BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
ONTARIO REFRIGERATION SERVICE, INC. **635 S. MOUNTAIN AVE** **ONTARIO, CA 91762** **Employer**	**1327187** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Ontario Refrigeration Service, Inc. (Employer) provides heating, ventilation, and air-conditioning (HVAC) services. On June 27, 2018, the Division, through Associate Safety Engineer (ASE) Timothy Decker (Decker), commenced an inspection of a job site at 6610 Cobra Way, San Diego, California (job site), after a report of a fatal injury at the site on June 26, 2018. On December 4, 2018, the Division issued three citations to Employer for violations of California Code of Regulations, title 8[1]: failure to provide an employee with heat illness training; failure to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP); and failure to ensure that employees that approached within six feet of unguarded skylights were protected from falling.

Employer timely appealed. The matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the Board, on July 23, 2020, and January 13, February 4, and February 19, 2021, from Los Angeles, California, with the parties and witnesses appearing remotely via the Zoom video platform. Eugene McMenamin, Attorney, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Martha Casillas, Staff Counsel, represented the Division.

In his Decision, on August 16, 2021, ALJ Lucas dismissed Citations 1 and 3. ALJ Lucas affirmed Citation 2, its Serious classification, and the Division's proposed penalty. Employer's timely Petition for Reconsideration (Petition) followed on September 20, 2021. The Board took the Petition under submission on October 8, 2021. The Division filed an Answer on October 21, 2021.

Employer argues that the Division failed in its burden to establish a rebuttable presumption that Citation 2 was properly classified as Serious, and that the classification of the violation should be reduced to General, with a commensurate penalty reduction. All objections,

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

irregularities, and illegalities concerning the matter upon which the reconsideration is sought, other than those set forth in the petition for reconsideration, are deemed waived and established as a matter of law. (Lab. Code § 6618.)

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the Division meet its burden of proof in establishing a serious violation of section 3203, subdivision (a)(4)?

2. Is the proposed penalty for Citation 2 reasonable?

FINDINGS OF FACT

1. On June 26, 2018, Employer's employees Bryan Heredia (Heredia) and Robert Celiceo (Celiceo) were tasked with repairing an air-conditioning unit (AC7) at the job site. There were no assignments that involved other air-conditioning units at the job site on the date of Heredia's accident.

2. The job site on which AC7 was located consisted of a flat roof with skylights. The skylights were not guarded.

3. Heredia and Celiceo were on a designated lunch break and had descended from the roof to eat their lunches during their break. For reasons unrelated to his job duties, Heredia returned to the roof during his lunch break and went to an area more than 30 feet from the area where he had been assigned to work.

4. Heredia approached within six feet of an unguarded skylight without fall protection and fell through the skylight approximately 25 feet to the reception area below, suffering fatal injuries in the fall.

5. Heredia had received training on fall prevention from Employer and had been provided with fall protection equipment by Employer.

6. Employer's written IIPP provides that supervisors are required to conduct monthly inspections of job sites and maintain records of the inspections for five years.

7. Employer's supervisors did not maintain documentation of, or conduct, monthly safety inspections of the job site.

8. Employer's written IIPP contains sections regarding identification, evaluation, and correction of safety hazards.

9. The failure to conduct scheduled inspections may result in an employee suffering serious injury or death if the inspections would have identified hazards to which the employee would be exposed.

10. There is a realistic possibility that a fall of 25 feet would result in serious physical harm or death.

11. A failure to establish, implement, and maintain a written IIPP is the responsibility of Employer's managerial and supervisorial employees, whose knowledge thereof is imputed to Employer.

12. The proposed penalty for Citation 2 is reasonable and was calculated in accordance with the Division's policies and procedures.

DISCUSSION

1. **Did the Division meet its burden of proof in establishing a serious violation of Citation 2?**

The only issue presented for review is whether the Division met its burden to prove that Citation 2 was properly classified as Serious. Citation 2 alleged a Serious violation of section 3203, subdivision (a), which requires employers to establish, implement, and maintain an effective Illness and Injury Prevention Program (IIPP). A rebuttable presumption of a serious violation exists when the Division establishes 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(a).)

The Citation alleged five Instances of the violation. The ALJ's Decision affirmed Instance 1 (sub-instance 1), Instance 4, and Instance 5. Instance 1 alleged two violations of section 3203, subdivision (a)(4) [failure to conduct scheduled periodic safety inspections; failure to identify and evaluate new and previously unrecognized hazards.] Instances 4 and 5 alleged violations of section 3203, subdivision (a)(7) [failure to establish written safety training procedures for non-supervisory and supervisory employees]. As Employer's Petition does not contest the ALJ's affirmance of these Instances, the existence of the violations is established as a matter of law. (Lab. Code § 6618.)

Employer's Petition addresses the Serious classification only with regard to Instance 1, sub-instance 1. Our discussion is therefore limited to Instance 1, sub-instance 1 as well. The relevant subsections of section 3203, subdivision (a) provide:

> (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:
> […]

> (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:
> […]
> (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.

In Citation 2, Instance 1, the Division alleged:

> Prior to and during the course of the inspection including, but not limited to June 27, 2018, the employer failed to establish, implement and maintain an effective Injury and Illness Prevention Program (Program) including, but not limited to:
>
> 1. The employer failed to implement Section VI of their Program in that Supervisors did not conduct and document a monthly safety inspection of the work areas under their supervision. The employer also failed to effectively identify and evaluate work place hazards, including but not limited to employees being exposed to falls through unguarded skylights. [3203(a)(4)]

Did the Division provide evidence that, if an accident were to result from the violation, it is realistically possible that the result of such an accident would be serious injury or death?

The ALJ found that Citation 2 was properly classified as Serious based on Employer's failure to implement IIPP procedures requiring that supervisors conduct and document monthly safety inspections of job sites, per section 3203, subdivision (a)(4). A citation, and accordingly its classification, may be upheld on the basis of a single instance, provided the Division meets its evidentiary burden on that instance. (*Golden State Boring & Pipe Jacking, Inc*., Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020).) We find the Division has met its burden here.

Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) 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 actual hazard may consist of, among other things:
> […]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

In order to prove that a violation is serious, the Division must provide evidence that, assuming an accident were to result from the violation, it is realistically possible that the result of such an accident would be serious physical harm or death. (*MDB Management Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) The Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015).) Labor Code section 6432, subdivision (e), provides that "serious physical harm," means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in inpatient hospitalization for purposes other than medical observation, the loss of any member of the body, any serious degree of permanent disfigurement, or significant and permanent physical impairment.

The violation was not cited as Accident-Related,[2] so the Board's analysis does not ask whether this accident itself was a result of Employer's failure to inspect; only whether, if an accident did occur as a result of Employer's failure to conduct monthly inspections of the job site, the accident would have a realistic probability of causing serious injury or death. ASE Decker testified that he was current in his Division-mandated training. Under Labor Code section 6432, subdivision (g), Decker was accordingly deemed competent to offer testimony to establish each element of the Serious violation. Here, Decker testified that there is a realistic possibility that an employee may sustain serious physical harm in an accident resulting from Employer's failure to conduct regular safety inspections as required by section 3203, subdivision (a)(4). (HT 1/13/21 p. 46; Decision, p. 17.).

The Division identified the hazard here as a fall hazard; specifically, the hazard of employees falling through unguarded skylights. Employer does not dispute that the skylights were unguarded. When, as here, the Division witness provides an opinion, based on his experience in the field of safety, that if an accident were to occur as a result of the violation, the result would more likely than not be serious injury, and there is no evidence to controvert such testimony, the Division has met its burden of proof to show the serious classification is correct. (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App, 05-3477, Decision After Reconsideration (Jul. 7, 2011).)

The parties stipulated that a fall of 25 feet through an unguarded skylight, the distance Heredia fell, is likely to result in serious injury or death. (HT 1/13/21, p. 86.) A stipulation satisfies the evidentiary burden and establishes the facts contained therein. (*C.A. Rasmussen, Inc*.,

[2] The ALJ concluded that Employer established the Unforeseeable Extreme Departure Defense with regard to Citation 3, which alleged a Serious, Accident-Related violation of section 3212, subdivision (e) [failure to ensure that employees that approached within 6 feet of unguarded skylights were protected from falling]. For an employer to successfully establish this defense, it must prove the following elements: 1) employee engaged in an extreme departure from the scope of a reasonable understanding of assigned work duties; 2) employee knew his/her work duties did not encompass the specific activity; and 3) employer did not and could not have known through the exercise of reasonable diligence and supervision the employee would so act. (*Blue Diamond Growers*, Cal/OSHA App. 1040471, Decision After Reconsideration (Sep. 24, 2018).)

Cal/OSHA App. 08-0219, Decision after Reconsideration (July 19, 2012) citing *Jaguar Farm Labor Contracting, Inc.*, Cal/OSHA App. 09-1136, Denial of Petition for Reconsideration (Oct. 6, 2010).). Although the Decision did not recite this stipulation, the ALJ correctly found that if, through failure to conduct scheduled periodic inspections, Employer failed to identify a new or previously unrecognized hazard, and an accident occurred as a result, the realistically possible result of such an accident is serious injury or death.

Based on the stipulations of the parties and the evidence presented at the hearing, the Division established a rebuttable presumption that the citation was properly classified as Serious. This is sufficient to establish a rebuttable presumption of a serious violation. (*C&M Fine Pack, Inc*., Cal/OSHA App. 07-4149, Decision After Reconsideration (May 11, 2012); *Fed Ex Freight, Inc*., Cal/OSHA App. 1099855, Decision After Reconsideration (Sep. 24, 2018).)

Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

In order to satisfactorily rebut the presumption, Labor Code § 6432, subdivision (c) provides that the employer must demonstrate both:

> (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.

As a rebuttable presumption, the burden is on the employer to show that it meets these elements. (*Synergy Tree Trimming*, Cal/OSHA 317253953, Decision After Reconsideration (May 15, 2017).) Here, Employer did not establish that that it did not know and could not, with the exercise of reasonable diligence, have known of the violation, nor did it establish that it took all appropriate actions to eliminate the hazard.

As the ALJ stated:

> The violation asserted in Citation 2 is the failure to establish and implement various provisions of its written IIPP. As set forth above, the Division established a violation of section 3203 with regard to the implementation of Employer's IIPP provisions regarding inspections, and failure to include required written provisions

> pertaining to training of employees and supervisors. As each of these aspects of the establishment and implementation of an IIPP are the responsibility of an employer, rather than its employees, there can be no reasonable assertion that the violations could have occurred as a result of actions outside of the knowledge of Employer and its managerial or supervisorial representatives. Accordingly, Employer cannot rebut the presumption that Citation 2 was properly classified as Serious.
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> (Decision, p. 19)

We therefore affirm the Serious classification of Citation 2.

2. Is the proposed penalty for Citation 2 reasonable?

Labor Code section 6319, subdivision (c) provides the factors which the Division considers when assessing penalty regulations: the size of the employer, good faith, gravity of the violation, and history of any previous violations. The enacting regulations can be found at sections 333 through 336. (*M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 21, 2014).) Penalties calculated in accordance with the penalty-setting regulations are presumptively reasonable. Penalties will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or the totality of circumstances warrants a reduction. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Decision After Reconsideration (May 26, 2017) citing *Stockton Tri-Industries*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Section 336, subdivision (c), with reference to section 335, sets forth the penalty calculation procedure for a Serious violation. The base penalty for a Serious violation is $18,000. Here, the Extent was rated High, adding 25% of the base penalty, for a gravity-based penalty of $22,500. (Exhibit 13.) The Likelihood was rated Medium, providing for no adjustment. (*Id*.) ASE Decker testified that the proposed penalty of $22,500 for Citation 2 was calculated in accordance with the Division's policies and procedures.

Employer contends it was entitled to a 50% abatement credit because the proposed penalty worksheet (Exhibit 13) rates Likelihood as Medium rather than High. However, section 336, subdivision (e)(2) provides that, for Serious violations where Extent and Likelihood are not rated High, an employer is not entitled to an abatement credit unless it has either:

> (A) Abated the Serious violation at the time of the initial or a subsequent visit during an inspection and prior to the issuance of a citation.
>
> (B) Submitted a statement signed under penalty of perjury, together with supporting evidence when necessary to prove abatement, that the employer has abated the Serious violation within the period fixed for abatement in the citation. The signed statement and supporting

> evidence must be received within 10 working days after the end of the period fixed in the citation for abatement.

Here, no such proof of abatement was provided. Employer is therefore not entitled to the abatement credit.

The Division, by introducing the proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, met its burden to show the penalties were calculated correctly. (*M1 Construction*, *supra*, Cal/OSHA App. 12-0222.) Employer failed to rebut the Division's evidence through cross-examination or introduction of evidence that would demonstrate that the penalty was not calculated correctly. The proposed penalty of $22,500 is therefore reasonable.

DECISION

For the reasons stated, the Serious classification of Citation 2 and the proposed penalty of $22,500 are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 03/22/2022