's recommendations. Where an employee is unfamiliar with the manufacturer's recommendations, it is reasonable to conclude that a violation of those recommendations is foreseeable. Additionally, because Wang was a supervisor and, as noted in *Brunton Enterprises, Inc*., *supra,* Cal/OSHA App. 08-3445, a supervisor's knowledge is imputed to the employer. As such, Wang's knowledge that the drill was unsecured at the time of the accident is imputed to Employer and, therefore, the violation was foreseeable.

As noted above, to establish the *Newbery* Defense, Employer must establish that none of the four elements exist. Therefore, the existence of just one element is sufficient to find that the *Newbery* Defense does not apply and, as three elements are found to have existed, it is unnecessary to examine further to consider whether the first element existed. Accordingly, Employer failed to meet its burden of proof to establish the requisite elements of the *Newbery* Defense.

4. Did the Division establish that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), 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, supra,* Cal/OSHA App. 1237932).)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Li testified that he was an Associate Safety Engineer for the Division and that he was current on his division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citation as Serious. Li testified that employees exposed to the hazard identified in Citation 2 could suffer a serious injury. However, Li did not testify that there was a realistic possibility of serious physical harm. As such, it is necessary to examine whether the record supports a finding that Wang had actual serious physical harm and, thereby, confirming that it was not only a realistic possibility but an actuality that serious physical harm could result from the hazard.

Employer's Accident/Property Damage Investigation Report indicates that, as a result of the accident, Wang suffered a broken foot and dislocated ankle and was transported by ambulance to a medical facility. (Ex. J3.) Employer's Report of Occupational Injury or Illness form indicates that, as a result of the accident, Wang suffered a "[f]racture of the foot, dislocated ankle, and severe bruising." (Ex. 37.) Additionally, Employer's Report of Occupational Injury or Illness form indicates that Wang was hospitalized as an inpatient overnight and treated in the emergency room. (*Id.*) Further, Wang testified that he was home as a result of the accident at the

time that Li interviewed him and that he did not return to the jobsite for six months after the accident. Therefore, it is found that Wang suffered a broken or fractured foot that resulted in inpatient hospitalization for other than medical observation.[10] This constitutes serious physical harm pursuant to Labor Code section 6432 and, therefore, demonstrates that serious physical harm was not merely a realistic possibility, but an actuality in this matter.

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

5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

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

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

In *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *Ventura Coastal, LLC*, Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017), the Appeals Board explained:

> A supervisor's knowledge of a hazard is imputed to the employer. [Citation.] In *Lift Truck Services Corporation*, Cal/OSHA App. 93-384, Decision After Reconsideration (March 14, 1996) the Appeals Board provided the rationale for the knowledge requirement employers may use to rebut the presumption of a serious injury: "With the purpose of the Act in mind, the Board reads the knowledge element of Labor Code section 6432 to encourage employers to

[10] This finding is further supported by Li's testimony that Wang's injury included broken bones that required surgery and that Wang spent the night in the hospital.

> conduct reasonably diligent inspections for violative conditions in the workplace so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty."

As discussed above, Wang was a supervisor at the time of the accident and his knowledge of the violation is imputed to Employer. Additionally, Employer failed to take all steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation by failing to establish and ensure that Wang was familiar with and following the manufacturer's recommendations for operation of the core drill. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

6. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In *Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, the Appeals Board explained:

> 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."

(Citations omitted.)

Labor Code section 6302,[11] subdivision (h), defines "serious injury" as follows:

> "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

[11] Labor Code section 6302 was amended effective January 1, 2020. However, the analysis relied upon herein for the definition of "serious injury or illness" uses the definition effective on the date of issuance of the citation, December 12, 2018.

In the instant matter, the record does not provide sufficient evidence as to the duration of Wang's time in the hospital. While Exhibit 37 shows that Wang stayed in a hospital overnight, it does not establish that his stay was in excess of 24 hours. It is noted that serious injury and serious physical harm are distinct under the Labor Code. Further, while Labor Code section 6432 [serious physical harm] contemplates inpatient hospitalization for other than medical observation, the version of Labor Code section 6302 [serious injury] that was in effect at the time of the issuance of the citations contemplates that serious injury requires hospitalization for a period in excess of 24 hours. Neither Li's testimony nor the facts of the case sufficiently demonstrated that Wang suffered a serious injury because it is not established that the injury that resulted from the accident met the definition in Labor Code section 6302. Therefore, the Division failed to establish a causal nexus between a violation and a serious injury. Accordingly, the characterization as Accident-Related is unsupported.

7. Did the Division establish that Citation 1 was properly classified as General?

Section 334, subdivision (b), provides: "General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."

