BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BARRETT BUSINESS SERVICES, INC. 4120 E. Jurupa St., Suite 220 Ontario, CA 91761 Employer	Inspection No. 315526582 Dockets No. 12-R3D1-1204 through 1206 **DECISION AFTER RECONSIDERATION**

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 by Barrett Business Services, Inc. (Employer or BBSI) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 28, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Anaheim, California maintained by Employer. On March 27, 2012, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

Citation 1 alleges a general violation of 3203, subdivision (a) [failure to effectively implement the IIPP]. Citation 2 alleges a general and willful violation of 5155, subdivision (e) [failure to monitor the level of CO], and Citation 3, alleges serious and willful violation of 5155, subdivision (c)(3) [failure to control CO levels]. Employer filed timely appeals of the violations and the classifications.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on April 13, 2016. The Decision denied Employer's appeal and imposed total civil penalties of $80,050.

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

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition.

ISSUES

1. Is Citation 1 defective on due process grounds?

2. Did the Division establish a violation of section 3203, subdivision (a), by a preponderance of the evidence?

3. Did the Division establish a violation of section 5155, subdivision (e), by a preponderance of the evidence?

4. Is Citation 2 properly classified as Willful?

5. Did the Division establish a violation of section 5155, subdivision (c)(3), by a preponderance of the evidence?

6. Is Citation 3 properly classified as Serious and Willful?

FINDINGS OF FACT

1. On September 28, 2011, employees of Barrett Business Services, Inc. (Employer), working at L&L Foods at 333 North Euclid Way, Anaheim California, became ill due to carbon monoxide exposure.

2. On September 28, 2011, employees Susan Cardenas (Cardenas), Maria Perez, and Jimmy Salgado (Salgado) received medical treatment related to exposure to elevated levels of carbon monoxide.[2]

3. On September 28, 2011, employees of Employer were exposed to carbon monoxide levels at and above the permissible exposure limit of 200 parts per million.[3]

4. Victor Garcia (Garcia), the Employer's on-site manager, was notified prior to September 28, 2011 that propane-fueled forklifts running at the site may be malfunctioning and causing employees to become ill. These complaints were lodged by several employees, including, but not limited to, Enrique Alvarez (Alvarez), Cardenas, Raoul Navarro (Navarro), and Rosa Sevilla (Sevilla).

5. Despite receiving a number of complaints from employees regarding the forklifts, Garcia failed to monitor the carbon monoxide levels at the facility.

[2] The ALJ erred in denying the Division's request to seal Exhibits 6, 8, and 9, the medical records of the employees listed in this finding of fact. The Board now seals these records under section 376.6, subsection (b), as they contain personal protected information.

[3] This permissible exposure limit of 200 parts per million (ppm) is found in section 5155, subsection (c).

6. Employer's Illness and Injury Prevention Program was not implemented at the worksite.

7. There was a realistic possibility of serious physical harm created by the actual hazard of carbon monoxide exposure above the permissible exposure limit in the workplace.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis of Labor Code section 6617, subdivisions (c) and (e).

Is Citation 1 defective on due process grounds?

Citation 1 alleges a failure to effectively implement the Employer's Illness and Injury Prevention Program (IIPP). Employer argues Citation 1 must fail on due process grounds. Citation 1 reads:

> At and before the time of the inspection conducted at 333 N Euclid Way in Anaheim, the employer failed to effectively implement its written Injury and Illness Prevention Program, in that: a. It did not ensure communication with employees, who were not encouraged to communicate their health and safety concerns to management, but feared reprisal [Ref: 3203(a)(3)] b. It did not identify and evaluate workplace hazards when changes were made to the facility that introduced the hazard of harmful exposures to employees, nor when employer was

> specifically made aware of the hazard [Ref: 3203(a)(4)(B) & (C)] c. It did not investigate the illnesses reported by employees who were subjected to harmful exposures [Ref: 3203(a)(5)] d. It did not take corrective action when the unhealthy conditions that exposed employees to harmful air contaminants became apparent [Ref: 3203(a)(5)] e. It did not provide health and safety training to the employees working at the facility [Ref: 3203(a)(7)]

Employer argues that Citation 1, Instances (b) and (c) are procedurally deficient, based on a lack of detail in the charging language. While the Division's language is not replete with detail, the citation as a whole provides adequate notice of the charges. The Board has stated in a number of Decisions After Reconsideration this familiar rule:

> It is well settled that administrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of a violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws. *Certified Grocer of California Ltd.*, OSHAB 78-607, Decision After Reconsideration (Oct. 27, 1982); *Central Coast Pipeline Construction Co. Inc.*, OSHAB 76-1342, 1343, Decision After Reconsideration (Jul. 16, 1980). (See also: *Novo-Rados Constructors*, OSHAB 78-135, Decision After Reconsideration (Apr. 28, 1983) at p. 3, and *Western Roofing Service*, OSHAB 75-029, Decision After Reconsideration (Apr. 23, 1981).) (*Gaehweiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985); see also, *Stearns v. Fair Employment Practices Comm.* (1971) 6 Cal.3d 205.)

