BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1155042**
SIGNAL ENERGY LLC **2034 HAMILTON PLACE BOULEVARD,** **4TH FLOOR** **CHATTANOOGA, TN 37421** **Employer**	**DECISION**

Statement of the Case

Signal Energy, LLC, (Employer or Signal Energy) is a solar installation general contractor. At the times relevant hereto, Signal Energy had contracted with Array Technologies, Inc. (ATI) to complete warranty work at a solar facility located at 9810 South Ohio, Cantua Creek, California, 93608 (the worksite). In turn, ATI subcontracted with Hill Country Staffing (HCS) to provide the labor necessary to complete the warranty work project. Beginning on June 13, 2016, in response to a complaint report that a worker had been injured on the job, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Joe Zavala (Zavala) and Assistant Safety Engineer Napoli Sams, conducted an investigation at the worksite.

On December 1, 2016, the Division issued one citation to Signal Energy for an alleged violation of California Code of Regulations, title 8, section 3395, subdivision (f)(2)(C).[1] Signal Energy filed a timely appeal of Citation 1, Item 1.

Citation 1 alleges that Signal Energy failed to implement effective emergency response procedures in accordance with its written procedures.

Signal Energy's timely appeal of Citation 1, Item 1, contains the following grounds for appeal: (1) the safety order was not violated; (2) the Serious classification is incorrect; and (3) the proposed penalty is unreasonable. The amended appeal also alleges the series of affirmative defenses set forth on Signal Energy's amended appeal form.[2]

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

[2] Except where discussed in the Decision, Signal Energy 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 J. Kevin Elmendorf, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (the Appeals Board), out of Sacramento, California, via Zoom Video Hearing on November 3, 2020, and November 4, 2020. Karen F. Tynan, Esq., and Robert Rodriguez, Esq., of the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Signal Energy. Cynthia Perez, Esq., Staff Counsel, represented the Division. The matter was submitted for decision on March 15, 2021.

Issues

1. Did Signal Energy fail to implement its emergency medical procedures when an employee showed symptoms of heat illness, including vomiting?

2. Can Signal Energy be cited for safety violations committed by its subcontractors under section 336.10?

3. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

4. Did Employer Signal Energy rebut the presumption that the violation cited 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?

5. Is the proposed penalty for Citation 1 reasonable?

Findings of Fact

1. On June 7, 2016, Teresa Beltran (Beltran), an employee of HCS working on a solar array project in a high heat area, experienced heat illness symptoms, including vomiting.

2. Employer Synergy Energy was the general contractor and the controlling employer of the multi-employer subject solar array project.

3. In June 2016, HCS was a staffing subcontractor for ATI, a materials subcontractor for Signal Energy.

4. Upon learning of Beltran's vomiting and other heat illness symptoms, ATI moved Beltran to a van with air conditioning and provided a bag of ice to cool down. After

30 to 40 minutes, Beltran returned to the worksite and worked the rest of the day without incident.

5. Subcontractor HCS did not implement Signal Energy's emergency medical procedures when an employee showed symptoms of heat illness, including vomiting.

6. There is a realistic possibility that an employee who experiences heat illness symptoms, including vomiting, can progress from headache, stomach cramps, vomiting, and nausea to a more serious illness, including death.

7. Zavala was current in his Division-mandated training.

8. Signal Energy did not have knowledge that an employee of a subcontractor was displaying heat illness symptoms, including vomiting, on June 7, 2016.

Analysis

1. Did Signal Energy fail to implement its emergency medical procedures when an employee showed symptoms of heat illness, including vomiting?

Governing heat illness and safety issues in the workplace is section 3395, subdivision (f) (2) (C), which provides, in relevant part: [...]

> (f) Emergency Response Procedures. The employer shall implement effective emergency response procedures including: […]
>
> > (2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided. […]
> >
> > > (C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with its written procedures.

Citation 1 alleges:

Prior to and during the course of the inspection, including, but not limited to, on June 13, 2016, Signal Energy LLC, failed to implement emergency medical services in accordance with its written procedures.

Instance 1

The employer failed to implement effective emergency response procedures. Employer did not follow its own procedures in Sections "I" 3.1.3 and 3.4.1.1.

Instance 2

The employer failed to implement or provide emergency medical services in accordance with the employer's procedures. Employer's written procedures Section "I" 3.4.1.1 indicate to call 911 if injured employee's symptoms include vomiting. One of the injured employees experienced vomiting and employer did not call 911.

In pertinent part, Signal Energy's Heat Illness Prevention Program (HIPP) section "I" 3.1.3 requires:

> If the signs or symptoms are indicative of severe heat illness (such as, but not limited to, decreased level of consciousness, vomiting, staggering, disorientation, irrational behavior, or convulsions), the employer must implement emergency response procedures.

Section 3.4.1.1 of Employer's HIPP requires:

> Call the safety department immediately by phone (or radio if available) to activate the emergency action plan and call 911.

Zavala, an Associate Safety Engineer, testified that on June 13, 2016, the Division responded to the worksite as a result of a heat illness complaint. Zavala's investigation determined that on June 7, 2016, Beltran, working at the multi-employer worksite, reported to her HCS supervisor that she was experiencing symptoms of heat illness, including vomiting, as a result of working in high heat. In response, ATI moved the employee to a van with air conditioning and provided a bag of ice where she stayed for 30 to 40 minutes. Her condition improved and she returned for work for the remainder of the day without further incident.[3]

It is not contested that neither subcontractor, ATI nor HCS, implemented or provided emergency medical services in accordance with Signal Energy's procedures. Even though Beltran's symptoms included vomiting, 911 was not called.

[3] Exhibit G - ATI Accident Report, Page 5.

2. Can Signal Energy be cited for safety violations committed by its subcontractors under section 336.10?

Section 336.10 provides, in relevant part:

> On multi-employer worksites, both construction and non-construction, citations may be issued only to the following categories of employers when the Division has evidence that an employee was exposed to a hazard in violation of any requirement enforceable by the Division: […]
>
> > (c) The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected (the controlling employer.) […]
>
> Note: The employer listed in subsections (b) through (d) may be cited regardless of whether their own employees were exposed to the hazard.

The employers at the worksite were identified as Signal Energy, ATI and HCS. Signal Energy was a general contractor at the worksite. Signal Energy contracted with ATI, who subcontracted with HCS to provide staff to replace a defective mounting clip on each solar unit in the 1,800-acre solar array system.

Chad Dueker, a Project Manager for Signal Energy, testified that Signal Energy, the general contractor, was responsible for the safety and health conditions on the worksite. As such, Signal Energy was a controlling employer and is, therefore, subject to being cited in this instance for its subcontractors' failure to implement heat illness emergency procedures.

3. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

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

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).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation" or "the loss of any member of the body." (Lab. Code §6432, subd. (e).)

Associate Safety Engineer Zavala testified that he had 33 years of experience in health and safety both in the field and in management. Zavala has a Bachelor of Science degree in Industrial Technology and he has a certified safety professional designation. Training throughout his 33 years includes occupational safety and health topics from machine guarding, chemical hazards, heat illness prevention, blood-borne pathogens. Zavala is current in his mandated training for the Division. During his tenure at the Division, Zavala had about 200 inspections including heat illness related inspections. In that Zavala was current in his Division-mandated training, under Labor Code section 6432, subdivision (g), Zavala is deemed competent to offer testimony to establish each element of the Serious violation, and to 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 was properly classified as Serious.

Zavala testified that Citation 1 was classified as Serious because there is a realistic possibility of serious injury or harm when emergency procedures are not promptly implemented when an employee experiences heat illness symptoms, such as vomiting. He further testified that heat illness can progress from headache, stomach cramps, vomiting, and nausea to a more serious illness, including death of an employee. Employer did not present evidence to contradict or controvert Zavala's testimony. As such, it was established that there was a realistic possibility of serious physical harm as a result of the violation.

Accordingly, the Division met its burden to establish a rebuttable presumption that the violation cited in Citation 1 was properly classified as Serious.

4. Did Employer Signal Energy rebut the presumption that the violation cited 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.

As set forth in Labor Code section 6432, subdivision (b), the burden is on an employer to rebut the presumption that a citation was properly classified as Serious. In this case, the Division concedes in its closing brief that Signal Energy had no actual knowledge of the violation. The Division's post hearing brief states, "Zavala testified that the Employer Signal Energy was not aware of the condition and additional testimony by Pontis, Wallace and Dueker indicated that Signal Energy was not aware that Beltran suffered heat illness on June 7, 2016. As such, the classification would be reduced to a General."