The adoption of a CSP by requiring compliance with its rules has a relationship to occupational safety and health of employees as it is evident from the facts of this case that a failure to follow the rules of a CSP can result in injury because an injured did occur. As the Division determined that this violation was not of a "serious nature" and neither party addressed this issue in argument or post-hearing briefing, there is nothing to upset that determination. Therefore, the classification of General is affirmed.

8. Were the abatement requirements for Citation 1 reasonable?

Labor Code section 6600 provides:

> Any employer served with a citation or notice pursuant to Section 6317, or a notice of proposed penalty under this part, or any other person obligated to the employer as specified in subdivision (b) of Section 6319, may appeal to the appeals board within 15 working days from the receipt of such citation or such notice with respect to violations alleged by the division, abatement periods, amount of proposed penalties, and the reasonableness of the changes required by the division to abate the condition.

The question posed for abatement is whether an employer has subsequently complied with the requirements of the safety order or eliminated the alleged violation in some other

manner. The evidence at hearing demonstrated that Li was unfamiliar with the current status of abatement of Citation 1. Further, although Wang testified at hearing that he believed securing the core drill was optional based on surface conditions, the testimony of Employer's other witnesses supported that Wang was no longer operating the core drill. Further, several of Employer's other witnesses testified that Employer does not intend to have Wang operate the core drill again. Additionally, Brown testified that he is not presently working for Employer. As the violation of section 1509, subdivision (b), stemmed from Wang's actions regarding the use of the core drill and Wang is no longer using the core drill for Employer and Brown is no longer an employee of Employer, it is not readily apparent that Employer has failed to abate the violation. Accordingly, the issue of the reasonableness of abatement is found moot at this time.

9. 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. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra*, Cal/OSHA App. 1092600.)

However, the Appeals Board has held that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board... ." (*DPS Plastering, Inc*., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to offer evidence in support of its determination of the penalty since the Board has historically required proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

Although the Division submitted its Proposed Penalty Worksheet, there was no testimony that the penalties were calculated in accordance with the Division's policies and procedures based on the penalty-setting regulations. (See *M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014), and *Ventura Coastal, LLC, supra,* Cal/OSHA App. 317808970.) As such, it is necessary to examine the evidence adduced at hearing to determine the reasonableness of the penalties.

Section 336, subdivision (b), provides that a base penalty will be set initially based on the Severity of the violation and thereafter adjusted based on the Extent and Likelihood. Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
>
> […]
>
> ii. 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.
>
> […]
>
> (2) Extent.
>
> […]
>
> ii. 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.

(3) Likelihood.

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

a. Citation 1

For Citation 1, Li testified that Severity was rated as High because injuries from the violation could result in hospitalization. However, the Division did not present evidence of the potential duration of hospitalization that could result from the injuries.[12] Li testified that the Division made a penalty reduction of $500 for Extent because the Division rated Extent as Low. Li testified Extent was rated as Low because it was an isolated violation of the safety standard. Li testified that Likelihood was rated as High because "the accident did happen." The Division did not present evidence as to how the number of employees exposed to the actual hazard created by the violation affected the Likelihood in contemplation of the extent to which the violation has in the past resulted in injury, illness, or disease to employees of Employer and/or the industry in general.

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.) Where the Division does not provide evidence to support its proposed penalty, it is appropriate that Employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.)

[12] Although Li testified that injuries could result in hospitalization, he did not offer further details about the duration of the potential hospitalization.

Pursuant to section 336, the Division established that the injuries could result in hospitalization, but did not establish that such hospitalization would exceed 24 hours. As such, Severity is found to be Medium, which results in a Base Penalty of $1,500. (§336, subd. (b).) As Extent was rated as Low by the Division, providing the maximum penalty reduction for Extent, Employer is entitled to a 25 percent penalty reduction. (*Id*.) However, as the Division failed to establish that the Likelihood was based on the factors set forth in section 335, the Likelihood shall be assessed as Low, for a further 25 percent reduction to the Base Penalty. (*Id*.) The resulting Gravity-based Penalty is $750.

Section 336 also provides adjustment factors for Good Faith, Size, and History.

Good Faith

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD—Effective safety program; FAIR—Average safety program; POOR—No effective safety program.

Section 336, subdivision (d)(2), allows for a reduction of 15 percent for a Fair rating of Good Faith. Li testified that Employer had an injury and illness prevention program that had all necessary components. However, Li testified that when calculating Good Faith, he determined that Employer's injury and illness prevention program was average. As discussed above, Employer failed to adopt various rules of its CSP. Therefore, the evidence supports the conclusion that Employer's safety program was average. Accordingly, Good Faith is determined to be Fair and the Gravity-based Penalty shall be reduced by 15 percent.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that a Gravity-based Penalty may be reduced for employers with 100 or fewer employees, but not for employers with more than 100 employees. Li testified that Rodriguez informed him that Employer had more than 100 employees and this was not refuted by Employer. As such, the Gravity-based Penalty may not be reduced for Employer's Size.