The charging language provided here meets the standard of providing sufficient notice to allow an employer to prepare a defense. There is no due process violation present in Instances (b) and (c). Furthermore, even if the Board were to strike those Instances for the alleged technical defects, Citation 1 would still move forward on the basis of Instances (a), (d), and (e), as Employer does not claim those Instances to be deficient. The Board has held that a Citation may be upheld on the basis of a single Instance. (*Chevron U.S.A. Inc.*, Cal/OSHA App. 13-0655, Decision After Reconsideration (Oct 20, 2015).)

Did the Division establish a violation of section 3203, subdivision (a), by a preponderance of the evidence?

Citation 1, Instance (a)

Citation 1, Instance (a) alleges a violation of section 3203, subdivision (a)(3), which requires that the Employer's IIPP:

> (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.

Initially, it bears noting that both the primary and secondary employers have responsibility for implementing and maintaining an IIPP in the joint employer context, and here it is undisputed that BBSI is a primary employer that provided employees to secondary employer L&L Foods. (See, *NDC/TSI*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Employer had at least one full-time representative on site at L&L Foods, Garcia. According to testimony, Garcia had at least some responsibility for safety, and Employer's employees were directed to discuss safety concerns with Garcia as well as their L&L Foods managers. According to BBSI's IIPP, employees were to be encouraged to report safety concerns and hazardous conditions to Garcia, their BBSI representative, who would act on those reports without reprisal or discrimination. (Ex. 4, p. 4.)

Employee testimony suggests that although employees did report safety concerns regarding the forklifts and ventilation generally to Garcia and other management officials, no investigation of those complaints or corrective actions were taken. Furthermore, employees were given the impression that discrimination or discharge would occur if they cooperated in the Division's investigation, in violation of BBSI's policy. While a means to communicate may have existed on paper in the IIPP, the policy was of little use to employees in practice. Instead, reports of hazards from employees were brushed aside rather than acted upon, in contravention of both Employer's communication policy and subdivision (a)(3) itself. A finding of a violation of the section is supported by the record evidence.

Citation 1, Instance (b)

Citation 1, Instance (b) alleges a violation of sections 3203, subdivisions (a)(4)(B) and (a)(4)(C)-- failure to identify and evaluate workplace hazards. The cited regulation contains the following language:

> (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 its Petition for Reconsideration, Employer argues that the ALJ's Decision focuses on irrelevant or inapplicable precedent. According to Board precedent, 3203, subdivision (a)(4):

> [C]ontains no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include 'scheduled periodic inspections'. (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*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, rev. denied). As discussed in the ALJ's Decision, the violation was demonstrated through evidence showing Employer's obvious failure to discover the hazards that existed in its workplace-- the smoking forklift, the many sick employees, propane fumes, and a sealed-off ventilation system.

Employer admitted to making modifications to the building, by sealing up the back dock area, and covering vents with an epoxy paint material that further blocked the flow of air. Having made these changes, Employer failed to engage in any inspection or assessment of the premises to determine what new hazards may have been created by the modifications, as required by section 3203, subdivision (a)(4). (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015) [Violation of 3203, subdivision (a)(4) found where employer fails to identify and evaluate hazards associated with modification of ATV.].)

The scope and range of the workplace problems also leads to the reasonable inference that Employer was not engaged in any kind of 'scheduled periodic inspection' program, and had no measures in place for identifying and evaluating hazards. "An inference is a deduction about the existence of a fact that may be logically and reasonably be drawn from some other fact or group of facts found to exist. (See, Evidence Code section 600, *Ajaxo Inc. v. E* Trade Group Inc.*, (2005) 135 Cal. App. 4th 21, 50.)" (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).)

A violation of section 3203, subdivisions (a)(4)(B) and (a)(4)(C) is found.

