

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

In the Matter of the Appeal of:

A. TEICHERT & SON, INC.  
dba TEICHERT CONSTRUCTION  
P.O. Box 15002  
Sacramento, CA 95851

Employer

Dockets 05-R2D4-2650  
and 2651

**ERRATA**

On August 16, 2012, the Occupational Safety and Health Appeals Board (Board) issued a Decision After Reconsideration in the above-entitled matter. The document so issued contained errors due to our inadvertently issuing an uncorrected version of the document. By this Errata to the Decision After Reconsideration, it is corrected as follows:

On page 4, the last sentence of the “Findings and Reasons [etc.]” section should read: “We affirm *in part and reverse in part* the ALJ’s Decision for reasons set forth below.”

On page 7, the sentence beginning after footnote 9 should read: “We have held that the Division may assume the worst case scenario *would occur* in evaluating whether the violation is serious, *and then provide evidence showing what the worst case is and what its likely consequences are in order to prove the violation was serious.*”

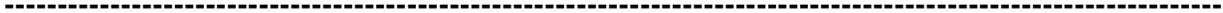
On page 7, in the paragraph beginning “Having sustained” the remainder of the paragraph should read: “The base penalty was \$18,000, *which was increased to \$25,000 because the violation was accident-related. We affirm the ALJ’s finding that the violation was accident-related.* If we then apply the adjustment factors as did the ALJ, there is a 25% adjustment for good faith, reducing the penalty to \$18,750 and an additional 50% adjustment for abatement, yielding a final penalty of \$9,375.”

The corrected text is given in italics above. The attached “Amended Decision After Reconsideration” includes the above corrections in the places indicated.

This Errata to the Decision After Reconsideration relates back to the issuance date of August 16, 2012.

ART R. CARTER, Chairman  
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: September 10, 2012



**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
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In the Matter of the Appeal of:

A. TEICHERT & SON, INC.  
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Employer

Dockets 05-R2D4-2650 and 2651

**AMENDED**  
**DECISION AFTER**  
**RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following Amended Decision After Reconsideration.

**JURISDICTION**

Beginning on April 5, 2005, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in California maintained by A. Teichert & Son, Inc., doing business as (dba) Teichert Construction (Employer). On July 20, 2005, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 1 alleged a Serious violation of section 1509(a) [failure to train employee given new job assignment] and proposed a penalty of \$10,125. Citation 2 alleged a Serious violation of section 1592(e) [failure to adequately control hauling and earth moving operations], and proposed a penalty of \$25,000.

Employer filed timely appeals of both citations.

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board.<sup>2</sup> After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on September 19, 2008. The Decision sustained the violations alleged in Citations 1 and 2, but reduced their classification to General and the penalties to \$840 for each.

Each party timely filed a petition for reconsideration. Employer's petition contended that the two violations were not established and its appeals should have been granted. The Division's petition contended that it had proved the Serious classifications of the violations and that the ALJ erred in reducing the classifications and penalties. In addition each party answered the other's petition.

The Board took both petitions under submission.

### **ISSUES**

Whether the Decision was correct regarding Citation 1.

Whether the Decision was correct regarding Citation 2.

### **EVIDENCE**

The summary and discussion of the evidence in the Decision are incorporated here by reference. For clarity, we briefly restate the evidence here.

Employer was engaged in earth moving activities at a location called Mountain House near Tracy, California. More specifically, Employer had engaged the services of third-party truck operators to haul sandy soil to its project site at Mountain House, where it was being stockpiled for later use. The material was placed, truck load by truck load, in stockpiles which each grew to occupy an area about 100 yards long and 75 yards wide, and reached a height of about 10 feet.

Employer used a three person crew to build the stockpiles. There was a foreman who operated a "blade," a piece of earthmoving equipment which would spread out the dumped material in the desired fashion; a "loader" operator who operated another piece of earthmoving equipment which was used to push the trailer trucks while they were unloading because the trucks tended to get stuck in the stockpiled material if using only their own power; and a "dump man" on foot who guided the trucks to the position on the

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<sup>2</sup> The three day hearing was held before two ALJs. After the first day of hearing the ALJ assigned to the case left the employ of the Board. A second ALJ was then assigned to hear the rest of the case and render a decision.

growing stockpile where each load was to be dropped. One salient feature of the operation was the practice of having the trailer trucks stay in motion while dumping their loads, typically by using their own motive power in combination with being pushed by the loader.

The trucks hauling the soil consisted of a tractor (i.e. the component providing the motive power in which the driver sat) and two bottom dump trailers in tandem. The trailers were emptied by opening gates at the bottom, which was usually done by the truck driver from his cab using a pneumatic or compressed air system,<sup>3</sup> but could also be done manually from the ground by operating a lever near the left rear wheels of each trailer.

