

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

<p>In the Matter of the Appeal of:</p> <p>CALIFORNIA FAMILY FITNESS 8680 Greenback Lane, Suite 220 Orangevale, CA 95662</p> <p style="text-align:right">Employer</p>	<p>Docket Nos.03-R2D1-0096</p> <p style="text-align:center"><b>DECISION AFTER RECONSIDERATION</b></p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by the Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

**JURISDICTION**

Between August 8, 2002 and December 13, 2002, a Division representative conducted an investigation at a place of employment maintained by California Family Fitness (Employer) at 2165 Sunset Blvd., Rocklin, California.

On December 13, 2002, the Division issued two citations to Employer alleging violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup>

Employer filed a timely appeal contesting the alleged violations.

Employer's appeals were heard on February 18, 2005 before an Administrative Law Judge (ALJ) for the Board, and the matter was submitted on March 18, 2005. The ALJ rendered a decision on April 4, 2005, which, among other things, upheld a violation of section 5162((a)(failure to provide emergency shower and eyewash), but reduced the classification from serious to general and reduced the proposed penalty from \$5,060 to \$335.

---

<sup>1</sup> Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

On May 9, 2005, the Division filed a petition for reconsideration protesting the reduction in classification for the section 5162(a) violation and the concomitant reduction in penalty. Employer filed a brief response to the Division's petition on May 31, 2005. The Board took the Division's petition under submission on June 27, 2005.

### **EVIDENCE**

The Division conducted an investigation of Employer's premises following an accidental chemical release from tanks used to store materials needed for pool maintenance. Because Employer lacked an emergency eye wash and shower facility, the Division issued the referenced citation.

The Division inspector testified to his education and background in chemistry, which was significant. He further testified regarding the chemicals in the tanks at Employer's facility and introduced Material Safety Data Sheets (MSDS) pertaining to them. The inspector testified to injuries that could result from eye and skin exposure to such chemicals, which included a greater than 50% likelihood that untreated exposure to the eye would result in blindness and require hospitalization well in excess of a day.

In the decision below, the ALJ concluded that the Division failed to provide an evidentiary foundation for the inspector's opinions regarding the nature of the injuries that would likely result from exposure to the relevant chemicals, and so rejected the serious classification.

The Division's petition for reconsideration contends that the inspector's background and education were more than sufficient to support his conclusions and further argues that the MSDS information submitted should, itself, have been sufficient to substantiate the classification.

### **ISSUE**

Was the reduction in classification from serious to general and the related reduction in penalty proper?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

To classify a violation as serious, the Division must show that there is a substantial probability that death or serious physical harm could result from the violation. Labor Code section 6432(a); *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004). The phrase "serious physical harm" is not defined in the regulations, but the Board has

equated it with “serious injury or illness” as defined in Labor Code section 6302(h). *Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985); see also, *Puritan Ice Co.*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003). Labor Code section 6302(h) defines “serious injury or illness” to mean “... any injury ... 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 ...”

The degree of evidentiary support needed to uphold a serious classification varies in Board precedent, because each case differs and presents different evidence, all of which must be evaluated on its own merits. Nonetheless, the Board has repeatedly held that opinions regarding the probability of serious injury must be supported by reasonably specific scientific or experienced based rationale, or generally accepted empirical evidence. E.g., *Brydenscot Metal Products*, Cal/OSHA App. 03-3554, Decision After Reconsideration (Nov. 02, 2007); *MV Transportation, Inc.*, *supra*; *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999); see also, *Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).

In the present matter, it is undisputed that the Division’s inspector had significant general education and background in chemistry. He also testified to some courses he took some time ago pertaining to chemicals’ effects on the body. However, no evidence was presented to show that he had any specific familiarity with the chemicals in question, or their potential to cause injury. Rather, he made various conclusive statements regarding their effect on skin and eyes and referred to the information in the MSDSs. No empirical research or scientific information was presented to support his assertions, nor did he attest to conducting accident investigations involving these or similar chemicals previously.

The circumstances present here resemble the situations we considered in *Brydenscot* and *Ja Con Construction*, *supra*. In *Brydenscot*, the Division inspector was qualified as an expert on the operation of press brakes, but the ALJ and the Board found that he lacked expertise regarding the likely injuries to be caused by them. As a result, his testimony was discounted and the serious classification was reduced to general. In *Ja Con Construction*, which involved the use of nail guns, the inspector testified to her extensive experience with the Division, specifically with respect to investigations pertaining to the construction industry. We rejected the serious classification, however, because no evidence was entered to show that she was knowledgeable or trained regarding nailers specifically, or the nature of the injuries they are likely to inflict. Here, while we do not question the Division inspector’s general

knowledge of chemistry, we agree with the ALJ's conclusion that the Division failed to lay a foundation for his opinions regarding the likely adverse consequences of exposure to the chemicals in question.

The Division references a prior Board Decision After Reconsideration, which suggests that the information in an MSDS is sufficient to support a serious classification, i.e., *Dayton Hudson Corp.*, Cal/OSHA App. 99-912, Decision After Reconsideration (Dec. 10, 2001). The Division contends that the same approach should apply here, and observes that the MSDSs relevant to the present matter unequivocally state that the substances covered *cause* severe skin and eye burns, as opposed to stating that they *may cause* such injuries. The Division argues that this should suffice to support the serious classification.

The Division's position fails to consider that the MSDSs also contain more equivocal language (e.g., "Concentrated material in contact with the eyes *can* cause severe irritation and injury . . ."). Moreover, the MSDS language is relatively vague (e.g., "severe skin burns") and fails to address factors necessary to uphold a serious classification (e.g., whether hospitalization will be needed and for how long).

For example, the Division inspector spoke of the potential for second and third degree burns to result from exposure to the chemicals involved. One of the MSDSs makes reference to "severe skin burns." While a second degree burn could properly be described as "severe," as used in the MSDS, it would not necessarily result in hospitalization in excess of 24 hours for more than observation, or cause a serious degree of permanent disfigurement. A "severe" burn, then, would not necessarily satisfy the statutory requirements for a serious violation. Accordingly, we fail to see how an MSDS, including those at issue here, can satisfy the Division's burden to support the violation's serious classification. To the extent that *Dayton Hudson, supra*, suggests that an MSDS alone can support a serious violation, it is disapproved.

Moreover, we will not assume facts that are not in evidence, or take official notice of an element of a violation on which the Division bears the burden of proof. *Architectural Glass & Aluminum Co., Inc.*, Cal/OSHA App. 01-5031, Decision after Reconsideration (Mar. 22, 2004). Accordingly, we cannot conclude that the chemicals in question would cause serious injury or death without stronger evidentiary support.

Based on all the foregoing, we conclude that the reduction in classification and penalty were proper in this matter.

#### **DECISION AFTER RECONSIDERATION**

The Board affirms and reinstates the ALJ's decision on the referenced appeal and the assessment of a \$335 civil penalty.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: