BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **DAVIS DEVELOPMENT COMPANY, INC.** **8780 PRESTIGE COURT** **RANCHO CUCAMONGA, CA 91730** **Employer**	Inspection No. **1241779** **DECISION**

Statement of the Case

Davis Development Company, Inc. (Employer), is a framing contractor. On June 23, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Louis Vicario, commenced an inspection of a work site located at 101 Park Boulevard in San Diego, California, after a report of an injury on June 12, 2017.

On October 23, 2017, the Division cited Employer for four alleged safety violations, three of which remain at issue: failure to file a complete report on Form 5020 for an occupational injury; failure to adopt a written Code of Safe Practices related to powered industrial trucks with boom attachments; and, failure to ensure that a truss boom did not contact an obstruction during lifting operations.

Employer filed timely appeals of the citations, contesting the existence of the violations for each of the items and Employer asserted a series of affirmative defenses for each alleged violation.[1] Additionally, for Citation 2, Employer asserted that the classification of the violation was incorrect and the proposed penalty was unreasonable. The Division withdrew Citation 3 at the commencement of the hearing in exchange for Employer's waiver of any rights it might have pursuant to California Code of Regulations, title 8, section 397 or Labor Code section 149.5 to petition for or recover costs or fees, if any, incurred in connection with this appeal

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), in San Diego, California, on October 23 and 24, 2019. Manuel Melgoza, attorney, of Donnell, Melgoza and Scates, LLP, represented Employer. Eric Compere, Staff Counsel, represented the Division. The matter was submitted on February 28, 2020.

[1] Except as otherwise noted 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).)

Issues

1. Did Employer file a complete report of the June 12, 2017, employee injury using "Employer's Report of Occupational Injury or Illness" in accordance with the Division's reporting requirements?

2. Did Employer adopt a Code of Safe Practices related to the use of powered industrial trucks configured with boom attachments?

3. Did Employer violate section 1616.1, subdivision (o), when a powered industrial truck with a boom attachment contacted an overhead fall protection railing?

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

5. Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

6. Is the proposed penalty for Citation 2 reasonable?

Findings of Fact

1. After an injury to Arnulfo Gonzalez (Gonzalez) on June 12, 2017, Employer filed with the Division a "Employer's Report of Occupational Injury or Illness" (Form 5020) that had multiple incomplete boxes.

2. Employer did not file the completed Form 5020 until after the Division issued the citations at issue in this matter.

3. Prior to the Gonzalez accident, Employer had adopted a general Code of Safe Practices and other trade-specific versions, such as a "Rough Terrain Forklifts Safe Operation Procedures and Code of Safe Practices."

4. Employer's forklift-specific Code of Safe Practices, in effect at the time of the inspection, addresses hazards associated with operation of a forklift with a boom attachment.

5. The truss boom that was attached to the forklift at the time of Gonzalez's accident had a circular device at the end through which a sling was attached.

6. The sling attached to the boom attachment was being used to lift and lower a large beam into place.

7. As the forklift operator was lowering the front end of the beam into place, the boom struck an overhead fall protection railing, which caused broken pieces of the railing to fall to the ground.

8. Materials struck by a boom or load could fall on nearby employees or the employees could be impacted and fall from height.

9. Gonzalez was assigned to work as the signal person, giving signals to the forklift operator during the beam-setting activity in an effort to avoid the type of situation that occurred at the time of the accident.

10. Employer's supervisors performed daily safety inspections and planning meetings, conducted weekly safety meetings, and trained its employees regarding proper procedures for placing beams.

11. Employer's Injury and Illness Prevention Program was effective.

12. Employer abated the alleged violation for Citation 2 during the inspection.

Analysis

1. Did Employer file a complete report of the June 12, 2017, employee injury using "Employer's Report of Occupational Injury or Illness" in accordance with the Division's reporting requirements?

California Code of Regulations, title 8, section 14001, subdivision (a),[2] provides:

Every employer shall file a complete report of every occupational injury or occupational illness to each employee which results in lost time beyond the date of such injury or illness or which requires medical treatment beyond first aid, as defined in Labor Code Section 5401(a). As used in this subdivision, "lost time" means absence from work for a full day or shift beyond the date of the injury or illness.

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

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to on 06/22/2017, the employer did not file a complete Form 5020 report of an occupational injury that occurred on or about 06/12/2017.

The Appeals Board has consistently interpreted the word "shall" to be mandatory. (See, e.g., *Central Valley Engineering & Asphalt, Inc*., Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 14, 2012); *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006).) The regulation sets forth the non-discretionary task that employers must file a complete report of occupational injuries or illnesses that result in lost time from work. Section 14001, subdivision (c), explains to employers that the report required by subdivision (a) is to be made on the Form 5020. Employer did file a Form 5020 for the June 12, 2017, injury to Gonzalez. The issue for Citation 1, Item 1, is whether the report Employer filed meets the requirement of section 14001, subdivision (a), because all information requested on the Form 5020 was not provided.

a. "Complete report"

The Appeals Board construes regulations by giving words their common sense meaning based on the evident purpose for which the regulation was enacted. (*The Herrick Corporation*, Cal/OSHA App. 07-4095, Decision After Reconsideration (Mar. 26, 2012), citing *In re Rojas* (1979) 23 Cal. 3d 152, 155.) Although there is nothing in the safety orders that specifically defines "complete" or that explains what the Occupational Safety and Health Standards Board intended when it included the phrase "complete report" in section 14001, subdivision (a), it is common sense to interpret it to mean that the form should be filled out in its entirety.

The Form 5020 dated June 13, 2017, is unsigned and missing several pieces of information, including, but not limited to:

Location of accident
Nature of business
Time employee began work
Date last worked
Department where event occurred
Other workers injured in this event
Hospitalized as inpatient overnight?
Name and address of hospital/phone number
Employee treated in emergency room
Injured employee's social security number, date of birth, address, phone number

Injured employee's date of hire
Hours employee usually works
Employment status (full/part time, temporary, seasonal)
Gross wages/salary

The missing information on the Form 5020 was ultimately filled out and submitted as proof of abatement on November 9, 2017. This date was after the citation was issued.

Employer did not claim that it was excused from reporting the June 12, 2017, injury. Rather, during the hearing, Employer asserted that the omissions on its original Form 5020 did not directly relate to the accident itself and were, therefore, inconsequential to the Division's need for the report. However, employers are obligated to file a complete report on the Form 5020 pursuant to the plain language in section 14001, subdivisions (a) and (c). The regulation does not contain any indication that the information required by Form 5020 is optional in any part and it does not indicate that filling out critical sections constitutes substantial compliance. It simply requires that an employer file a "complete report." In the instant matter, the report was filed but there is no colorable argument that the Form 5020 was complete when it was filed.

b. Filed with the insurer

Employer's post-hearing brief raises the issue of the differentiation between filing the Form 5020 with the Division versus the workers' compensation insurer.

Section 14001, subdivision (e), provides that the report required by subdivision (a) "shall be filed with the insurer within five days after such insured employer obtains knowledge of the injury, illness or death." Section 14001, subdivision (d), requires the report to be filed directly with the Division of Labor Statistics and Research if an employer is self-insured. After an employer files the report with its workers' compensation insurer, that insurer is mandated to immediately forward it to the Division of Labor Statistics and Research pursuant to section 14002.[3]

Employer asserts that it <u>did</u> submit the complete report to the Division. That completed form was filed in November 2017, after the citations had been issued. The subdivision for which Employer was cited, subdivision (a), does not contain a time period for filing the complete report, and Employer argues that it was not cited for a violation of either subdivision (d) or (e), related to the timing of the report.

---

[3] It is noted that section 14000, et seq. is located in Chapter 7, Division of Labor Statistics and Research. For the purposes of Article 1 of Chapter 7, section 14000 defines "Division" as the Division of Labor Statistics and Research (DLSR) of the Department of Industrial Relations, rather than the Division of Occupational Safety and Health (DOSH). However, because there was no evidence on this issue and it is unclear whether filing with DLSR automatically results in a copy being sent to the DOSH, the distinction is not determined to be an issue here.

It is necessary to read the other subdivisions of section 14001 in conjunction with subdivision (a) in order to "harmoniz[e] to the extent possible all provisions relating to the same subject matter." (*Gerdau dba Gerdau Reinforcing Steel*, Cal/OSHA App. 315832014, Denial of Petition for Reconsideration (Feb. 27, 2017), citing *Pacific Gas & Electric Co. v. Superior Court* (2006) 144 Cal.App.4th 19, 24.) Subdivisions (d) and (e) of section 14001 both set forth the requirement that the report mandated by subdivision (a) must be filed within five days. Without the timing requirements set forth in subdivisions (d) and (e), the report required by subdivision (a) could arguably be filed at any time, which defeats the purpose of requiring a report at all.

Without timing requirements for filing a report, Employer appears to be arguing that an employer does not have to file a report until it receives a citation. All of the subdivisions of section 14001 must be read in conjunction with one another to fully inform an employer of its obligations with regard to the filing of the Form 5020.

As such, the Division established that Employer violated section 14001, subdivision (a). Accordingly, Employer's appeal of Citation 1, Item 1, is denied.

2. Did Employer adopt a Code of Safe Practices related to the use of powered industrial trucks configured with boom attachments?

Section 1509, subdivision (b), provides:

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

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to on 06/22/2017, the employer did not adopt a written Code of Safe Practices which relates to the employer[']s use of powered industrial trucks configured with boom attachments for hoisting, lowering, and moving suspended loads during construction operations.

"The stated goal of the Occupational Safety and Health Act in general (Labor Code § 6400), and the accident prevention program in particular, is to prevent injuries and deaths on the job. (*George L. Lively*, Cal/OSHA App. 98-088, Decision After Reconsideration (Apr. 28, 1999).) Employers are required to adopt safe methods of carrying out whatever tasks employees are assigned to perform at a place of employment. Committing these methods to writing is

essential, since an employee must be trained in job safety just as he or she must be trained to perform specific tasks... ." (*Id.*)

"No single code could cover the safe practices applicable to all construction places of employment. Therefore, responsibility for adopting a code appropriate to the work to be performed at a site must rest with the person or entity that knows of the hazards likely to be encountered there; the employer." (*Western States Construction Company*, *Inc.*, Cal/OSHA App. 86-0096, Decision After Reconsideration (Mar. 18, 1988).)

In response to the Division's request for Employer's Code of Safe Practices (CSP), Employer gave Associate Safety Engineer Louis Vicario (Vicario) its general CSP, which is a general code that does not pertain specifically to forklift operations. The general CSP that was provided to Vicario is similar to Plate A-3, referenced in section 1509, subdivision (b).[4] Because it did not contain instructions for use of a forklift with boom attachments, the Division determined that Employer had violated section 1509, subdivision (b).

However, during the hearing, Employer produced a document entitled "Forklift Operating Procedures and Code of Safe Practices." (Ex. H.) Employer's Safety Coordinator, Alfredo Sanchez (Sanchez), testified that this document is the set of practices specific to forklift operations that was in effect at the time of the accident. The forklift-specific CSP contains practices for using a forklift with boom attachments.

Employer's Injury and Illness Prevention Program (IIPP) references both the CSP and "Trade Specific—Code of Safe Practices" as topics to communicate to new employees during orientation. This supports Employer's assertion that the general CSP that was produced to the Division during the inspection was not the only CSP maintained by Employer. The IIPP also refers to an "Office Code of Safe Practices," which further demonstrates Employer's use of specific CSPs.

When asked why the forklift CSP was not provided to the Division during the inspection, Sanchez stated that it was not requested. The Document Request asks for the "Code of Safe Practices" and Vicario did not inquire further as to whether there were others, even after receiving the IIPP that clearly references other trade-specific CSPs.

While it would have been prudent to provide the Division with the forklift CSP in addition to the general CSP, the fact that Employer did not provide more than was specifically requested does not mean that Employer violated the safety order.

---

[4] Plate A-3 is in Appendix A of the Construction Safety Orders and is "a suggested code. It is general in nature and intended as a basis for preparation by the contractor of a code that fits his/her operations more exactly."

a. Admission of Evidence After the Hearing Record was Closed

The Division asserted in its post-hearing brief that the forklift-specific CSP was not created until after the accident. The basis for this assertion is a statement on Employer's Statement of Abatement (Forms 160 and 161) that the forklift CSP was revised "immediately after the incident." The Forms 160 and 161 were not admitted into evidence during the hearing. At the close of the hearing, the parties were informed that the record was closed to further evidence and were given the following instruction:

> The evidentiary record is closed to further evidence. If you wish to present further evidence after today, you file a motion requesting leave to submit additional exhibits or evidence, specify what evidence you wish to submit and the reason why with the exercise of reasonable diligence you were unable to submit that proposed evidence at the time of the hearing.

Additionally, the parties were instructed that post-hearing briefs were limited to issues identified during the hearing.

The Division did not file a motion requesting leave to submit the Forms 160 and 161 into evidence. Additionally, the Division's post-hearing brief does not assert that the Division was unable to submit the forms at the time of the hearing. Rather, Division's counsel stated that he had a "lapse of memory" about the statement on the Forms 160 and 161 when Sanchez testified about the forklift CSP during the hearing.

In response to the Division's post-hearing assertions that the forklift CSP was not in effect at the time of the accident, Employer submitted a brief with additional evidence that the forklift CSP was created after a *prior* incident in 2016.

Both parties have submitted evidence without leave to do so after the record was closed. Additionally, the issue of whether the forklift CSP was in existence at the time of the 2017 accident was not presented at the time of the hearing. The Division did not challenge the veracity of Sanchez's assertion that the forklift CSP was in existence in 2017, nor did Employer produce documentation to support the assertion during the hearing. This was not an issue that the parties raised as a dispute during the hearing. As such, the parties have introduced a new issue requiring an analysis of additional evidence without the benefit of testimony as to the authenticity of this new evidence and the ability to ask Sanchez why he wrote the statement on the Forms 160 and 161.

None of the evidence the parties submitted after the close of evidence is admitted. The determination of the validity of Citation 1, Item 2, is made based on evidence admitted at the

hearing. There was no evidence admitted at the hearing that supports an allegation that the forklift CSP was not in existence at the time of the Gonzalez accident.

The Division did not establish that Employer violated section 1509, subdivision (b). Employer did have a forklift CSP that addressed the hazards associated with operating a powered industrial truck with a boom attachment. Citation 1, Item 2, is dismissed.

3. Did Employer violate section 1616.1, subdivision (o), when a powered industrial truck with a boom attachment contacted an overhead fall protection railing?

Section 1616.1, subdivision (o), pertains to the operation of cranes and derricks in construction. The section provides: "During lifting operations, the load, boom, or other parts of the equipment shall not contact any obstruction in a way which could cause falling material or damage to the boom."

In Citation 2, the Division alleges:

> Prior to and during the course of the inspection, the employer conducted lifting operations where a truss boom made contact with a fall protection railing that broke and caused the beam being hoisted to fall. As a result, on or about 06/12/2017, an employee who was receiving the load was seriously injured after he was struck by the broken railing that caused him to fall, and the beam being hoisted fell on and crushed his left hand.

a. Applicability of the Safety Order

Section 1610.1, Scope, provides, in relevant part:

> (a) This Article applies to power operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load. Such equipment includes, but is not limited to: … multi-purpose machines when configured to hoist and lower (by means of a winch or hook) and horizontally move a suspended load; … . However, items listed in subsection (c) of this section are excluded from the scope of this standard.

Section 1610.1, subdivision (c), provides that the "Cranes and Derricks in Construction" Article excludes, among other things: "Powered industrial trucks (forklifts), except when configured to hoist and lower (by means of a winch or hook) and horizontally move a suspended load." (§1610.1, subd. (c)(8).) That is, the Cranes and Derricks in Construction safety orders do

not apply to forklifts unless they are configured to horizontally move a load and have a winch or hook to hoist and lower the load.

(1) Configured with a Winch or Hook

Employer asserts that section 1610.1, subdivision (c), makes section 1616.1, subdivision (o), inapplicable to the industrial truck involved in the accident based on the argument that the truss boom did not use a winch or hook. The Division did not assert that the boom attachment had a winch. The issue is whether it had a hook. The term "hook" is not specifically defined in the safety orders. Where a statutory (or regulatory) term is not defined, "it can be assumed that the Legislature was referring to the conventional definition of that term." (*OC Communications, Inc.,* Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016), citing to *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.) "The rules of statutory and regulatory interpretation require that terms be given their ordinary meaning if not specially defined otherwise." (*California Highway Patrol,* Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).) To obtain the ordinary meaning of a word the Appeals Board may refer to its dictionary definition. (*Fedex Freight, Inc.,* Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

Merriam-Webster defines "hook" as "a curved or bent device for catching, holding, or pulling." (https://www.merriam-webster.com/dictionary/hook <accessed Mar. 1, 2020>.)

