BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **ORIGINAL SIXTEEN TO ONE MINE, INC.** **PO BOX 909** **ALLEGHANY, CA 95910** **Employer**	Inspection No. **1285791** **DECISION**

Statement of the Case

Original Sixteen to One Mine, Inc. (Employer) is a mining company. On July 28, 2015, the Division of Occupational Safety and Health (the Division) opened an inspection of Employer's work site located at 527 Miners Street in Alleghany, California. Pursuant to that inspection, the Division cited Employer for three alleged safety violations. The parties reached a settlement of that case on August 15, 2016, and the Appeals Board issued a Settlement Order affirming the violations on September 19, 2016. The Division later determined that it had not received abatement verification for Citation 1, Item 1 (2015 Citation). A follow-up inspection was conducted by Ronald Aruejo, Senior Safety Engineer, on December 12, 2017.

On May 22, 2018, the Division cited Employer for a failure to abate the previous safety violation, alleging that Employer was using a plastic piping system to convey compressed air and had failed to provide the Division with written laboratory certification from the manufacturer of the pipes.

Employer filed a timely appeal of the citation, asserting that the classification was incorrect and that the abatement requirements and proposed penalty were unreasonable. Additionally, Employer asserted numerous affirmative defenses.[1] During the hearing, Employer withdrew its assertion that the General classification was incorrect.

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On November 8, 2022, ALJ Lewis conducted the hearing from Sacramento County, California, with the parties and witnesses appearing remotely via the Zoom video platform. Michael Meister Miller,

[1] 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).)

Employer's President, represented Employer. Cynthia Perez, Staff Counsel, represented the Division. The matter was submitted on November 8, 2022.

Issues

1. Did Employer fail to abate the previously-affirmed violation cited in the 2015 Citation?

2. Were the abatement requirements unreasonable?

3. Is the proposed penalty reasonable?

Findings of Fact

1. Employer uses plastic pipes in its underground mining system to convey compressed air.

2. Upon request from the Division, Employer did not produce a certification from the piping manufacturer attesting that the plastic pipes meet or exceed the test requirements found in Appendix C of the safety orders.

3. The Division determines whether plastic piping systems meet or exceed the test requirements in Appendix C of the safety orders by reviewing a certification regarding the testing from a piping manufacturer.

4. After receiving the 2015 Citation and subsequent citation for failure to abate, Employer sought to modify the safety order through the Occupational Safety and Health Standards Board (Standards Board), but no changes were made to the safety order.

5. Throughout the course of its interactions with the Standards Board, Employer made no changes to the plastic piping system and did not submit a manufacturer's certification in order to abate the violation cited in the 2015 Citation.

6. The proposed penalty was calculated in accordance with the Division's policies and procedures.[2]

[2] Finding of Fact No. 6 is a stipulation by the parties.

Analysis

1. Did Employer fail to abate the previously-affirmed violation cited in the 2015 Citation?

California Code of Regulations, title 8, section 462, subdivision (m),[3] provides, in relevant part:

> (3) Plastic piping systems may be used for compressed air conveyance above and below ground, when meeting all of the following requirements:
>
> […]
>
> (I) The employer shall use pipe that meets or exceeds the test requirements listed in Appendix C, and upon request, supply the Division written laboratory certification from the manufacturer that the pipe meets or exceeds all test requirements listed in Appendix C of these orders.

The Alleged Violation Description (AVD) for Citation 1, states[4]:

> As a result of an abatement follow-up inspection on 12/12/2017 due to a planned inspection on 07/28/16, the Division determined that the employer continued to use pipes that did not meet or exceed the test requirement listed in Appendix C of this subsection for its compressed air conveyance at its mine operation located at 527 Miners St., Alleghany, CA 95910. Also, the employer did not comply to a prior request to provide the Division a written laboratory certification from the manufacturer that the plastic pipes meet or exceed all test requirements listed in Appendix C of these orders.

Section 462, subdivision (m)(3)(I), requires that (1) if an employer uses a plastic piping system to convey compressed air, (2) the pipes must meet or exceed the test requirements listed in Appendix C, and, if requested by the Division, (3) the employer must provide the Division with a written laboratory certification from the manufacturer that the pipe meets or exceeds the test requirements.

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

[4] The Division sought to amend the AVD to correct a typographical error during the hearing. Employer did not oppose the amendment. The AVD previously stated that Employer was using piping that "meets or exceeds the test requirements…" The Division amended to clarify the language to say the pipes "did not meet or exceed the test requirements…" As a separate issue not addressed during the hearing, the AVD appears to have another typographical error in the date of the original inspection. It should have been July 28, 2015, not 2016. (See Ex. 3 and Ex. 4 [Summary Table].)

Ronald Aruejo (Aruejo) testified, and Employer confirmed, that the pipes Employer used to convey compressed air were HDPE (high-density polyethylene), which is a type of plastic. There was no dispute that the same pipes were in use at the time of the first inspection, the follow-up inspection, and at the time of the hearing in this matter. As such, section 462, subdivision (m)(3), is applicable.

It is noted that, despite the amendment to the AVD, the Division did not actually assert that the plastic piping used by Employer did not meet the test requirements set forth in Appendix C.[5] The condition or quality of the pipes was not the issue that resulted in the issuance of the original 2015 Citation and the subsequent citation for failure to abate the original violation. Rather, as averred extensively during the hearing, the violation for which Employer was cited was a failure to provide the Division with the certification showing that the pipes did, in fact, meet or exceed those test requirements.

Aruejo testified that there is no way for the Division to determine whether plastic piping systems meet the testing requirements based on a visual inspection. Thus, while the Division was not asserting that the pipes did not meet the testing standards, it could also not confirm that they did meet those requirements. The safety order provides the Division with a means of ensuring that plastic piping is compliant, which is the requirement that the employer using the plastic pipes must provide a manufacturer's certification to the Division establishing the sufficiency of the pipes. Aruejo testified that the failure to provide the certification was the basis for the original 2015 Citation and the subsequent citation for failure to abate.

