

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal
of:

DAMON, INC.
9602 Samoline Ave
Downey, CA 90240

Employer

DOCKETS 13-R6D5-1975
and 1976

DECISION

Statement of the Case

Damon, Inc. (Employer) is a construction contractor. Beginning April 25, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Miguel Vargas conducted a programmed Labor Enforcement Task Force inspection at a place of employment maintained by Employer at 3149 Front Street, Alhambra, California (the site). On June 7, 2013, the Division cited Employer for (1) failure to have a trained person qualified to render first aid at the site, (2) failure to have a written heat illness prevention program (HIPPP), and (3) failure to have a belt and pulley drive guard on a concrete mixer.

Employer filed timely appeals contesting the existence of the violations and the reasonableness of the proposed penalties.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on April 2, 2014. Emmanuel John Damoulakis, Secretary, represented Employer. Michael Nelmda, District Manager, represented the Division. The parties presented oral and documentary evidence. The ALJ extended the submission date on her own motion to May 9, 2014.

Issues

1. Was a person appropriately trained to render first aid at the site?
2. Did the proposed penalty for Citation 1, Item 1, reflect the correct number of employees?
3. Did Employer's documents contain all the elements required for a Heat Illness Prevention Plan?
4. Was the proposed penalty for Citation 1, Item 2, appropriate?
5. Were employer's employees exposed to the hazard of an unguarded belt and pulley drive on the concrete mixer at the site?
6. Was the proposed penalty for Citation 2 appropriate?

Findings of Fact

1. No appropriately certified or trained first aid person was at the site during the inspection.
2. Employer had between 11 and 25 employees.
3. Employer did not have a history of previous violations with Cal/OSHA.
4. Employer had an average safety program.
5. Employer did not have its HIPP in writing.
6. The concrete mixer at the site was working and was being used by Employer's employees.
7. Employer's employees were exposed to the hazard of an unguarded belt and pulley drive.

Analysis¹

Issue 1

Was a person appropriately trained to render first aid at the site?

Section 1512(b) provides:

Emergency Medical Services.

Appropriately Trained Person. Each employer shall ensure the availability of a suitable number of appropriately trained persons to render first aid.

With reference to Emergency Medical Services, § 1504(a) defines "Appropriately Trained Person" as follows:

¹ Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

A physician or registered nurse currently licensed in California or a person possessing a current certificate (training within the last three years or as specifically stated on the certificate) from the American National Red Cross or equivalent training that can be likewise verified. Acceptable Red Cross certificates are those from the Standard First-Aid Multimedia, Standard First Aid and Personal Safety, or Advanced First Aid and Emergency Care courses.

Section 1504(a) defines “First Aid” as follows:

The recognition of, and prompt care for injury or sudden illness prior to the availability of medical care by licensed health-care personnel.

When Associate Safety Engineer Miguel Vargas (Vargas) arrived at the site on April 25, 2013, Employer’s employees were working outside, constructing a brick wall. (Exhibit 5).

CEO and President Emmanuel John Damoulakis (E. Damoulakis) testified about his training and certification in first-aid, but he was not present at the site. Thus he could not provide care prior to the arrival of licensed health-care personnel.

E. Damoulakis testified that he trained his son, Jacob Damoulakis (J. Damoulakis) and Foreman Daniel Velasquez (Daniel) on matters related to first aid. Both of them were at the site. However, there was no evidence regarding the extent of the training or whether it was equivalent to that provided by the American National Red Cross. Daniel told Vargas that he was not trained or certified to provide first aid. In any event, neither J. Damoulakis nor Velasquez possesses the required current certificate in order to qualify as a person appropriately trained to render first aid.

Therefore, the Division established a general² violation of § 1512(b) by a preponderance of the evidence.

² Employer did not contest the classification. An issue not properly raised on appeal is deemed waived. (See § 361.3 [“Issues on Appeal”] and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Issue 2

Did the proposed penalty for the violation of § 1512(b), (Citation 1, Item 1), reflect the correct number of employees?