Additionally, the evidence adduced at hearing demonstrates that upon learning of the incident, Signal Energy took immediate action to eliminate employee exposure to the hazard by promptly arranging for and completing training with an emphasis on heat illness training.

As conceded by the Division in its closing brief, Signal Energy met its burden to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. As such, this issue is not contested. Employer has rebutted the presumption that the citation was properly classified as Serious. Accordingly, Citation 1 is reclassified as a General violation.

5. Is the proposed penalty for Citation 1 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.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Neither of the parties challenged the calculations by the inspector. Absent any challenge, it is found that the penalty was calculated in accordance with the Division's policies and procedures. As such, the factors analyzed by the Division to determine Extent and Likelihood, along with the adjustment factors of Good Faith, History, and Size, will not be re-evaluated. The Severity of the violation was originally rated as High because it was classified as Serious, and no other adjustments to the Base Penalty were permitted because it was characterized as Accident-Related. (See §336, subd. (c)(2) and (d)(7).) However, because the citation is reclassified from Serious to General, the Base Penalty, from which all other adjustments are made, must be reduced in accordance with section 336.

Section 336, subdivision (b), provides that a Base Penalty will be set initially based on the Severity of the violation. 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:
>
> (1) Severity.
>
> (A) General Violation. […]
>
> i. When the safety order violated pertains to employee illness or disease, Severity shall be based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. Depending on the foregoing, 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.

To determine the proper Severity level, it is necessary to evaluate the type and amount of medical treatment required for an injury most likely to be sustained as a result of an employee not being immediately treated and possibly transported to a health care facility. Zavala testified that severe illness, including death, could possibly occur as a result of the violation. However, Zavala did not opine as to whether a violation would likely result in hospitalization, lengthy or otherwise. The Division established that a violation would likely result in requiring medical attention and limited hospitalization, but there was little or no evidence that extended hospitalization would be required.

The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries* Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); Where the Division does not provide evidence to support its proposed penalty, it is appropriate that 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).)

Based on the evidence and argument presented, the Severity is characterized as Medium. A General violation with a Medium Severity has a Base Penalty of $1,500. (§336, subd. (b).)

The Division's Proposed Penalty Worksheet indicates that the Division assigned a Medium Extent and Likelihood, resulting in no further reduction or increase to the Base Penalty, for a Gravity-Based Penalty of $1,500. (§336, subd. (b).)

Section 336 provides for further adjustment to the Gravity-Based Penalty for Good Faith, Size, and History. The Division's Proposed Penalty Worksheet indicates that Employer is entitled to a 15 percent adjustment for Good Faith, 10 percent adjustment for Size, and 10 percent adjustment for History. Because the parties did not challenge that these adjustment factors were calculated in accordance with Division policies and procedures, the adjustment factors are applicable to Citation 1 because it is reclassified to a General violation. As such, the adjustment factors for Good Faith, Size, and History result in a penalty reduction of 35 percent of the Gravity-Based Penalty for a total Adjusted Penalty of $975. (See §336, subd. (d).)

Section 336, subdivision (e), provides that an Adjusted Penalty is subject to an abatement credit adjustment of 50 percent. Citation 1 indicates that the violation was "corrected during inspection." Therefore, Employer is entitled to an abatement credit of 50 percent of the Adjusted Penalty, resulting in a final penalty of $485, which is found to be reasonable.

Conclusion

In Citation 1, the Division established a violation of section 3395, subdivision (f)(2)(C). As Signal Energy was the controlling employer at the multi-employer worksite, Signal Energy was properly cited and responsible for the citation issued. However, it was further established that Signal Energy had no knowledge of the violation by its subcontractors. Therefore, the citation was reclassified as a General violation. The penalty, as discussed herein, is found to be reasonable as modified.

Orders

It is hereby ordered that Citation 1 is sustained as a General violation with a penalty of $485.

It is further ordered that the penalties are assessed as set forth in the attached Summary Table.

Dated: 04/08/2021

_____
J. Kevin Elmendorf
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.**