BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1239535**
LOS ANGELES CITY FIRE DEPARTMENT **200 N. MAIN STREET, 18TH FLOOR- RISK MNGMT.** **LOS ANGELES, CA 90012** **Employer**	**DECISION**

Statement of the Case

The Los Angeles City Fire Department (Employer) provides fire, rescue, and other first responder services. Beginning June 3, 2017, the Division of Occupational Safety and Health (the Division), through District Manager Victor Copelan (Copelan), conducted an accident inspection at 104 West 4th Street, in Los Angeles, California (the site).

On December 1, 2017, the Division issued three citations to Employer alleging violations of California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges that Employer failed to include several required elements in its Injury and Illness Prevention Program (IIPP). Citation 1, Item 2, alleges that Employer used its aerial ladder in a manner contrary to the manufacturer's recommendations. Citation 1, Item 3, alleges that Employer failed to include procedures for the provision of water and shade in its Heat Illness Prevention Plan (HIPP).

Employer filed timely appeals of the citations. Employer asserted only affirmative defenses for Citation 1, Item 1. Employer contested the existence of the violations and the proposed penalties for Citation 1, Item 2, and Citation 1, Item 3. Employer contested the reasonableness of the required changes to abate Citation 1, Item 2. Additionally, Employer asserted various affirmative defenses for Citation 1, Item 2, and Citation 1, Item 3.[2] This appeal was docketed as inspection number 1239535.

Also on December 1, 2017, the Division issued Special Order Number 139 (the Special Order) regulating Employer's use of aerial ladders. Employer timely appealed the Special Order with several affirmative defenses including assertions that: implementation of the Special Order

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

restricts Employer's ability to safely train for and respond to emergencies, and may create greater hazards for employees and the public. This appeal was docketed as inspection number 0000139.

Inspection numbers 1239535 and 0000139 were consolidated. Inspection number 1239535 was deemed the lead case.

The two matters came regularly before Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on December 17, 2020, December 18, 2020, and February 18, 2021.[3] ALJ Avelar conducted the hearing remotely via the Zoom video platform. Jorge Otano, Deputy City Attorney, and Erika Johnson-Brooks, Deputy City Attorney, from the Los Angeles City Attorney's Office, represented Employer. William Cregar, Staff Counsel, represented the Division. The matter was submitted on May 9, 2021.

Issues

1. Did Employer fail to include any required elements in its Injury and Illness Prevention Program?

2. Did Employer fail to use the aerial ladder in accordance with the manufacturer's recommendations?

3. Did Employer fail to include procedures for the provision of water and access to shade in its Heat Illness Prevention Plan?

4. Are the proposed penalties reasonable?

Findings of Fact

1. Employer had an IIPP in effect at the time of the inspection.

2. Employer's IIPP required training for supervisors as to their general duties only, and not specifically as to the hazards to which the employees under their immediate direction may be exposed.

3. The Division had access to, but did not offer into evidence, a copy of the manufacturer's recommendations for the aerial ladder at issue or a photograph of its equipment tag.

[3] The official record of the proceedings of the first day of hearing is an audio recording. Court reporter's transcripts were deemed to be the official record of the proceedings for the remaining days of hearing.

4. Employer had an HIPP in effect at the time of the inspection.

5. Employer's HIPP did not include procedures for the provision of water or shade to employees.

Analysis

1. Did Employer fail to include any required elements in its Injury and Illness Prevention Program?

The Division cited Employer for a violation of section 3203, subdivisions (a)(1) through (7), which provide:

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

(1) Identify the person or persons with authority and responsibility for implementing the Program.

(2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

(3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.

Exception: Employers having fewer than 10 employees shall be permitted to communicate to and instruct employees orally in general safe work practices with specific instructions with respect to hazards unique to the employees' job assignments as compliance with subsection (a)(3).

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A) When the Program is first established;

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(5) Include a procedure to investigate occupational injury or occupational illness.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

(A) When observed or discovered; and,

(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

(7) Provide training and instruction:

(A) When the program is first established;

Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including but not limited to June 3, 2017, the employer had not established, implemented and maintained an effective Injury and Illness Prevention Program in that:

The employer's written program did not contain the following required elements:

1. The identity of the person or persons responsible for implementing the program. Ref. 3203(a)(1)

2. Procedures for the identification and evaluation of workplace hazards when new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard and when the employer is made aware of new hazards. Ref. 3203(a)(4)
3. Procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard when observed or discovered, and procedures for addressing an imminent hazard. Ref. 3203(a)(6)
4. Procedures for providing training and instruction to supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed. Ref. (a)(7)(F)

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct 1, 2019).) "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 kinds of evidence. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Section 3203, subdivision (a)(7)(F), requires that a written IIPP must include provisions for training supervisors to ensure familiarity with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Employer called Battalion Chief Scott Quinn (Quinn) to testify regarding Employer's 14-page IIPP in effect at the time of the inspection. Quinn testified that the IIPP discusses training on pages 11 and 12. The section on supervisor training begins with the encompassing, "Ensure employees and supervisors understand and are trained in this IIPP, applicable safe work practices and procedures, safe use of equipment, tools and materials, required safety training for their job duties, and for safety and health hazards that they may be exposed to."