The gravity based penalty is adjusted by giving due consideration to Employer size as follows: 40% for 10 or fewer employees, 30% for 11 to 25 employees, 20% for 26 to 60 employees, and 10% for 61 to 100 employees. (§§ 335(d), 336(d)(1))

A review of the proposed \$250 penalty finds that the Division followed the penalty setting regulations³. Vargas offered testimony to establish the amount of the penalty as reflected on the penalty calculation worksheet (Exhibit 3). Employer did not contest that testimony, nor did it offer any evidence contrary to that testimony except for the number of employees.

Vargas observed 12 workers at the site at the time of his inspection. J. Damoulakis, an officer of the corporation (Exhibit 8), told Vargas that all the workers at the site were Employer's employees. Accordingly, Vargas applied a penalty adjustment of 30%.

Doris Velasquez, an enforcement representative of the State Contractor's Board, was at the site at the same time as Vargas. She testified that there were about 12 workers present. J. Damoulakis said that he was the Project Manager and that all the workers were his employees.

E. Damoulakis is a licensed construction contractor. He testified that Employer had eight employees working at the site. The job was a public works project and the payroll had to be certified by the City of Alhambra. E. Damoulakis testified that the other four workers were employees of another employer. The other employer did not have a contractor's license.

The statements made by J. Damoulakis on the day of the inspection are those of Employer because he was an officer of Employer as well as the Project Manager.⁴ Even if these statements are not true, Employer may not benefit now from false statements made during the inspection.

³ Penalties calculated in accordance with the penalty setting regulations (§§ 333-336) are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) A penalty proposed by the Division in accordance with those regulations is presumptively reasonable and will not be reduced absent evidence by Employer 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. (*Id.*)

⁴ No hearsay objection was made. The statements made by Project Manager J. Damoulakis to DOSH inspector Vargas are hearsay but would support a finding over a hearsay objection

Based on the above, it is found that Employer had 12 employees for purposes of the instant proceeding. The penalty adjustment factor of 30% for size was appropriate. The penalty is therefore established in the amount of \$250.

Issue 3

Did Employer's documents contain all the elements required for a Heat Illness Prevention Plan?

Section 3395(f)(3) provides as follows:

The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I)⁵ shall be in writing and shall be made available to employees and to representatives of the Division upon request.

Section 3395(a)(2)(B) provides that the construction industry is subject to all provisions of § 3395, including high heat provisions.

because they are reliable. (Rule 376.2) Evidence Code § 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth. Evidence Code § 1222 provides that evidence offered against a party is not made inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make statements concerning the subject matter of the statement. A foreman's statements are authorized admissions. (*Webcor Construction, Inc. dba Webcor Builders*, Cal/OSHA App. 06-2095, Decision After Reconsideration (Mar. 27, 2012), citing *Bill Nelson Engineering Construction, Inc.*, Cal/OSHA App. 09-3769, Denial of Petition for Reconsideration (Oct. 7, 2011).)

⁵ Section 3395(f) provides as follows:

- (1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:

...

(B) The employer's procedures for complying with the requirements of this standard.

...

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.

(H) The employer's procedures for contacting emergency medical services, and, if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

Employer was performing construction activity, building a concrete wall, and was therefore required to have a written HIPP. On the day of the inspection, Vargas requested Employer's HIPP, but the only document that Employer gave Vargas was a copy of California Code of Regulations, Title 8, Section 3395 (Exhibit 9). At hearing, Employer presented undated Exhibits A and D.

Exhibit A was typewritten and titled "Damon's Inc. Safety Program." The language in Exhibit A that pertains to heat illness instructs employees to "drink plenty of liquids," "wear appropriate clothing," "get out of the sun" if they do not feel well and to "take more frequent breaks." This document falls far short of the requirements of § 3395(f)(3). For example, it does not contain the procedures for complying with heat illness requirements (§ 3395(f)(1)B), responding to symptoms of heat illness (§ 3395(f)(1)G), procedures for contacting emergency medical services and transporting employees (§ 3395(f)(1)H), procedures for ensuring that clear and precise directions are provided to emergency responders, or procedures to designate a person to be available to ensure that emergency procedures are invoked when appropriate (§ 3395(f)(1)H).

Exhibit D was handwritten and did not have a title or date. Exhibit D is a description of Employer's oral HIPP. E. Damoulakis testified that Employer's provisions regarding heat "were not the wording Cal/OSHA required" and "maybe were not written down, but they tend to take care of their employees." Exhibit D itself is addressed to Vargas and did not exist before the date of the inspection. Exhibit D is not an HIPP. It is not a defense that Employer took care of their employees. Exhibit D cannot be found to satisfy the requirement to have Employer's procedures in writing.

Therefore, the Division established a general violation of § 3395(f)(3) by a preponderance of the evidence.

Issue 4

Was the proposed penalty for the violation of § 3395(f)(3), (Citation 1, Item 2), appropriate?

Employer did not present evidence to rebut calculation of the proposed penalty, except for the number of employees. As discussed above, the number of employees was found to be between 11 and 25. The Division's proposed penalty of \$250 is therefore found appropriate.

Issue 5

Were employer's employees exposed to the hazard of an unguarded belt and pulley drive on the concrete mixer at the site?

Section 4070(a) provides, "All moving parts of belt and pulley drives located 7 feet or less above the floor or working level shall be guarded."

On the day of the inspection, an electric cement mixer was at the site. (Exhibit 5). It had an unguarded belt and pulley drive that was inches from the control switch (Exhibit 4) and less than 7 feet from the ground. (Exhibit 5)

The evidence was in conflict regarding whether the concrete mixer was in operation on the day of the inspection.

Two inspectors testified that the mixer was in operation and being used while they were conducting their inspections. Vargas took a photograph of two employees standing in front of the mixer's motor and unguarded belt and pulley drive. They were within the zone of danger created by the unguarded belt and pulley drive nip points.

Doris Velasquez, from the contractor's license board, testified that she saw the mixer. It was moving and very noisy. She saw cement in the mixer.

E. Damoulakis's testimony that the mixer was not working cannot be credited because he never saw the mixer and his belief is based on employee statements.

E. Damoulakis testified that Daniel, the foreman, said he first became aware that the mixer was there when the inspectors came⁶. Daniel was working in the back, and the mixer was set up in front. These statements are double hearsay, but they fall into hearsay exceptions. Daniels's statements

⁶ Although Daniel's statement to E. Damoulakis is hearsay, it is an adoptive admission. Evidence Code § 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth.

are admissions against interest⁷. E. Damoulakis adopted these statements, making them adoptive admissions⁸.

E. Damoulakis submitted a signed, unsworn statement from Daniel (Exhibit C) which stated “The mixer was not working before or after Cal-Osha came to the job.” Daniel’s written statement cannot be given weight because he never saw the mixer before the inspectors arrived at the site.

Rigoberto Zuniga (Zuniga) owned the mixer in question and brought it to the site that morning. E. Damoulakis submitted an unsworn written statement from Zuniga that the mixer “was not being used and not operable.” This statement is viewed with distrust. First, Zuniga did not give any explanation for bringing a non-working mixer to the site that morning. It is not reasonable to believe that Zuniga would bring a mixer to the site unless it worked and he intended to use it.

Second, Evidence Code §412 provides, “If 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.” In *Rudolph & Sletten, Inc.*, Cal/OSHA App. 85-419, Decision After Reconsideration (Dec. 24, 1985), the Board held that “failure to provide the testimony of a critical witness which would have established a defense may result in an inference adverse to Employer’s contention.” That employer relied on its project superintendent and foreman’s hearsay testimony, rather than call the field superintendent who allegedly made the statements. That principle applies here. The Board has found that a party’s failure to offer evidence, although production of the evidence was easily within the party’s power to do so, raises the inference that the evidence, if produced, would have been adverse to their position. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing *Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 580.) Here, the failure to call Zuniga raises the inference that his testimony would have been adverse to his written statement.