In the instant matter, an industrial truck was configured with a truss boom. Affixed to the end of the boom was a circular metal structure to which various components could be attached. At the time of the accident, a sling was attached to the boom through the circular structure. The configured industrial truck was lowering the front end of a beam into place with the sling, having already placed the far end of the beam into its bracket. The definition of "hook" supports a finding that the structure at the end of the boom was a hook, as it was a piece of curved metal for holding the appropriate apparatus, such as a sling.

(2) Horizontal Movement of a Suspended Load

Employer further argued that there was no evidence that the industrial truck with the boom was performing any horizontal movement of a load at the time of the accident. The safety order does not mandate that the industrial truck must be actually performing horizontal movement in addition to hoisting and lowering. Rather, it must be configured to be able to perform such actions: "configured to … horizontally move a suspended load." (§1610.1, subd. (c).) Whether this particular beam was moved horizontally or not, had the forklift operator needed to do so, the forklift was configured to take such action with the truss boom and the hook-supported sling.

(3) Attached to the Structure of the Equipment vs. Loose Components

Under the Applicability section of the Cranes and Derricks in Construction Article, section 1610.1 further provides:

> (b) Attachments. This Article applies to equipment included in subsection (a) when used with attachments. Such attachments, *whether crane-attached or suspended* include, but are not limited to: Hooks, magnets, grapples, clamshell buckets, orange peel buckets, concrete buckets, drag lines, personnel platforms, augers or drills and pile driving equipment.

(Emphasis added.)

Employer argues that the safety orders differentiate between the structure of the equipment and the loose components attached to the equipment. (See §1613.6, subd. (b).) Because the circular metal structure through which the sling was inserted was part of the boom's structure, rather than a loose attachment, Employer argues that the metal opening cannot be considered a hook.

However, section 1610.1, subdivision (b), indicates that the crane and derrick safety orders apply when equipment has attachments, such as hooks, that are either "crane-attached or suspended."

Accordingly, the Cranes and Derricks in Construction Article of the safety orders governs the use of the industrial truck involved in the accident, and section 1616.1, subdivision (o), for which Employer was cited, is applicable.

b. Violation of the Safety Order

As set forth above, Employer was cited for a violation of section 1616.1, subdivision (o), which provides: "During lifting operations, the load, boom, or other parts of the equipment shall not contact any obstruction in a way which could cause falling material or damage to the boom."

In order to establish a violation of the safety order, the Division must prove by a preponderance of the evidence that (1) there was a lifting operation, (2) the load or boom contacted an obstruction, and (3) that the contact could cause falling material or damage to the boom.

(1) Lifting Operations

The employees present at the time of the accident were tasked with setting a large wooden beam into brackets using the forklift with boom attachment. While forklift operator Angel Rivera (Rivera) was focusing on placing the front end of the beam into place, Jose Julian Jimenez (Jimenez) and the signal person, Gonzalez, were assisting him.

The forklift with the boom attachment was being used in a lifting operation. It had lifted the beam from its original location using a sling affixed to the end of the boom. The forklift was in the process of lowering the beam into place after having lifted it.

Accordingly, the first component of the violation is established.

(2) Load or Boom Contacted an Obstruction

As the beam was being maneuvered into place, the boom got stuck on an overhead fall protection railing. Although Jimenez and Gonzalez attempted to signal Rivera to stop maneuvering the boom, it broke the fall protection railing, which fell to the ground. Jimenez testified that Gonzalez was struck by the boom and fell to the ground. Gonzalez sustained an injury to his hand.[5]

There was inconsistent evidence pertaining to whether the beam or the boom struck the fall protection railing. A portion of the testimony from Jimenez, who was testifying through an interpreter, appears contradictory and it is unclear whether the inconsistency was an issue with interpretation, he did not see what really happened, or that he had a lapse in his memory. Jimenez stated that the *beam* was stuck on the handrail, but he also said that the handrail was destroyed by the impact of the *boom*. However, Vicario testified that Rivera and Gonzalez told him that the *boom* struck the railing. Employer objected to these statements as hearsay, but they further clarify the testimony from Jimenez and are, therefore, permissible pursuant to section 376.2. Additionally, the reasonable inference is that the boom hit the railing because the forklift operator would have been focused on the precise placement of the beam into a bracket, so it is not likely that he would not have seen the beam if it had struck the railing.

[5] There was only hearsay testimony regarding the extent of the injury Gonzalez suffered. Employer objected to the testimony and, because there was no non-hearsay evidence presented, Vicario's testimony regarding the injury cannot be used to support a finding of fact regarding the nature of the injury. "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." (§376.2)

Regardless of the confusion about whether the boom or the beam hit the fall protection railing, the second component of the violation is established because section 1616.1, subdivision (o), references both "the load" and the "boom" and prohibits contact with an obstruction for both.

(3) Contact That Could Cause Falling Material or Damage to the Boom

The contact with the fall protection railing caused the railing to break and the pieces fell to the ground. As such, the third component of the violation is established.

Accordingly, the Division established a violation of section 1616.1, subdivision (o), by a preponderance of the evidence.

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

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

(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.

[…]

(g) 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.

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).)

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

> "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:
>
> (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.

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.

Vicario, who was current on his Division-mandated training at the time of the hearing, testified that there is a realistic possibility that an employee may suffer death or serious physical harm such as amputation, fractures, or blunt force trauma as a result of a violation of section 1616.1, subdivision (o). There was no non-hearsay evidence in the instant matter that established that Gonzalez's injuries met the definition of serious physical harm. As such, there is no finding that serious physical harm was an actuality, although it was a realistic possibility.

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

5. Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and

could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

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

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.

Employer performed daily inspections to discover hazards. The reports indicate that the foreman or competent person that completed the inspection occasionally found safety issues and noted the corrective actions taken as a result of the inspection. (Ex. I.) Additionally, the employees were required to attend a safety meeting each week. Employer noted topics discussed in the meetings on a sign-in sheet each week. (Ex. L.)

Sanchez testified that Employer conducted planning meetings each day to assign groups to the task of installing beams like the one involved in the accident. Employer provided the groups with a plan of where and how to set each beam every day. Rivera was trained and certified to operate the equipment and all the employees involved in setting the beams were trained on the process, including where they were supposed to stand when the load was being moved. Gonzalez was assigned to work as the signal person, giving signals to the forklift operator during the beam-setting activity in an effort to avoid the type of situation that occurred at the time of the accident.

Accordingly, Employer took "all the steps a reasonable and responsible employer in like circumstances should be expected to take" to anticipate and prevent the violation. Other than the fact that this event happened, there was no evidence that Employer failed to take action to prevent it. As such, the presumption that the violation was properly classified as Serious is rebutted and Citation 2 is reclassified as General.[6]

6. Is the proposed penalty for Citation 2 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. (*RNR Construction, Inc.*, *supra,* Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

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).) 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*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

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

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

[6] Because the citation is reclassified as General, the issue of whether it was properly characterized as Accident-Related is moot and will not be discussed.

(1) Severity.

(A) General Violation.

[…]

ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:

LOW-- Requiring first-aid only.

MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.

HIGH-- Requiring more than 24-hour hospitalization.

[…]

(2) Extent.

[…]

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

LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.

HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

(3) Likelihood 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

Vicario testified that the Severity of the violation was rated as High because it was classified as Serious, and that no other adjustments to the Base Penalty were permitted because it was Accident-Related. (See §336, subd. (c)(2) and (d)(7).) However, because Citation 2 is being reclassified as General, an analysis of the various factors is warranted to determine the modified penalty amount.

In determining the Severity of a violation, the consideration is the extent of treatment that is likely to be required for an injury that would most likely result from the violation. The treatment required for an injury most likely to be sustained as a result of a boom, load, or piece of equipment contacting an obstruction is not necessarily going to result in hospitalization, which is the criteria for High Severity. In the instant matter, there was no non-hearsay testimony about the extent of Gonzalez's injury. Jimenez said he saw that the hand was bleeding, and Employer's post-citation Form 5020 reports a finger contusion, bleeding and pain, and that Gonzalez was treated at the emergency room. Although this particular accident resulted in an injury that required treatment beyond first aid, there was no evidence about "the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would *most likely result* from the violation." (§335, subd. (a)(1)(A), emphasis added.) Without sufficient evidence from the Division, the Severity is determined to be Low, resulting in a Base Penalty of $1,000. (§336, subd. (b).)

