

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

**ACTIVAR CONSTRUCTION PRODUCTS
GROUP**

6285 Randolph Street
Commerce, CA 90040

Employer

**DOCKETS 15-R4D1-0878
and 0879**

ERRRATUM

A Decision of the Occupational Safety and Health Appeals Board was issued on this matter on August 1, 2016. The Decision is amended as follows:

Enclosed please find an amended Decision reflecting additional language added to page 14 that was inadvertently omitted.

The Amendment relates back to the date of issuance of the Decision and is effective as of that date (August 1, 2016).

DATED: August 4, 2016



CLARA HILL-WILLIAMS
Administrative Law Judge

CHW:ml

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**ACTIVAR CONSTRUCTION PRODUCTS
GROUP**

6285 Randolph Street
Commerce, CA 90040

Employer

**DOCKETS 15-R4D1-0878
and 0879**

DECISION

Statement of the Case

ACTIVAR CONSTRUCTION PRODUCTS GROUP (Employer) is a manufacturer of construction products. Beginning December 29, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Rosalind Dimenstein (Dimenstein), conducted an accident inspection at a place of employment maintained by Employer at 6285 Randolph Street, Commerce, California (the site). On February 4, 2015, the Division cited Employer for three violations of, California Code of Regulations, title 8.¹ Citation 1, item 1 alleged that Employer failed to implement its IIPP, a General violation of section 3203, subdivision (a). Citation 1, item 2 alleged that Employer failed to ensure that the rear of a Lodge & Shipley Shear Machine was guarded to prevent entry during operation, a General violation of section 4227, subdivision (e). Citation 2 alleged that Employer failed to appropriately guard the "hold downs" on a Lodge & Shipley Shear Machine, a Serious Accident Related violation of section 4227, subdivision (b).

Employer filed a timely appeal contesting the existence of the alleged violations and the reasonableness of the penalties proposed in Citation 1, items 1 and 2, and Citation 2. In addition, Employer contested the classification of Citation 2. Employer also alleged numerous affirmative defenses² as set forth in Employer's appeal forms (Exhibit 1).

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

² Except as discussed herein, Employer failed to present evidence as to its various affirmative defenses; therefore, unless otherwise noted, Employer's affirmative defenses are deemed waived.

This matter came regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on April 5, 2016. Thomas Song, Attorney, of Ogletree Deakins et al., represented Employer. Victor Copelan, District Manager, represented the Division. The matter was submitted on May 5, 2016. ALJ extended the submission date to June 1, 2016 on her own motion.

Issues

1. Did Employer fail to implement its Injury and Illness Prevention Program (IIPP) by either a) failing to maintain a system for ensuring that its employees complied with safe and healthy work practices for the operation of a Lodge & Shipley metal shear (metal shear)³; or, b) failing to conduct adequate inspections of the metal shear, which would have disclosed that the bottom of the guard protecting the “hold down”⁴ on the metal shear was more than 3/8 of an inch from the table/working surface?
2. Did Employer fail to prevent entry to the rear of the metal shear during operation?
3. Did Employer fail to ensure that no greater than a 3/8 inch gap existed between the bottom of the guard protecting the hold-downs on the metal shear and the table/working surface?
4. Did the Division establish a rebuttable presumption that Employer’s violation of section 4227, subdivision (b), was serious?
5. Did Employer present sufficient evidence to rebut the presumption that its violation of section 4227, subdivision (b), was serious?
6. Did the Division establish a causal link between the violation in Citation 2, and the serious injury that occurred?
7. Did the Division correctly calculate the proposed penalties?

Findings of Fact

1. On December 18, 2014, Employer’s employee Guillermo Prado (Prado) suffered a crushing injury to a finger on his hand (the accident), while operating Employer’s metal shear.
2. Employer did not take steps to ensure that Prado knew he was prohibited from using the metal shear. As a result, Prado used the metal shear on several occasions prior to the accident, and was using it in an unsafe manner when the accident occurred.
3. Prior to the accident Employer failed to have procedures in place to evaluate workplace hazards, which included failing to conduct adequate

³ According to the testimony received during the hearing, a metal shear is equipment used for cutting sheet metal.

⁴ According to the testimony received during the hearing, a “hold-down” is a type of clamping device that holds the stock in place during cutting.

