BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1454931**
TESLA, INC. **dba TESLA MOTORS, INC.** **901 PAGE AVENUE** **FREMONT, CA 94538** **Employer**	**DECISION**

Statement of the Case

Tesla, Inc., doing business as Tesla Motors, Inc. (Employer) is a manufacturing company involved in construction activities at its manufacturing facility. On January 8, 2020, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer, Charles Jackson, commenced an accident investigation of Employer's manufacturing facility located at 45500 Fremont Boulevard, in Fremont, California (jobsite).

On July 1, 2020, the Division issued two citations to Employer. The citations allege: (1) Employer failed to implement an effective Injury and Illness Prevention Program; and (2) Employer failed to guard floor openings. On August 2, 2021, the Division moved to amend the alleged violation descriptions for each citation and to amend Citation 2 to allege, as an alternative, a violation of section 1541, subdivision (l)(2), and assert Employer failed to provide adequate barrier physical protection for excavation holes by means of a barricade or cover. The motion to amend was granted on February 1, 2022.

Employer filed a timely appeal of each citation. Employer's grounds for appeal for each citation contest the existence of the violations, the classifications of the citations, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses.[1]

[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).

This matter was heard by Christopher Jessup (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 October 18, 19, and 20, 2023, on March 12, 13, and 14, 2024, and on April 24 and 25, 2024, with the parties and witnesses appearing remotely via the Zoom video platform. Alka Ramchandani-Raj, attorney with Littler Mendelson, P.C., represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. This matter was submitted for Decision on October 31, 2024.

Issues

1. Did Employer fail to maintain an effective Injury and Illness Prevention Program?

2. Did Employer fail to provide adequate barrier physical protection for an excavation by failing to ensure that it was barricaded or covered?

3. Did Employer establish the due diligence defense?

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

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

6. Did Employer rebut the presumption that the violation alleged in Citation 2 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?

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

8. Are the proposed penalties reasonable?

Findings of Fact[2]

1. On January 4, 2020, there were five excavation holes at the jobsite that were created by G&G Builders on January 3, 2020.

2. On January 4, 2020, an employee of Apollo Sheet Metal (Apollo), Robert Laney (Laney), was injured when he stepped into an uncovered excavation hole outside of the GA4 tent at Employer's factory in Fremont, California

[2] Finding of Fact numbers 1, 2, 3, 11, 18, and 21 are pursuant to stipulation of the parties.

3. Laney's injury consisted of a broken femur and, as a result of the injury, Laney was hospitalized for more than medical observation.

4. The project that gave rise to the incident involved creating excavation holes to allow anchors to be placed around the perimeter of an existing structure.

5. Employer had a written Injury and Illness Prevention Plan in place at the time of the accident.

6. During the first several days of the anchor placement project, G&G Builders' process involved machinery, including a Bobcat drilling machine, to drill holes in the ground that were used as pilot holes for driving the anchors into the ground.

7. The process used during the first several days of the project did not require additional backfilling after the anchors were placed.

8. The process used by G&G Builders changed the day before the accident to a process where the holes were dug by hand, using picks, shovels, and other equipment, but not the larger machinery, such as the Bobcat drilling machine.

9. The process used the day before the accident resulted in excavation holes, measuring approximately 13 inches wide and 3 feet deep, that were not completed on the same day they were created.

10. There is a realistic possibility that serious physical harm could result from an employee stepping into an uncovered excavation hole that is approximately 13 inches wide and 3 feet deep.

11. Juan Romero (Romero), Employer's project manager involved in overseeing the project at issue in this case, visited the jobsite on the day prior to the accident and observed the creation of the excavation holes.

12. Romero's responsibilities as a project manager included ensuring that contractors were familiar with applicable Cal/OSHA safety regulations. Romero had the authority to direct action to cover the holes that were left uncovered. Also, Romero was aware, at the time of the accident, that Cal/OSHA regulations require that excavations need to be covered or have barriers put in place to prevent accidents.

13. Romero did not know that the excavation holes were left uncovered prior to the accident. Employer did not follow up on the status of the excavation holes prior to the accident and after Romero saw them created.

14. The excavation hole that injured Laney was not covered or barricaded prior to the accident.

15. The excavation holes were readily apparent and in plain view.

16. Employer's Injury and Illness Prevention Program states that additional inspections and audits are required to identify and evaluate hazards when new processes, procedures, or equipment may present a new hazard or when Employer's management, supervisors, or employees discover or identify a previously unrecognized hazard.

17. Employer had the authority for ensuring that the hazardous condition was corrected and Employer had the responsibility for actually correcting the hazard.[3]

18. Employer commonly received pre-task plans, forms used by subcontractors to identify tasks, hazards, and controls daily, from contractors on a weekly basis. The pre-task plans were reviewed by Employer's Environmental Health and Safety staff days after the subcontractors had already worked at the site.

19. Employer identified the project involved in the accident as being not high risk and assumed that hazards would not be left behind by the project.

20. Employer reviewed subcontractor safety history as part of the qualification process.

21. The penalties were calculated in accordance with the Division's administrative regulations, polices, and procedures.

[3] This finding is based upon the stipulation of the parties that Employer was a correcting employer and a controlling employer in conjunction with the definitions set forth in California Code of Regulations, title 8, section 336.10.

Analysis

1. Did Employer fail to maintain an effective Injury and Illness Prevention Program?

In Citation 1, Employer was cited for an alleged violation of California Code of Regulations, title 8,[4] section 1509, subdivision (a). Section 1509, subdivision (a), provides that "Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders."

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

> (a) Effective July 1, 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:
>
> […]
>
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> (A) When the Program is first established;
>
> […]
>
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
>
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.
>
> […]

The Alleged Violation Description (AVD) of Citation 1, as amended on February 1, 2022, provides:

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

> Prior to and during the course of this investigation, including[,] but not limited to, on January 4, 2020, the employer did not implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.
>
> The employer did not conduct an inspection to identify unsafe conditions and work practices of sub-contractors at the G4 jobsite drilling area to ensure all openings were guarded and/or excavations were protected and warning signs installed.

Section 3203, subdivision (a), and therefore section 1509, subdivision (a), requires employers to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP). To establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement" or "maintain" an "effective" program. Even when an employer has a comprehensive IIPP, the Division may still demonstrate a violation by showing that the employer failed to implement the plan. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP, Tri-State Staffing,* Cal/OSHA App. 12-0378, Decision After Reconsideration (Oct. 5, 2015).) Said another way, a failure to implement constitutes a failure to act in accordance with the terms of the IIPP.

Further, in *General Dynamics Nassco*, Cal/OSHA App. 1300984, Decision After Reconsideration (Jan. 23, 2023), the Appeals Board explained:

> Section 3203, subdivision (a)(4) requires that employers include procedures for identifying and evaluating work place hazards in the IIPP. These procedures must include "scheduled periodic inspections to identify unsafe conditions and work practices." (*Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) To establish a violation of section 3203, subdivision (a)(4), the Division must demonstrate that the employer failed to effectively implement its duty to inspect, identify, and evaluate workplace hazards when (1) the program was first established, (2) new substances, processes, procedures, or equipment were introduced, or (3) the employer was made aware of a new or previously unrecognized hazard. (§ 3203, subd. (a)(4)(A)-(C); *Hansford Industries, Inc. dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021).)

The Division has the burden of proving a violation by a preponderance of the evidence. (*Wal-Mart Stores, Inc. Store # 1692,* Cal/OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019).) "'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." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

The citation, as amended, alleges that Employer failed to "conduct an inspection to identify unsafe conditions and work practices of sub-contractors at the G4 jobsite to ensure all openings were guarded and/or excavations were protected and warning signs installed."

There is no dispute that Employer had a written IIPP at the time of the accident. Both a copy of the IIPP and excerpts therefrom were offered as evidence at hearing. (See Exh. H and Exh. 20.) Employer's IIPP provides, in relevant part:

> The most widely accepted way to identify hazards is to conduct plant or facility safety inspections. Inspections are conducted to verify compliance with Cal/OSHA safety requirements, to identify any additional hazards, and to analyze incidents, injury and illness cases, and unusual occurrences.
>
> Periodic department inspections are performed by Health and Safety representatives, Health and Safety Team members, and members of the Operations management team from the department.
>
> These periodic workplace safety inspections are used to identify unsafe conditions and work practices. Additional inspections and audits are performed to identify and evaluate hazards when:
>
> 1) New processes, procedures, equipment substances or equipment are introduced which may present a new hazard.
>
> 2) Tesla management, supervisor, or employees discovers or identifies [*sic*] a previously unrecognized hazard.