Citation 1, Instances (c) and (d)

Instances (c) and (d) allege a violation of 3203, subdivision (a)(5), which requires an Employer's IIPP program to "Include a procedure to investigate occupational injury or occupational illness." The Employer's IIPP does not include procedures for investigating occupational illnesses or injuries. (Ex.4.) Although a number of employees reported illnesses to Garcia, a BBSI management representative on site, those illnesses were not investigated by Employer. Rather, Garcia testified that he told ill employees that they could go home, pay to go to the doctor themselves, or stay at work. The employees were assured that the forklifts were not the cause of their illnesses. Several workers also testified that Garcia would dispense aspirin and other non-prescription painkillers when they complained about headaches, nausea, and dizziness. These factors taken as a whole lead to the reasonable inference that no investigation of employee illnesses occurred. (See, *Tomlinson Construction*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998), *Sentinel Insulation*, Cal/OSHA App. 92-030, Decision After Reconsideration (Jul. 22, 1993).) The record evidence supports the conclusion that the Employer failed to investigate occupational illnesses as alleged in Citation 1, Instance (c), and required by section 3203, subdivision (a)(5).[4]

Citation 1, Instance (e)

The last instance alleges a violation of the requirement to provide training pursuant to section 3203, subdivision (a)(7)(E):

[4] We note that Instance (d) alleges a failure to take "corrective action", which is not an element of section 3203, subsection (a)(5). We therefore vacate Citation 1, Instance (d).

> (7) Provide training and instruction:
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard[.]

The regulation requires that employees be provided appropriate training or instruction when a new or unrecognized hazard emerges in the workplace. (See, *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) In a joint employer context such as this, even if one party has contracted with the other to be solely responsible for the completion of certain duties, such as workplace hazard training, under California's Occupational Safety and Health Act, both employers will be held responsible for deficiencies in implementation. The Board recently issued a Decision After Reconsideration which summarizes the responsibilities of joint employers as follows:

> And while NDC and TSI may, in some instances, reach an agreement whereby TSI performs the required heat illness training—primary and secondary employers may cooperate with each other in fulfilling their duties—both Employers retain ultimate responsibility to ensure compliance with the training requirements, and both may be held liable for any deficiencies in implementation. (See e.g., *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001); *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).) (*NDC/TSI*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).)

Garcia, the BBSI representative on site, testified that he was chiefly responsible for human resources functions, and that it was L&L Foods that would organize safety training, although Garcia would be present and assist with translation.

BBSI has fallen short in its duty to train and instruct its employees, and to ensure that its employees were properly trained by L&L Foods. Although employees raised concerns regarding the hazards associated with sealing off the ceiling ventilation and warehouse doors, and the forklift fumes, Employer did not raise the issues with the secondary employer, and no training regarding these hazards was ever conducted.

The Board also stated in a footnote in *NDC/TSI*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) that:

> If a primary employer does not have control over the worksite, the primary employer's implementation of corrective efforts may include, in some instances, removing employees from a hazardous or unhealthy places of employment until correction occurs. Labor Code section 6402: "No employer shall require, or

> permit any employee to go or be in any employment or place of employment which is not safe and healthful." The primary employer must also instruct their employees that they may refuse to do work when they believe a job is dangerous, without sanction. (See, *Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 695-700, citing, *Petroleum Maintenance Company* Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985) ("*PEMCO II*"), *PEMCO II* was reversed by the Board on other grounds.)

While BBSI may not have been responsible for training or correction related to the hazardous conditions at the worksite, Employer ultimately had a responsibility to ensure the safety of its own employees. Employer had a duty to ensure that its employees were aware of their right to refuse work when a job is dangerous, without sanction. BBSI, as the primary employer present at the worksite, was responsible for removing its employees from a worksite that it knew to be hazardous and unhealthful. The Division has shown a violation of this subdivision.

A general violation of the safety order is established. The $675 penalty is upheld.

Did the Division establish a violation of section 5155, subdivision (e), by a preponderance of the evidence?

Citation 2 alleges a violation of Section 5155, subdivision (e). The regulation reads:

> (e) Workplace Monitoring
> (1) Whenever it is reasonable to suspect that employees may be exposed to concentrations of airborne contaminants in excess of levels permitted in section 5155(c), the employer shall monitor (or cause to have monitored) the work environment so that exposures to employees can be measured or calculated.

The Division's alleged violative description reads as follows:

> At or before the time of the inspection conducted at 333 N Euclid Way in Anaheim, the employer failed to monitor (or caused to have monitored) the level of carbon monoxide at the facility, where forklifts powered by internal combustion engines were operated in an enclosed, unventilated space, and when

symptoms of exposure to carbon monoxide had been exhibited by the exposed employees.

