BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1412595**
ANGELUS BLOCK CO., INC. **11374 TUXFORD STREET** **SUN VALLEY, CA 91352** **Employer**	**DECISION**

Statement of the Case

Angelus Block Co., Inc. (Employer), manufactures cinder blocks. On June 25, 2019, the Division of Occupational Safety and Health (the Division), through Assistant Safety Engineer Juan Nava, commenced a programmed inspection of a work site located at 88100 Fargo Canyon Road in Indio, California.[1]

On September 11, 2019, the Division cited Employer for eight alleged safety violations, five of which remain at issue: failure to close unused openings in electrical cabinets; failure to post danger signs in the area of a permit-required confined space; failure to ensure a top rail has a vertical height of at least 42 inches from the walkway platform; failure to properly guard a belt and pulley drive located less than seven feet above the floor; and failure to guard a sprocket chain drive located less than seven feet above the floor.

Employer filed timely appeals of the citations, contesting the existence of the violations for all citations. For Citations 2, 3, and 4, Employer also asserted that the classifications were incorrect and the proposed penalties were unreasonable. Additionally, Employer asserted a series of affirmative defenses for all of the citations.[2]

At the commencement of the hearing, Employer withdrew its appeals of Citation 1, Items 1 and 2. In its post-hearing brief, the Division withdrew Citation 1, Item 3, due to evidence presented during the course of the hearing.

[1] Juan Nava was an Assistant Safety Engineer at the time that he conducted the inspection of the work site, but had been promoted to Associate Safety Engineer at the time of the hearing in this matter.

[2] Except where discussed in this Decision, Employer did not present evidence in support of its 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 Mario Grimm, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On June 9, December 1, and December 2, 2021, ALJ Grimm conducted the hearing from West Covina, California, with the parties and witnesses appearing remotely via the Zoom video platform. Eugene F. McMenamin, attorney with Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Kathryn J. Woods, Staff Counsel, represented the Division. The matter was submitted on August 8, 2022.

Issues

1. Did the Division establish that employees were exposed to a hazard from uncovered openings in electrical cabinets?

2. Was the mixer in Plant 2 a permit-required confined space for which Employer was required to post danger signs?

3. Was the guardrail on the crossover walkway the proper height from the platform?

4. Did the Division establish that the unguarded portion of a belt and pulley drive created a hazard to which there was employee exposure?

5. Did the Division establish that the unguarded portion of a sprocket chain drive created a hazard to which there was employee exposure?

6. Did the Division establish a rebuttable presumption that Citations 2 and 3 were properly classified as Serious?

7. Did Employer rebut the presumption that the classification of the violations in Citation 2 and 3 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?
8. Are the proposed penalties for Citations 2 and 3 reasonable?

Findings of Fact

1. There were two electrical boxes with unused openings on the sides that were not covered.

2. The mixer in Plant 2 is large enough for an employee to enter and there is only one point of entry and exit on the mixer.

3. Employees go inside the mixer in order to clean it.

4. There is a large paddle inside the mixer that could injure employees cleaning it.

5. Employees inside the mixer could become engulfed by material if the machine was accidentally engaged.

6. Employer did not designate the mixer as a permit-required confined space and no warning signs were visible on or around the mixer.

7. The top rail of a guardrail on a crossover walkway in Plant 1 had a vertical height of 38 inches from the platform walkway.

8. A belt and pulley drive was partially exposed on the left side of a machine that brushed loose fragments from the top of cinder blocks moving on a conveyor belt. The exposed drive was less than seven feet above the floor.

9. Employees could access the area next to the exposed belt and pulley drive while the brush machine was in operation.

10. There was a screw adjustment on the left side of the brush machine that was adjusted by employees using a wrench to raise or lower the height of the brushes dependent upon the size of the cinder blocks.

11. There was a sprocket chain drive with a missing bolt on the side of a conveyor less than seven feet from the floor.

12. The missing bolt caused the guard on the sprocket chain drive to pull away from the side of the machine, exposing a few inches of the chain.

13. There were no employees working in the area where the sprocket chain drive was located unless the machine was shut down.

14. Employees did not clean up the area near the sprocket chain drive until the end of the shift when the machine was no longer in operation.

15. An employee could suffer an injury if he fell over a crossover walkway guardrail to the concrete floor and machinery below.

16. If an employee's hand was pulled into the belt and pulley drive, he could suffer an amputation.

17. The height of the guardrail would have been evident if anyone had tried to measure it.

18. The exposed belt and pulley drive on the brush machine was in plain view.

19. Employer had an effective safety program and cooperated with the Division's inspection.

20. Employer had more than 100 employees at the time of the Division's inspection.

21. Employer has two Serious citations in its safety history that became final in 2019.

22. Employer was entitled to an abatement credit for Citations 2 and 3.

Analysis

1. Did the Division establish that employees were exposed to a hazard from uncovered openings in electrical cabinets?

California Code of Regulations, title 8, section 2473.1, subdivision (b),[3] provides:

(b) Unused openings in cabinets, boxes, and fittings shall be effectively closed.

In Citation 1, Item 4, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on June 25, 2019, the employer failed to close unused openings in electrical cabinets or boxes located in Plant #2 and Plant #1 control room.

The Division has the burden of proving a violation, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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

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

kinds of evidence. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Unused Openings in Electrical Cabinets

In order to establish a violation of section 2473.1, subdivision (b), the Division must prove that there were unused openings in electrical cabinets that were not effectively closed. Associate Safety Engineer Juan Nava (Nava) testified that he observed two electrical boxes that had "knockouts" on the sides of the boxes that were not covered. Nava testified that he did not recall if he had taken any photographs of the alleged violations regarding unused openings. No photographs of electrical boxes were offered into evidence. Although the testimony was disjointed and unclear, as discussed further below, Nava testified credibly that he saw round openings in the sides of electrical boxes, approximately 0.5 to 0.75 inches in diameter, and that the openings were unused and were not effectively closed. As such, the Division met its burden of establishing that there were unused openings in cabinets that were not effectively closed.

Plant 2 Switch Box

Nava testified that there was a red switch in the "on" position on a junction box located in Plant 2 and the junction box had an uncovered opening on the side. However, Nava did not provide information regarding where the Plant 2 switch box was located with regard to employees, how large the box was, how someone would be potentially exposed to an alleged hazard created by this particular uncovered opening, or whether there was any possibility that someone could come into contact, either intentionally or inadvertently, with live wires through the missing knockout on the side of the box. Nava testified that he did not observe any employees working near the switch box in Plant 2.

Plant 1 Electrical Cabinet

Nava testified that there was a control room in Plant 1 with multiple electrical cabinets and that one of the cabinets had a missing knockout. When asked how he knew there was power going to the cabinets, Nava said that it was "obvious" because Employer controls the production line from the operating room. However, Nava did not explain why it was obvious that every cabinet in the room was controlling the production line. Nava did not provide any specific information about how many cabinets were located in the operating room, whether all of them were live, or how an employee would potentially come into contact with live wires via the one missing knockout in one cabinet. As set forth above, there were no photographs taken of the alleged violative condition and there is no testimony about what the cabinets look like.

Exposure to an Existing Dangerous Condition

In order to sustain the citation, the Division must establish that there was employee exposure to the condition addressed by section 2473.1, subdivision (b). (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) "To find 'exposure' there must be reliable proof that employees are endangered by an *existing* hazardous condition or circumstance." (*Id.*, emphasis in original.) Here, while the Division established that there were two electrical boxes that had unused openings that were not effectively covered, there must also be evidence that those openings exposed employees to a dangerous condition.

When questioned about employee exposure to a hazard allegedly created by the open knockouts in both Plant 1 and Plant 2, Nava acknowledged that he did not know if someone could contact live wires through the knockouts and that the existence of a hazard was dependent upon the location of the wires within the switch box or electrical cabinet.

> Q. Okay. But you haven't told us yet how close those wires are to an intruding finger, and you don't know, do you?
> A. Correct, I don't know how far it is from the opening to the live wires.
> Q. Okay. So there may not be a hazard depending on where those wires are; correct?
> A. Depending upon the wires, correct.

(Tr.: 314:20 - 315:2.)

> Q. … So that means here you don't know how -- what the hazard was or if, in fact, there was one, sticking fingers in those orifices; isn't that right?
> A. Correct.

(Tr.: 351:13-17.)

The Division's evidence was lacking with regard to Citation 1, Item 4. Although Nava's testimony established that there were knockouts missing from two electrical boxes, the Division did not meet its burden of proof to establish that there was employee exposure to a hazard resulting from the missing knockouts.

Accordingly, Citation 1, Item 4, is vacated.

2. Was the mixer in Plant 2 a permit-required confined space for which Employer was required to post danger signs?

Section 5157, subdivision (c)(2), pertains to permit-required confined spaces and provides:

> If the workplace contains permit spaces, the employer shall inform exposed employees and other employees performing work in the area, by posting danger signs or by any other equally effective means, of the existence, location of and the danger posed by the permit spaces.

In Citation 1, Item 5, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on June 25, 2019, the employer had Permit-Required Confined Spaces in the Plant #2 mixer and failed to post danger signs of the existence of permit spaces to inform exposed employees and others performing work in the area.

In order to prove that Employer violated section 5157, subdivision (c)(2), the Division is required to establish that (1) the mixer was a permit-required confined space and (2) that Employer did not inform exposed employees of the existence of, location of, and the danger posed by the permit-required confined space.

a. Does the mixer meet the elements of a permit-required confined space?

Section 5157, subdivision (b), defines "confined space" as a space that:

(1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
(2) Has limited or restricted means for entry or exit […]; and
(3) Is not designed for continuous employee occupancy.

A "permit-required confined space" is further defined in section 5157, subdivision (b), as:

[A] confined space which has one or more of the following characteristics:

(1) Contains or has a potential to contain a hazardous atmosphere;
(2) Contains a material that has the potential for engulfing an entrant;
(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
(4) Contains any other recognized serious safety or health hazard.

As noted above, the first question is whether the mixer in Plant 2 was a confined space. Nava testified credibly that the mixer in Plant 2 is large enough for an employee to enter, that the top of the mixer is the only entry and exit point, and that the mixer is not designed for employees to occupy it continuously. Additionally, Nava testified that Scott Clause (Clause), Employer's Regional Production Manager, told him that employees enter the mixer to clean the inside. Therefore, it is inferred that, because employees entered the mixer to clean it, it was configured so that employees could enter to perform assigned work. Thus, the mixer in Plant 2 meets the elements of a confined space.

It is next necessary to examine the elements of a permit-required confined space (PRCS). Nava testified that the slurry material mixed by the mixer would pose an engulfment hazard to an employee in the mixer. Additionally, Nava testified that the large paddle in the mixer that is used to stir the slurry could injure an employee if the mixer was accidentally engaged. Therefore, the mixer in Plant 2 meets the elements of a PRCS.

b. Did Employer refute the Division's assertion that the mixer was a PRCS?

Employer argues that the mixer was not a PRCS. At hearing, Dave Wilson (Wilson), Employer's former Environmental Health and Safety Manager, testified that the mixer was not a PRCS because "once the mixer is locked out, the hazard is eliminated and there are no air quality issues or lack of oxygen in the mixers, so they were not required to have permits." (Tr. 433:1-4.) Employer's argument appears to be that it did not have the PRCS-required warnings because its lockout program is sufficient to mitigate any hazard to which an employee entering the mixer would be exposed.

However, section 5157 contains language indicating that a lockout program is part of, and does not substitute for, a PRCS program. Section 5157, subdivision (d), sets forth the requirements for an employer's PRCS program, such as identifying hazards, implementing measures to prevent unauthorized entry, and verifying that conditions are acceptable for entry, among other things. One of the requirements of a PRCS program is "Isolating the permit space[.]" (§5157, subd. (d)(3)(B).) "Isolation" is defined as:

> [T]he process by which a permit space is removed from service and completely protected against the release of energy and material into the space by such means as: Blanking or blinding; misaligning or removing sections of lines, pipes, or ducts; a double block and bleed system; lockout or tagout of all sources of energy; or blocking or disconnecting all mechanical linkages.

(§5157, subd. (b).) Thus, the safety order contemplates lockout, tagout, or otherwise isolating, the permit space before employees enter it. As such, Employer's locking out of the mixer, while an appropriate and required practice before employees enter to clean the inside, does not negate the PRCS status of the mixer.

c. Did Employer inform exposed employees of the existence, location of, and the danger posed by the PRCS?

Having identified the mixer as a PRCS, it is necessary to examine whether Employer informed exposed employees of the existence of, location of, and the danger posed by the PRCS. The Division has the burden to establish that the exposed employees were not warned of the hazards via the requisite signage or any other equally effective means.

Wilson testified that the mixer had signage even though it was not a PRCS. However, Nava testified that any signs that were on the mixer were illegible and covered in hardened material. Nava's testimony is substantiated by photographs taken during the inspection. (See Ex. K, L, and M.)

Additionally, it is inferred that Employer took no additional steps to warn the employees of the existence of, location of, and the danger posed by the PRCS because both Clause and Wilson refuted the characterization of the mixer as a PRCS. As such, the Division met its burden to establish both that the mixer in Plant 2 was a PRCS and that Employer did not inform employees of the existence, location of, and the danger posed by the PRCS. Therefore, the next question is whether any employees were exposed.

d. Were employees exposed to the hazard created by the PRCS?

The Division may establish employee 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).)

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.)

Clause told Nava that employees enter the mixer in order to clean it. This fact informed Nava's analysis of the mixer as a PRCS. Employer did not dispute that employees were tasked to clean inside the mixer. Accordingly, the Division established employee exposure to the hazard.

Accordingly, the Division established a violation of section 5157, subdivision (c)(2). Citation 1, Item 5 is affirmed.

3. Was the guardrail on the crossover walkway the proper height from the platform?

Employer was cited for a violation of section 3209, subdivision (a), which provides, in relevant part:

> Wherever guardrail protection is required, the following standards shall be adhered to except that other types and arrangements of guardrail construction will be acceptable where the height, surface and end projection of the top rail complies with the standard specifications and the closure of the vertical area between the top rail and floor, platform, runway, or ramp provides protection at least equivalent to that afforded by a mid-rail.
>
> (a) A standard guardrail shall consist of top rail, midrail or equivalent protection, and posts, and shall have a vertical height within the range of 42 inches to 45 inches from the upper surface of the top rail to the floor, platform, runway, or ramp level. (Note: the permissible tolerance on height dimensions is one inch). […]

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on June 25, 2019, the crossovers in Plant #1 had top rails with a vertical height less than 42 inches from platform.

In order to establish a violation of section 3209, subdivision (a), the Division must prove that (1) guardrail protection was required on the crossover walkway, and (2) that the vertical height of the guardrail was not within the range of 42 to 45 inches, allowing for a deviation of one inch.

a. Was guardrail protection required on the crossover walkway?

Section 3210 provides, in relevant part:

> (a) Buildings. Guardrails shall be provided on all open sides of unenclosed elevated work locations, such as: roof openings, open and glazed sides of landings, balconies or porches, platforms, runways, ramps, or working levels more than 30 inches above the floor, ground, or other working areas of a building as defined in Section 3207 of the General Industry Safety Orders.

"Platform" is defined as "an elevated working level for persons" and "working level" is defined as a "platform, walkway, runway, floor or similar area fixed with reference to the hazard and used by employees in the course of their employment." (§3207, Definitions.)

The crossover walkway served as a bridge over a conveyor system and other equipment. Nava estimated that it was at least five feet above the floor of the plant. Nava testified, and Employer did not dispute, that employees traversed the walkway to access equipment on the other side of the conveyor belt.

Because this crossover walkway was an elevated work location more than 30 inches above the floor, guardrail protection was required pursuant to section 3210, subdivision (a).

b. Was the vertical height of the guardrail within the range of 42 inches to 45 inches from the upper surface of the top rail to the platform?

There was a guardrail on both sides of the crossover walkway. Nava measured the guardrail on the crossover pathway at multiple locations and determined that the top rail was 38 inches from the platform. Accordingly, the vertical height of the guardrail did not comply with the safety order's requirement of between 42 and 45 inches and the shortfall was in excess of the one-inch permissible tolerance.

c. *Was the height of the guardrail a de minimis deviation which would excuse Employer's non-compliance?*

Employer argued that, with the permissible deviation, the difference between the height of the guardrail and the safety order's minimum requirement was *de minimis* and should not have been cited as a violation of the safety order.

Section 3209, subdivision (a), is a prescriptive standard and compliance requires adherence to the specific language contained therein.

> A prescriptive standard is "a regulation that specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means." (Gov't. Code, § 11342.590; see also *Mladen Buntich Construction Co*., Cal/OSHA App. 85-1668, Decision After Reconsideration (Oct. 14, 1987).)

(*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1059365, Decision After Reconsideration (July 5, 2019).)

In *Shimmick Construction Company, Inc., supra*, Cal/OSHA App. 1059365, the employer argued that, because its guardrails were only a few inches shorter than required by the safety order, it had substantially complied with the safety order. The Appeals Board rejected this argument:

> Employer's petition, while largely admitting the railings failed to comply with the requirements of section 1620, subdivision (a), argues no exposure existed to any hazard "because the guardrails may have been only slightly lower than required by the safety standard; at most an alleged 3.5 inches." (Petition, pp. 9-10.) However, we concur with the ALJ that substantial compliance is not a defense to this prescriptive standard, nor does it preclude a finding of exposure. The ALJ's decision correctly held, "Employer's contention that it substantially complied with the safety standard does not support a conclusion that Employer did not violate the safety order. Rather, it clearly demonstrates Employer failed to follow the requirements of the prescriptive standard set by the safety order." [ALJ Decision.]

(*Id.*)

Thus, the *de minimis* argument proffered by Employer has already been considered and dismissed by the Appeals Board.

Accordingly, the Division established a violation of section 3209, subdivision (a), because the guardrails on the crossover walkway were only 38 inches, which is four inches

shorter than the permissible minimum height and the shortfall exceeds the one-inch deviation set forth in the safety order. Citation 2 is affirmed.

4. Did the Division establish that the unguarded portion of a belt and pulley drive created a hazard to which there was employee exposure?

Section 4070, subdivision (a), pertaining to guarding, provides:

> All moving parts of belt and pulley drives located 7 feet or less above the floor or working level shall be guarded.

In Citation 3, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on June 25, 2019, the employer exposed employees to unguarded belt and pulley drives located 7 feet or less above the floor or working level located in the Plant #1.

In order to establish a violation of section 4070, subdivision (a), the Division must establish that there was part of (1) a belt and pulley drive located seven feet or less above the floor that (2) was not guarded, thus (3) exposing employees to a hazard.

a. Location of the Belt and Pulley Drive

The belt and pulley drive at issue for Citation 3 was on a machine that brushed uncured cinder blocks as they moved along a conveyor belt into an area where they would be cured. The cinder blocks were transported under a brushing system that scraped loose fragments of sand or rock from the top of the blocks. The belt and pulley drive was located adjacent to a screw on the left side of the machine. The screw was adjusted by an employee using a wrench to raise or lower the brushes inside the machine, depending on the size of the blocks passing through on the conveyor.

Through photographs and Nava's testimony, the Division established that the belt and pulley drive was located less than seven feet above the plant floor. Employer did not dispute the distance of the belt and pulley drive from the floor. (See Ex. DDDD and EEEE.)

b. Guarding of the Belt and Pulley Drive

Section 3941 contains definitions that apply to the safety order at issue. Of particular relevance for the analysis of the guarding of the belt and pulley drive at issue are the definitions of "guarded" and "accidental contact":

> Guarded. 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.
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> Accidental Contact. 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.

As such, using these definitions, section 4070, subdivision (a), is analyzed by further explaining what is meant by "guarded," as follows: All moving parts of belt and pulley drives located 7 feet or less above the floor or working level shall be [protected so as to remove the hazard of] [inadvertent physical contact which could result from unplanned action or movement].

Having established that there was a belt and pulley drive located less than seven feet above the floor, the Division had the burden to prove that the drive was not protected to remove the hazard of inadvertent contact.

Nava opined that the exposed back side of the belt and pulley drive constituted a hazard because an employee working on the left side of the conveyor belt, where the aforementioned screw was located, could accidentally put a hand behind the cover of the drive and his fingers could come into contact with the belt and pulley system. Additionally, Nava testified about the area below the conveyor belt where there was debris that had been brushed off the cinder blocks, opining that a worker could inadvertently reach his hand into the area where belt and pulley were unguarded as he cleaned up the debris.

It is noted that Nava observed this particular machine when there were no employees working. Clause testified that the plant was not in operation at the time of Nava's inspection because it was a maintenance day. Wilson and Clause both provided testimony about where employees are located when the machine is running and the circumstances surrounding the types of activities about which Nava testified.

Wilson and Clause testified that most of the operation of the brushing machine is performed by an operator sitting in a control room approximately 30 feet from the machine. However, there are occasions where employees need to work near the brushing machine when it

is in operation. Those employees are positioned on the right side of the conveyor belt, not the left side where the belt and pulley drive is located.

Wilson testified that employees are trained to adjust the brush height using the wrench on the screw when the machine is shut down because the employee needs to have the block stationary in order to set the brushes at the proper height. However, he acknowledged that it is possible to adjust the screw with the machine in motion.

Additionally, Clause testified that maintenance and cleanup of the debris below the conveyor belt is performed at the end of the work shift, when the machine is shut down.

There was testimony about a gate located to the left of the belt and pulley drive that provides access to a guarded area of the plant. All operations behind that guard are automated, but employees may need to enter the area to perform maintenance. When the gate is opened, the entire conveyor system shuts down and does not restart until the employee goes to the control panel to re-energize the machine after exiting the area. What was not discussed, however, is the fact that the employee could be walking past the belt and pulley drive while the machine was in operation before opening the gate that shuts down the machine automatically.

While it is not part of Employer's general practice for employees to stand near the belt and pulley drive, there was testimony that the area where the drive is located is accessible to employees.

c. Employee Exposure to the Belt and Pulley Drive

> [E]mployee exposure may be established 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. [Citations omitted.] Under this "access" exposure analysis, the Division may establish exposure by showing that it was reasonably predictable that during the course of their normal work duties employees "might be" in the zone of danger.

(*Dynamic Construction Services, Inc., supra,* Cal/OSHA App. 14-1471.)

Based on the testimony from Employer's own witnesses, there was nothing preventing employees from accessing the area next to the conveyor where the belt and pulley drive was located. As such, the Division established that it was reasonably predictable that employees might be in the zone of danger created by the belt and pulley drive that was not fully guarded.

Accordingly, Citation 3 is affirmed.

5. Did the Division establish that the unguarded portion of a sprocket chain drive created a hazard to which there was employee exposure?

Section 4075, subdivision (a), pertaining to gears and sprockets, provides:

> All gears and sprockets and sprocket chain drives located 7 feet or less above the floor or working level shall be guarded.

In Citation 4, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on June 25, 2019, the employer exposed employees to unguarded sprockets and sprocket chain drives located 7 feet or less above the floor or working level located in Plant #1.

As with section 4070, subdivision (a), the requirement for establishing a violation of section 4075, subdivision (a), is that there must be (1) gears, sprockets, or sprocket chain drives located seven feet or less above the floor that are (2) not guarded, thus (3) exposing employees to a hazard.

a. Location of the Sprocket Chain Drive

Nava identified a chain and sprocket drive on a conveyor belt system that had a guard, but it was missing a bolt so the guard was not flush against the machine, which exposed several inches of chain. The drive was located just a few feet above the floor. Accordingly, the Division established the first element of having a sprocket chain drive located seven feet or less above the floor.

b. Guarding of the Sprocket Chain Drive

As set forth above, the guard covering the sprocket chain drive at issue had been pulled away from the side of the machine, creating an approximately one-inch gap exposing a few inches of the chain. Clause testified that the reason the guard was not flush against the side of the conveyor was because a bolt was missing.

c. Exposure to the Sprocket Chain Drive

On the date that Nava observed the sprocket chain drive, there were no employees working in the area. Clause testified that employees do not enter that area where the drive is located when the conveyor is in operation: "If we were in production [at the time of the inspection], we would never have been near that." (Tr. 358: 22-25.) Clause further clarified that "the areas that that's in, we would not have been near it if we were actually in production, if we were manufacturing with the machinery. It was a maintenance day, so it's just in an area that people aren't allowed in production." (Tr. 359: 7-12.)

Nava again used the example of employees cleaning the debris below the conveyor as an example of when an employee might inadvertently come into contact with the exposed chain. However, as discussed with regard to Citation 3, Clause and Wilson both testified that employees are not cleaning around the conveyors when the machines are in operation.

In contrast to the Division's exposure argument in Citation 3, there was no evidence of what an employee would be doing to support a reasonably predictable access to the sprocket chain drive. The Division did not establish that any employees were ever exposed to the chain visible behind the guard of the sprocket chain drive. The Division did not provide any testimony that supported a finding that any employees were ever in proximity to the drive in order to inadvertently come into contact with a hazard. Accordingly, Citation 4 is vacated.

6. Did the Division establish a rebuttable presumption that Citations 2 and 3 were properly classified as Serious?

Labor Code section 6432, subdivision (a), in relevant part states:

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

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

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body.
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*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 Division cannot meet its burden unless it introduces at least some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MDB Management, Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).)

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

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

Nava testified that he was current on his Division-mandated training at the time of the hearing. As such, he was deemed competent to offer testimony regarding the classification of the Serious violations cited in Citations 2 and 3.

Citation 2

The actual hazard created by the violation set forth in Citation 2 is that an employee could fall over the insufficient guardrail to the floor and equipment below the crossover walkway.

Here, Nava did not provide any testimony regarding the types of injuries that could result from falling over the guardrail to the floor more than five feet below. However, in its post-hearing brief, Employer conceded, with regard to the realistic possibility that death or serious physical harm could result from the actual hazard created by the violation, that "Employer does not dispute that a 5'> fall on to machinery below meets that threshold." (Employer's Post-Hearing Brief, p. 7, ln. 6-7.)[4] As such, the hazard of falling from the crossover walkway to the floor below poses a realistic possibility of serious physical harm or death.

Employer's argument with regard to the realistic possibility of serious physical harm is that the Division did not establish that any serious physical harm would result from the arguably *de minimis* difference between 38 inches and the minimum of 40 inches, again using the wrong permissible deviation.[5] That is, Employer argues that there was no evidence that the shorter guardrail would result in serious physical harm any more than a compliant guardrail. Employer's argument is unpersuasive.

> [A]s to Employer's substantial compliance argument, we note that the prescriptive requirements of the regulation represent a legislative determination as what guardrail heights offer sufficient protection from fall hazards. Given the testimony of Armas, and Employer's clear departure from the prescriptive standards, we decline to accept Employer's argument that there is no realistic possibility of serious physical harm.

(*Shimmick Construction Company, Inc.*, *supra*, Cal/OSHA App. 1059365.)

Employer conceded that a fall of greater than five feet onto the machinery and concrete below the crossover walkway could result in serious physical harm. Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.

Citation 3

The actual hazard created by the unguarded belt and pulley drive is that an employee could inadvertently contact the drive and have a body part pulled into the rotating pulley. Nava testified that a glove or shirt contacting the pulley could result in amputation of fingers or a hand.

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

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[4] The Appeals Board has held that "Briefs and arguments are reliable indications of a party's position on the facts as well as on the law, and a reviewing court may make use of statements therein as admissions against the party." (*Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012), fn. 3.)

[5] As discussed above, the plain language of the safety order permits a deviation of one inch, not two inches, so the minimum permissible height with the deviation is 41 inches, not 40 inches.

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

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

(Lab. Code §6432, subd. (c).)

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.

The Appeals Board has recognized that the employer has the burden to establish that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation:

> To prove that Employer could not have known of the violative condition by exercising reasonable diligence, Employer must establish that the violation occurred at a time and under the circumstances which could not provide Employer with a reasonable opportunity to have detected it. [Citations.]

(*National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).)

Citation 2

In Citation 2, the violative condition was static and the discovery of the condition required only that someone measure the guardrail on the crossover walkway to observe that the height of the top rail was noncompliant. Wilson testified that he did not "feel it was unsafe" as he walked across the walkway. This was not an unknown or undetectable violation, it was simply overlooked in plain sight.

Therefore, Employer failed to rebut the Division's classification of Citation 2 as Serious.

Citation 3

In Citation 3, the violative condition was the exposed back side of the belt and pulley drive on the brush machine. The Appeals Board has held that "unguarded machine parts that are in plain view constitute a serious hazard because an employer can detect them through the use of reasonable diligence. [Citations omitted.]" (*C & M Fine Pack, Inc.*, Cal/OSHA App. 07-4149, Decision After Reconsideration (May 11, 2012).) The Appeals Board has further held that "[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. (*Id.*)

The unguarded belt and pulley drive was in plain view. Accordingly, Employer cannot rebut the presumption that Citation 3 was properly classified as Serious.

8. Are the proposed penalties for Citations 2 and 3 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).)

However, the Appeals Board has held that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board... ." (*DPS Plastering, Inc*., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).) Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to

offer evidence in support of its determination of the penalty since the Appeals Board has historically required proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

The Appeals Board has held that when the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc, supra*, Cal/OSHA App. 00-4250.)

The Division submitted into evidence its Proposed Penalty Worksheet and Nava testified about how he calculated the penalties. However, some of Nava's testimony is contrary to the penalty-setting regulations. As such, it is necessary to examine the evidence adduced at hearing to determine the reasonableness of the penalties. The two affirmed citations will be discussed separately.

Citation 2

Severity

Section 336, subdivision (c), provides that a Base Penalty for a Serious violation will be initially set at $18,000 and thereafter adjusted based on the Extent and Likelihood factors of the violation. As set forth above, Citation 2 was properly classified as a Serious violation. Accordingly, the Base Penalty for Citation 2 is $18,000.

Extent

Section 335, subdivision (a)(2), defines Extent:

> […]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

> LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
>
> MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.
>
> HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

For Citation 2, Nava testified that he rated Extent as High because "the whole [guardrail] was too short." (Tr. 166: 24-25.) The noncompliant guardrail was identified as being on one crossover walkway. This appears to be an isolated violation rather than numerous violations of the standard. The Extent factor of High is for a high degree of violations or a widespread incidence of violations, which is not the circumstance here.

Accordingly, Employer is afforded maximum credit for Extent for Citation 2. (*RII Plastering, Inc, supra*, Cal/OSHA App. 00-4250.) Extent is reduced to Low, which results in a 25 percent reduction of the Base Penalty. (§336, subd. (c)(1).)

Likelihood

Section 335, subdivision (a)(3), defines the adjustment for Likelihood:

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

For Citation 2, Nava testified that he applied a Low rating for Likelihood because the use of the crossover walkway was limited to transitioning from one location to another, rather than performing work activities on the walkway. As such, the Low Likelihood results in a 25 percent reduction of the Base Penalty. (§336, subd. (c)(1).)

Thus, for Citation 2, the Gravity-based Penalty resulting from applying the reductions for Extent and Likelihood is $9,000 ($18,000, less 50 percent).

Section 336 also provides for adjustment of the Gravity-based Penalty pursuant to the factors for Good Faith, Size, and History.

Good Faith

Section 335, subdivision (c), provides:

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

Nava testified that he credited Employer with a 15 percent reduction for a Fair rating of Good Faith, which means that the Division rated Employer's safety program as average. (§336, subd. (d)(2).) Nava did not explain why he found the program to be average. In fact, the testimony about Good Faith seemed to be an explanation of why it should be rated as Good. Nava testified that Employer was not cited for any problems with its safety program and "they were very professional and respectful during my inspection." (Tr. 158: 8-12.) There was no negative or deficient assessment that Nava indicated would result in anything but a Good rating for Good Faith. Accordingly, the adjustment factor for Good Faith is hereby modified to Good, which results in a reduction of 30 percent of the Gravity-based Penalty. (§ 336, sub. (d)(2).)

Size

Section 335, subdivision (b), defines the "Size of the Business of the Employer" as "the number of individuals employed at the time of the inspection/investigation." If an employer has more than 100 employees, there is no downward adjustment for Size. (§ 336, sub. (d)(1).)

Nava testified that Clause informed him that Employer had more than 100 employees. Employer did not dispute this fact. Accordingly, Employer was not entitled to a downward adjustment for Size.

History

Section 335, subdivision (d), provides:

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

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

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

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

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

Nava testified that he reviewed Employer's citation history and there were two Serious citations issued in 2017 that became final in 2019 after appeal. Therefore, Employer was not afforded a reduction for History. (§ 336, sub. (d)(3).)

Accordingly, for Citation 2, Employer's Gravity-based Penalty of $9,000 shall be further reduced by 30 percent for Good Faith, resulting in an Adjusted Penalty of $6,300.

Abatement Credit

Section 336, subdivision (e)(2), provides for a 50 percent reduction in the Adjusted Penalty if an employer abates an alleged violation within specified time parameters. Nava testified that he made a mistake when he did not apply the abatement credit to Citation 2 and the Division acknowledged that the penalty for Citation 2 should be reduced by 50 percent.

Accordingly, the Adjusted Penalty of $6,300 is reduced to $3,150 for Citation 2.

Citation 3

As with Citation 2, the Base Penalty for a Serious citation is $18,000 for Citation 3. Further review of the Division's application of the Extent and Likelihood factors is warranted here.

Extent

As set forth above, section 335, subdivision (a)(2), provides for varying levels of adjustment based on how widespread the violation is. The only testimony provided by Nava in support of the Division's application of Medium Extent was "… there are machine guarding issues. So it was medium. No credit was given." (Tr. 170: 21-23.) The factors in section 335, subdivision (a)(2), are:

> LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
>
> MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.
>
> HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

Nava's testimony does not provide any information regarding the extent of the violation. The Division's evidence in support of its Medium Extent for Citation 3 is insufficient. (*RII Plastering, Inc*, *supra*, Cal/OSHA App. 00-4250.) Accordingly, Extent is modified to Low and a 25 percent reduction of the Base Penalty is warranted. (§336, subd. (c)(1).)

Likelihood

Nava did not provide any testimony explaining the basis for the Division's assignment of a Low Likelihood for Citation 3. However, because the maximum reduction for Likelihood is the Low determination, it will not be disturbed. The Low Likelihood results in a 25 percent reduction of the Base Penalty. (§336, subd. (c)(1).)

Thus, for Citation 3, the Gravity-based Penalty resulting from applying the reductions for Extent and Likelihood is $9,000 ($18,000, less 50 percent).

The remaining adjustment factors of Good Faith, Size, and History are unchanged from Citation 2 to Citation 3. As such, the Adjusted Penalty amount for Citation 3 is $6,300 ($9,000, less 30 percent).

As with Citation 2, the Division conceded that Employer should have received an abatement credit for Citation 3, further reducing the penalty by 50 percent. Accordingly, the Adjusted Penalty of $6,300 is reduced to $3,150 for Citation 3.

Conclusions

For Citation 1, Item 4, the Division did not establish a violation of section 2473.1, subdivision (b).

For Citation 1, Item 5, the Division established a violation of section 5157, subdivision (c)(2), because Employer did not inform employees of the dangers created by the mixer in Plant 2, which was a permit-required confined space. The classification and reasonableness of the proposed penalty were not appealed.

For Citation 2, the Division established that Employer violated section 3209, subdivision (a), because the guardrail on the crossover walkway was not the required height. The citation was properly classified as Serious. The penalty, as modified herein, is reasonable.

For Citation 3, the Division established a violation of section 4070, subdivision (a), because an employee could inadvertently contact the exposed belt and pulley drive with reasonably predictable access to the zone of danger. The citation was properly classified as Serious. The penalty, as modified herein, is reasonable.

For Citation 4, the Division did not establish a violation of section 4075, subdivision (a), because there was no evidence that an employee could inadvertently contact the sprocket chain drive so there was no employee exposure to the hazard.

Order

It is hereby ordered that Citation 1, Items 1 and 2, are affirmed due to Employer's withdrawal of its appeal at the commencement of the hearing. The penalties remain $425 for each of the two items.

It is further ordered that Citation 1, Item 3, is dismissed and the penalty is vacated pursuant to the Division's withdrawal of the citation after the conclusion of the hearing.

It is ordered that Citation 1, Item 4 is vacated.

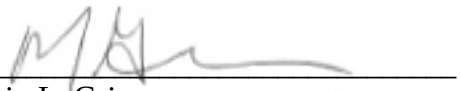
It is further ordered that Citation 1, Item 5, is affirmed and the penalty is sustained.

It is hereby ordered that Citation 2 is affirmed and the penalty is modified to $3,150 as set forth herein.

It is hereby ordered that Citation 3 is affirmed and the penalty is modified to $3,150 as set forth herein.

It is hereby ordered that Citation 4 is vacated.

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



Dated**:** 09/07/2022

Mario L. Grimm
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.**