BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1226666**
WASHINGTON ORNAMENTAL IRON WORKS INC. **dba WASHINGTON IRON WORKS** **17926 S. BROADWAY** **GARDENA, CA 90248** **Employer**	**DECISION**

Statement of the Case

Washington Ornamental Iron Works Inc. is a metal work subcontractor. On April 25, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer E. Rosalind Dimenstein, commenced an accident investigation of a construction project located at 900 Wilshire Boulevard, Los Angeles, California (the job site) in response to an injury report.

On July 20, 2017, the Division cited Employer for three violations: failure to establish, implement, and maintain an effective Injury and Illness Prevention Program; failure to post the required annual summary of injuries and illnesses; and failure to ensure all machinery was not used under conditions that are contrary to the manufacturer's recommendations.

Employer timely appealed the citations, contesting the existence of the violations, the classifications of the violations, the reasonableness of the proposed penalties, and asserting a series of affirmative defenses.[1]

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on September 4, 2019. Lisa Baiocchi, Attorney, of Walter & Prince, LLP, represented Employer. Martha Casillas, Staff Counsel, represented the Division. The matter was submitted on December 10, 2019.

[1] Except as otherwise noted, 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 establish, implement, and maintain an effective Injury and Illness Prevention Program?

2. Did Employer properly post the required annual summary of the Log 300?

3. Did Employer permit employees to use machinery and equipment under conditions of speeds, stresses, loads, or environmental conditions that were contrary to the manufacturer's recommendations?

4. Did the Division establish that Citation 1, Item 1, and Citation 1, Item 2, were properly classified as General?

5. Did the Division establish the rebuttable presumption that Citation 2, Item 1, was properly classified as Serious?

6. Did Employer demonstrate it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation in Citation 2, Item 1?

7. Did the Division establish that Citation 2, Item 1, was properly characterized as Accident-Related?

8. Were the proposed penalties reasonable?

Findings of Fact

1. Employer permitted its employees to operate a Victor Technologies oxy-acetylene torch on a closed container despite the manufacturer's warning to "never perform welding, cutting, and heating operations on a closed container or vessel, which may explode when heated."

2. Employer covered the annual summary of the Log 300 with other material.

3. The use of the gang box as a working surface for the cutting torch is an "environmental condition."

4. Employer's failure to identify and to correct a hazard stated in a manufacturer's guide has a relationship to occupational safety and health of employees. The improperly posted summary of the Log 300 does not have a relationship to occupational safety and health of employees.

5. Roberto Salazar (Salazar) suffered a broken arm and was hospitalized for four days when the gang box exploded and the lid flew open.

6. Both Steve Sartain (Sartain) and Scott Allee (Allee) are supervisors with responsibility for the safety of employees. Both Sartain and Allee were aware that employees used gang boxes as work surfaces for the cutting torch.

7. The use of the cutting torch on the gang box caused an explosion in which the gang box's lid flew open, breaking Salazar's arm.

8. The Division did not calculate the penalties in accordance with its penalty-setting regulations.

Analysis

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

1. Did Employer establish, implement, and maintain an effective Injury and Illness Prevention Program?

Section 1509, subdivision (a), requires that "[e]very employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) in accordance with section 3203 of the General Industry Safety Orders."

Section 3203 provides that employers must have a written IIPP that meets minimum requirements. In Citation 1, Item 1, the Division set forth subdivision (a)(4) and (6), as follows:

> (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:
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> ...
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> (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;

...

(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.

...

(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.

In the Alleged Violation Description for Citation 1, Item 1, the Division alleges:

Prior to and/or during the course of the investigation, including, but not limited to, 4/25/17, the employer had not identified and corrected the unsafe work practice of welding and/or torch cutting on top of closed gang boxes, using them as working surfaces.

While an employer may have a comprehensive IIPP, the Division may still demonstrate an IIPP violation by showing that the employer failed to implement that plan. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (February 26, 2015).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0378, Decision After Reconsideration (Oct. 5, 2015).)

"An employer cannot abrogate its responsibilities to employee safety and health by pleading lack of direction or ignorance in the face of easily discernible hazards and common remedies." (*FMC Corporation, Food Processing Machinery Division*, Cal/OSHA App. 77-498, Decision After Reconsideration (Aug. 28, 1979).)