The Board stated in *Acme Felt Works* that "The Division did not have to establish the presence of airborne contaminants in excess of the permissible exposure limit (PEL); it had only to establish that the airborne concentration may have exceeded the PEL." (*Acme Felt Works*, Cal/OSHA App. 83-607, Decision After Reconsideration (Dec. 31, 1988).) Under the standard, an employer has a responsibility to be aware of the potential hazards associated with processes and contaminants in use at its workplace. (See, *Kaiser Steel Corporation, Fabricated Products Group*, Cal/OSHA App. 83-1069, Decision After Reconsideration (Oct. 9, 1985) [Symptoms Kaiser Steel's employees were experiencing were not so dissimilar with potential contaminants involved in certain welding work currently being done by Kaiser Steel, and therefore Kaiser was on notice of the need for monitoring of potential air contamination and could reasonably deduce a need to monitor for certain metals that were found in the product being welded.].)

Employees, including Alvarez, Navarro, Cardenas, and Sevilla, testified that they had complained to Garcia, about the forklift. These employees had complained that they thought the forklift was the cause of their headaches, nausea, and dizziness, and also recalled hearing other employees make the same complaints. All testified that their concerns were dismissed-- they were told to go home, or that they were crazy, or that there was nothing wrong with the forklift. Two other employees, Macarrio Tenorio and Christian Caraballo, testified that they had not noticed smoke or fumes, but even these two employees recalled hearing co-workers complain about symptoms including headaches. Employer was on notice that a number of employees were experiencing the same physical symptoms while at work.

In addition, these employees also told management that they believed the smoke and fumes from a forklift were causing their symptoms. For its part, management was aware that it had recently, in the summer of 2011, sealed off the ceiling ventilation of the building and closed off the warehouse doors, in order to prevent contaminants from entering the building. For Employer to argue as a defense to the citation that it was not reasonable to suspect exposure to carbon monoxide lacks credulity. Employer's witness, John Pooley, testified that L&L had purchased electric forklifts, and had tried to restrict forklift use indoors, evincing at least some knowledge of the danger of using internal combustion engines in an indoor environment. Moreover, the closeness in time between the worker complaints regarding the forklift fumes and the sealing off of the ventilation would make a reasonable employer suspicious of the healthfulness of the air in its workplace, and spurred testing and investigation. Finally, when the typical symptoms of carbon monoxide exposure are considered, as testified to by Dr. Paul Papenek, Employer's failure to conduct testing is inexcusable.

A general violation of the safety order is found.

Is Citation 2 properly classified as Willful?

Employer objects to the "willful" classifications of Citation 2, and argues that the ALJ applied the incorrect standard in finding Citation 2 to be willful.

Section 334 establishes two alternate tests for determining whether a violation is willful. The tests are described in a decision by the state Appellate Court:

> the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law . . ." (§ 334, subd. (e).) The second and alternate test requires the Division to prove the employer, even though 'not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.' (Ibid.) (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board* (2000) 80 Cal.App.4th 1023, 1034.)

Employer states in its Petition that "the failure to act reasonably to detect a hazard, although possibly negligent, does not rise to the level of 'willful' misconduct." Employer reasons that it did not ignore employee complaints, but instead was mistaken as to the cause of the employees' distress.

The Board does not find this to be a compelling argument. Employees of Employer informed Garcia that it was the forklift that was making them sick. Employer was aware that the ventilation had recently been closed off, thereby trapping the exhaust fumes from the forklift in the work area. This is enough to meet the second and alternate test; Employer was aware of an unsafe or hazardous condition, and made no effort to eliminate the condition through any means. The ALJ properly classified Citation 2 as willful.

The penalty of $9,375 is affirmed.

Did the Division establish a violation of section 5155, subdivision (c)(3), by a preponderance of the evidence?

Citation 3 alleges a violation of section 5155, subdivision (c)(e), which reads as follows:

> Employee exposures shall be controlled such that the applicable ceiling limit specified in Table AC-1 for any airborne contaminant is not exceeded at any time.

The Division's citation also includes the following alleged violative description:

> On and before September 28, 2011, at the facility located at 333 N Euclid Way in Anaheim, the employer failed to control Carbon Monoxide levels in the work environment such that employee exposures did not exceed the Ceiling Limit at any time. As a result, on September 28, 2011, several employees suffered adverse health effect, one of whom suffered a serious illness.