Therefore, the Division’s direct testimony of its observations outweighs Employer’s evidence. It is found that the mixer was in operation on the day of the inspection and Employer’s employees were exposed to the hazard of its

⁷ Evidence Code § 1222 provides that evidence offered against a party is not made inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make statements concerning the subject matter of the statement.

⁸ Evidence Code § 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth.

unguarded belt and pulley drive. The Division established a violation of § 4070(a).

Accordingly, Employer's appeal is denied. Citation 2 is affirmed.

Issue 6

Was the proposed penalty for the violation of § 4070(a), (Citation 2), appropriate?

Where an employer does not appeal the classification of a violation, but has appealed the reasonableness of the penalty, the classification is put in issue. (*Hudson Plastering Co., Inc.*, Cal/OSHA App. 85-1271, Decision After Reconsideration (Nov. 19, 1987) citing *Anderson, Clayton & Company, Oilseed Processing Division*, Cal/OSHA App. 79-131, Decision After Reconsideration (July 30, 1984).)

Labor Code section 6432(a) provides:

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 serious⁹ physical harm could result from the actual hazard created by the violation.

The legal standard "realistic possibility" is not defined in the safety orders. The Appeals Board utilized a "reasonable possibility" standard in *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980) when analyzing whether an employer must ensure workers possibly exposed to the danger of splashing caustic chemicals were required to wear eye protection. The Appeals Board determined that it is unnecessary for DOSH to "present actual proof of hazardous splashing if a realistic possibility of splashing exists." They explained, "[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) of the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation." This definition

⁹ Section 330(h) provides as follows: "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

was again utilized in *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).

Associate Safety Engineer Oscar Amancio from the Cal/OSHA Labor Enforcement Task Force (LETf) testified that he was current in his Division-required training and has experience conducting accident inspections involving unguarded belt and pulley drives. The nip points are pinch points which can take and grab material like loose clothing. The type of injury that usually results from an accident caused by lack of a guard is amputation with fingers being the most typical amputation. Amputations are always serious injuries. Employer did not rebut or challenge this testimony. Amancio's testimony established that a serious injury was more than speculation, and therefore, a realistic possibility in the event of an accident caused by the violation.

The Division offered testimony to establish the amount of the penalty as reflected on the penalty calculation worksheet (Exhibit 2). Employer did not contest that testimony, nor did it offer any evidence to the contrary, except for evidence relating to the number of employees.

The proposed penalty for Citation 2 is therefore established in the amount of \$3,035.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

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

Dated: June 3, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR:ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
Damon, Inc.
Dockets 13-R6D5-1975 and 1976**

Date of Hearing: April 2, 2014

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Form 1BY and response for Citation 2	Yes
3	Form C10	Yes
4	Photograph of belt and pulley drive, motor and control switch for concrete mixer	Yes
5	Photograph of men working at site	Yes
6	Field Documentation Worksheet	Yes
7	Employer's Written Hazard Assessment Procedures	Yes
8	Employer's Contractor's License—Details	Yes
9	Section 3395	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Employer's Safety Program	Yes
B	Zuniga Statement	Yes
C	Velasquez Statement	Yes

D Handwritten HIPP

Yes

Witnesses Testifying at Hearing

1. Miguel Vargas
2. Oscar Amancio
3. Emmanuel John Damoulakis
4. Doris Velasquez

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

DAMON, INC.
Dockets 13-R6D5-1975 and 1976

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 317028876

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R6D5-1975	1	1	1512(b)	G	ALJ affirmed violation	X		\$250	\$250	\$250
		2	3395(f)(3)	G	ALJ affirmed violation	X		250	250	250
13-R6D5-1976	2		4070(a)	S	ALJ affirmed violation	X		3,035	3,035	3,035
Sub-Total								\$3,535	\$3,535	\$3,535

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$3,535

NOTE:

Please do not send payments to the Appeals Board.

All penalty payments should be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: DR/ml
POS: 06/04/14