BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1474269**
CIRCLE M TRUCK REPAIR, INC. **4605 SCALLOWAY COURT** **BAKERSFIELD, CA 93312** **Employer**	**DECISION**

Statement of the Case

Circle M Truck Repair, Inc. (Employer) is a truck repair shop. Beginning May 7, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido (Pulido), conducted an accident investigation at Employer's worksite located at 4234 Foster Avenue, in Bakersfield, California (the site).

On October 10, 2020, the Division issued two citations to Employer for alleged violations of sections of the California Code of Regulations, title 8.[1] Citation 1, classified as Regulatory, alleges that Employer failed to timely report a serious injury suffered by one of its employees. Citation 2, classified as Serious Accident-Related, alleges that Employer failed to ensure that employees operated machinery and equipment under speeds, stresses, loads or environmental conditions that are consistent with the manufacturer's recommendations.

Employer filed a timely appeal of Citation 1 challenging the existence the alleged violation and the reasonableness of the proposed penalty. Employer filed a timely appeal of Citation 2 challenging the classification and the reasonableness of the proposed penalty. Employer also raised numerous affirmative defenses.

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on January 4, 2023. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. Senior Safety Engineer Greg Clark represented the Division, and attorney Daniel Klingenberger of LeBeau Thelen, LLP, represented Employer.

During the hearing, the parties stipulated to a protective order concerning Exhibit 18, which contains medical records. Good cause appearing, Exhibit 18 is placed under seal by the undersigned pursuant to section 376.6.

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

The matter was submitted on February 1, 2023.

Issues

1. Did Employer fail to timely report a serious occupational injury to the Division?

2. Did the Division establish that Citation 2 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious?

4. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

5. Did Employer establish any of its affirmative defenses?

6. Are the proposed penalties reasonable?

Findings of Fact

1. On April 24, 2020, at approximately 3:15 p.m., Employer's employee Cipriano Ramirez (Ramirez) suffered a serious injury while at work and was admitted to a hospital for treatment that evening at 7:31 p.m.[2]

2. Ramirez was operating a pneumatic lift (air lift) to raise the rear of a truck that Employer was repairing and refurbishing for a customer. The contract with the customer involved refurbishment of 11 trucks.

3. The air lift is a piece of machinery designed to lift vehicles by resting the lifting points of the vehicle on two adjustable saddles. The distance between the saddles is adjustable, as is their height.

4. The manufacturer of the air lift involved in the accident recommends against modifying the air lift or using attachments that are not approved by the manufacturer.

5. The rear of the truck that Ramirez was attempting to lift was too narrow to lift with the air lift, as it did not fit in the lifting saddles. Ramirez modified the air lift by placing a wooden plank across the lifting saddles, and rested the rear hitch of the truck on the wooden plank.

6. The manufacturer's recommendations also state that the air lift is designed to lift

[2] This finding results from a stipulation by the parties during the hearing.

from the lifting saddles, with the lifting saddles cradling the lifting points and hooking over the frame, bumper or bed of the vehicle.

7. The lifting saddles were not cradling the truck's lifting points at the time of the accident.

8. The accident occurred when Ramirez attempted to raise the truck with the modified air lift.

9. The manufacturer of the air lift involved in the accident requires chocking the wheels at the opposite end of the vehicle from where it is being lifted.

10. Ramirez did not chock the wheels on the opposite end prior to attempting to lift the truck.

11. The air lift tipped backward and fell onto Ramirez.

12. Marcos Cintora (Cintora), Employer's Service Manager, heard screaming and ran over to where Ramirez was on the floor with the air lift on top of him. Cintora immediately called 911.

13. Despite having a policy to eliminate the use of wood and other foreign objects, Employer was aware that employees were using wood to alter the performance of the air lifts.

14. Employer was aware that the truck that Ramirez was working on was configured differently from the other 10 trucks that were part of the same contract. The rear bumper had been uniquely modified with a large hitch that prevented resting the rear of the truck on the lifting saddles. Despite being aware of this, Employer failed to advise or instruct Ramirez regarding how to safely lift the rear of the truck.

15. Employer did not supervise Ramirez because Employer relied on his experience as a mechanic.

16. The accident happened out in the open at the site, which is a 50 by 200 foot truck repair shop.

17. Rodriguez was not trained by Employer on how to safely lift the truck involved in the accident.

18. Ramirez did not know that modifying the air lift by placing a wooden plank across the lifting saddles was contrary to Employer's safety policies.

19. A serious crushing injury could predictably result from an air lift falling on an employee.

20. Ramirez's injuries occurred because he was using an air lift to raise the rear end of a truck in an improper manner that went against the recommendations of the manufacturer of the air lift.

21. The Division proposed reasonable penalties for Citations 1 and 2.

22. Employer had 17 employees at the time of the accident.

23. Employer cooperated during the inspection, and had an average safety program.

Analysis

1. Did Employer fail to timely report a serious occupational injury to the Division?

Section 342, subdivision (a), states:

> (a) Every employer shall report immediately to the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. The report shall be made by the telephone or through a specified online mechanism established by the Division for this purpose. Until the division has made such a mechanism available, the report may be made by telephone or email.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

Section 330, subdivision (h) defines "serious injury or illness" as:

> "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for other than medical observation or diagnostic testing….[3]

Citation 1 alleges:

> Employer failed to immediately report to the Division a serious injury suffered by an employee operating an air lift jack on or about April 24, 2020.

"Section 342(a) requires employers to report to the Division any and all serious injuries occurring in the workplace, within 8 hours of the employer obtaining knowledge of the gravity of the injury using reasonable diligence." (*Allied Sales and Distribution, Inc*., Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).) "The purpose of the reporting requirement is to allow the Division to quickly respond to injuries or illnesses occurring on the job." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 et al., Decision after Reconsideration (Apr. 24, 2003).) This rapid response is "necessary to [enable the Division to] inspect potentially dangerous conditions close to the time of the accident…and to examine any equipment that may have caused an injury." (*Id*., citing *Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979).)

The time period within which an employer must report is controlled by section 342, subdivision (a). (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 et al., *supra.*) Section 330, subdivision (h), on the other hand, provides "objective guidance to what constitutes a 'serious injury' which does not preclude employer knowledge at an earlier time where, under particular circumstances, and employer knows or with diligent inquiry could know that hospitalization for more than 24 hours is either required **or substantially probable**." (*Id*., emphasis added.) Thus, "it is the facts giving rise to [an employer's] actual or constructive 'knowledge' of the serious injury which are dispositive for determining a violation of the eight-hour rule in section 342(a)." (*Id.*)

The Appeals Board has addressed the constructive knowledge component of section 342, subdivision (a), in *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 et al., *supra*, by stating:

> [I]n addressing the constructive knowledge requirement in section 342(a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical

[3] The remainder of the definition is not relevant to the facts at hand and has been omitted.

> treatment, Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h). (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 et al., *supra.*)

In determining whether the Division met its burden of proof by a preponderance of the evidence, "[f]ull consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence, including that which has been produced by defendant." (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, review denied.)

a. Type and location of injury

The parties do not dispute that on April 24, 2020, Employer's employee Cipriano Ramirez (Ramirez) suffered a serious injury while at work. Ramirez testified that he was using an air lift to lift the rear of the truck that he was working on, and had just connected the air hose to the air lift when he heard a cracking noise. Ramirez was on the left rear side of the truck. He further testified that he jumped over to the right, and that is when the air lift tipped over and fell on him. Employee Saturnino Zacarias (Zacarias) witnessed the accident. Zacarias credibly testified that he heard a cracking noise, and immediately after saw Ramirez on the floor with the air lift on top of him. Additionally, Marcos Cintora (Cintora), Employer's Service Manager, heard screaming and ran over to where Ramirez was on the floor with the air lift on top of him. Cintora called 911.

b. Employer's knowledge of the cause of Ramirez's injury

There is no dispute that Employer knew Ramirez had injured himself as a result of the air lift falling on him at work. (See Exhibit 4.) The air lift is a large piece of metal equipment designed to support up to 10,000 pounds. (See Exhibits 4, 5, and 15.) The fact that Employer discovered Ramirez under the fallen air lift immediately after screams were heard, should have put Employer on notice that Ramirez may have suffered a serious injury.

c. Steps taken to provide or obtain medical treatment

Cintora credibly testified that upon discovering Ramirez under the fallen air lift, he called 911, and the parties do not dispute that Ramirez was admitted for treatment on April 24, 2020 at 7:31 p.m. Cintora's decision to call 911 is strong evidence that he was aware that Ramirez had suffered a serious injury. Because he is a manager, Cintora's knowledge is imputed to Employer. (*Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision After Reconsideration (Sept. 22,

2017).) This factor, therefore, weighs in favor of finding that Employer possessed constructive - if not actual - knowledge of a serious injury immediately following Ramirez's accident.

d. Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.)