- inspections to detect that the guard in front of the hold-down was adjusted to greater than 3/8 inch from the table.
4. Employer did not provide recognition to employees who follow safe work practices.
 5. Employer did not train Prado effectively regarding safe work practices at work.
 6. Employer did not discipline Prado for violating its safety rules in connection with the accident.
 7. On the date of the accident, there was a greater than 3/8 inch gap between the bottom of a pneumatic or hydraulic U-shaped guard and the table of the metal shear. The gap, which measured approximately 1/2 inch, was large enough to permit Prado's hand to reach the hold-down.
 8. The greater than 3/8 inch gap between the bottom of the guard and the table of the metal shear exposed the operator's hands and fingers to the risk of crushing and amputation by the hold-down.
 9. The gap between the bottom of the guard and the table of the metal shear caused Prado to suffer a crushing/amputation injury, which was a serious physical harm.
 10. Dimenstein did not observe or note any employee exposure to the rear of the metal shear.
 11. The Division correctly applied the penalty-setting regulations in calculating the penalties for Citation 1, item 1 and Citation 2.

Analysis

1. **Did Employer fail to implement its Injury and Illness Prevention Program by either a) failing to maintain a system for ensuring that its employees complied with safe and healthy work practices for the operation of a Lodge & Shipley metal shear (metal shear); or, b) failing to conduct adequate inspections of the metal shear, which would have disclosed that the bottom of the guard protecting the "hold down" on the metal shear was more than 3/8 of an inch from the table/working surface?**

Section 3203, subdivision (a) states in relevant part:

- (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:

...

- (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.

...

(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:

(A) When the Program is first established;

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

...

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

In Citation 1, item 1, the Division alleged:

Instance 1 - 3203(a)(2): Prior to and during the course of the investigation, including, but not limited to, December 18, 2014, the employer did not ensure that all employees complied with safe work practices. On or about 12/18/14 an employee who was not authorized to use a Metal Shear machine had a serious accident when he did use it.

Instance 2 - 3203(a)(4): Prior to and during the course of the investigation, including, but not limited to, December 18, 2014, the employer did not ensure that inspections of the Metal Shear machine were adequate. On or about 12/18/14 the guard for the "Hold-Down" was not close enough to the table to prevent an employee from getting his finger under it and a serious accident occurred.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

To establish the violation, the Division must prove that flaws in Employer's Injury and Illness Prevention Program (IIPP) amount to a failure to implement or maintain an effective program. (See *Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) An IIPP can be proved not effectively implemented on the ground of one deficiency, if that deficiency is essential to the overall program. (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Instance 1:

In *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 09-1920, Decision After Reconsideration (Mar. 5, 2013), the Board held that in order to prove a violation of section 3203, subdivision (a)(2), the Division has the burden of demonstrating that the employer "did not comply with any of the four listed options" under the safety order. There, the Board held that the Division did not meet its burden, because there was substantial evidence that the employer complied with at least one of the four listed options.

There was no evidence found in the Division's investigation that Employer recognized employees who follow safe and healthful work practices.

As for training, Dimenstein testified that through her investigation, she determined that Prado was not trained to use the metal shear. Prado credibly testified that that he had not received training on the metal shear and did not know how to adjust it or how to use extension tools provided by Employer for inserting or holding stock in place while being cut. The only training document offered by Employer, Exhibit B (Employee Safety Orientation Checklist), merely shows that Employer discussed "EMK"⁵ equipment with Prado. Although there was some evidence that Prado was trained on how to use his assigned machine, there was no credible evidence that Employer trained Prado specifically to avoid the metal shear, or generally regarding the risks associated with using machinery that he was not authorized or trained to operate.

With respect to employee discipline, in response to the Division's 1BY letter sent to Employer regarding Citation 2 (Exhibit 3), Employer stated that it had a discipline program in place for safety infractions. Yet, Employer's Production Manager Salvador Carranza (Carranza) merely testified that he *would have* disciplined Prado had he known about Prado using the metal shear. Carranza further testified that Human Resources Coordinator Adriana

⁵ Although neither party specifically defined what "EMK" equipment is, there was no dispute that this equipment was separate and distinct from the metal shear that Prado was using when the accident occurred.

Gonzalez (Gonzalez) had some involvement in employee discipline, but there was no evidence that Prado was ever disciplined for using the metal shear. Thus, there was no credible evidence presented that Employer actually *implemented* a system for disciplining employees for safety violations.

Finally, the Division offered sufficient evidence that Employer did not take any other measures to ensure that employees comply with safe and healthy work practices. Dimenstein testified to numerous ways that Employer could have ensured that employees knew what equipment they were authorized to use (such as with a list of authorized employees, or by use of color coding). Furthermore, the evidence in the record demonstrates that Employer failed to adequately supervise Prado. Prado credibly testified that he had used the metal shear on several or more occasions prior to the accident, despite not being authorized to do so.

Thus, whatever supervision Prado received was insufficient to ensure that he complied with safe and healthy work practices. For all of the foregoing reasons, therefore, the Division proved a violation of section 3203, subdivision (a)(2) by a preponderance of the evidence.

Instance 2:

Although the above discussion is sufficient to affirm Citation 1, item 1, an analysis of instance 2 is provided in order to ensure the completeness of this Decision. Here, the Division alleged that Employer failed to implement its IIPP because it failed to adequately inspect the hold-downs of the metal shear and thus failed to observe that a hold-down was improperly adjusted, leaving more than a 3/8 inch gap through which Prado was able to insert his finger, leading to a serious injury. Even where an employer has a comprehensive IIPP, the Division may still establish a violation by showing that the employer failed to implement the plan, such as by failing to inspect, identify and evaluate hazards. (*HHS Construction*, Cal/OSHA App. 12-0492-0497, Decision After Reconsideration (Feb. 26, 2015), citing *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) Whether an employer implemented its IIPP involves questions of fact. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).)

Dimenstein testified that during her investigation, she learned that Employer had inspected the metal shear visually on the day of the accident and the day before, but had not measured the hold-down with a tape measure or other device. Specifically, Dimenstein interviewed Prado's supervisor, Silvestre Yanez, who told her that he had visually inspected the metal shear the morning of the accident, but had not actually measured the gap between

the hold-downs and the table⁶. Dimenstein credibly testified that it would be very difficult for someone to “eye-ball” the hold-down and determine that it was off by approximately 1/8 of an inch.

Carranza testified that the hold-downs were inspected weekly by himself or by supervisor Pascual Poredes, and were measured with a tape measure and/or a ruler type device. However, Carranza’s testimony that the gap was measured with a measuring device was not credible, particularly in light of Employer’s admission in response to the Division’s 1BY (Notice of Intent to Classify Citation as Serious), wherein Employer’s Human Resources Coordinator Gonzalez⁷ stated “The guard was off by 1/8 [inch], which was very minimal and hard for the operator and supervisor to detect the difference. Had they noticed the guard was off they would have taken the steps necessary to correct immediately.” Gonzalez’s statement shows that Employer did not utilize anything more than visual “eye-ball” inspection to measure the distance between the guard and the table, and provides strong evidence, in the form of an admission, that Employer’s inspections were not adequate to detect workplace hazards.

Thus, for all of the foregoing reasons, the Division established a violation of section 3203, subdivision (a)(4) by a preponderance of the evidence.⁸

2. Did Employer fail to prevent entry to the rear of the metal shear during operation?

Section 4227, subdivision (e), states:

⁶ Although Mr. Yanez did not testify, it was undisputed that he was a supervisory employee, and therefore, his statements are admissible because they are attributable to Employer, who was present at the hearing. (See Cal. Lab. Code, § 6304, which defines “employer” as including every person having direction, management, control or custody over any employee.)

⁷ Employer objected to Exhibit 3 on hearsay grounds, arguing that there was no evidence that Gonzalez was a supervisor authorized to speak on behalf of Employer. Dimenstein credibly testified, however, that she asked Carranza, who was Employer’s representative at the hearing and who was indisputably a supervisor, to whom to send the 1BY, and he responded that it should be directed to Ms. Gonzalez. Carranza also admitted at the hearing that Gonzalez possessed some authority over employee safety. Gonzalez, therefore, had apparent, if not actual, authority to speak on behalf of Employer, and Employer’s hearsay objection was properly overruled.

