

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

In the Matter of the Appeal of:
RNR CONSTRUCTION, INC.

Inspection No.
1092600

**DENIAL OF PETITION FOR
RECONSIDERATION**

Employer

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above-entitled matter by RNR Construction, Inc. (Employer).

JURISDICTION

Commencing on September 17, 2015, the Division of Occupational Safety and Health (Division) conducted an inspection of places of employment in California maintained by Employer.

On February 19, 2016, the Division cited Employer with a violation of California Code of Regulations, title 8.¹

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly noticed contested evidentiary hearing.

On March 10, 2017, the ALJ issued a Decision, which affirmed the violation and imposed a civil penalty.

Employer timely filed a petition for reconsideration.

The Division did not file an answer to the petition.

ISSUE

Was the Decision correct in affirming the citation and imposing civil penalties?

¹ References are to California Code of Regulations, title 8 unless otherwise specified.

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- b) That the order or decision was procured by fraud.
- c) That the evidence does not justify the findings of fact.
- d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- e) That the findings of fact do not support the order or decision.

Employer's petition asserts the Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Board adopts the Decision as its own, and incorporates it here in total as Exhibit A.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

FILED ON: 05/26/2017



EXHIBIT A

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

In the Matter of the Appeal of:

RNR CONSTRUCTION, INC.

Employer

Inspection No.
1092600

DECISION

Statement of the Case

RNR Construction, Inc. (Employer) is a contractor performing heavy construction projects on bridges and freeways. The Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Shannon Lichty (Lichty) conducted an inspection of two of Employer's worksites: on September 17, 2015, Lichty went to a bridge on Vineyard Road where Employer was engaged in paving work (the bridge); and on September 22, 2015, Lichty inspected Employer's facility located at 8589 Thys Court in Sacramento, California (the yard). On February 19, 2016, the Division cited Employer for failure to guard a chain and sprocket drive which was located seven feet or less above the working level.

Employer filed a timely appeal of the citation contesting the existence of the violation, the classification of the citation, the reasonableness of the penalty, and asserted a series of affirmative defenses.¹

This matter was heard by Kerry E. Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California, on December 8, 2016. Fred Walter, Attorney, of Walter & Prince, LLP, represented Employer. Carl Paganelli, Staff Counsel, represented the Division. The matter was submitted on February 15, 2017.

¹ Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503 and 504, Decision After Reconsideration (July 31, 1998); *Central Coast Pipeline Construction Co., Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).)

Issues

1. Did the Division establish that the chain and sprocket drive controlling the roller on the “Bid-Well boom truss roller finisher” (the Bid-Well)² was unguarded?
2. Was the chain and sprocket drive guarded by location?
3. Did Employer establish the Independent Employee Action Defense?
4. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?
5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know of the presence of the violation?
6. Did the Division establish that the citation was properly classified as Accident-Related?
7. Is the proposed penalty reasonable?

Findings of Fact³

1. Cal/OSHA Associate Safety Engineer Shannon Lichty conducted an inspection of Employer’s business on September 17, 2015, at the bridge, and on September 22, 2015, at the yard.
2. While working on the bridge on August 27, 2015, employee Eric Roye (Roye) suffered an injury which resulted in a partial amputation of his finger.
3. The chain and sprocket drive was located seven feet or less above the working level.
4. The chain and sprocket drive was not guarded at the lower portion of the sprocket.
5. Employer did not present evidence regarding Roye’s experience or his knowledge that walking alongside the Bid-Well was in violation of Employer’s safety policy.
6. Roye sustained serious physical harm when his hand came into contact with an unguarded chain and sprocket drive on the Bid-Well.

² At the time of the accident, the Bid-Well was being used for bridge construction. The Bid-Well is a large piece of motorized equipment that extends across, or straddles, the roadway to spread and smooth concrete with a mechanized roller. The roller is chain-driven, traversing from side to side across the roadway below the elevated machine.

³ Findings of Fact 1 and 2 are stipulations by the parties.

7. The chain and sprocket drive was not so located by its remoteness from the ground, or by its location with reference to frame, foundation or structure, as to remove the likelihood of accidental contact.
8. The Division established that the unguarded chain and sprocket drive violation was the primary cause of Roye's injury.
9. The proposed penalty was calculated in accordance with the Division's penalty-setting regulations.

Analysis

1. Did the Division establish that the chain and sprocket drive controlling the roller on the Bid-Well was unguarded?

California Code of Regulations, title 8, section 4075, subdivision (a)⁴ provides: "Gears and Sprockets. All gears, sprockets, and sprocket chain drives located seven feet or less above the floor shall be guarded."

In the citation, the Division alleges:

On August 27, 2015 an employee of RNR Construction Inc, while working at the location of Vineyard Rd at Laguna Creek Bridge in Sacramento, suffered a serious accident when his right middle finger was amputated when it came in contact with an unguarded sprocket chain drive on a Bidwell Boom Truss Roller Finisher. Employer failed to guard all gears sprockets and sprocket chain drives located 7 feet or less above the working level.

a. Height of the Chain and Sprocket Drive

"The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016), citing *Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).) Although there was no evidence presented regarding the specific height of the chain and sprocket drive on the Bid-Well, it is permissible to make a reasonable inference based on other evidence.

⁴ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Lichty testified that the height of the chain and sprocket drive that controlled the roller on the Bid-Well was approximately “shoulder height.” Employer produced photographs of the Bid-Well with workers around it on the day of the accident. The level of the Bid-Well where the chain and sprocket drive is located was shown to be at the workers’ chest and shoulder areas. Without having an exact height measurement, the pictures and testimony make it clear that the chain and sprocket drive was located seven feet or less above the working level. Employer did not provide any evidence to dispute this fact.

b. Effectiveness of Guarding of the Chain and Sprocket Drive

“Guarded” is defined in section 3941 as:

Shielded, fenced, enclosed or otherwise protected according to these orders, by means of suitable enclosure guards, covers or casing guards, trough or “U” guards, shield guards, standard railings or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact.

The chain and sprocket drive in question is located near the side of the Bid-Well. A chain runs the entire width of the Bid-Well between a sprocket drive on each side, which propels the roller horizontally across the roadway from side to side. The chain and sprocket drive, located on the inside of the end panel, is partially enclosed by two “flanges” on either side of it.⁵

Employer’s expert, Richard Cosgrove (Cosgrove), testified that the flanges measure 5.5 inches at their deepest point. However, the flanges taper down at an angle from approximately the middle of the sprocket until they reach a “lip” below the chain and sprocket drive.⁶ As a result, the bottom of the chain and sprocket drive is not fully encased by the full depth of the 5.5-inch flanges. Because of this tapered angle, the only “guard” encasing the lower half of the chain and sprocket drive is the tapered flange on either side and the lip at the bottom, which left the sprocket exposed to inadvertent contact by employees.

There was no testimony regarding the measurement of the distance from the panel behind the sprocket to the inner edge of the lip. It is from this angle, below the sprocket, that Roye’s hand came into contact with the chain and sprocket drive because the distance from the edge of the panel to the inner edge of the lip was inadequate to fully encompass the lower portion of the chain and sprocket drive. This is further evidenced by the photographs taken by Lichty, which show that the flanges taper down and the sprocket is visible at the bottom.

⁵ Exhibits 3 through 5.

⁶ Exhibit 5.

The chain and sprocket drive is not fully guarded due to the fact that the lowest portion of the assembly, on which Roye caught his hand, is exposed only a few inches from the side of the Bid-Well, making it easily accessible to employees.

c. Employee Exposure to the Chain and Sprocket Drive

“The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent.” (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976.) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016), citing *Gilles & Cotting, Inc.*, 3 O.S.H. Cas (BNA) 2002, 1975-76 O.S.H. Dec. (CCH) P 20448, 1976 OSAHRC LEXIS 705 (Feb. 20, 1976) fn 4.)

In addition to demonstrating actual employee exposure to the hazard, “the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger.” (*Dynamic Construction Services, Inc.*, *supra*, Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was “accessible” to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*Id.* [citations omitted].)

Employer argued that employees were not allowed to walk on the side of the Bid-Well, so there was no exposure to the chain and sprocket drive. Whether Roye was authorized to be in the area or not, he walked by the Bid-Well and his hand inadvertently came into contact with the chain and sprocket drive when he slipped and reached out to steady himself, resulting in actual exposure to the hazard. (*Dynamic Construction Services, Inc.*, *supra*, Cal/OSHA App. 14-1471; *Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976.) The Division has met its burden of proof with regard to employee exposure due to the fact that at least one employee has

actually been exposed to the zone of danger, i.e., the area surrounding the ineffectively guarded chain and sprocket drive. Additionally, despite the argument that employees are “not allowed” to walk alongside the Bid-Well near the chain and sprocket drive at issue, there is nothing physically preventing them from doing so.

Cosgrove and Employer’s president, Andre Catellier (Catellier), testified that there was no record of any reported injuries from this chain and sprocket drive on a Bid-Well machine, nor had either witness heard of any unreported instances of employees coming in contact with the chain and sprocket drive. However, the fact that a violation “had never before caused an injury is not a defense to the existence of the violation.” (*Sonoma Grapevines, Inc.*, Cal/OSHA App. 99-875, Decision After Reconsideration (Sept. 27, 2001).)

Accordingly, because employees were exposed to an unguarded chain and sprocket drive that was seven feet or less above the working level, the Division has established a violation of section 4075, subdivision (a).

2. Was the chain and sprocket drive guarded by location?

“Guarded by location” is defined in section 3941 as: “The moving parts are so located by their remoteness from floor, platform, walkway, or other working level or by their location with reference to frame, foundation or structure as to remove the likelihood of accidental contact.”

For a machine to be guarded by location, the “likelihood of accidental contact with moving parts is removed by their remoteness,” and decreasing the likeliness of accidental contact is not enough. (*EZ-Mix, Inc.*, Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013).)

The phrase “accidental contact” is defined in section 3941 as: “Inadvertent physical contact with power transmission equipment, prime movers, machines or machine parts which could result from slipping, falling, sliding, tripping or any other unplanned action or movement.”

In order for moving parts to be guarded by location, section 3941 provides for two scenarios: (1) the moving parts may be so high up from the working level that employees would not be likely to come into contact with them accidentally; or (2) even if not remote from the working level, the moving parts may be located within the structure of the equipment such that there is unlikely to be any accidental contact.

Employer contends that the chain and sprocket drive is guarded by location because employees should not be walking alongside the Bid-Well at any time, thereby eliminating the likelihood that they will come into contact with the hazard. However, Employer's argument misinterprets the second "guarded by location" scenario. The Appeals Board has held that "[r]emoteness is determined by examining the moving part *with reference to the frame.*" (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 08-0219, Decision After Reconsideration (July 19, 2012). Emphasis added.) This does not apply to the chain and sprocket drive at issue on the Bid-Well.

Catellier testified that the workers are instructed to maintain their designated positions when the Bid-Well is in operation and there is no reason for an employee to be under, next to, or near the Bid-Well. Catellier asserted that he is "always there" (at the job site) when the Bid-Well is being used, and he does not allow the workers to approach the Bid-Well when it is operational. As such, Catellier argued that the location of the chain and sprocket drive was guarded.

Cosgrove concluded that accessing the chain and sprocket drive from the outside of the Bid-Well would be "very, very difficult." However, the side of the Bid-Well, where the chain and sprocket drive is located, is physically accessible and is within arm's reach from where an employee would be walking if he happened to leave his designated post and walk alongside the Bid-Well. The chain and sprocket drive is not fully encased at the bottom and is at approximately chest- or shoulder-height, making accidental contact a possibility.

While Employer's safety rules and usually strict supervision may have prevented an accident such as this from happening in the past, decreasing the likeliness of accidental contact is not sufficient to find an unguarded chain and sprocket drive to be guarded by location, as that concept is defined in section 3941 and interpreted by Appeals Board case law. The chain and sprocket drive was neither remote from the working level nor remote with reference to the frame of the machine.

Accordingly, Employer is found to have violated section 4075, subdivision (a).

3. Did Employer establish the Independent Employee Action Defense?

In order to successfully assert the affirmative defense of Independent Employee Action (IEAD), an employer must establish the following elements:

- (1) The employee was experienced in the job being performed;
- (2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
- (3) The employer effectively enforces the safety program;

- (4) The employer has a policy of sanctions against employees who violate the safety program; and
- (5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

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

Here, Employer presented testimony about its safety and training program and its enforcement thereof. However, there was no testimony regarding the extent of Roye's experience in the job being performed and his knowledge that the particular safety infraction (walking alongside the Bid-Well) was in violation of Employer's safety policy.

A single missing element defeats the IEAD. (*Home Depot USA, Inc. # 6617, Home Depot*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec, 24, 2012).) Accordingly, Employer has not met its burden of proof with regard to the affirmative defense of IEAD.⁷

4. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?

Labor Code section 6432, subdivision (a) states:

- (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The 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.

[...]

⁷ Employer also raised the defense that the violation was an "isolated incident." The Appeals Board has not addressed the defense of isolated incident since 1983. It appears that the defense has been largely incorporated into the IEAD. However, in this matter, the claim that this was an isolated incident is inapplicable because the violation for which Employer was cited was failure to guard, which was an ongoing violative condition, whether or not an employee came into contact with the unguarded chain and sprocket drive.

Labor Code section 6432, subdivision (e), provides that “serious physical harm,” means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in, among other things, the loss of any member of the body or any serious degree of permanent disfigurement. The parties stipulated that Roye’s injury, partial amputation of his finger, was serious physical harm as defined by Labor Code section 6432, subdivision (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. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) The fact that Roye suffered a partial amputation results in a finding that there was not only a realistic possibility of serious physical harm, but the violation resulted in actual serious physical harm.

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

5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know of the presence 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)⁸]; 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.

⁸ Labor Code section 6432, subdivision (b) provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer’s health and safety rules and programs.

Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (*Gateway Pacific Contractors, Inc.*, Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).)

Catellier testified that he supervises the employees strictly, admonishing them not to approach the Bid-Well. However, on the date of the accident, Catellier and the foreman failed to ensure that the workers were adequately supervised when the supervisors were otherwise preoccupied by an incident with an angry resident at the job site. It was incumbent upon Catellier or the foreman to ensure that either the Bid-Well operations were shut down while they were preoccupied, or another competent person was put in charge of employee compliance and safety while they were unavailable. As such, Employer failed to exercise adequate supervision at the time of the incident.

Additionally, the Appeals Board has long held that unguarded machine parts in plain view constitute a serious hazard. A machine is in plain view if it is located in an employer's facility and is of sufficient size to be easily detectable and recognizable. (*Nolte Sheet Metal*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016); *Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007); *New England Sheet Metal Works*, Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 6, 2005). See also *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014) ["hazardous conditions, plainly visible to the naked eye, constitute serious violations since the employer could have discovered them through reasonable diligence."].) The Bid-Well and the exposed chain and sprocket drive were in plain view. Additionally, Catellier testified that he had personally assembled and disassembled the chain and sprocket drive for maintenance purposes, demonstrating he is aware of the structural design of the machine and the extent to which the sprocket is guarded.

Nonetheless, Employer argued that it had no knowledge that this chain and sprocket drive posed a hazard to someone outside the machine during operation. Employer cites as the basis for this argument its use of safety consultants, lack of prior incidents, and lack of information regarding the hazards of this particular chain and sprocket drive in the manufacturer's manual. However, it is the Employer's duty to ensure compliance with the safety orders, and assurances of manufacturers, insurance companies, or consultants with regard to particular hazards will not relieve an Employer of that duty. (See *Crescent Metal Products*, Cal/OSHA App. 92-629, Decision After Reconsideration (Dec. 6, 1994).) In *Advanced Components Technology*, Cal/OSHA App. 91-1045, Decision After Reconsideration (Nov. 13, 1992), the Appeals Board held that "Employer's arguments that no operator has been injured using the press, that no

guarding of such presses is suggested by the literature used in the industry, and neither Federal OSHA nor the Division cited Employer for not having a guard in previous inspections are irrelevant in deciding whether the citation was proper.”

In *Fibreboard Box & Millwork Corp.*, *supra*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991), a case with circumstances similar to the instant matter, the employer argued that it could not have known of the existence of the violation because safety committees and the Division had not found the unguarded bolt to be a violation, it had an ongoing safety program, and no one had been injured by the unguarded bolt in 23 years prior to the incident that led to the citation. Nonetheless, the Appeals Board found knowledge sufficient to support a classification of Serious:

Although these factors tend to prove that Employer may have had no actual knowledge of the hazard caused by the bolt, they do not prove reasonable diligence on Employer’s part. A reasonably diligent employer could have known that the bolt and base plate constituted an unguarded pinch point in violation of Section 4002(a). ...Employer’s good faith belief that an unguarded pinch point (the bolt) was not hazardous is not material in determining whether it could have known of the violative condition had it exercised reasonable diligence.

(*Fibreboard Box & Millwork Corp.*, *supra*, Cal/OSHA App. 90-492. Emphasis in original.)

Accordingly, Employer has failed to rebut the presumption that the violation was properly classified as Serious. Employer could have known, with the exercise of reasonable diligence, that the chain and sprocket drive was unguarded in violation of the safety orders.

6. Did the Division establish that the citation was properly classified as Accident-Related?

In order for a citation to be classified as accident-related, there must be a showing by the Division of a “causal nexus between the violation and the serious injury.” (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) 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.” (*Id.*, citing *MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).) Employer has not

presented any evidence which would refute Lichty's testimony. Lichty testified that the unguarded chain and sprocket drive was the cause of Roye's injury.

Employer argued that the Division did not establish that the citation was Accident-Related because the only evidence that the alleged violation caused the injury was Lichty's hearsay testimony about what Roye told her had happened.

Board rules allow the admission of evidence that would not be allowed in civil proceedings. "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (Section 376.2.)

Section 376.2 states, in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

Roye informed Employer and Lichty that he had injured himself on the chain and sprocket drive when he grabbed under the lip of the Bid-Well to catch himself from falling as he was walking along the side of the Bid-Well. Roye did not testify at the hearing and Employer objected to Lichty's testimony as hearsay.

However, Catellier testified that he was able to conduct a re-enactment of the accident based on information reported to Catellier by another employee who was present at the time of the injury. The other employee, a finisher, reported to Catellier that he had seen Roye walk alongside the Bid-Well to go to the work bridge on the other side and, on his return, he slipped. The finisher's observations corroborate what Roye told Lichty during her investigation. Using the finisher's observations, Catellier prepared a demonstrative diagram (Exhibit A), which reflects Roye's reported path alongside the Bid-Well.

Lichty's testimony was not uncorroborated hearsay. Roye told Lichty the same story that he told Employer, which was corroborated by the finisher's report and incorporated into Employer's diagram of the accident. Lichty took a photograph of Roye's hand which evidences the amputation of his right middle finger.⁹ Based on the information provided by both Roye and the finisher, a reasonable inference may be drawn that Roye's injury was the result of his hand coming into contact with the unguarded chain and sprocket drive.

⁹ Exhibit 6.

Accordingly, the Division established that the citation was properly classified as Accident-Related.

7. Is the proposed penalty 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Employer asserted that the penalties were not reasonable.

An initial penalty of \$18,000 is assessed for all serious violations. (Section 336, subd. (c).) When the violation results in a serious injury, as the case is here, the only permissible downward adjustment is for employer size. (Labor Code §6319(d); *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).)