No evidence was introduced during the hearing regarding Employer's efforts to determine the nature of Ramirez's hospitalization. The parties stipulated during the hearing that Ramirez was hospitalized for treatment on the date of the accident at 7:31 p.m. Even if Employer had taken steps to determine the nature of the hospitalization, however, Employer's attempts to learn Ramirez's status following the incident would not have absolved it of the responsibility it had to report Ramirez's injury to the Division within eight hours of its occurrence. As the Appeals Board held in *Burbank Recycling, Inc*., Cal/OSHA App. 10-0562 et al., Decision After Reconsideration (June 30, 2014):

> When an employer has doubts as to whether an injury is serious, we have long thought the employer should resolve any doubt in favor of reporting the event. (*Dubug # 7 Inc. dba Wood-Ply Forest Products*, Cal/OSHA App. 92-1329, Decision After Reconsideration (Jun. 26, 1995), citing, *Alpha Beta Company*, Cal/OSHA App. 77-853, Decision After Reconsideration (Nov. 2, 1979) and *Phil's Food Market, Inc.*, Cal/OSHA App. 78-806, Decision After Reconsideration (Feb. 6, 1979).) After an employer receives objective indicators that suggest the injury in question may have been serious, even if it cannot be definitively resolved prior to expiration of the eight hour reporting deadline contained in section 342(a), the employer should resolve all doubt in favor of making a timely report of the incident to the Division.

Here, Employer was faced with objective indicators that Ramirez had suffered a serious, reportable injury. Given the state Ramirez was in when he was found by his supervisor and coworker, the fact that Employer called 911 immediately following the accident, and any remaining uncertainty about his condition following the 911 call, Employer was on notice that Ramirez had likely suffered a serious, reportable occupational injury.

These objective indicators therefore triggered a duty for Employer to report Ramirez's accident within eight hours. Employer's President Chris Machado (Machado) acknowledged during his testimony that he reported the accident "a few days later," due to not being knowledgeable about the process. Ignorance of the law, however, is not recognized by the Appeals Board as an excuse for failing to timely report a serious injury to the Division. (*Ranch of the Golden Hawk*, Cal/OSHA App. 1224802, Decision After Reconsideration (May 23, 2022).)

For all of the foregoing reasons, therefore, the Division established a violation of section 342, subdivision (a), and Citation 1, is affirmed.

2. Did the Division establish that Citation 2 was properly classified as Serious?

Section 3328, subdivision (a)(2) states:

> (a) 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.

Citation 2 alleges:

> Prior to and during the course of the investigation, the Employer did not prohibit the use of equipment used under conditions of stress and loads that is [*sic*] contrary to the manufacturers [*sic*] recommendations. As a result, on or about April 24, 2020, an employee suffered a serious injury when a 10-ton air jack (OTC 10 Ton Air Lift) used to lift a truck slipped from under the truck and fell on the employee. The saddles on the air jack were not used to lift and support the load.

Employer did not appeal Citation 2 on the ground that the safety order was not violated, and therefore, the issue is deemed waived. (Cal. Code Regs., tit. 8, § 361.3.) Notwithstanding, a brief discussion of the relevant facts underlying the violation is helpful to provide context for the classification discussion.

As previously discussed, it is undisputed that Ramirez suffered a serious injury while using an air lift to raise the rear of a truck that he was assigned to refurbish. Pulido testified that Ramirez told him that he placed a piece of wood on the lifting saddles of the air lift in order to raise the rear of the truck, and positioned the wood under the hitch attachment with the intention of lifting the rear up. After attempting to lift the truck, the air lift "shot back" and fell on Ramirez. Ramirez provided consistent testimony, stating that he had just finished putting the motor into the truck, and was preparing to put the transmission in, but needed to adjust the height of the rear. Ramirez admitted that he placed a piece of wood across the lifting saddles because the truck did not otherwise fit in the saddles, so he attempted to lift the truck from the hitch. In addition, Cintora testified that he observed that Ramirez had not chocked the front wheels of the truck opposite the lift point as required.

The evidence, as summarized above, establishes a violation. There is no dispute that the air lift is a machine or equipment covered by section 3328. The manufacturer recommends against modifying the air lift or using attachments that are not approved by the manufacturer. It also states that the air lift is designed to lift from the lifting saddles, with the lifting saddles cradling the lifting points and hooking over the frame, bumper or bed of the vehicle. The

manufacturer also requires chocking the wheels at the opposite end of the vehicle from where it is being lifted. (Exhibit 15.) In summary, the evidence establishes that Ramirez operated the air lift under stresses, and loads in a manner contrary to the manufacturer's recommendations.

Labor Code section 6423, subdivision (a), in relevant part states:

> 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. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Undisputed evidence at hearing established that the Division complied with Labor Code section 6432, subdivision (b)(1) by issuing a Notice of Intent to Classify Citation as Serious (1BY) more than 15 days before issuing Citation 2. (Exhibit 19.)

Pulido has been employed as an Associate Safety Engineer with the Division since July, 2013. Prior to that, he was an Assistant Safety Engineer from March 2010 through July 2013. Pulido testified at hearing that his Division-mandated training was up to date. Pulido testified that he classified Citation 2 as Serious because he determined as part of his investigation that

there was a realistic possibility of serious physical harm that could result from operating the air jack in a manner contrary to the manufacturer's recommendations.

Evidence at the hearing established that the air lift is a heavy machine capable of lifting up to 10,000 pounds. (Exhibits 5 and 15.) It is reasonable to infer that, were such a machine be used improperly to lift a heavy truck, it could tip over and crush an employee, causing serious injuries. Here, Ramirez suffered serious injuries while using the air lift in a manner contrary to the manufacturer's recommendations by modifying the air lift with a piece of wood placed across the lifting saddles, and by failing to chock the opposite wheels of the truck that he was lifting. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

3. Did Employer rebut the presumption that the violation alleged in Citation 2 was Serious?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists 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.

In order to satisfactorily rebut the presumption, the employer must demonstrate both that:

> (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) [; and]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Ramirez credibly testified that on the date of the accident, he was working on the truck in Employer's 50 by 200 foot truck repair facility, in plain view of other employees and supervisors. He also credibly testified that other employees observed him placing wood across the lifting saddles to lift other trucks. Machado credibly testified that, despite having a policy to eliminate the use of wood and other foreign objects, Employer was aware that employees were using wood in an unapproved way with the air lifts.

Additionally, Machado testified that he was aware that the truck that Ramirez was working on was configured differently from the other 10 trucks that were part of the same refurbishment contract. The rear bumper had been uniquely modified with a large hitch that

prevented resting the rear of the truck on the lifting saddles. Despite being aware of this, Employer made no effort to advise or instruct Ramirez regarding the safe performance of work on the truck, because, according to Machado "typically, after 35 years of experience in the field, it is not necessary." Although Cintora testified that he went over each truck with the mechanics before they began working on them, he acknowledged that Ramirez "took shortcuts" in his work in order to finish quickly. Despite this knowledge, neither Machado nor Cintora were present to observe Ramirez's work on the truck when the accident occurred.

Employer did not provide evidence that it took all of the steps that a reasonable and responsible employer in like circumstances would have taken in order to anticipate and prevent the violation. Specifically, instead of providing appropriate training, instruction and supervision to Ramirez regarding the proper and safe way to use the air lift to lift the uniquely configured truck, Employer relied on Ramirez's experience as a mechanic. Moreover, Employer was aware that employees continued to improperly use wood when lifting trucks, despite Employer's policy against the practice, but Employer took inadequate steps to ensure that its policy was followed. Finally, Employer acknowledged it was aware that Ramirez had a propensity to take shortcuts in order to finish a job quickly.

Despite this knowledge, Employer did not adequately supervise his work to prevent the violation. Ramirez was working out in the open in a 50 by 200 foot facility; therefore, Employer could have easily observed Ramirez's improper actions before the accident occurred. Employer's failure to take any of the above steps is particularly noteworthy given the risk to employees of serious injury or death in connection with lifting and working around heavy trucks and equipment. Employer's inaction cannot, therefore, be deemed reasonable under the circumstances.

Accordingly, Employer failed to rebut the presumption that the Division correctly classified Citation 1 as Serious.

4. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*RNR Construction, Inc.*, Cal/OSHA Insp. No. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer." (*Id.)*

Here, uncontroverted evidence establishes that Ramirez suffered serious injuries when an air lift fell onto him while he was attempting to use the air lift under stresses and loads in a

manner contrary to the manufacturer's recommendations. Thus, for all of the foregoing reasons, Citation 2 is properly characterized as Accident-Related.

5. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600.) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the hearing. Employer presented evidence which, viewed in the light most favorable to Employer, goes to its Independent Employee Action Defense with regard to Citation 2.

In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Here, Employer's defense fails for several reasons. First, Employer did not establish that Ramirez was experienced in the job being performed. Although evidence at hearing established that Ramirez was an experienced mechanic familiar with the use of air lifts, the evidence demonstrates that he was not familiar, much less experienced, with the unique configuration of the truck that he was lifting to be able to accomplish his work in a safe manner. Thus, although Ramirez was an experienced mechanic who was generally familiar with using air lifts, he was not experienced with regard to the particular job he was performing with respect to the truck involved in the accident.

The Division did not cite Employer for its safety program, but the record demonstrates that Employer did not provide adequate training to Ramirez regarding safety respective to the particular truck he was assigned to repair. Employer introduced evidence that it discussed with employees, including Ramirez, how to safely operate jacks and other lifting equipment during a tailgate meeting on January 23, 2020 (Exhibit D). Nonetheless, the evidence in the record as a

whole establishes that Machado and Cintora relied on Ramirez's experience and failed to train Ramirez on how to safely lift the uniquely configured truck that was involved in the accident.

Employer had the opportunity to provide evidence to show that it effectively enforces its safety program, but Employer offered little such evidence. In fact, admissions from Machado and Cintora established that although Employer had a policy against using wood or other foreign objects when lifting trucks, employees nonetheless continued to do so. Although Cintora testified that he would have stopped Ramirez if he had seen him using wood to lift the truck, this evidence is afforded little weight in light of the substantial evidence that Employer had actual knowledge that its employees violated its safety policy with regard to use of wood and other foreign objects to lift trucks. The evidence thus strongly supports an inference that Employer does not effectively enforce that aspect of its safety program.

Employer also offered insufficient evidence to establish that it has a policy of sanctions against employees who violate its safety program. Machado testified that Ramirez will be disciplined if he ever returns to work, but Employer offered no further evidence regarding its policy of sanctions against employees for violating its safety program, despite having the opportunity to do so. The weak evidence offered by Employer as to this element is therefore afforded very little weight.

Finally, Ramirez credibly testified that he was not aware that he was doing anything wrong when the accident occurred, which undercuts any argument by Employer that Ramirez knew that he was caused a safety infraction that violated Employer's safety requirements. Employer's evidence as to Ramirez's training and Employer's efforts to enforce safety rules at the site was particularly weak and did not establish that Ramirez knew he was doing anything wrong.

For all of the foregoing reasons, Employer's defense based on independent employee action fails.

6. Are 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. (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures,

will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co*., Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

a. Citation 1

A violation of section 342, subdivision (a), carries a minimum regulatory penalty of $5,000. (Cal. Code Regs., tit. 8, § 336, subd. (a)(6).) Well-established Appeals Board precedent holds that, where an employer reports late, as opposed to not at all, the ALJ may only adjust the penalty based on evidence establishing the employer's good faith, size and history. (*Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012).)

Here, the Division introduced its proposed penalty worksheet (Exhibit 2), and Pulido credibly testified that Employer had 17 employees at the time of the inspection. He further credibly testified that Employer had an average safety program and was cooperative during the inspection, and that Employer had a good safety history. Pulido's uncontroverted testimony is credited.

Applying the penalty adjustments consistent with section 336, subdivision (d), the undersigned exercises his discretion to adjust the $5,000 penalty 15 percent for Employer's good faith, 30 percent based on its size, and 10 percent based on its safety history known to the Division. Accordingly, the undersigned finds good cause to adjust the proposed penalty for Citation 1 by a total of 55 percent, or $2,750, resulting in an adjusted penalty of $2,250, which shall be assessed.

b. Citation 2

Serious classification violations begin at $18,000, and Serious violations that are deemed to have resulted in serious injury, illness or fatality are not subject to any further adjustment except for size, pursuant to section 336, subdivision (c)(7). Here, Pulido credibly testified that Employer was eligible to receive a size adjustment of 30 percent. Applying the 30 percent size adjustment results in a calculated penalty of $12,600, which is found appropriate. Thus, a final penalty of $12,600 will be assessed.

Conclusion

The evidence supports a conclusion that Employer violated section 342, subdivision (a), by failing to timely report a serious workplace injury suffered by its employee.

The evidence supports a conclusion that the Division properly classified Citation 2 as Serious.

The Division properly characterized the violation identified in Citation 2 as Accident-Related.

Employer did not establish any of its pleaded affirmative defenses.

The proposed penalty for violating section 342, subdivision (a), may be adjusted 55 percent by applying the appropriate good faith, size and history adjustment factors.

The Division proposed a reasonable penalty for Citation 2.

Orders

Citation 1 is affirmed and the associated penalty is reduced to $2,250 as set forth in the attached Summary Table.

Citation 2 is affirmed and the associated penalty is assessed as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 02/01/2023

Howard I Chernin
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.**