When trucks arrived at the Mountain House site, the drivers knew to move to the stockpile being built, and were directed by the dump man to the location at which the load was to be dropped. Trucks moved slowly, at speeds variously estimated in the record, while dumping their loads.<sup>4</sup> The dump man would position himself well in front and to the left (driver's side) of the truck so the truck driver would know where to position the truck on the pile. At the appropriate time the dump man would give a hand signal to the driver, who would then dump the material in the rear trailer, and then upon another signal from the dump man, dump the front trailer's load.<sup>5</sup>

If a trailer's dump gates failed to open when the truck driver used the pneumatic system, the dump man would go to the lever on the trailer and use it to open the dump gates manually. When the dump man was in position to activate the dump lever of the forward trailer of a tandem pair, however, he could not be seen by the loader operator who was pushing the truck and trailers from behind because the view was blocked by the equipment. Also, the truck driver could not see the dump man in that position in his rear view mirror.

On February 8, 2005, Employer's dump man at the Mountain House site observed that the forward trailer of one truck did not open when the truck driver activated the pneumatic system.<sup>6</sup> Following the usual procedure, the dump man went to the dump lever on the left rear side of that trailer. In the process he fell or was struck by the trailer and run over by its left rear wheels and seriously injured. After investigating that accident the Division issued the two citations at issue to Employer.

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<sup>3</sup> We infer the system was pneumatic from testimony that when the truck driver operated the mechanism from his cab a compressed air sound was made.

<sup>4</sup> Estimates of the speed at which the trucks moved during the dumping operation ranged from 2 to 10 miles per hour. While not dispositive either way, we believe the lower estimates more likely to be correct.

<sup>5</sup> We infer the dump sequence was intended to better control placement of the materials and prevent the trailers from unnecessarily disturbing them.

<sup>6</sup> On the date in question, about 4 of the approximately 21 trucks in use that day had trailers which did not open from the truck cab.

After hearing and argument, the ALJ issued a Decision which upheld the two citations but reduced their classification from “Serious” to “General,” and adjusted the proposed civil penalties accordingly.

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

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.
- (a) 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 and the Division each petitioned for reconsideration on the basis that the Decision was issued in excess of the Board’s powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision. We affirm in part and reverse in part the ALJ’s Decision for reasons set forth below.

#### **Citation 1, docket number 05-R2D4-2650.**

The parties’ respective petitions for reconsideration raise the issues of whether the violation was proved, and, if so, whether it was shown to be a serious violation as alleged. We first examine whether the violation was established.

Citation 1 alleged a Serious violation of section 1509(a), for failure to train an employee given a new job assignment. Section 1509(a) states: “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.” In turn, section 3203(a)(7)(C) requires:

“(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program. The Program shall be in writing, and shall, at a

minimum: [¶] “(7) Provide training and instruction: [¶] (C) To all employees given new job assignments for which training has not previously been received[.]”

The evidence established that the dump man had been working at the Mountain House site for about two weeks before his accident. Although he had previous training and experience as a dump man on road projects, he had no previous experience working as a dump man on a sand pile and had not been trained on how to conduct those operations on a sand pile on which the tractor-trailer combination was moving both under its own power and being pushed from behind. Neither had he been trained on how to do so where the dumping procedure was designed to always have the trailer trucks stay in motion. The evidence therefore established that Employer had violated section 1509(a) by failing to train the dump man in the new assignment. As the Decision pointed out, the process of operating the manual dump valve on the trailer was a more complicated procedure at Mountain House than the dump man’s training encompassed. (Decision, p. 9.)

An employer which does not train an employee regarding the hazards of a new assignment violates section 1509(a). (*Clark Pacific Precast, LLC, et al.*, Cal/OSHA App. 08-0027, Denial of Petition for Reconsideration (Jul. 26, 2010); *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003); *Los Angeles Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

Regarding the classification of the violation, the Division alleged it to be serious. The Division has the burden to prove by a preponderance of the evidence that the classification is correct. (*Howard J. White, Inc.*, Cal/OSHA App. 80-720, Decision After Reconsideration (Jul. 29, 1981).)

At the time the citation was issued, violation of a safety order was “serious” “if there is a substantial probability that death or serious physical harm could result from a violation[.]” (Labor Code section 6432(a)<sup>7</sup>; see also section 334(c)(1).) “Substantial probability” refers not to the probability of an accident occurring but to the probability of serious physical harm resulting from an assumed accident. (Labor Code section 6432(c); section 334(c)(3); *Estenson Logistics LLC*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011); *BLF, Inc.*, Cal/OSHA App. 03-4428, Decision After Reconsideration (Jan. 21, 2011).)

The Division’s witness’s testimony on the issue was conclusory and without foundation. Where the Division’s witness’s testimony that the violation was serious lacks a foundational basis for the statement or opinion, it does not

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<sup>7</sup> The definition of “serious” was changed when Labor Code section 6432(a) was amended effective January 1, 2011. Because the events in question took place before that amendment, we apply the former law.

satisfy the burden of proof. (*Anning-Johnson Company*, Cal/OSHA App. 06-1976, Decision After Reconsideration (Jan. 13, 2012).)

**Citation 2, docket number 05-R2D4-2651.**

Citation 2 alleged a serious violation of section 1592(e), which states in its entirety:

Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of rootpickers, spotters, lab technicians, surveyors or other workers in the area of their operation.

It was not disputed that the work involved in this proceeding involved or constituted “earth moving operations” and that section 1592(e) applied.

In *Teichert Construction v. California Occupational Safety and Health Appeals Board* (2006) 140 Cal.App.4<sup>th</sup> 883, 891-892, the Court of Appeal characterized the Board’s following interpretation of section 1592(e) as “reasonable”:

“The hazard contemplated under the regulation is the exposure of workers on foot to dangers of hauling or earth moving equipment. The safety order is designed to protect workers on foot and imposes an affirmative obligation upon an employer to control such operations. Hauling and earth moving operations inherently involve *movement* of equipment and vehicles in the defined area and the location of such vehicles changes within the area of operation. Only where control measures are used by the employer to ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment.” [Original emphasis; quoting from *Teichert Construction*, Cal/OSHA App. 98-2521, Decision After Reconsideration (Mar. 12, 2002).]

The evidence established that Employer had no effective means to assure that the drivers of the trailer trucks, loader operator, and blade operator knew of the particular location of the dump man.<sup>8</sup> The trailer truck driver could not see him in the rear view mirror if he was close to the trailer, and the only means of communication between the dump man and driver was hand signals. Nor had the truck driver been told the dump man might be walking toward the trailer to operate the dump valve manually. The loader operator could not see

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<sup>8</sup> We also note that Employer stipulated that if a trailer of the type involved in the accident were to roll over a person serious injury was likely. (Decision, p. 14.) That stipulation may well have led the Division to believe it did not need to put on additional evidence regarding the serious classification of the violation.

the dump man when he was walking or standing close to a trailer or the truck, or in position to operate the dump valve. The blade operator testified that though he usually knew where the dump man was, he had lost sight of him before the accident. And even though Employer's three employees, including the dump man, had hand-held radios to communicate with each other, the dump man testified that there was no time to use them if he had to use the manual valve to dump a load. In addition, the operation was designed and intended to keep the truck and trailer unit moving at all times, to prevent it from getting stuck in the sand pile. We find, therefore, that Employer did not control the earth moving operation so as to "ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment." (*Teichert Construction, supra*, 140 Cal.App.4<sup>th</sup> at p. 892; section 1592(e); Decision, p. 17.)

The Decision concluded that the Division did not prove the serious classification of the citation because its witness did not testify as to the various consequences of the kinds of accidents which could occur as a result of the violation. That approach was unduly narrow. As the *Teichert* court stated, "On its face, the regulation [i.e. § 1592(e)] is intended to prevent the very type of accident that occurred here." (*Teichert Construction, supra*, 140 Cal.App.4<sup>th</sup> at p. 892; emphasis added.) Here, as in *Teichert*, "a worker on foot was injured by being struck by earth moving equipment because the operator was unaware of [the worker's] presence in the immediate vicinity of the operation." (*Id.*) The *Teichert* court did not distinguish among the various theoretical consequences of being struck by the equipment, and we find it is not necessary to do so. Moreover, the worst case accident is the employee being struck and run over by the trailer, which is what in fact occurred. This accident is the most significant risk to employees when considering both the likelihood of occurrence and the severity of consequences.<sup>9</sup> We have held that the Division may assume the worst case scenario would occur in evaluating whether the violation is serious, and then provide evidence showing what the worst case is and what its likely consequences are in order to prove the violation was serious. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2977, Decision After Reconsideration (Apr. 24, 2003).) It was appropriate to do so under the circumstances here.

Having sustained the serious classification of the violation, we now consider the amount of penalty to assess. The base penalty was \$18,000, which was increased to \$25,000 because the violation was accident-related. We affirm the ALJ's finding that the violation was accident-related. If we then apply the adjustment factors as did the ALJ, there is a 25% adjustment for good faith, reducing the penalty to \$18,750, and an additional 50% adjustment for abatement, yielding a final penalty of \$9,375.

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<sup>9</sup> For example, another possible type of accident would be the trailer's tire bumping the employee but pushing him aside. Such an event is in our view of the evidence less likely to occur than the employee being run over.

## **DECISION AFTER RECONSIDERATION**

We affirm in part and reverse in part the ALJ's Decision. The Decision is affirmed as to Citation 1, docket number 05-R2D4-2650, a General violation with a civil penalty of \$840. The Decision is reversed as to Citation 2, docket number 05-R2D4-2651, which is here held to be a Serious Accident-Related violation with a civil penalty of \$9,375.

ART CARTER, Chairman  
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: September 12, 2012