The Division applied an adjustment factor of 20 percent of the gravity-based penalty for Size in accordance with section 336, subdivision (d)(7). Although there was no evidence presented regarding the specific number of employees working for Employer, there was also no dispute from Employer as to the accuracy of this adjustment factor. Lichy testified that she based this factor on information provided to her by Employer and, as it was not objected to by Employer during the hearing in this matter, the adjustment factor based on that information is deemed to be accurate. As such, the penalty was properly reduced by 20 percent, or \$3,600.

Accordingly, the proposed penalty of \$14,400 is found to be reasonable.

Conclusions

The evidence supports a finding that Employer violated section 4075, subdivision (a), by failing to ensure that all gears, sprockets, and sprocket chain drives located seven feet or less above the working surface were guarded. The violation was properly classified as Serious, Accident-Related. The proposed penalty is found to be reasonable.

ORDER

It is hereby ordered that Citation 1, Item 1 is upheld and a penalty of \$14,400 is assessed as indicated above and as set forth in the attached Summary Table.

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



Dated: 03/10/2017

Kerry E. Lewis
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 Title 8, California Code of Regulations, section 390.1.

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

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

Inspection No.: **1092600**
 Employer: **RNR CONSTRUCTION, INC.**
 Date of hearing: December 8, 2016

DIVISION'S EXHIBITS

Exhibit Number	Exhibit Description	Status
1-A	Citation documents / Proposed Penalty Worksheet	Admitted Into Evidence
1-B	Appeal documents	Admitted Into Evidence
1-C	Notice of Hearing	Admitted Into Evidence
2	Photo of Bid-Well machine	Admitted Into Evidence
3	Photo of chain/sprocket	Admitted Into Evidence
4	Photo of chain/sprocket (closer view)	Admitted Into Evidence
5	Photo of chain/sprocket (very close-up view)	Admitted Into Evidence
6	Photo of Eric Roye hand	Admitted Into Evidence
7	ER's Incident Investigation Report	Admitted Into Evidence
8	DOSH Investigation Summary	Admitted Into Evidence
9	Investigator notes of conversation with Roye	Not Admitted into Evidence
10	DOSH Documentation Worksheet	Admitted Into Evidence

EMPLOYER'S EXHIBITS

Exhibit Letter	Exhibit Description	Status
A	Bid-Well diagram/photos	Admitted Into Evidence
B	Cosgrove resume	Admitted Into Evidence

Witnesses testifying at hearing:

Shannon Lichty
Andre Catellier
Richard Cosgrove

DOSH Associate Safety Engineer
President of RNR Construction
Safety Consultant

**APPENDIX A
CERTIFICATION OF HEARING RECORD**

Inspection No.: **1092600**
Employer: **RNR CONSTRUCTION, INC.**

I, Kerry E. Lewis, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.



Kerry E. Lewis
Administrative Law Judge

03/10/2017

Date

SUMMARY TABLE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: RNR CONSTRUCTION, INC.	Inspection No. 1092600
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Citation Issuance Date: **02/19/2016**

C I T A T I O N	I T E M	SECTION	T Y P E	CITATION/ITEM RESOLUTION	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED
1	1	4075 (a)	S	Citation affirmed by ALJ.	A		\$14,400.00	\$14,400.00
Sub-Total							\$14,400.00	\$14,400.00

Total Amount Due* **\$14,400.00**

**You may owe more than this amount if you did not appeal one or more citations or items containing penalties.
Please call (415) 703-4291 if you have any questions.*

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:

Department of Industrial Relations

2. Write the **Inspection No.** on your payment

3. Mail payment to:

Department of Industrial Relations (Accounting)
 Cashier Accounting Office
 P.O. Box 420603
 San Francisco CA 94142-0603

Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

-DO NOT send payments to the California Occupational Safety and Health Appeals Board-

Abbreviation Key:

G=General	R=Regulatory	Er=Employer
S=Serious	W=Willful	Ee=Employee
RG=Repeat General	RR=Repeat Regulatory	A/R=Accident Related
		RS=Repeat Serious