Employer did not dispute that it did not provide the Division with written laboratory certification from the manufacturer that the pipes met or exceeded all test requirements listed in Appendix C. Rather, Employer argued that abatement was unnecessary because the material used for the pipes is sufficient for the purpose of conveying compressed air above or below ground because of the amount of air pressure the pipes can sustain, the quality of the pipe material, and many mines throughout the country use these pipes. The only testimony from Miller regarding Employer's failure to provide the Division with written laboratory certification from the manufacturer was that he notified the manufacturer that he was required to provide the Division with certification and the manufacturer "laughed" about the request. Miller explained that the manufacturer laughed because the pipes are well above the standards required to perform the function of conveying compressed air. Thus, Miller's argument was that the pipes met the testing requirements, but he did not dispute that Employer did not provide the Division with a laboratory certification from the manufacturer.

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[5] Appendix C, located after section 560 in Article 10 "Safe Practices," sets forth the types of testing that must be passed for acceptance of plastic piping for the conveyance of compressed air.

a. *Occupational Safety and Health Standards Board (Standards Board)*

Miller asserted that the safety order is outdated and plastic pipes have improved over the decades since this regulation was implemented. Miller testified that he was told by the Division during the first inspection in 2015 that he could "go to the Standards Board" if he had concerns or complaints about the safety order. According to Miller, he spoke to the Standards Board at length to "fix" the regulation, but nothing had been done. Miller did not provide any testimony regarding whether Employer sought or received a variance from the Standards Board.

The Legislature has delegated to the Standards Board the exclusive authority to "adopt, amend or repeal occupational safety and health standards and orders." (Lab. Code §142.3, subd. (a).) The Division's role is to ensure that employers are complying with the safety standards adopted by the Standards Board. (Lab. Code §6307.) "If an employer feels that there is no feasible method of compliance with a safety order, or the safety order is unreasonable, it should apply to the Occupational Safety and Health Standards Board for a variance or to have the safety order repealed or amended." (*Northern California Anthes, Inc*., Cal/OSHA App. 84-1085, Decision After Reconsideration (Dec. 31, 1986).)

In *Hoffman Bros. Packing Co., Inc*., Cal/OSHA App. 90-1035, Decision After Reconsideration (May 31, 1991), the Appeals Board explained: "The Standards Board is the only agency permitted to grant a permanent variance from the provisions of a safety standard…"

There was no evidence submitted regarding whether the Standards Board did, in fact, agree to modify the safety order at some point or to grant Employer a variance. Nonetheless, Appeals Board precedent requires employers to comply with the safety order while a variance application is pending. (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).)

The safety order in its current version, which was also the version in effect at the time the citations were issued, requires that employers who use plastic piping to convey compressed air provide the Division with a written laboratory report from the manufacturer certifying that the plastic pipes meet or exceed the test requirements set forth in Appendix C. Miller did not provide the Division with a manufacturer's certification while he was in communication with the Standards Board.

The Division established that Employer was using a plastic piping system for conveyance of compressed air and that Employer never provided the Division with the required certification. Accordingly, the Division established that Employer failed to abate a violation and Citation 1 is affirmed.

2. Were the abatement requirements unreasonable?

Labor Code section 6600 provides:

> Any employer served with a citation or notice pursuant to Section 6317, or a notice of proposed penalty under this part, or any other person obligated to the employer as specified in subdivision (b) of Section 6319, may appeal to the appeals board within 15 working days from the receipt of such citation or such notice with respect to violations alleged by the division, abatement periods, amount of proposed penalties, and the reasonableness of the changes required by the division to abate the condition.

The question posed for abatement where a violation is found is whether an employer has subsequently complied with the requirements of the safety order or eliminated the alleged violation in some other manner. The abatement in this matter was required after the original 2015 Citation was affirmed by a Settlement Order from the Appeals Board. Employer failed to provide the Division with satisfactory proof of abatement at any time between the original citation and the date of the hearing in this matter.

Abatement may be achieved by either changing the conditions that trigger the need to produce the manufacturer's laboratory certification, i.e., not using a plastic piping system, or by complying with the safety order that says that, if a plastic piping system is used, a certification from the manufacturer must be provided to show that the pipe meets or exceeds the test requirements listed in Appendix C.

When asked about feasibility of abatement, Miller asserted that it would be far too expensive to replace all the pipes and stated in his direct testimony that "there is no way a small company could abate this." In response to a question about submitting the manufacturer's laboratory certification, Miller said that he was unable to obtain certification from any of the manufacturers he queried about it. Miller's explanation for why he did not submit a manufacturer's certification did not adequately establish that it was not feasible to obtain such a report.

Therefore, Employer is mandated to comply with the requirements of the safety order. However, consistent with the Appeals Board's previous precedent concerning abatement, this Decision does not specify the method of abatement. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018).) Employer may select the least burdensome means of meeting the requirements of the cited section. (*Id*.)

3. Is the proposed penalty 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 parties stipulated that the penalty for Citation 1 was calculated in accordance with the Division's policies and procedures. Accordingly, the penalty for Citation 1 is affirmed.

Conclusions

The Division established that Employer failed to abate the previously-affirmed violation of section 462, subdivision (m)(3)(I), by not providing the Division with a written laboratory certification from the manufacturer that the plastic pipes used to convey compressed air meet or exceed all testing requirements. The proposed penalty is reasonable.

ORDER

It is hereby ordered that Citation 1 is affirmed and the penalty of $16,650 is sustained.

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

Dated: 12/07/2022

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.**