(Exh. H and Exh. 20.)

As Employer's written IIPP largely mirrors the language of the regulation, the question becomes one of implementation. The first question addressed is whether there was a hazard. The parties stipulated that Laney sustained a broken femur as a result of stepping in an uncovered

excavation. Additionally, the parties stipulated that there were five excavation holes at the jobsite on the day of the accident, January 4, 2020, created by G&G Builders on January 3, 2020. Further, the parties stipulated that there is a realistic possibility that serious physical harm could result from an employee stepping into an uncovered excavation hole with the dimensions of approximately 13 inches in width and 3 feet in depth. Given these stipulations and the evidence adduced at hearing, it is clear that the excavation holes at the jobsite are appropriately considered a hazard.

The next issue addressed is whether there were new substances, processes, procedures, or equipment introduced to the workplace that represent a new occupational safety and health hazard. The project that gave rise to the incident in this matter included creating excavation holes to allow anchors to be placed around the perimeter of an existing structure. Erick Montano (Montano), the foreman for G&G Builders who oversaw the creation of the holes, testified that the process used to make the holes during the first several days of the project involved machinery which included a Bobcat drilling machine. Montano explained the Bobcat drilling machine was used to drill holes in the ground to use as pilot holes for the anchors. However, Montano testified that the machinery did not fit in the area involved in the accident, so the holes in that area had to be dug by hand, relying on tools such as picks and shovels. As such, it is apparent that new equipment was involved in the creation of the hazard.

Montano also testified that the process changed on the day before the accident for the portion of the jobsite that was involved in the accident. Montano testified that the process involving the pilot holes resulted in holes that would not require additional backfilling once the anchor was placed. Montano testified that the process used during the first several days at the jobsite did not result in excavations like the one that was involved in Laney's injury because they were small and no hole remained after they completed their process. An inference is drawn, based upon Montano's testimony that the drill attachment had a 4-inch diameter, that the holes created in the first several days were of a similarly small width. In contrast, the excavation holes involved in the accident were approximately 13 inches wide. The evidence adduced at hearing established that the excavation holes created the day before the accident were not completed or backfilled on the same day they were started. Because the process used the day before the accident resulted in excavation holes that were not completed on the same day as they were created and that process resulted in excavation holes with larger dimensions, it is apparent there was a new process or procedure in place at the jobsite.

Having found there was a new hazard at the jobsite that was the result of a new process, procedure, or equipment, it is next necessary to consider whether Employer effectively implemented its IIPP to identify or discover the hazard.

Both Montano and Romero testified that Romero visited the jobsite where the accident took place the day before the accident. Romero testified that he saw the holes being dug when he was present at the jobsite. The parties stipulated that Employer was the correcting employer.[5] Notably, Romero testified that one of his responsibilities as a project manager is to ensure that contractors are familiar with applicable Cal/OSHA safety regulations and that he was aware, at the time of the accident, that Cal/OSHA regulations require that excavations need to be covered or have barriers put in place to prevent accidents like the one that happened in this case. Romero also testified that he had the authority to direct action to cover the holes that were left uncovered. However, despite this knowledge, responsibility, and authority, Employer did not ensure that further action was taken to resolve the hazard. As such, it is important to consider whether the failure to take action was the result of a failure to identify a hazard.

As an initial consideration, it is inferred, based on Romero's testimony, that Romero did not know that the holes were left uncovered. Indeed, this is supported by Employer's post-hearing brief:

> Moreover, had Romero known that G&G left the holes uncovered, he would have done more than just called Apollo, he would have called Tesla Operations to immediately secure material to cover and mark the holes, which is precisely what he did once he learned of the holes on January 4 after the incident.

However, because Romero was unaware that the excavation holes were left in a hazardous condition and based on Romero's testimony and the other evidence establishing that the holes were not covered prior to the accident, it is inferred that Employer did not investigate the status of the excavation holes prior to the accident. Employer's IIPP indicates that additional inspections and audits are necessary to identify and evaluate hazards when new processes, procedures, or equipment may present new hazards or when Tesla management, supervisors, or employees discover or identify a previously unrecognized hazard. Here, the failure to investigate the status of the excavation holes prior to the accident is the direct result of the failure to identify the excavation holes as a hazard despite Romero's knowledge about the creation of the excavation holes and knowledge about the safety requirements of the Cal/OSHA regulations.

Accordingly, the Division has met its burden of proof to establish a violation of section 1509, subdivision (a), and Citation 1 is affirmed.

[5] Section 336.10, subdivision (d), defines the correcting employer as the employer who had the responsibility for actually correcting the hazard.

2. **Did Employer fail to provide adequate barrier physical protection for an excavation by failing to ensure that it was barricaded or covered?**

In this matter, the Division initially alleged a violation of section 1632, subdivision (b)(1). However, the Division subsequently moved to amend the citation to allege, in the alternative, a violation of section 1541, subdivision (l)(2). Based upon the stipulations of the parties, referencing the hazard in question as an excavation, and the post-hearing briefing for each side, there is no dispute that the hazard in question is properly characterized as an excavation. Indeed, section 1540, subdivision (b), defines an excavation as "[a]ny man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal." This accurately describes the hazard where the employee in this case was injured. As such, the analysis herein shall begin with section 1541, subdivision (l)(2).

Section 1541, subdivision (l)(2), provides:

> Adequate barrier physical protection shall be provided at all remotely located excavations. All wells, pits, shafts, etc., shall be barricaded or covered. Upon completion of exploration and other similar operations, temporary wells, pits, shafts, etc., shall be backfilled.

The AVD for Citation 2 was also amended by order on February 1, 2022, and provides:

> Prior to and during the course of this investigation, including but not limited to, on January 4, 2020, the controlling and correcting employer (Tesla, Inc. dba Tesla Motors, Inc.) failed to ensure floor openings located at GA4 was guarded by either a temporary railing or covers. As a result, the exposing employer (Apollo Sheet Metal, Inc. dba Apollo Mechanical Contractors) employee received a serious injury when he fell into the unguarded opening. (Reference Title 8 CCR 3212(a)(1))
>
> This citation is issued under Multi-Employer worksite regulation (Title 8 CCR 336.10)[.]
>
> Or in the alternative,
> […]
> Prior to and during the course of this investigation, including but not limited to, on January 4, 2020, the controlling and/or correcting employer (Tesla, Inc. dba Tesla Motors, Inc.) failed to ensure an excavation located at GA4 was protected by either barriers or covers. As a result, the exposing employer (Apollo Sheet

Metal, Inc. dba Apollo Mechanical Contractors) employee received a serious injury when he fell into an unprotected excavation.

This citation is issued under Multi-Employer worksite regulation (Title 8 CCR 336.10)[.]

In order to establish a violation of section 1541, subdivision (l)(2), the Division must establish that an employer failed to provide adequate barrier physical protection by means of a barricade or cover for wells, pits, shafts, or other excavations.

The parties stipulated that Laney stepped into an uncovered excavation hole outside the GA4 tent at the Tesla factory in Fremont. The parties stipulated that on the morning of January 4, 2020, there were five excavation holes at the jobsite that were created by G&G Builders on January 3, 2020. Further, the parties stipulated that the injury that Laney sustained was a broken femur as a result of stepping in an uncovered excavation. The evidence adduced at hearing was that the excavation holes at the jobsite were not covered until after the accident. The evidence did not demonstrate there were physical barriers prohibiting access to the excavation holes. As there were excavation holes at the jobsite that were not protected by means of barricades or covers, the Division met its burden of proof to establish a violation of section 1541, subdivision (l)(2).

3. Did Employer establish the due diligence defense?

Employer argued that it exercised due diligence in ensuring safety at the jobsite and met the elements of the Due Diligence affirmative defense. The Appeals Board has explained:

> The Board recognizes a due diligence affirmative defense available to controlling employers in California cited under the multi-employer worksite regulation. (*McCarthy Building Companies, Inc*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan 11, 2016) (*McCarthy*).) Where the controlling employer exercises "due diligence" it may be relieved from liability for violation of a safety order. (*Ibid.*) The due diligence defense recognizes that the "[t]he general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired." (*Harris Construction Company*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015).)
>
> In determining whether the controlling employer exercised due diligence, the totality of circumstances will be considered. (*McCarthy, supra*, Cal/OSHA App. 11-1706.) Multiple factors are relevant to the determination of due diligence,

including: (a) whether the controlling employer conducted periodic inspections of appropriate frequency; (b) whether the controlling employer implemented an effective system for promptly correcting hazards; (c) whether the controlling employer enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; (d) whether the controlling employer researched the safety history of the subcontractor; and (e) whether the hazard was latent and unforeseeable. [Fn. Omitted.] (*Ibid*; see also *Hanover RS Construction, LLC.*, Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2011) (*Hanover*).)