There was no testimony regarding Extent. However, this was an isolated instance involving one forklift placing one beam into place. There is no indication that this type of violation occurred, or was likely to occur, with any other beams or forklifts. Accordingly, the violation is assigned an Extent of Low, which results in a 25 percent reduction in the Base Penalty. (§336, subd. (b).)

Similarly, there was no testimony regarding Likelihood. There were two employees working in the group setting the beam at the time of the accident. There was no evidence presented about 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." Accordingly, Likelihood is rated as Low, which results in a 25 percent reduction in the Base Penalty. (§336, subd. (b).)

Therefore, the violation is determined to be Medium Severity with a Low Extent and Likelihood. The Base Penalty of $1,000 is reduced by 50 percent, for a Gravity-Based Penalty of $500.

Section 335 provides for further adjustment to the Gravity-Based penalty for Good Faith, Size, and History. The Division's Proposed Penalty Worksheet indicates that, for the other citations that were not Accident-Related, Employer was granted a 15 percent adjustment for Good Faith and no other adjustments for Size and History. Because Citation 2 was previously characterized as Accident-Related, and no adjustments were permitted other than for Size, the Division did not apply the Good Faith adjustment factor. (See §336, subd. (c)(2) and (d)(7).) There was no testimony about the basis for the 15 percent Good Faith adjustment factor.

Section 335, subdivision (c), provides:

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

The assignment of a 15 percent adjustment factor means that the Division rated Employer's safety program as average, which results in a rating of Fair. (§336, subd. (d)(2).) However, Employer was not cited for any safety program deficiencies, Vicario did not allege that the IIPP was insufficient, and a review of its IIPP reveals a thorough safety program that goes beyond merely restating the language set forth in the IIPP safety order requirements of section 3203. 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.

Vicario testified that Employer's superintendent, Bill Herson, informed him that Employer had more than 200 employees. Employer did not provide any evidence to refute this testimony. As such, no adjustment factor for Size was applied in accordance with section 336, subdivision (d)(1).

Vicario did not provide any testimony regarding the adjustment factor for History. As set forth above, Employer is entitled to the maximum credit if the Division does not provide evidence to support its calculation. Accordingly, an adjustment factor of 10 percent will be applied for History.

The application of adjustment factors for Good Faith and History in the amount of 40 percent of the Gravity-Based Penalty results in an Adjusted Penalty of $300.

Section 336, subdivision (e), provides that the Adjusted Penalty is subject to an abatement credit of an additional 50 percent. Citation 2 indicates that the violation was "corrected during inspection." The abatement credit was not previously applied because it is not available for Serious Accident-Related violations. (§336, subd. (e)(3)(D).) However, due to the reclassification to a General violation, Employer is entitled to an abatement credit of 50 percent of the Adjusted Penalty, for a final penalty of $150, which is found to be reasonable.

Conclusions

The Division established that Employer violated section 14001, subdivision (a), by failing to file a complete report of an injury that required medical treatment beyond first aid.

The Division failed to establish that Employer violated section 1509, subdivision (b). Employer's forklift-specific Code of Safe Practices relates to the use of powered industrial trucks with a boom attachment.

The Division established that Employer violated section 1616.1, subdivision (o), when a boom attachment contacted an obstruction in a way which caused falling material. The citation is reclassified to General due to lack of Employer knowledge and the penalty is modified.

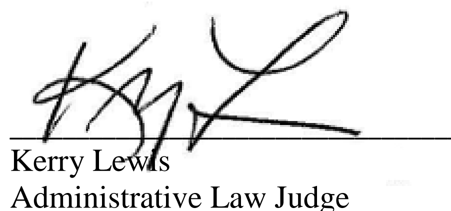
Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty of $425 is sustained.

It is hereby ordered that Citation 1, Item 2, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 2 is affirmed with an amended classification of General and the penalty is modified to $150.

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



Dated: 03/27/2020

Kerry 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 California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**