BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: ECHO ALPHA, INC., JOHN STAGLIANO, INC., EVIL ANGEL PRODUCTIONS, AND JOHN STAGLIANO INC. dba .EVIL ANGEL VIDEO 14141 Covello Street, Unit 8C Van Nuys, California 91405 Employer	Dockets. 14-R3Dl-0802 through 0804 **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 Echo Alpha Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 20, 2013, the Division of Occupational Safety and Health (Division) conducted a complaint-initiated inspection at a place of employment in Van Nuys, California maintained by Employer. On February 19, 2014, 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] All citations were settled except for Citation 2, and at hearing the Division withdrew Instance 1 of Citation 2.

Citation 2, Instance 2 alleged a serious violation of section 3203(a) [failure to correct unsafe work practices].[2]

Employer filed a timely appeal of the citation.

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

[1] Unless otherwise specified, all references are to California Code of Regulations, Title 8.
[2] The Division withdrew Instance I of Citation 2 at hearing. (Decision, L)

issued a Decision on March 11, 2015. The Decision denied Employer's appeal, imposing a total civil penalty of $9000.

Employer timely filed a petition for reconsideration of the ALJ's Decision.

The Division filed an answer to the petition.

ISSUES

1. Was the Employer properly provided notice of the Division's intention to cite Citation 2, Instance 2 as serious via the procedures described in Labor Code section 6432(b)(l)?

2. Did the ALJ correctly calculate the penalty?

FINDINGS OF FACT

1. The Division served an administrative subpoena duces tecum to Employer's representative, Christian Mann, on August 23, 2013, requesting various records related to Employer's business. (Ex. 9.)
2. Employer issued a written **IIPP** that included procedures for ensuring that employees comply with safe and healthy work practices. (Ex. 5.)
3. Despite having an IIPP that included systems that met the requirements of section 3203(a) as written, Employer failed to implement this program in its workplace.
4. Employer did not have a system for recognition for employees who followed safe work practices.
5. Employer did not have formal on the job training or retraining in matters related to safety.
6. Employer had a written progressive discipline policy for violations of safety rules, but this disciplinary policy was never enforced.
7. No system of communication for health and safety issues, such as meetings or other methods, was in place at Employer's worksite.
8. Four employees and a supervisor were employed in Employer's warehouse.

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(a), (c) and (e).

Employer makes several arguments in its petition for reconsideration: that the ALJ's decision relies upon unreliable hearsay, that the Division did not prove a violation of section 3203, that the serious classification of the violation was improper, that appellant was not provided adequate notice that the Division intended to issue the citation as serious, that there was no employee exposure, and that the penalty was improperly calculated. The Board finds the majority of these arguments to be unavailing, and to have been thoroughly and properly addressed in the ALJ's Decision. However; the issue regarding notice of intent to issue a serious citation is one of first impression for the Board, and merits closer inspection.

As background, Labor Code section 6432 subdivision (b)(1) contains the following language:

(b) (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:
(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
(C) Supervision of employees exposed or potentially exposed to the hazard.
(D) Procedures for communicating to employees about the employer's health and safety rules and programs.
(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:
(i) The employer's explanation of the circumstances surrounding the alleged violative events.
(ii) Why the employer believes a serious violation does not exist.
(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so

as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

(2) The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision. The director shall prescribe the form for the alleged violation descriptions and solicitation of information. Any forms issued pursuant to this section shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

In sum, the Labor Code instructs the Division to consider the factors listed in subdivision (b)(l) prior to issuing a citation as serious; this provides an employer with the opportunity to furnish information to the Division that may militate in favor of issuance of a less than serious citation. The Labor Code in subdivision (b)(2) also allows the Division to create and issue a standardized form to collect the information listed in subdivision (b)(l).

In this case, the Division opted to send to Employer its standardized form, referred to as a lBY. However, Employer notes that while the lBY it received referenced the IIPP standard, the alleged violative description is labeled "Instance 1" and discusses blood and other potentially infectious material, rather than the general IIPP issues that were ultimately litigated in Instance 2. No separate lBY form was issued for Citation 2, Instance 2. The Division's inspector agreed in testimony that he issued a lBY form for Citation 2, but per his usual practice, did not issue a separate lBY form for each Instance cited therein, as they all related to the same general IIPP violation described in the "charging language". While this may be the Inspector's usual practice, section 6432 subdivision (b)(2) requires that the Division provide the "alleged violative description" on the lBY. The Division's completion of the form unquestionably fell short. For Citation 2, Instance 2, the Division cannot rely on its issuance of a related, but factually distinct, lBY as proof that it solicited the information required by section 6432 subdivision (b)(l).

Labor Code section 6432 subdivision (d) provides the following remedy for those instances where the Division makes an error of this kind:

(d) If the employer does not provide information in response to a division inquiry made pursuant to subdivision (b), the employer shall not be barred from presenting that information at the hearing

> and no negative inference shall be drawn. The employer may offer different information at the hearing than what was provided to the division and may explain any inconsistency, but the trier of fact may draw a negative inference from the prior inconsistent factual information. The trier of fact may also draw a negative inference from factual information offered at the hearing by the division that is inconsistent with factual information provided to the employer pursuant to subdivision (b), or from a failure by the division to provide the form setting forth the descriptions of the alleged violation and soliciting information pursuant to subdivision (b).

The Board has the ability to draw a negative inference from the Division's failure to provide an appropriate lBY form; drawing a negative inference at the discretion of the fact finder under Labor Code 6432 subdivision (d). The Board declines to make a negative inference, given the evidence demonstrating that the Division made good faith attempts to collect information required by the Labor Code prior to issuance of the serious citation, despite having made errors in its issuance of the lBY. (See, *Ovemite Transp.* Co. *v. NLRB* (D.C. Cir. 1998) 140 F. 3d 259, 267. "[T]he decision of whether to draw an adverse inference has generally been held to be within the discretion of the fact finder.")

On February 4, 2014, the Division noticed Employer with three !BY forms. Employer was not required to respond to any of these notices, and chose not to. Furthermore, on August 23, 2013, Associate Safety Engineer Brandon Hart (Hart) served the Employer with _a subpoena duces tecum, requesting all records of Employer's health and safety training, health and safety inspections, written health and safety programs and policies, as well as Employer's IIPP and Exposure Control Plan. (Ex. 9.) While the IIPP and Bloodborne Pathogen Exposure Control Program were provided in a response several months later, none of the other listed documents were forthcoming, as the Employer had no records to produce.

This document request from the Division, made well before the issuance of Citation 2, shows the Division's good faith attempt to meet the requirements of Labor Code section 6432 subdivision (b)(l), through its attempt to gather documents generally related to training for employees and supervisors relevant to preventing employee exposure to hazards; procedures for discovery and correction of hazards; supervision of employees exposed to hazards; as well as procedures for communication to employees regarding safety rules and procedures. (Labor Code section 6432 subdivision (b)(l)(A)-(O).) The Division substantially complied with four of the five provisions of subdivision (b)(l), as discussed above.

We do observe that the Division's failure to properly complete the lBY left Employer without an opportunity to respond to the specific charges, as provided by section 6432 subdivision (b)(l)(E), which in some instances might support drawing a negative inference. However, on this particular set of facts,

this failure does not support drawing a negative inference against the Division. Here, while jmperfect, the Division's c.onduct evinced a good faith attempt to comply with section 6432. We note that the Division's use of a subpoena duces tecum, issued only days after the inspection, was an unusual effort by the Division to seek out a variety of pertinent information. Furthermore, no representative of Employer testified to suggest that Employer's response to the lBYs would have been different had additional or more specific charging language been included. We therefore decline to draw a negative inference in this instance.

Violation and Classification of Citation 2, Instance 2

The single remaining citation alleges a violation of section 3203 subdivision (a) for failure to correct unsafe work practices. Section 3203 subdivision (a) reads as follows below:

> (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:
> (1) Identify the person or persons with authority and responsibility for implementing the Program.
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
> (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.
> Exception: Employers having fewer than 10 employees shall be permitted to communicate to and instruct employees orally in general safe work practices with specific instructions with respect to hazards unique to the employees' job assignments as compliance with subsection (a)(3).

The Division's alleged violative description states:

> The employer failed to implement and maintain all the required elements of their Injury and Illness Prevention Program including, but not limited to correcting unsafe work condition(s) and/or work practices, which are essential to their overall program.
>
> Instance 2: The employer failed to enforce the safety and health practices fairly and uniformly and failed to ensure employees used safe work practices, and followed directives, policies and procedures to maintain a safe work program, as required by their written program.

The Division does not allege that Employer failed to have an Illness and Injury Prevention Program (IIPP); rather, it contends that Employer failed to implement and maintain its IIPP by correcting unsafe working conditions and practices. (See, *Contra Costa Electric, Inc.* Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014).) Employers are responsible for meeting all three prongs of section 3203 subdivision (a).

The Division's Associate Safety Engineer, Brandon Hart, testified for the Division. Based on his initial walkthrough with a management representative, he concluded that the IIPP had not been implemented. The owner of Echo Alpha, Inc., John Stagliano (Stagliano), and Adam Greyson (Greyson), Employer's Chief Financial Officer, testified on behalf of Employer. Stagliano is listed as the person responsible for implementing Employer's IIPP in its program.

Employer's IIPP describes a program of formal recognition, including written acknowledgement of employees who make "significant contributions to maintenance of a safe workplace", with those written acknowledgments being placed in the employees' personnel file. (Ex. 5.) Hart testified that records were not provided in response to the Division's subpoena, leading him to believe that the Employer's IIPP was not implemented. When questioned regarding employee recognition for following safe and healthy work practices, as described in section 3203 subdivision (a)(2), Stagliano testified that he supposed employees received a smile for recognition of safe work practices. Employer failed to provide any evidence to demonstrate that it had implemented its written program to recognize employees who engage in safe and healthy work practices.

The safety order also requires training and retraining of employees, where required. (Section 3203(a)(2).) The Employer's IIPP describes providing training to workers whose safety performance is deficient, to all new workers, to workers when given new job assignments or when new processes or procedures are introduced, and when new hazards are identified. (Ex. 5.)

During his initial walkthrough, Hart testified that he learned that new employees were not provided training, Hart requested training records, but did not receive any, leading him to believe that the IIPP was not implemented in this aspect.

Stagliano testified that he did not believe any special training was needed for working in Employer's warehouse. He believed there may have been some special training for certain pieces of equipment, but was unable to elaborate. Employer's CFO, Greyson, was aware that there was a company policy in the employee handbook that prohibited open-toed shoes in the warehouse, and that this policy was enforced. He also noted that the forklift certifications for the warehouse forklift drivers were framed on a warehouse wall, and that Employer had not realized that they were documents that would constitute training documents that should be turned over to the Division. Employer failed to provide training as required by the safety order.

Employer was similarly unable to demonstrate that it implements an effective disciplinary program related to health and safety violations. Employer's IIPP describes a progressive disciplinary policy beginning with verbal warnings for minor incidents, written warnings, suspensions, and ending with termination for those who repeatedly jeopardize the safety of themselves and their coworkers. (Ex. 5.) No documents related to disciplinary actions were provided to the Division, and neither Greyson nor Stagliano were able to testify to a specific instance of discipline related to employee health or safety. (Section 3203(a)(2).)

The Employer's IIPP also describes a system of communication designed to meet the requirements of section 3203 subdivision (a)(3). The system described in the plan includes safety meetings on a monthly or more frequent basis, distribution of safety information in the workplace, training, and a system for workers to anonymously report workplace hazards. (Ex. 5.) Stagliano testified that he was not aware of any safety meetings occurring at the worksite, or safety inspections. Hart testified that employees appeared unaware of the IIPP provisions and were not following safe work practices during his inspection.

The Board upholds the ALJ's finding that a violation of section 3203 subdivision (a) has been established.

In order to demonstrate a serious violation of a safety order, the Division must demonstrate 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 term "realistic possibility" means that that it is within the bounds of reason, and not purely speculative." *(International Paper Company,* Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015), citing *(Langer Farms, LLC,* Cal/OSHA App. 13-0231, Decision After

Reconsideration (Apr, 24, 2015).) In support of the serious classification, Hart testified regarding the actual hazards created by Employer's violation of the safety order. He concluded that there was both a fall hazard and a hazard of collapse due to the Employer storing materials on the mezzanine level in the warehouse. Employees accessed the unguarded mezzanine with a portable ladder, and were exposed to a fall onto concrete of approximately nine feet. Because the mezzanine was not built for storage, there was a hazard of employees either falling or being hurt by falling materials in a collapse due to the mezzanine exceeding its live load capacity.

Hart also described the hazard of fire due to inaccessible fire extinguishers, extension cords that were daisy chained, and blocked electrical panels. He explained the hazard of electrocution created by an exposed bus bar. Hart further testified that these and other hazards he identified in the warehouse were the result of Employer's failure to identify, correct and train employees on hazards as required by the IIPP safety order.

An employer may rebut the presumption of a serious violation by demonstrating that it did not know, and could not know, of the violation. (Labor Code section 6432 subdivision (c).)[3] Employer failed to rebut the presumption. The violation is properly classified as serious,

Calculation of Penalty

The Division's Proposed Penalty Worksheet (Ex. 8) shows severity for Citation 2 as $18,000, or the base penalty for a serious violation.[4] The final penalty, after all adjustments and credits, was $7,200. The ALJ adjusted this penalty based on her finding that "Extent" should be rated high, due to Employer having 40 employees total, and 22 workers in the warehouse. We find this to be in error.

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3 Specifically, section 6432(c) reads as fo,llows: If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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, The employer may accomplish this by demonstrating both of the following:

(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).

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

4 Section 336(c)(l) In General - Any employer who violates any occupational safety and health standard, order, or special order, and such violation is determined to be a Serious violation (as provided in section 334(c)(l) of this article) shall be assessed a civil penalty of up to $25,000 for each such violation. Because of the extreme gravity of a Serious violation an initial base penalty of $18,000 shall be assessed.

Greyson, Employer's CFO, testified that four employees and one supervisor_worked_in the .warehouse .at.the _time of the inspection. This comports with Hart's recollection, wfiich was that he saw about four employees working in the warehouse, who regularly access the mezzanine, the electrical panels and cords, and use the ladders cited by Hart. The Division failed to rebut this testimony, and it is credited.[5] We return the "Extent" to "Medium", and reinstate the $7200 penalty, as initially proposed by the Division.

Therefore, we affirm the result of Decision sustaining the citation but for the different reasons stated above.

/s/ Art Carter, Chairman
/s/ Ed Lowry
/s/ Judith S. Freyman

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[5] Greyson also testified that Employer had around 30 employees total at the time. His estimate was similar to Stagliano's, who believed that Employer had around 25 to 30 at the time of the inspection. The Division failed to rebut the testimony of Greyson and Stagliano in regard to the number of employees; our calculating the penalty based on Employer having 30 versus 40 employees makes no difference in the penalty, and so we set the matter aside.