Here, some *McCarthy* factors favor application of the due diligence defense. As correctly discussed within the ALJ's Decision, the evidence, including stipulations, demonstrates that Employer had familiarity with the subcontractor's safety practices and background, conducted regular and frequent inspections, generally enforced compliance with safety and health requirements, had a system of employee education and training, and had a comprehensive IIPP. (Decision, pp. 17-20.) On the other hand, other factors militate against the defense. The evidence demonstrates that the hazard in this case, i.e., the improperly marked cover, was neither latent nor unforeseeable. (Decision, pp. 19-20.) Further, although Employer generally enforced compliance with safety and health requirements, Employer did not promptly correct this particular hazard upon discovery. (*Id.* at p. 18.)

In resolving whether to apply the defense, when some factors favor and others disfavor the defense, "[t]he Board does not consider or apply the foregoing factors mechanically." (*Hanover, supra*, Cal/OSHA App. 1205077; *McCarthy, supra*, Cal/OSHA App. 11-1706.) "Rather, the respective weight assigned to each factor, or combination thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented." (*Ibid.*)

Here, the ALJ found that the patent nature of the hazard, and the failure to promptly correct the hazard, were sufficient to defeat the due diligence defense. We agree.

[…]
We concur with the ALJ's determination that the hazard was not latent or unforeseeable. The evidence demonstrates that the opening was created by Conco, the concrete contractor, who also initially placed the cover over the opening. The opening existed for several months prior to the accident. RJP framed around the opening and the cover. Employer was aware, or should have been aware, of the

> opening, the cover, and the fact that it was improperly marked. Employer had the blueprints, was present when the opening was created, was present when RJP framed around it, conducted regular inspections, and should have been aware of the deficient writing, but did not direct anyone to properly mark the cover for several months. We cannot find that Employer engaged in due diligence when it left such a patent hazard unaddressed for months. This deficiency alone is sufficient to defeat the defense.
>
> Next, although the evidence demonstrates that Employer did have procedures in place to promptly correct observed safety hazards, those procedures were not followed here. As the ALJ noted, "Employer did not take action to ensure that the hazard created by the improperly marked floor opening cover was corrected promptly. Guiriba did not conduct his initial inspection of the job site until two weeks after the accident and the cover was in the same condition it had been it at the time of the accident." (Decision, p. 18.) We concur.

(*Lennar Corporation*, Cal/OSHA App. 1340561, Decision After Reconsideration (Sept. 26, 2023).) Pursuant to the foregoing, each factor will be considered in turn.

a) *Did the controlling employer conduct periodic inspections of appropriate frequency?*

As discussed above, regarding Employer's IIPP, it is inferred that Employer did not take additional steps to confirm whether the hazard of the open excavation holes was resolved after the holes were observed by Romero. As the correcting employer, Employer had the responsibility to ensure that it promptly resolved the hazard. On this basis, Employer's lack of further inspection of the jobsite to ensure that the hazard was resolved and lack of action to resolve the hazard is deficient on its face. Even ignoring Employer's status as the correcting employer, the evidence shows that Romero observed the creation of the hazard that injured Laney and did not take action to inspect the jobsite before other employees were exposed to the hazard. This does not support a conclusion that Employer exercised due diligence.

b) *Did the controlling employer implement an effective system for promptly correcting hazards?*

As discussed above, Employer failed to identify the hazards posed by the excavation holes. The holes were neither hidden from view nor unknown to Employer, by way of Romero. Employer's failure to identify a readily apparent hazard in plain view renders its system for promptly correcting hazards ineffective. Additionally, it is not reasonable to conclude that the term "prompt" would contemplate correction of a patent hazard after the hazard has injured an

employee. Employer was responsible for both correcting the hazard and for ensuring that the hazard was corrected because of its dual role as the correcting and controlling employer. Further, because of this dual role, Employer's failure to identify the hazard caused it to fail at both correcting the hazard and taking action to ensure correction of the hazard in a timely manner. Accordingly, this factor does not support the conclusion that Employer exercised due diligence.

c) Did the controlling employer enforce the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections?

As discussed repeatedly herein, it is inferred that Employer did not take additional steps to confirm whether the hazard of the open excavation holes was resolved after the holes were observed by Romero. Employer's lack of correction and lack of follow-up inspection of the hazard renders its enforcement ineffective.