History

Section 335, subdivision (d), provides:

(d) The History of Previous Violations--is the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:

GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.

FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.

POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

For the purpose of this subsection, establishment and the three-year computation, shall have the same meaning as in Section 334(d) of this Article.

Section 336, subdivision (d)(3), provides a 10 percent reduction to the Gravity-based Penalty for employers with a Good rating for History and a five percent reduction to the Gravity-based Penalty for employers with a Fair rating for History. Li testified "History of five is the – there's previous inspections that resulted in citations." The Division did not put on further evidence supporting its rating of Employer's History. Therefore, the Division did not establish sufficient evidence to support the Fair rating. As such, Employer's History shall be assessed as Good, as a maximum credit, and Employer is entitled it to a 10 percent reduction of the Gravity-based Penalty.

The additional adjustment factors for Good Faith and History result in a total of 25 percent adjustment to the Gravity-based Penalty, for an Adjusted Penalty of $562.50, which, pursuant to section 336, subdivision (j), is reduced further to $562. Additionally, the resulting Adjusted Penalty is reduced by 50 percent pursuant to section 336, subdivision (e), resulting in a penalty of $281.[13] The result is adjusted downward to the next lower five dollar value, pursuant to section 336, subdivision (j), resulting in a final penalty of $280.

[13] Although the Division's counsel initially asserted that Employer had failed to abate Citation 1 Li testified that he did not know whether Employer had abated Citation 1 at the time of hearing. Section 336, subdivision (e), provides that General violations are presumed to be abated by the abatement date. Evidence was not identified by the Division to rebut the presumption of abatement for Citation 1 and the Division's post-hearing brief makes reference to the abatement of Citation 1.

b. Citation 2

Section 336, subdivision (c), provides that a Base Penalty for a Serious violation will be initially set at $18,000 and thereafter adjusted based on the Extent and Likelihood.

Li testified that the Division made no penalty reduction for Extent because "This is medium. There's no high or low so there's no credit or no additional charge to it." The Division did not present additional evidence regarding the Extent of the violation. As noted above, section 335, subdivision (a)(2)(ii), contemplates that Extent is based upon the degree to which a safety order is violated. The evidence presented did not support a finding that Extent was Medium. Therefore, Employer shall be afforded the maximum credit of 25 percent.

Li also testified that, similar to Citation 1 Likelihood was rated as High because "the accident occur[ed]." The Division did not present evidence as to how the number of employees exposed to the actual hazard created by the violation affected the Likelihood in contemplation of the extent to which the violation has in the past resulted in injury, illness, or disease to employees of Employer and/or the industry in general. The evidence presented did not support a finding that Likelihood was High. Therefore, Employer shall be afforded the maximum credit of 25 percent. Pursuant to the foregoing, the resulting Gravity-based Penalty is $9,000 ($18,000 less 50 percent).

As discussed above, section 336 also provides adjustment factors for Good Faith, Size, and History that result in a 25 percent reduction to the Gravity-based Penalty, resulting in an Adjusted Penalty of $6,750

Section 336, subdivision (e)(2), in relevant part provides:

> (2) For Serious violations not listed in paragraph (3), the Division shall not grant a 50% abatement credit unless the employer has done either one of the following:
>
> (A) Abated the Serious violation at the time of the initial or a subsequent visit during an inspection and prior to the issuance of a citation.

Citation 2 indicates on its face "Corrected During Inspection." (Ex. 1.) As such, the Adjusted Penalty is reduced by 50 percent.[14] Accordingly, pursuant to section 336, subdivision (j), the resulting final penalty for Citation 2 is $3,375.

[14] The Division's post-hearing brief asserts that Citation 2 was not abated but does not discuss the assertion or its implications further, nor does the brief identify evidence in the record in support of the assertion.

Conclusion

The evidence supports a finding that Employer violated section 1509, subdivision (b), by failing to adopt various safety rules within its CSP. The violation was properly classified as General. The modified penalty of $280 is found reasonable.

The evidence supports a finding that Employer violated section 3328, subdivision (a)(2), by failing to ensure that equipment was not used or operated under conditions of speeds, stresses, loads, or environmental conditions that were contrary to the manufacturer's recommendations. The violation was properly classified as Serious, but the Division did not establish that it was properly characterized as Accident-Related. The modified penalty of $3,375 is found reasonable.

ORDER

Pursuant to the stipulation of the parties by email on May 13, 2022, the court reporter's transcripts of these proceedings created for the Appeals Board by the Northern California Court Reporters is designated as the official record. Further, the parties have stipulated that the audio record of these proceedings remains available to supplement or explain the transcript.

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

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

Dated: 07/29/2022

Christopher Jessup
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.**