Readings taken by the City of Anaheim Fire Department Hazardous Response team showed levels of carbon monoxide over the 200 ppm (parts per million) carbon monoxide permissible exposure limit. The levels recorded by the team included 204 ppm carbon monoxide in the main warehouse area, 250 ppm in the raisin storage area, 350 ppm in the pallet/dock area, and 300 ppm in the employee locker room. (Ex. 2 [Team Incident Report].) Later readings taken by the team at a second walk-through of the facility hovered in the mid-200 ppm and upper 100 ppm levels. We note that the CO levels were measured at 4:00 pm by the fire department, some time after work was stopped and employees were evacuated from the building, and thus we infer employees were exposed to even higher levels when working. The readings were consistent with Division Associate Safety Engineer Norma Boltz's (Boltz) readings, recorded as in the upper 100 ppm levels in the front office and readings in the low 200 ppm levels, near the door of the production area. (Ex. F.) Boltz did not go into the warehouse to get further readings, as she did not have the appropriate PPE.

In its Petition, Employer argues that these readings, taken by the Division and Fire Department, are unreliable and should be rejected as evidence. Employer states that the equipment used by both the Division and the Fire Department was not demonstrated to be properly calibrated. These arguments are rejected for the reasons discussed below.

As described in testimony from several witnesses, both the Anaheim Fire Department and the Division have procedures in place for calibrating the carbon monoxide measuring instruments. While the Employer asks the Board to reject the testimony of Boltz, her testimony was both credible and unrebutted. "Evidence Code section 664 requires the Board to presume that the inspector acted properly in the conduct of his official duty until that presumption is rebutted." (*Scribner Construction*, Cal/OSHA App. 93-2168, Decision After Reconsideration (Sep. 1, 1998).) The testimony of Fire Engineer David Reid, Fire Fighter Thomas Hogan, and Fire Captain William Stark were not only credible and unrebutted, but each Anaheim Fire Department employee corroborated the testimony of his coworkers. Their cumulative testimony establishes that the Anaheim Fire Department monitoring instruments are regularly calibrated on Sundays, and that a record of their calibration is kept on a white board in the fire station. Moreover, the fire department's records of inspection, Division inspector's notes from the inspection, which record the monitored CO levels, as well as a certificate of calibration, are all present in the hearing record. (Exs. 2, D, C, A.)

The evidence and testimony preponderate to a showing that employees were exposed to carbon monoxide levels above the established ceiling limit of 200 ppm on September 28, 2011. The ALJ's finding of a violation is upheld.

Is Citation 3 properly classified as Serious, Accident Related and Willful?

Employer's Petition for Reconsideration objects to both the serious, accident related, and willful classifications of Citation 3. Labor Code section 6432, subdivision (a) creates 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." Boltz testified that there was a realistic possibility of death or serious physical harm that could result from the actual hazard of carbon monoxide exposure. She based that conclusion in part on the actual injury suffered by Salgado, who was hospitalized for over 24 hours due to carbon monoxide exposure at the plant. (Ex. 8 [Salgado hospital record].) Salgado testified that while at work on September 28, 2011, he felt symptoms including shortness of breath, fever, headaches, chest pain, and vomiting. He became progressively more ill, and eventually Salgado told his supervisor he needed medical attention. He then has only a memory of waking up in the hospital, and at time of hearing continued to have memory problems, as well as sleeping, speaking, and breathing issues.

The citation is properly classified as serious.

The ALJ also properly upheld the classification of the violation as accident related. To demonstrate that a violation is accident related, the Division must make a "showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2013); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration [24] (Oct. 4, 2002).)." (*Duininck Bros., Inc.*, Cal/OSHA App. 06-2870 Decision After Reconsideration & Order of Remand (Apr. 13, 2012.).) The ALJ found, and the Board agrees, that there was a causal nexus between the failure to control carbon monoxide levels in the workplace, and the injury suffered by Salgado, as well as several of his coworkers who were less seriously injured by the exposure to carbon monoxide.

Finally, the citation is also classified as willful. As discussed in detail in Citation 2, Section 334, subdivision (e) defines a willful violation as follows:

> a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the

> employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

Again, the Board is not persuaded by Employer's arguments regarding the willful classification. Employer had knowledge of the modifications made to the building ventilation, was receiving a number of complaints from employees about the air quality, and in particular Garcia continued to receive employee complaints regarding forklift fumes. A responsible employer would have taken steps to investigate the employee complaints, through testing of the air, investigation of the forklift emissions, or both. Even if Employer was not consciously violating a safety order, Employer had knowledge of a hazardous condition, from the persistent complaints of its employees, and made no efforts to either investigate or remedy it. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board* (2000) 80 Cal.App.4th 1023, 1034.) This is the definition of willful, and the results are evident in the record. The $70,000 penalty for Citation 3 is upheld.

Therefore, we affirm the result of the ALJ's Decision sustaining the citations, and total penalties of $80,050, but for the reasons as stated above.

ART CARTER, Chairman

ED LOWRY, Board Member

JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: