BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1165502**
KS INDUSTRIES, L.P. **6205 DISTRICT BOULEVARD** **BAKERSFIELD, CA 93313** **Employer**	**DECISION**

Statement of the Case

KS Industries, L.P. (Employer) is a company involved in repairing equipment used in the oil industry. On July 28, 2016, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ujitha Perera, commenced an accident investigation of Employer's work site located at Chevron Steam Plant #6, Franco Western Road, McKittrick, California (jobsite). On November 28, 2016, the Division issued two citations to Employer. The citations allege: (1) Employer failed to assess the workplace for hazards likely to be present and require appropriate personal protective equipment to protect employees from those hazards; and (2) Employer failed to reduce the pressure in a line to atmospheric or as near atmospheric as practicable before opening the line and failed to inform employees of the hazards from the contents of the line and provide instructions on the precautions necessary to deal with such hazards.

Employer filed a timely appeal of the citations, contesting the existence of the violations, the classification of the citations, and the reasonableness of the proposed penalties. On its appeal of each citation Employer marked that it would assert:

> Another affirmative defense: other affirmative defenses may exist and can be asserted by the employer. If the Appellant contends one or more affirmative defenses exist, the appellant, may, but is not required to, provide a short, plain statement in writing setting forth the facts or circumstances which, if true, would prove the affirmative defense.

After this statement Employer included the words: "All requirements met." Employer did not elaborate further in its appeal forms. However, in its post-hearing brief, Employer argued that it was relieved from liability for Citation 2 because of two affirmative defenses. The defenses that

Employer asserted in its post-hearing brief were the Unforeseeability defense, also known as the Newbery defense, and the Independent Employee Action defense.[1]

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), in Bakersfield, California, on September 18 and 19, 2019. Daniel Klingenberger, Attorney with LeBeau Thelen, LLP, represented Employer. Efren Gomez, District Manager, represented the Division. This matter was submitted for Decision on December 24, 2019.

Issues

1. Did Employer fail to assess the workplace for hazards likely to be present and require appropriate personal protective equipment to protect employees from those hazards?

2. Did Employer fail to reduce the pressure in the line to atmospheric or as near atmospheric as practicable before opening the line and did it fail to inform employees of the hazards of the contents of the line and provide instructions on the precautions necessary to deal with such hazards?

3. Did the Division establish that the citations were properly classified as Serious?

4. Did Employer rebut the presumption that the violations in the citations were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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

6. Are the proposed penalties reasonable?

Findings of Fact

1. On July 5, 2016, Ivan Gomez (Gomez), an employee of Employer, was injured at the jobsite while assisting with the removal of a gate valve connected to a steam generator line.

2. Gomez was burned by steam that discharged from the line during the gate valve removal and, as a result, required a two-week hospital stay and two skin graft surgeries.

[1] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

3. Employer selected personal protective equipment designed to protect against the hazards associated with working with and around fire involved in torch cutting.

4. Employees used an impact gun to remove bolts rather than a cutting torch.

5. The steam would have discharged from the line regardless of whether the employees used an impact gun or a cutting torch to remove the bolts from the gate valve.

6. Steam was released from the line either because it was present in the line prior to the initiating of the line break or because the cooler air outside of the line drew out steam from the system.

7. Employer's job safety analysis for the removal of the gate valve from the steam generator line did not consider the hazards posed by steam.

8. Employer did not require personal protective equipment designed to protect against the hazards posed by steam.

9. Steam was likely to be present at the jobsite while the employees were working on removing a gate valve from a steam generator.

10. Because steam discharged from the line at the time of the accident, the pressure in the line was not atmospheric or as near atmospheric as practicable at the time of the accident. Additionally, the pressure persisted in the line long enough for pictures to be taken of the steam discharge.

11. Rance Rogers (Rogers), Employer's superintendent, knew employees would be working on the removal of a valve connected to a steam generator line.

12. Carlos Ochoa (Ochoa) was referred to as the crew leader or person leading work and also held the position of tool pusher.

13. Ochoa was responsible for ensuring the safety of other employees because: (1) employer charged Ochoa with ensuring the employees would follow the job safety analysis; (2) Ochoa was responsible for identifying hazards and appropriate mitigation of those hazards in the job safety analysis; (3) Ochoa was responsible for pre-screening the site for hazards that required stopping work; and (4) Ochoa was required to sign numerous safety documents on behalf of Employer to allow the work to proceed.

14. Ochoa told Gomez that it was safe to proceed with the removal of the gate valve prior to the accident, which dissuaded Gomez from exercising his stop work authority.

15. Employees exposed to steam may suffer death, permanent disfiguration, first to third degree burns, amputation, and hospitalization for more than 24 hours.

16. Associate Safety Engineer Ujitha Perera was current on his division-mandated training at the time of the hearing.

17. The penalties were calculated in accordance with the Division's policy and procedure.

Analysis

1. Did Employer fail to assess the workplace for hazards likely to be present and require appropriate personal protective equipment to protect employees from those hazards?

California Code of Regulations, title 8,[2] section 3380, subdivision (f)(1)(A), provides:

> (f) Hazard assessment and equipment selection:
> (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
> (A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment[.]

The Alleged Violation Description (AVD) for Citation 1 provides:

> Prior to and during the course of the inspection, including, but not limited to, on July 28, 2016, the employer did not effectively evaluate the presence of thermal hazards in the workplace to determine the types of PPE necessary to be used to protect affected employees.

In order to establish a violation of section 3380, subdivision (f)(1)(A), the Division may establish a violation either by demonstrating: (1) Employer failed to assess the workplace to determine if hazards are present, or likely to be present, which require the use of personal protective equipment (PPE); or (2) that hazards were present, or likely to be present, at the workplace and employer failed to have each affected employee use the PPE that would protect

[2] All references are to California Code of Regulations, title 8, unless otherwise indicated.

against the hazards. The Appeals Board has explained that an inadequate assessment that fails to assess an obvious hazard is insufficient and that an interpretation of section 3380, subdivision (f)(1)(A), that finds otherwise would be contrary to the protective purpose of the Cal/OSH Act. (*Lion Farms, LLC,* Cal/OSHA App. 1070258, Denial of Petition for Reconsideration (June 30, 2017).) Moreover, the Appeals Board has considered that where such an obvious hazard is present, a failure to provide appropriate PPE to address that hazard also constitutes a violation. (*HHS Construction,* Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015); see also *KIMCO Staffing Services, Inc.,* Cal/OSHA App. 15-4594, Decision After Reconsideration (Aug. 26, 2016).)

In the instant matter, Employer's work at the jobsite included the removal of a gate valve from a steam generator line. As such, employees were tasked with removing bolts from the valve. In the process of removing the bolts, an employee, Gomez, was injured by a discharge of steam from the line while assisting with the removal of the final bolt. Gomez was sprayed with steam on his right arm from his forearm to his bicep, which resulted in a two-week hospital stay and two skin graft surgeries.

Employer's superintendent, Rogers, selected torch cutting as the method to remove the bolts from the valve and assigned a certified welder to the task of removing the bolts. Rogers testified that, "the hazards, the PPE, and the mitigation are all around using a welder to do the bolt cutting." Rogers indicated that the PPE selected was for torch cutting and would have included a face shield, high impact gloves, sleeves, and a fan for gases. Gomez testified that he was wearing a long-sleeved fire-resistant shirt, a face shield, and impact gloves on the day of the accident. Employer's job safety analysis (JSA) shows that Employer selected "PPE for torch cutting." (Ex. A.) Indeed, Employer's post-hearing brief indicates that PPE was assessed and provided for "torch cutting." As such, Employer's focus for PPE was from the hazard presented by working with and around fire involved in torch cutting. However, the employees involved in the accident did not use a cutting torch in the process of removing the bolts from the valve. Instead, the Employees used an impact gun to remove the bolts.

Despite the use of the impact gun, however, Rogers testified credibly that using a cutting torch would not have prevented the release of steam from the line. Rogers explained that, even though there was not pressure in the system at the time of the accident, steam was expelled from the line because the air outside of the system was cooler than the temperature inside of the system. As such, Rogers' testimony supports that the hazard would not have been eliminated from the jobsite had a torch been used instead of an impact gun.

Employer's JSA fails to appropriately consider and address the hazard posed by steam. Employer's JSA addresses stored pressure if pressure bleeders are plugged but only advises employees to make sure the pressure bleeders are not plugged without any reference to PPE. (Ex.

A.) The only reference to PPE in the JSA is to "wear all PPE for torch cutting." Employer's JSA does not provide further indication that the steam hazard was addressed.

In this case, the steam hazard was an obvious hazard that was likely to be present at the jobsite while the employees were working on removing a gate valve from a steam generator line. In considering the hazard, it is apparent that if Employer's efforts to bring the system to a zero energy state were unsuccessful, as happened in the instant matter, the potential hazard that would be left unmitigated would be the steam. Rogers testified that he believed that the steam generator involved in the accident was capable of producing steam at temperatures up to 600 degrees and at pressures up to 1,600 pounds per square inch. As such, the steam normally created by the system posed an obvious hazard. Furthermore, although Employer took efforts to ensure that the pressure in the system was eliminated, the record does not demonstrate that Employer took similar efforts considering temperature. Both Gomez and Rogers testified that they did not know the temperature of the steam or the pipes on the day of the accident. As Rogers testified that steam could be drawn out of the system when it was exposed to cooler outside air, Employer should have known of the potential hazard of steam created at the time of a line break or residual steam remaining in the lines of the steam generator.

Accordingly, Employer failed to assess the obvious hazard of steam and provide employees with sufficient PPE to protect against the hazards posed by steam. Therefore, the Division has established a violation of section 3380, subdivision (f)(1)(A).

a. Employer's Argument

Employer argues that the citation is overbroad in that the focus of the inquiry relies on events taking place on July 5, 2016, while the inspection period and date in the AVD refer to the period from July 28, 2016, to November 17, 2016. However, it is noted that the AVD references the period "[p]rior to and during the course of the inspection." Further, as Employer notes in its closing brief, it appears the use of the date of July 28, 2016, is an inadvertent error. It is clear based on the arguments of the parties and the evidence adduced at hearing that there can be no dispute that there was a mutual understanding that the events of July 5, 2016, were at issue. As such, to the extent that the language of Citation 1, Item 1, references July 28, 2016, it is inferred to include July 5, 2016.

2. Did Employer fail to reduce the pressure in the line to atmospheric or as near atmospheric as practicable before opening the line and did it fail to inform employees of the hazards of the contents of the line and provide instructions on the precautions necessary to deal with such hazards?

Section 6535, subdivision (a), provides:

> Before opening lines or other equipment, the pressure shall be reduced to atmospheric or as near atmospheric as is practicable. Employees shall be informed of the hazards from the contents of lines or equipment, and shall be instructed on precautions necessary.

Citation 2 alleges:

> Prior to and during the course of the inspection, the employer did not reduce the pipe line pressure to atmospheric or as near atmospheric as practicable before the lines were opened for maintenance. As a result[,] on or about July 5, 2016[,] an employee working on replacing a 4" valve on the pipe line suffered a serious injury when steam was released from the pipe line and got in contact with the employee's right arm.

The Division may establish a violation of section 6535, subdivision (a), by demonstrating that: (1) before opening lines or other equipment, Employer failed to reduce the pressure inside the line or other equipment to atmospheric or as near atmospheric as practicable; (2) Employer failed to inform employees of the hazards from the contents of lines or equipment; or (3) Employer failed to instruct employees on the precautions necessary to account for the hazards posed by the contents of the lines.

a. Did Employer fail to reduce the pressure inside the line to atmospheric or as near atmospheric as practicable?

In *UCI Construction, Inc.*, Cal/OSHA App. 96-615, Decision After Reconsideration (Dec. 28, 1999), the Appeals Board found a violation of section 6535 where the employer failed to reduce the pressure inside of a line to atmospheric or as near atmospheric as practicable. In that case, the employer was involved in removing a valve connected to a system that contained pressurized hot crude oil. In an effort to ensure the system had pressure reduced to atmospheric or near atmospheric Employer opened a bleeder port and attached a vacuum assembly to assist with removing pressure. In the process of removing the bolts attaching the valve to the line, the line opened and sprayed several employees with hot oil, burning them to such a degree that hospitalization was required for at least one employee. The Appeals Board concluded that there was sufficient evidence in the record to establish that the pressure in the line was greater than atmospheric or near atmospheric where it was undisputed that the oil would not have sprayed out unless there was pressure in the line. (*Id.*)

In the instant matter, it is uncontested that steam sprayed out of the line. However, there is a factual question as to whether that steam resulted from pressure within the line or from air outside of the line drawing the steam out of the line. However, this question is rendered moot because the fact that steam discharged from the line at the time of the accident reflects pressure in the line that was greater than atmospheric or near atmospheric. As with the facts in *UCI Construction, Inc., supra*, Cal/OSHA App. 96-615, such a discharge is a movement of the steam from a higher pressure area, inside the line, to a lower pressure area, the atmosphere outside of the lines. It is noted that the steam persisted for a sufficient period of time for a photograph to be taken showing the continued venting of steam from the line and an inference is drawn that not only was there pressure in the line at the moment of the accident, but such pressure persisted in the line. (See Ex. 6, Ex. F-1, and Ex. F-3.) Therefore, Employer failed to reduce the pressure inside the line to atmospheric or as near atmospheric as practicable.

b. Did Employer fail to inform employees of the hazards posed by steam in the line?

As discussed above, Employer's JSA did not sufficiently identify or mitigate the hazard of steam in the lines despite Rogers' knowledge that employees would be working on a valve connected to a steam generator line. Further, Gomez testified that Ochoa told him it was safe to begin working on removing the bolts from the line. Ochoa's representation of safety to Gomez calls into question whether Employer failed to inform employees of the hazards posed by steam because if Ochoa was a supervisor his representation that misinformed Gomez is imputed to Employer. Therefore it is necessary to determine whether Ochoa was a supervisor in order to determine whether Ochoa was acting as a representative on behalf of Employer.

The Appeals Board has long held that a supervisor means someone who has the authority or responsibility for the safety of other employees. (*PDM Steel Service Centers, Inc.*, Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) Further, in *City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998), the Appeals Board discussed a series of prior cases to explain that the determination of supervisor is based on a factually specific analysis and is not determined by title or job description alone. In *Granite Construction Company*, Cal/OSHA App. 84-648, Decision After Reconsideration (Mar. 13, 1986), the Appeals Board held that an employee was a supervisor where he was deemed in charge of the work site because he was responsible for controlling the work site, bringing materials to the work site, and where work did not begin until that employee instructed the crew on what was to be done. In *Contra Costa Electric, Inc.*, Cal/OSHA App. 90-470, Decision After Reconsideration (May 8, 1991), the Appeals Board held that it is the cumulative nature of an employee's responsibilities, rather than the traditional power to hire and fire, that determines whether an employee is a supervisor. In these cases, the Appeals Board has made it clear that it is not necessary for a supervisor to have particular tasks or

responsibilities beyond the threshold issue of authority or responsibility for safety of other employees. (*City of Sacramento, Dept. of Public Works, supra*, Cal/OSHA App. 13-2446.)

Gomez testified that Ochoa was the crew leader, also known as the pusher or tool pusher. Gomez's testimony indicated that he typically discussed concerns regarding health and safety with Ochoa. Moreover, Employer required Ochoa to complete portions of the JSA, which is signed by Ochoa after the statement: "Person Leading Work (PLW) I have communicated this plan and any permit documents prior to beginning today's work with all workers. I will follow what is required to perform the work safely." (Ex. A.) This statement demonstrates Employer's intent to charge Ochoa with safety responsibilities. Further, Rogers testified that while he wrote the steps in the JSA for performing the task, Ochoa was responsible for, and completed, the sections for identifying the hazards for the various steps of the task and the actions taken to eliminate the hazards for each task. Rogers also testified that Ochoa performed a pre-screening of the site and, if the jobsite had been determined to be dangerous to work, then work would have been stopped based on that screening. Additionally, Ochoa's name appears on numerous safety documents presented at hearing evidencing his substantial role in jobsite safety. For example, Ochoa's name appears as the party initialing on behalf of Employer for Employer's Lockout/Tagout Process form. (Ex. E.) Further, a permit to work at the site was signed by Ochoa on behalf of Employer. (Ex. D.) Ochoa also initialed on behalf of Employer on a Chevron form, Employer's client who operated the jobsite, entitled "Isolation of Hazardous Energy Certificate." (Ex. C.) Pursuant to the foregoing, Ochoa was a supervisor.

Gomez testified credibly that he expressed concerns about the safety of the process before work was started to remove the gate valve. Gomez provided further credible testimony that Ochoa assured him it was safe to proceed. Gomez explained that Ochoa's assurances were the reason that he did not exercise his stop work authority.[3]

Employer failed to inform employees of the hazard posed by the steam or hot water remaining in the line because Ochoa, as a supervisor, assured Gomez that it was safe to begin removing the gate valve while the hazard of steam had not been eliminated.

Accordingly, the Division established Employer failed to reduce the pressure inside the line to atmospheric or as near atmospheric as practicable and Employer failed to inform employees of the hazards posed by steam in the line.

c. Employer's Arguments

1) The *Newbery* defense or Unforeseeability defense

[3] Stop work authority is a program instituted by Employer where any employee may stop all work on a project if they feel a safety concern requires work to cease.

Employer's appeal did not assert the *Newbery* defense. Rather, Employer merely marked a box indicating it was asserting another affirmative defense, as noted above. Employer's post-hearing brief appears to be the first time that Employer has sought to assert the *Newbery* defense. Employer's post-hearing brief argues that: (1) Employer neither knew nor should have known of the potential danger to employees posed by pressure in the line because it verified zero state and arranged the job to avoid such exposures; (2) Employer exercised supervision adequate to assure safety; (3) Employer ensures employee compliance with its safety rules; and (4) the violation was not foreseeable.

To establish the *Newbery* defense, an employer must demonstrate that each of the following factors are not true:

> (1) that the employer knew or should have known of the potential danger to employees;
> (2) that the employer failed to exercise supervision adequate to assure safety;
> (3) that the employer failed to ensure employee compliance with its safety rules; and
> (4) that the violation was foreseeable

(*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

Further, as a preliminary consideration, the *Newbery* defense is unavailable where the violation is caused by a supervisor. In *Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013), the Appeals Board explained:

> However, an employer cannot utilize the *Newbery* defense when a supervisor commits the violation. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243 [employer necessarily fails the second prong of the *Newbery* defense when a supervisor violates a safety order].) The Board has also previously considered this issue and denied the *Newbery* defense when a supervisor committed the violation. (See *Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012), citing *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) [*Newbery* defense fails since supervisor's knowledge is imputed to employer].)

As discussed above, Ochoa was a supervisor who failed to inform Gomez, an employee, about the hazard by telling Gomez that it was safe to proceed with removing the gate valve and thereby dissuading Gomez from exercising his stop work authority. As a supervisor was involved in the violation, the *Newbery* defense is unavailable.

Additionally, steam from a steam generator is an obvious hazard. As such, Employer should have known of the potential danger to employees posed by the steam. Moreover, Ochoa's assurance to Gomez indicates that Employer failed to provide adequate supervision to assure safety. Finally, the violation, in terms of a failure to ensure that the pressure in the system was reduced to atmospheric or near atmospheric as practicable was foreseeable as the evidence at hearing showed Employer relied overly on the pressure gauges to indicate a lack of pressure in the system and not enough on other information, such as system temperature, to gauge whether pressure or elements capable of creating more pressure remained in the system. Accordingly, Employer failed to establish the *Newbery* defense.

2) The Independent Employee Act defense

Employer's appeal did not assert the Independent Employee Act defense (IEAD). Rather, Employer merely marked a box indicating it was asserting another affirmative defense, as noted above. Employer's post-hearing brief appears to be the first time that Employer has sought to assert the IEAD. Employer's post-hearing brief argues that: (1) Gomez failed to follow his training and the JSA; (2) Gomez's decision to break open the line before his supervisor returned was in direct contradiction to an order to wait; (3) Gomez was trained on the procedure and the importance of adhering to the JSA; (4) Gomez acknowledged that he had complete stop work authority; (5) Employer and Gomez agreed that Employer had a well-defined safety program in place; (6) Employer enforced its safety program company wide and as to Gomez; and (7) Gomez did not return to work on a regular basis after the incident.

In *Fedex Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained:

> There are five elements to the IEAD, all of which must be shown by an employer in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contrary to employer's safety rules. (*Synergy Tree Trimming, Inc.*, [Cal/OSHA App.]

317253953, Decision After Reconsideration (May 15, 2017) [other citations omitted].)

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence. "'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. [Citations.]" (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).)

In the instant matter, Employer failed to put on evidence or argument addressing a number of elements. Most notably, Employer fails to address the experience of the employees involved in the violation and that the employees knew that they were taking actions contrary to Employer's safety rules. Employer's assertion that the employees did not follow the JSA and instructions to wait for Rogers return is insufficient to establish that employees consciously knew that they were taking actions contrary to Employer's safety rules and the record is devoid of evidence that each of the employees involved had such an understanding. As set forth above, Rogers testimony indicating that the use of the cutting torch rather than the impact gun would not have prevented the release of steam further weakens Employer's argument that the employees' actions caused the violation. Accordingly, Employer failed to establish elements one and five of the IEAD.

Moreover, the Appeals Board has long held that the IEAD does not apply where a supervisor or foreperson commits the violation. (*Brunton Enterprises, Inc.*, *supra,* Cal/OSHA App. 08-3445.) The Appeals Board has explained that the issue of whether a supervisor commits the violation is not a true exception to the IEAD, but rather a situation where the third element required under the IEAD is not met. (*Id.*) In the instant matter, Ochoa was involved in the decision to proceed with work that was allegedly contrary to Rogers' instructions, as he told Gomez that it was safe to proceed with the work. As Ochoa was a supervisor, the instruction to proceed with work is tantamount to Employer's instruction to proceed with the work. Therefore, Employer is unable to establish element three of the IEAD.

Accordingly, Employer failed to establish the IEAD.

3. Did the Division establish that the citations were properly classified as Serious?

Labor Code section 6432, subdivision (a), 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 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. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Associate Safety Engineer Ujitha Perera (Perera) testified that he was current on his division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citations as Serious. Perera identified the hazard of high temperature steam for each citation and testified that employee exposure to high temperature steam posed a realistic possibility of death, permanent disfiguration, first to third

degree burns, amputation, or hospitalization for more than 24 hours. Moreover, in the instant matter, an employee actually suffered serious physical harm. Gomez testified credibly that he was hospitalized for two weeks and required two homograph skin surgeries for treatment of his burns. Accordingly, the Division established a rebuttable presumption that the citations were properly classified as Serious.

4. Did Employer rebut the presumption that the violations in the citations were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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:

> (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.

In *Ventura Coastal, LLC,* Cal/OSHA App. 317808970, Decision after Reconsideration (Sept. 22, 2017), the Appeals Board explained:

> A supervisor's knowledge of a hazard is imputed to the employer. The Appeals Board provided the rationale for the knowledge requirement employers may use to rebut the presumption of a serious injury: "With the purpose of the Act in mind, the Board reads the knowledge element of Labor Code section 6432 to encourage employers to conduct reasonably diligent inspections for violative conditions in the workplace so that the hazard associated with that condition can be timely corrected or, otherwise, face the prospect of a serious violation and heightened civil penalty."

(Citations omitted.)

As discussed above, the hazard of steam coming from a steam generator is an obvious hazard. Moreover, Employer failed to take appropriate steps to address the hazard both by failing to assess the hazard and failing to issue appropriate PPE to protect against the hazard, as demonstrated by Gomez's injuries resulting from exposure to the steam. Employer further failed to eliminate the hazard by failing to ensure that the pressure in the system was reduced to atmospheric or near atmospheric, as evidenced by the steam expelling from the line. Additionally, Rogers testified that he believed all steam was dangerous to employees because it could burn them. This indicates that Employer was well aware of the potential hazards posed by steam which makes the lack of safety measures designed to address the steam hazards less reasonable. Therefore Employer did not demonstrate that it took all steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

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

In *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, the Appeals Board explained:

> 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." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury."

(Citations omitted.)

The first element to consider here is whether there was a serious injury. Labor Code section 6302,[4] subdivision (h), provides that a "serious injury" includes any injury occurring in a place of employment or in connection with any employment that requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or that results in an employee suffering any serious degree of permanent disfigurement. In the instant matter, Gomez was hospitalized for two weeks and received two skin graft surgeries. As such, Gomez suffered a serious injury.

[4] Labor Code section 6302 was amended effective January 1, 2020. However, the analysis relied upon herein for the definition of serious injury or illness uses the definition effective on the date of issuance of the citations, November 28, 2016.

As there was a serious injury, it is next necessary to consider whether there was a causal nexus between the violation and the serious injury. The discharge of steam evidenced Employer's violation of section 6535, subdivision (a), by its failure to ensure the pressure in the line was reduced to atmospheric or near atmospheric pressure and Gomez was injured by the steam. The evidence adduced at hearing supported that a causal nexus exists between Employer's violation and the employee injury. Further, Employer failed to inform Gomez of the hazard posed by the steam. Ochoa's representation to Gomez that it was safe to proceed and was relied upon by Gomez and stopped him from exercising the stop work authority. This too is a violation of section 6535, subdivision (a), and supports a causal nexus between the employee injury and Employer's violation. Accordingly, Citation 2 was properly characterized as Accident-Related.

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).)

The parties stipulated that the penalties were calculated in accordance with the Division's policy and procedure. As the citations are affirmed and no additional evidence was presented regarding the penalty calculations to call them into question, the proposed penalties are affirmed for each citation.

Conclusion

The evidence supports a finding that Employer violated section 3380, subdivision (f)(1)(A), by failing to assess the workplace for hazards likely to be present and for failing to require its employees to use PPE that would protect against the obvious hazard of steam. The violation was properly classified as Serious and the proposed penalty is reasonable.

The evidence supports a finding that Employer violated section 6535, subdivision (a), by failing to reduce pressure in the line to atmospheric or as near atmospheric as practicable before opening the line and by failing to inform its employees of the obvious hazard of steam and providing instructions on the precautions necessary to deal with that hazard. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is reasonable.

ORDER

It is hereby ordered that citations are affirmed and the associated penalties are established and assessed as set forth in the attached Summary Table.

Dated: 01/13/2020

J. Kevin Elmendorf
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.**