Here, Employer failed to identify and to correct a hazard that was identified in the manufacturer's guide. Employer commonly uses a Victor Technologies oxy-acetylene torch (the cutting torch) for welding and cutting metal. The cutting torch includes two hoses that draw the gases that produce the flame. Employer possessed the manufacturer's guide to the cutting torch. Section 2.03 of the guide is titled "Fire Prevention." Item fourteen in the section states: "Never perform welding, cutting, and heating operations on a closed container or vessel, which may explode when heated."[2]

The gang box in the present case is a large steel box with a lid. Associate Safety Engineer Dimenstein measured the gang box to be 34.5 inches tall. Employer uses gang boxes to store equipment such as hand tools, buckets, fall protection gear, and extension cords. Employer used the gang box as a working surface, i.e., placing other objects on top of the gang box to make it easier to weld or cut the other object.

Employer contends the gang box is not a "closed container" contemplated by the manufacturer's guide because the gang box is not sealed or air-tight. However, the manufacturer's guide does not refer to a sealed container or an air-tight container. Importantly, the gang box has a lid that can cover the opening of the gang box. The lid was closed at the time of the explosion. Therefore, the gang box is a "closed container."

On the day of the explosion, Salazar needed to remove portions of an angle iron that was five inches wide, ten inches high, and five feet long. Salazar used the cutting torch to remove the unwanted portions. In order to facilitate cutting, Salazar placed the angle iron along the top edge of the gang box as a working surface. Salazar cut a portion from the right end of the iron, then cut a portion from the left end of the iron, and started to cut the middle portion of the iron when the gang box exploded.

[2] There may be ambiguity with respect to the manufacturer's recommendation. In one sense, "never perform . . . operations on a closed container" might pertain to a working surface, such as a table or saw horse. In this sense, the closed container is a separate object from the object being cut or welded. The parties presented evidence and argument that accepts this interpretation. In a different sense, "never perform . . . operations on a closed container" might pertain to the object to which the cutting torch is applied. In this sense, the guide would prohibit cutting or welding a closed container. A review of additional items listed in the Fire Prevention section suggests similar ambiguities with the word "on." Nevertheless, the parties did not present evidence and argument regarding the second interpretation. Therefore, the first interpretation will be accepted for purposes of this Decision.

Employer contends it corrected the hazard as soon it became aware of the hazard. However, Employer possessed the manufacturer's guide, and therefore knew or should have known of the prohibition against using the torch on a closed container. Additionally, Employer knew its employees used the gang box as a working surface. Thus, Employer failed to identify and to correct a hazard it knew or should have known about.

Employer's witnesses testified it is common in Employer's industry to use a gang box as a working surface. None of the witnesses had ever heard of a gang box exploding. Nevertheless, industry practice is not a defense to a violation. (*Ekedal Concrete, Inc.*, Cal/OSHA App. 13-0131, Decision After Reconsideration (Mar. 28, 2016).) Regardless of industry practice, Employer failed to identify and to correct hazards stated in the manufacturer's guide. Accordingly, Employer failed to establish, implement, and maintain effective procedures for identifying and evaluating workplace hazards related to the cutting torch as required by section 3203, subdivisions (a)(4) and (a)(6).

2. Did Employer properly post the required annual summary of the Log 300?

Section 14300.32, subdivision (a), requires an employer to create and post "an annual summary of injuries and illnesses recorded on the Cal/OSHA Form 300 using the Cal/OSHA Form 300A Annual Summary of Work-related Injuries and Illnesses." In Citation 1, Item 2, the Division references part (6) of subdivision (b) of section 14300.32, which provides: "When do I have to post the annual summary? You must post the annual summary no later than February 1 of the year following the year covered by the records and keep the posting in place until April 30."

In the Alleged Violation Description for Citation 1, Item 2, the Division alleges:

> On or before 4/25/17, the employer had not posted the annual summary of the Log 300 for the previous year.

Legislative intent must be assessed according to the language of the whole regulation. (*Coast Waste Management, Inc*., Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016); *Cal. State Psychological Ass'n v. County of San Diego* (1983) 148 Cal.App.3d 849, 855 [holding "legislative intent should be gathered from the whole statute or act rather than from isolated parts or words."].)

Although part (6) refers to the time for posting, the statute as a whole provides additional requirements that must be read together with part (6). In particular, part (5) states the posting must not be covered by other material: "How do I post the annual summary? You must post a copy of the annual summary in each establishment in a conspicuous place or places where

notices to employees are customarily posted. You must ensure that the posted annual summary is not . . . covered by other material."

Here, Dimenstein inspected the job site on April 25, 2017, and took a picture of the annual summary that was posted. Because the inspection took place between February 1, 2017 and April 30, 2017, section 14300.32 required Employer to post the summary for 2016. However, the photographed summary was for 2015.