Additionally, Laura Harting (Harting), Employer's director of Environmental Health and Safety, testified about contractor monitoring. Harting testified about pre-task plans. Harting explained the pre-task plans were forms Employer required subcontractors to complete before commencing work to identify tasks, hazards, and controls. Pursuant to Harting's testimony, the pre-task plans are completed by subcontractors daily, but are typically only submitted to Employer weekly. Harting testified that coaching or direction is provided if there are problems with the form completion. The process described requires hazard identification, but the review of that information by Employer is not completed until days later. Notably, Harting testified that she did not believe that the Environmental Health and Safety staff member assigned to the project audited the pre-task plans prior to the accident because the project had not been at the jobsite for a week at the point of the accident. Weekly collection and review creates a situation where employees are exposed to hazards prior to the point where Employer, as the correcting and controlling employer, can take appropriate action to correct those hazards. This process is not effective for ensuring other employers' compliance with health and safety requirements.

Harting also testified about inspections performed in the field by Environmental Health and Safety staff. Harting testified to the following regarding risk assessment:

> It depends on the tasks that they're performing, and it depends on if they can effect different systems, if they can effect different employees or other contractors, and then it really gets down to if they are doing anything and what, like, the safety industry would consider, like, a high-risk activity. That could be working at high, confined spaces, doing critical lift with cranes. All of those would be common high-risk activities, where we would shift our – our attention to.

However, with regard to the project involved with the accident, Harting testified:

> [I]t wasn't a high-risk project because, one, their crew size, but also the scope of work, from my understanding of what they would be doing on a day-to-day basis, which would be they would dig a hole, they would set the anchor, and then they would backfill. While doing those things, one, the risk to others during the day would have been low, because it would have been controlled by G&G and they would have been on-site. And then, also, they wouldn't be leaving a hazard.

The hazard assessment system used by Employer resulted in a situation where Employer failed to identify the hazard of the excavation holes and did not ensure that the holes were corrected before employees were exposed to the hazard. Therefore, the system of field inspections by Employer's Environmental Health and Safety staff did not ensure other employers' compliance with health and safety requirements.

Pursuant to the foregoing considerations, this factor does not support the conclusion that Employer exercised due diligence.

d) Did the controlling employer research the safety history of the subcontractor?

Romero testified that subcontractor's safety history is considered when hiring subcontractors. Harting testified that contractors were required to report safety history details to Employer as part of the qualification process. This factor supports the due diligence defense.

e) Was the hazard latent and unforeseeable?

Romero saw the excavation holes as they were being created and was aware of the holes. Employer did not conduct a follow-up inspection to confirm the status of the holes and did not ensure that the hazard was corrected before other employees entered the area. Employer's failure to identify the hazard is not the same question as whether the hazard itself was latent and unforeseeable. Romero's testimony establishes that he was aware of the holes and that they were readily apparent. This is further supported by Laney's testimony that he noticed several uncovered holes at the jobsite when he arrived in the area of the accident. As such, the hazard was readily apparent.

Additionally, as to the foreseeability of the hazard, Romero observed the creation of the holes. Absent further action to complete the project or correct the hazard, the hazard would obviously continue to exist. Romero testified that he expected G&G Builders to complete its process and correct the hazard. However, expectation alone does not reflect the exercise of due

diligence to follow up on the existence of a readily apparent hazard. Rather, the hazard was foreseeable and it was foreseeable that the hazard would continue to exist until action was taken to correct it.

Accordingly, this factor does not support the conclusion that Employer exercised due diligence.

f) Was the due diligence defense established?

As discussed above, one factor weighs in favor of the due diligence defense while the remaining factors weigh against the due diligence defense. As discussed in *Lennar Corporation*, *supra,* Cal/OSHA App. 1340561, the patent nature of the hazard and the failure to promptly correct the hazard are especially notable. In this matter, the majority of the factors weigh against finding that the due diligence defense was established and, notably, Employer was aware of the creation of the hazard and failed to conduct sufficient follow-up inspections to ensure the hazard was resolved. Where Employer has the dual roles of correcting and controlling Employer, this cannot be described as due diligence. Employer failed to meet its burden of proof to establish this defense.