Employer's IIPP requires supervisors to receive training applicable to their job duties. However, Employer's IIPP does not go on to specifically require the training of supervisors to become familiar with the particular safety and health hazards to which employees under their immediate direction and control may be exposed. Generally requiring that supervisors be trained as to their job duties without requiring that they be trained about the hazards that affect their subordinates is insufficient to comply with the safety order. Therefore, Division establishes the violation because Employer's IIPP fails to contain these provisions.

When a citation alleges more than one instance of a violation of a safety order, it is enough to sustain a violation if just one instance is proven. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) Here, the evidence supports a finding of a violation of one instance of section 3203, subdivision (a)(7)(F). Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer fail to use the aerial ladder in accordance with the manufacturer's recommendations?

The Division cited Employer under section 3328, subdivision (a), which provides:

(a) All machinery and equipment:

(1) shall be designed or engineered to safely sustain all reasonably anticipated loads in accordance with recognized engineering principles; and
(2) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design.

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to June 3, 2017, an aerial ladder (American LaFrance-LT) Aerial Apparatus, Serial 5227X)) was used in a manner contrary to manufacturers [*sic*] recommendations when it was placed in a supported manner by resting it against an approximately ninety (90) ft. tall building and not extending it above the roof level.

Section 3328, subdivision (a), is written in the conjunctive, requiring employers to satisfy both conditions. Thus, the Division may establish a violation by showing Employer failed to satisfy any one of the conditions. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).)

The Division referred to, but did not produce, the manufacturer's manual for the aerial ladder. Instead, the Division relied solely on the testimony of Copelan, who testified at length regarding the manufacturer's manual. He testified that he personally reviewed it and even referred to page 77 as containing specific recommendations. When asked to confirm terms used in the manufacturer's manual, Copelan testified that he would have to refer back to the manual, showing both that the manual was available and that his recollection was limited.

The Appeals Board has previously stated, "[i]f weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (*A. Teichert & Son, Inc. dba Teichert Rock Products*, Cal/OSHA App. 1047912, Decision After Reconsideration (Jun. 30, 2017), citing Evid. Code § 412.) Thus, Copelan's testimony regarding the manufacturer's recommendations cannot be fully credited.

Copelan also testified that he observed and photographed the equipment tag of the aerial ladder. Copelan testified the equipment tag displayed the ladder's supported and unsupported load-bearing capacities. The Division acknowledged that it did not place a photograph of the equipment tag into evidence. Copelan's testimony regarding the equipment tag seems to establish that the manufacturer anticipates both supported and unsupported uses of the ladder, working against the Division's proposition that an aerial ladder must be unsupported while in use.

The Division argued that the aerial ladder must be operated without support, but did not produce the manufacturer's recommendations or establish that this was an engineering requirement for the ladder at issue to show Employer violated the terms of the safety order. Testimony regarding the equipment tag seems to establish that the aerial ladder is engineered to carry loads while supported or unsupported. The Division thus failed to establish by a preponderance of the evidence that Employer operated the aerial ladder contrary to the manufacturer's recommendations. Accordingly, Citation 1, Item 2, is dismissed.

3. Did Employer fail to include procedures for the provision of water and access to shade in its Heat Illness Prevention Plan?

The Division cited Employer under section 3395, subdivision (i), which provides:

> (i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
>
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to June 3, 2017, the employers [*sic*] written heat illness prevention plan did not include specific procedures for the provision of water and shade.

An employer is obligated to "provide" water, which means to obtain, or pay for, the water, and then give it to employees. (*A C Transit*, Cal/OSHA App. 08-4611, Denial of Petition for Reconsideration (Jun. 10, 2011).) A violation can be established even when an employer encourages drinking water if the actual provision of water is insufficient. (*CA Forestry & Fire Protection*, Cal/OSHA App. 10-0728, Decision After Reconsideration (Aug. 10, 2012).)

Employer had an operative HIPP in effect at the time of inspection. To establish a violation, the Division must show that Employer's 17-page HIPP did not contain written procedures for how Employer is to provide water and shade to employees.

On pages 3, 7, and 13, the HIPP requires Employer to meet employees' hydration needs. For example, on page 13, it requires:

> LAFD members will be provided access to sufficient potable water sources during the course of an event or incident. LAFD members are encouraged to have personal water supplies with them throughout their work day and to drink 12 eight ounce glasses of water each day (page 7)[.]

However, a review of the HIPP reveals that it does not provide procedures for how Employer will give or replenish the water.

On pages 3 and 13, the HIPP requires Employer to provide access to shade. For example, on page 3, it requires Employer to:

> Provide access to shade for at least five (5) minutes of rest when an employee believes he or she needs a preventive recovery period. The employee should not wait until they feel sick to do so.

However, further review of the HIPP shows that it does not contain written procedures on how Employer will make the shade available.

The Division met its burden and established that Employer's HIPP failed to contain the written procedures for the provision of water and shade as required by section 3395, subdivision (i). Thus, Citation 1, Item 3, is affirmed.

4. Are the proposed penalties reasonable?

Employer did not appeal the reasonableness of the proposed penalty for Citation 1, Item 1, therefore, only the reasonableness of the proposed penalty for Citation 1, Item 3, is at issue.

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable. (*RNR Construction, Inc.*, supra, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) However, the Division must provide 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).) The maximum credit and the minimum penalty are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with Division policy and procedure, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) In the immediate matter, the Division introduced its proposed penalty worksheet, but did not assert it calculated the penalties according to Division policy and procedure. Copelan offered testimony pertaining to the applicable penalty criteria.

Citation 1, Item 3, is a General violation and the base penalty is determined by the severity of the violation. (§336, subd. (b).) The base penalty is then subject to adjustments for the Extent, and Likelihood, and adjustment credits for Good Faith, Size, and History of Employer are applied.

Severity

The Severity of a General violation may be Low, Medium, or High. (§336, subd. (b).) To determine the appropriate rating, 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 the HIPP failing to contain procedures for the provision of water or shade. Copelan testified he applied High Severity because a violation could result in hospitalization greater than 24 hours. The base penalty for a General Violation with High Severity is $2000.

Extent

The Extent of a General violation may be Low, Medium, or High. (§336, subd. (b).) To select the appropriate rating, it is necessary to determine whether or not the safety order violation pertains to employee illness or disease, and then determine how many employees are affected by the violation, or alternatively, how many units are in violation. (§335, subd. (a)(2).)

Further, section 336, subdivision (b), provides that for a Low rating, 25 percent of the base penalty shall be subtracted; no adjustment be made for a Medium rating; and for a High rating, 25 percent of the base penalty shall be added.

Copelan did not provide testimony to explain why Medium Extent was applied, thus the maximum credit must be applied. As a result, the base penalty shall be reduced by 25 percent, or $500, resulting in a base penalty of $1,500.

Likelihood

Section 336, subdivision (b), provides that Likelihood for a General violation is rated under section 335, subdivision (a)(3), which states:

> 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 .

Further, section 336, subdivision (c), provides that for a Low rating, 25 percent of the base penalty shall be subtracted; no adjustment be made for a Medium rating; and for a High rating, 25 percent of the base penalty shall be added.

Copelan did not provide testimony explaining why Medium Likelihood was applied, thus the maximum credit must be applied. As a result, the base penalty shall be reduced by 25 percent, or $375, resulting in a gravity-based penalty of $1,125.

Good Faith

Section 335, subdivision (c), provides that an adjustment credit for Good Faith may be applied based on the quality and extent of an employer's safety program, and includes indications of an employer's desire to comply with safety regulations. The ratings are Good for an effective safety program and a reduction of the gravity-based penalty by 30 percent, Fair for an average safety program and a penalty reduction by 15 percent, and Poor for no effective safety program and no reduction to the penalty.

Copelan testified that Employer was given a 15 percent credit but did not explain how this was determined. Thus, the maximum credit must be applied. As a result, the gravity based penalty shall be reduced by 30 percent.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that an adjustment credit may applied for Size when an employer has fewer than 100 employees. Copelan testified that Employer had more than 100 employees. Employer is thus not eligible for any credits for size.

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a negative history of violations in the past three years, based upon no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees, a maximum 10 percent reduction of the penalty may be applied.

Copelan testified that Employer has no history of prior serious violations. Copelan testified that he applied the maximum 10 percent credit to the gravity-based penalty.

The application of the 30 percent Good Faith and 10 percent History credits, results in a 40 percent reduction of the gravity-based penalty of $1,125, or $450, resulting in the adjusted penalty of $675 for Citation 1, Item 3.

Abatement

Section 336, subdivision (e)(2), permits the Division to provide a 50 percent abatement credit. Copelan testified that that Employer was automatically entitled to the 50 percent abatement credit because it is a General Violation. The penalty is thus reduced to $337.50.

Amounts of the civil penalties are rounded down to the next whole dollar during the calculation stages, and final figures are adjusted downward to the next lower five dollar value. (§336, subd. (j).)

Accordingly, the penalty of $335.00 for Citation 1, Item 3, is found reasonable.

Conclusions

The evidence supports a finding that Employer violated section 3203, subdivisions (a)(1) through (7). The proposed penalty is found to be reasonable.

The evidence does not support a finding that Employer violated section 3328, subdivision (a), because the Division did not produce the manufacturer's recommendations.

The evidence supports a finding that Employer violated section 3395, subdivision (i). The penalty is reasonable as modified herein.

Order

Citation 1, Item 1, is affirmed, and the penalty assessed as set forth in the Summary Table.
Citation 1, Item 2, is vacated.
Citation 1, Item 3, is affirmed, and the penalty assessed as set forth in the Summary Table.

Dated: 06/08/2021

Rheeah Yoo Avelar
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.**