Despite the fact Dimenstein photographed the 2015 summary, Employer contends it substantially complied with the safety order. Allee testified Employer had posted the 2016 summary, but inadvertently placed it underneath the 2015 summary. Thus, Employer argues it satisfied part (6) of subdivision (b). However, Employer concedes it covered the 2016 summary, which violates part (5) of subdivision (b). Part (5) and part (6) must be read together to carry out the purpose of the safety order, which is to post the annual summary such that employees may readily find and review it.

Although the citation specifically referenced part (6) of subdivision (b) of section 14300.32, administrative proceedings are not bound by strict rules of pleading. The liberal rules of administrative pleading require only that Employer be informed of the substance of the charge and afforded the basic, appropriate elements of procedural due process. (*Western Digital Corporation*, Cal/OSHA App. 1200858, Decision After Reconsideration (May 16, 2019) (Alleged Violation Description stated Employer failed to report death but the employee suffered an illness not death).) The present citation informed Employer that it did not properly post the summary. Accordingly, the citation is affirmed.

3. Did Employer permit employees to use machinery and equipment under conditions of speeds, stresses, loads, or environmental conditions that were contrary to the manufacturer's recommendations?

Section 3328 provides: "All machinery and equipment: . . . (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 the Alleged Violation Description for Citation 2, Item 1, the Division alleges:

> Prior to and/or during the course of the investigation, including, but not limited to, 4/25/17, the employer did not ensure that all machinery and equipment was only used under conditions of speeds, stresses, loads and environmental conditions recommended by the manufacturer.

> On or about 4/18/17 a serious accident occurred when an Iron Worker (victim) was using a cutting torch (Victor Technologies) to trim off an inch or so from the 5-inch leg of a 5-foot-long , 3/8" thick angle iron (5 x 10) which was resting on a metal gang box. An explosion occurred in which lid of the closed gang box flew open, breaking the victim's arm.
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> The Victor Technologies Cutting, Heating and Welding Guide provided by the employer states, on page 2-4, under No. 14, "Never perform welding, cutting, and heating operations on a closed container or vessel, which may explode when heated." The closed gang box involved in this accident was being used as a working surface when it exploded during torch cutting.

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).)

Here, Salazar used the cutting torch to cut an angle iron. Salazar placed the angle iron on the gang box as a work table. There is no dispute the cutting torch is a machine or piece of equipment under the safety order.

The Division must establish Salazar used the cutting torch under "conditions of speeds, stresses, loads, or environmental conditions" that are contrary to the manufacturer's recommendations. There is no evidence Salazar used the cutting torch under a condition of speed, stress, or load that was contrary to the manufacturer's recommendation.

The safety order does not define "environmental condition." The Merriam-Webster dictionary defines "environment" as "the circumstances, objects, or conditions by which one is surrounded."[3] The gang box is an object, and it was one of the objects surrounding the cutting torch at the time of the accident. Therefore, the use of the gang box as a working surface for the cutting torch was an "environmental condition."

[3] https://www.merriam-webster.com/dictionary/environment?utm_campaign=sd&utm_medium=serp&utm_source=jsonld

Because Salazar performed cutting operations on a closed container, Employer used machinery under an environmental condition that was contrary to the manufacturer's recommendation. Accordingly, Employer violated the safety order.

4. Did the Division establish that Citation 1, Item 1, and Citation 1, Item 2, were properly classified as General?

A. Citation 1, Item 1

Section 334, subdivision (b), defines General violations as follows:

> General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.

With respect to Citation 1, Item 1, Employer failed to establish, implement, and maintain an effective IIPP by failing to identify and to correct a hazard stated in a manufacturer's guide. Failure to identify and to correct hazards has a relationship to occupational safety and health of employees because an unidentified or uncorrected hazard can cause injury or illness to an employee. Accordingly, Citation 1, Item 1, was properly classified as General.

B. Citation 1, Item 2

Section 334, subdivision (a), defines Regulatory violations as follows:

> Regulatory Violation - is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

With respect to Citation 1, Item 2, the Division established Employer failed to properly post the annual summary of workplace injuries and illnesses (Log 300). Dimenstein testified this violation has an indirect relationship to employee safety and health because it allows employees to review the posting and decide if they want to work for the employer. This evidence does not establish a relationship to occupational safety and health of employees because it does not indicate that employee safety or health will be improved, diminished, or otherwise affected. Therefore, Citation 1, Item 2 was not properly classified as General.

Citation 1, Item 2, is a violation other than Serious or General that pertains to a posting requirement. Therefore, Citation 1, Item 2, meets the definition of a Regulatory violation. Accordingly, Citation 1, Item 2, is reclassified to a Regulatory violation.

5. Did the Division establish the rebuttable presumption that Citation 2, Item 1, was properly classified as Serious?

Labor Code section 6432, subdivision (a), defines a Serious violation as follows:

> 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.

Labor Code section 6432, subdivision (e), defines "serious physical harm" as "any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any, among other things, inpatient hospitalization for purposes other than medical observation." "Realistic possibility" means it is within the "bounds of reason," and "not purely speculative." (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Dimenstein is an Associate Safety Engineer with the Division. She has been employed by the Division for over eleven years. She has taken numerous training courses while employed, and is current with her training. Dimenstein is, therefore, qualified to provide an opinion on the likelihood of serious physical harm. (Lab. Code § 6432, subd. (g).)

Dimenstein testified the actual hazard is employee exposure to explosions. Dimenstein further testified she is familiar with explosions that resulted in surgeries and hospitalizations, and that even death could result from explosions. In fact, serious physical harm resulted from the explosion in the present case because Salazar suffered a broken arm and was hospitalized for four days. Accordingly, the Division established the rebuttable presumption that Citation 2, Item 1, was properly classified as Serious.

6. Did Employer demonstrate it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation in Citation 2, Item 1?

Pursuant to Labor Code section 6432, Employer can rebut the presumption of a Serious violation on the following grounds:

> (c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:
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> > (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).
> >
> > (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

A supervisor's knowledge of a hazard is imputed to the employer if the supervisor is responsible for the safety of employees. (*City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998)).

Here, Supervisor Allee and Sartain were responsible for the safety of others. Allee was the foreman at the job site. He led weekly safety trainings and conducted site safety inspections. Sartain is Employer's Field Operations Manager. He oversees Employer's job sites, and supervises Employer's foremen. Sartain was familiar with the manufacturer's guide for the cutting torch. Both Allee and Sartain were aware that employees used gang boxes as work surfaces. Because they are each responsible for the safety of employees, their knowledge is imputed to Employer. Additionally, they knew or should have known of the manufacturer's warning not to operate the cutting torch on a closed container. Accordingly, Employer has failed to rebut the presumption of a Serious violation.

7. Did the Division establish that Citation 2, Item 1, was properly characterized as Accident-Related?

In order to establish that Citation 2, Item 1, was properly classified as Accident-Related, the Division must show a causal nexus between Employer's violation of the safety standard and the employee's serious injury. (*MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016); *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) The Division must show "the violation more likely than not was a cause of the injury." (*Ibid.)*

"An inference is a deduction about the existence of a fact that may be logically and reasonably drawn from some other fact or group of facts found to exist." (*Barrett Business Services, Inc.*, Cal/OSHA App. 315526582, Decision After Reconsideration (Dec. 14, 2016).) "The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016), citing *Mechanical Asbestos Removal, Inc*., Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).)

Section 330(h) defines a "serious injury" as, among others, any injury or illness occurring in a place of employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation. Here, Salazar suffered a serious injury because he was hospitalized for four days for the treatment of a broken arm.

Here, the violation is that Employer permitted Salazar to operate the cutting torch on top of a closed container, which is contrary to the manufacturer's guide. Importantly, the manufacturer's guide identifies the hazard that may result from using the cutting torch on a closed container—the closed container "may explode when heated." Thus, the manufacturer's guide establishes a link between operating the cutting torch on top of a closed container and an explosion of the closed container. Those two events are precisely the events at issue in this case: (1) Salazar used the torch on top of a closed container, and (2) the closed container exploded. Therefore, the manufacturer's guide supports a reasonable inference that the violation caused the explosion, thereby causing the injury.

Employer contends the evidence does not establish the explosion resulted from the use of the torch on the gang box. Employer emphasizes Salazar's testimony that he had his left arm on the gang box, but did not feel the gang box heat up. However, this evidence is not persuasive. First, if Salazar's left arm was on the gang box at the time of the explosion, it is difficult to understand why the explosion broke his right arm but not his left arm. Second, Salazar did not clearly identify when his arm was on the gang box. He operated the torch for approximately twenty minutes, and moved from one end of the five-foot long iron to the other end, and then to

the middle of the iron. It does not seem Salazar's left arm could have been on the gang box through all three positions. The timing is important because, for example, if Salazar had his arm on the gang box only at the start of his operations, then the gang box would not have had a chance to heat up yet. Ultimately, Employer did not provide a persuasive picture of events that would lend weight to Salazar's statement. Therefore, Salazar's testimony does not outweigh the credible link established by the manufacturer's guide.

Finally, although Employer's witnesses testified they do not know why the gang box exploded, their testimony tends to rule out alternative explanations for the explosion. Multiple witnesses testified the gang box did not contain flammable objects, which indicates the explosion did not result from a spark igniting a flammable object. Additionally, multiple witnesses testified they would have smelled gas if one of the hoses on the torch had a leak; but they did not smell gas prior to the explosion, which indicates the explosion did not result from a gas leak.

In light of the strong, credible explanation established by the manufacturer's guide, and the lack of alternative explanations, the preponderance of the evidence indicates the violation caused the explosion and the lid of the gang box to fly open, thereby causing Salazar's broken arm. Accordingly, the Division established Citation 2, Item 1, was properly characterized as Accident-Related.

8. Were the proposed penalties reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Appeals Board has held that if the Division fails to establish all of the facts supporting the implementation of the penalty calculation, the employer is to be given maximum credit. (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 08-0219, Decision After Reconsideration (July 19, 2012).)

Exhibit 14 is the Division's "Proposed Penalty Worksheet (C-10)." Dimenstein provided testimony explaining how she calculated the penalties from this C-10 worksheet.

a. Citation 1, Item 1

Severity

Section 335, subdivision (a)(1)(A)(ii), provides that Severity for a General violation, when not pertaining to an employee illness or disease, is based upon the type and amount of medical treatment likely to be required. Severity is rated as Low when first-aid only is required, Medium when medical attention but not more than 24-hour hospitalization is required, and High when more than 24-hour hospitalization is required.

Section 336, subdivision (b), provides that the Base Penalty for a rating of Low is $1,000, Medium is $1,500, and High is $ 2,000.

Citation 1, Item 1, rated the Severity of the violation as Medium. Dimenstein testified she always reviews the definitions prior to issuing a citation, but she could not recall why she rated this particular citation as Medium. Thus, the Division did not establish the type and the amount of medical treatment likely to be required. Employer is entitled to the maximum reduction.

Accordingly, the Severity rating is modified to Low, and the Base Penalty is $1,000.

Extent

Section 335, subdivision (a) (2) (ii), in relevant part, provides:

> 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 follows:
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> > 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.

Section 336, subdivision (b), provides that for a rating of Low, 25 percent of the Base Penalty shall be subtracted; for a rating of Medium, no adjustment to the Base Penalty shall be made; and for a rating of High, 25 percent of the Base Penalty shall be added.

Citation 1, Item 1, rated the Extent of the violation as Medium. Dimenstein testified she always reviews the definitions prior to issuing a citation, but she could not recall why she rated this particular citation as Medium. Thus, the Division did not establish how widespread the violation was. Employer is entitled to the maximum reduction.

Accordingly, the Extent rating is modified to Low, and Employer is entitled to a 25 percent reduction to the Base Penalty.

Likelihood

Section 335, subdivision (a) (3), provides as follows:

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

Citation 1, Item 1, rated Likelihood as Medium. Dimenstein testified she always reviews the definitions prior to issuing a citation, but she could not recall why she rated this particular citation as Medium. Thus, the Division did not establish the probability that injury, illness, or disease will occur as a result of the violation. Employer is entitled to the maximum reduction.

Accordingly, the Likelihood rating is modified to Low, and Employer is entitled to a 25 percent reduction to the Base Penalty.

The Base Penalty is $1,000. With the reduction of 25 percent for Extent and 25 percent for Likelihood, there is a 50 percent reduction to the Base Penalty. The adjusted Gravity-Based Penalty is $500.

Penalty Adjustments - Good Faith

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.

Section 336, subdivision (d)(2), provides that the Gravity-Based Penalty shall be reduced by 30 percent for a rating of Good, 15 percent for a rating of Fair, and zero percent for a rating of Poor.

In determining the rating for Good Faith, the Appeals Board considers the employer's attitude toward safety of its employees, as well as peculiar circumstances affecting the application of safety orders, and the employer's experience. A determination that the employer did not intend to disregard its employees' safety may be taken into consideration for potential reduction of penalties. (*Watkins Contracting, Inc.*, Cal/OSHA App. 93-1021, Decision After Reconsideration (Sep. 24, 1997), citing *Wunschel and Small, Inc.*, Cal/OSHA App. 78-1203, Decision After Reconsideration (Feb. 29, 1984).)

Citation 1, Item 1, rated Employer's Good Faith as Fair. Dimenstein testified she always reviews the definitions prior to issuing a citation, but she could not recall why she rated this particular citation as Fair. Thus, the Division did not establish the employer's attitude toward safety of its employees, as well as peculiar circumstances affecting the application of safety orders, and the employer's experience. Employer is entitled to the maximum reduction.

Accordingly, the Good Faith rating is modified to Good, and Employer is entitled to a 30 percent reduction to the Gravity-Based Penalty.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that adjustment may be made for Size when an employer has 100 employees or less.

Dimenstein testified Employer had approximately 150 employees, which she learned during her inspection, and documented in her field notes (Exhibit 14). Employer did not present evidence indicating it employed 100 employees or less. Accordingly, Employer is not entitled to a penalty adjustment for Size.

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a history of violations in the past three years, the employer is entitled to a 10 percent History credit.

Dimenstein provided a 10 percent History credit, and there is no evidence Employer has committed a violation in the past. Accordingly, Employer is entitled to the maximum History credit of 10 percent.

In sum, Employer is entitled to a 30 percent Good Faith credit, zero percent size credit, and 10 percent History credit. Application of these adjustment factors results in a reduction of the Gravity-Based Penalty by 40 percent or $200. Accordingly, the Adjusted Penalty is $300.

Abatement Credit

Section 336, subdivision (e), provides that the penalty for General violations shall be reduced by 50 percent on the presumption that the employer will correct the violation by the abatement date. Application of the 50 percent abatement credit is not discretionary. It must be applied wherever it is not prohibited. (*Luis E. Avila dba E & L Avila Labor Contractors*, Cal/OSHA App. 00-4067, Decision After Reconsideration (Aug. 26, 2003).)

Citation 1, Item 1, indicates the violation was abated. There was no evidence at hearing to the contrary. Thus, Employer is entitled to a 50 percent abatement credit.

Accordingly, the assessed penalty is $150.

b. Citation 1, Item 2

Section 336, subdivision (a), provides the penalty framework for Regulatory violations:

> (1) In General - Any employer who commits any Regulatory violation (as provided in Section 334(a) of this article) shall be assessed a civil penalty of up to $13,047 for each such violation. Except as set forth in parts (2) through (6) of this subsection, a minimum proposed penalty of $500, representing the gravity of the violation, shall be assessed against employers who commit Regulatory violations. The proposed penalty shall be adjusted for Size, Good Faith, and History; however, an abatement credit shall not be granted.

Citation 1, Item 2, is for a Regulatory violation (as modified above). Therefore, the Gravity-Based Penalty is $500.

As discussed above, Employer is entitled to a 30 percent adjustment for Good Faith, a 10 percent adjustment for History, and no adjustment for Size. Thus, the Adjusted Penalty is $300.

Abatement credits are not permissible for Regulatory violations. Accordingly, the assessed penalty is $300.

c. Citation 2, Item 1

Section 336, subdivision (d)(7), provides the penalty for a Serious violation causing death or serious injury, illness, or exposure, may be reduced only for Size.

Here, the citation is properly classified as Serious, and the violation caused a serious injury. In such cases, Size is the only permissible penalty adjustment. However, Employer is not entitled to an adjustment for Size because it had more than 100 employees. Accordingly, the assessed penalty is $18,000.

Conclusion

The Division established Employer violated section 1509, subdivision (a), because Employer failed to implement its IIPP by not identifying and correcting hazards stated in the manufacturer's recommendations. The proposed penalty was not reasonable, and is modified as set forth above.

The Division established Employer violated section 14300.32, subdivision (b)(6), because Employer did not properly post its annual summary of the Log 300. The classification was incorrect, and is modified as set forth above. The proposed penalty was not reasonable, and is modified as set forth above.

The Division established Employer violated section 3328, subdivision (a)(2), because Employer operated equipment under an environmental condition contrary to the manufacturer's recommendations. The Division further established the violation was Serious, and caused a serious injury. The proposed penalty was reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is modified to $150.

It is hereby ordered that Citation 1, Item 2, is reclassified to a Regulatory violation and the penalty is modified to $300.

It is hereby ordered that Citation 2, Item 1, and the $18,000 penalty are affirmed.

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

Jacqueline Jones

Dated**:** 01/06/2020

Jacqueline Jones
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.**