Additionally, Employer requests extension of the due diligence defense to cover correcting employers as well as controlling employers. However, having found that the due diligence defense did not apply to Employer as a controlling employer, the request is effectively rendered moot here. Further, were the factors to be considered as requested by Employer, it is noted that the totality of the circumstances weigh more against a correcting controller. Specifically, section 336.10, subdivision (d), provides the correcting employer is "[t]he employer who had the responsibility for actually correcting the hazard." As such, Employer simply waiting in expectation for an obvious hazard to be corrected would be considered even more unreasonable. Further, Romero testified that one of his responsibilities as a project manager is to ensure that contractors are familiar with applicable Cal/OSHA safety regulations and that he was aware, at the time of the accident, that Cal/OSHA regulations require that excavations need to be covered or have barriers put in place to prevent accidents like the one that happened in this case. As noted in *Lennar Corporation*, *supra,* Cal/OSHA App. 1340561, the due diligence defense recognizes that general contractors are not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge as subcontractors. However, Romero's familiarity with the applicable Cal/OSHA regulations and safety requirements does not serve the announced purpose of the defense, especially when considering the applicability for a correcting Employer.

4. 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 implementation of an IIPP, by requiring compliance with its rules, has a relationship to occupational safety and health of employees. It is evident from the facts of this case that a failure to effectively implement an IIPP can result in employee injury. 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.

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

Labor Code section 6432, subdivision (a),[6] 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.

[6] Labor Code section 6432 was amended effective January 1, 2021. The portions discussed herein reflect the version of Labor Code section 6432 as it was in effect at the time of issuance of the citation.

(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).)

The parties stipulated that, on January 4, 2020, Apollo employee, Laney, stepped into an uncovered excavation hole outside of the GA4 tent. The parties stipulated that the injury that Laney sustained was a broken femur as a result of stepping in an uncovered excavation. The parties further stipulated that as a result of the injury, Laney was hospitalized for more than medical observation. The parties also stipulated that there is a realistic possibility that serious physical harm could result from an employee stepping into an uncovered excavation hole with the dimensions of approximately 13 inches in width and 3 feet in depth.

Pursuant to the foregoing, serious physical harm was not merely a realistic possibility, but an actuality. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

6. Did Employer rebut the presumption that the violation alleged in Citation 2 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.

As discussed above, Romero observed the creation of the hazard, the hazard was obvious, Employer did not ensure that the hazard was corrected prior to Laney's exposure to the hazard, and Employer failed to follow up on the status of the hazard despite its role as the correcting and controlling employer. It cannot be concluded that Employer took all the steps that a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation because of these failures.

It is, therefore, unnecessary to consider, here, whether Employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered because rebuttal of the presumption requires that Employer establish both elements. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification is properly established.

7. 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, subdivision (h), provides that a "serious injury" includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for other than medical observation or diagnostic testing. Section 330, subdivision (h), has a substantially similar definition. In the instant matter, the parties stipulated that the injury that Laney sustained was a broken femur as a result of stepping in an uncovered excavation and that, as a result of the injury, Laney was hospitalized for more than medical observation. Therefore, it is uncontested that Laney suffered a serious injury. The evidence adduced at hearing, and discussed above, supports that a causal nexus exists between the violation, Employer's failure to ensure the hazard of the excavation

holes were corrected, and the serious injury. Accordingly, the citation is properly characterized as Accident-Related.

8. 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.) The Appeals Board explained in *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017):

> Generally, where 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, 2015).)

At hearing, the Division offered the proposed penalty worksheet into evidence. (Exh. 4.) The parties stipulated that the Division calculated the penalties on the proposed penalty worksheet, referred to as the C-10, in accordance with the Division's administrative regulations, policies, and procedures. Pursuant to Appeals Board precedent, the Division has presented sufficient evidence to meet its burden of proof for each citation. Accordingly, the proposed penalty for Citation 1, Item 1, of $1,125 and the proposed penalty for Citation 2, Item 1, of $22,500 are found reasonable and affirmed.

Conclusion

The evidence supports a finding that Employer violated section 1509, subdivision (a), by failing to implement an effective Injury and Illness Prevention Program. The citation was properly classified as General. The proposed penalty is found reasonable.

The evidence supports a finding that Employer violated section 1541, subdivision (l)(2) because employees were exposed to excavation holes at the jobsite that were not protected by means of barricades or covers. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is found reasonable.

Order

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

/s/ Christopher Jessup

Dated**: 11/27/2024**

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.**