⁸ Employer argued in its closing brief that the Division did not prove instance 2, because Dimenstein testified that in order to determine whether there was compliance with the inspection requirement, she would need to know more details such as how often inspections took place, and how often metal with different thicknesses was cut with the metal shear. Dimenstein’s testimony, while demonstrating some confusion, does not change the requirements of the safety order. The evidence, as described herein, adequately set forth sufficient facts to support a conclusion that Employer did not adequately inspect the guards in front of the hold-downs.

Chains, barriers or other means of guarding shall be provided to prevent entry to the rear of the shear during operation.

The Division's citation alleged:

Prior to and during the course of the investigation, including, but not limited to, December 18, 2014, the employer did not ensure that chains, barriers or other means of guarding the Metal Shears were provided to prevent entry to the rear of the shear during operation.

The Division's burden includes proving that employees were exposed to the hazard addressed by the cited Safety Orders. (*San Francisco Bay Area Rapid Transit District*, Cal/OSHA App. 11-3137-3139, Decision After Reconsideration (Sep. 21, 2015), citing *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) The Appeals Board has previously required "some evidence that employees came within the zone of danger while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations for there to be a violation." (*Ja Con Construction Systems, Inc. dba Ja Con Construction*, Cal/OSHA App. 03-0441, Decision After Reconsideration (Mar. 27, 2006), citing *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).)

Here, Dimenstein could not recall observing any employees behind the metal shear during her visit. She also did not measure the distance between the edge of the table and the blade. Instead, she appeared to have simply "eye-balled" the table, and testified that she estimated approximately an arm's length distance, which she speculated was dangerous because employees could trip and fall and therefore come into contact with the blade. Although Exhibit 2A appears to show the rear of the metal shear was accessible from the rear due to its placement on the production floor, that evidence was insufficient to support a finding of employee exposure without any evidence that employees actually passed behind the metal shear. The Division did not present any evidence that any employee was likely to visit the rear of the metal shear, that the area was a passage-way to another work location or that it was an exit-way. There was also no evidence that anybody had ever worked behind the metal shear while it was operating or went to retrieve any of the remainder metal while the machine was running.

For the foregoing reasons, the Division failed to establish a violation of section 4227, subdivision (e), by a preponderance of the evidence.

3. Did Employer fail to ensure that no greater than a 3/8 inch gap existed between the bottom of the guard protecting the hold-downs on the metal shear and the table/working surface?

Section 4227, subdivision (b), states:

Automatic clamps of "hold-downs" on metal shears, when cutouts are filled in with plastic or screen, will be acceptable as a guard. Hydraulic or pneumatic hold-downs shall be guarded by U shaped guards coming down to provide a clearance of not more than 3/8-inch between the table and the bottom of the guard or by other means or methods which will provide equivalent protection for the employee.

Citation 2 alleged:

Prior to and during the course of the investigation, including, but not limited to, December 18, 2014, the employer did not ensure the "hold-downs" on the Lodge & Shipley Shear Machine (Model No. S 0412; Serial No. 44323) were guarded by U Shaped guards coming down to provide a clearance of not more than 3/8-inch between the table and the bottom of the guard or by other means or methods which provided equivalent protection for the employee.

On or about December 18, 2014, an employee using the Shear Machine had a serious accident when his finger was crushed under a "hold-down" at the left end of the machine as he trimmed a small piece of sheet metal (approximately 8 inches by 8 inches) down to approximately 6 inches by 6 inches. The gap between the bottom of the U shaped guards and the table at the left end of the machine was great enough for his finger to fit under the guard.

There was uncontradicted evidence that the metal shear featured hydraulic or pneumatic hold-downs. (Exhibit 3, referencing the fact that "Guillermo [Prado] had actually smashed his finger with one of the hold-down

piston[s].”⁹) The undersigned takes official notice of the fact that pistons are components that transfer energy through the compression of liquid (hydraulic pistons) or gas (pneumatic pistons) contained therein.) Additionally, it was undisputed that the hold-downs were guarded by U-shaped guards. (Testimony of Dimenstein; Exhibit 2.) In addition, there was sufficient evidence demonstrating that Employer permitted a greater than 3/8 inch gap to exist between the table and the bottom of the guard on the metal shear. Dimenstein testified that when she spoke with Production Manager Carranza, he admitted to her that at the time of the accident, the guard in front of the hold-down that injured Prado was set at half an inch. Employer also admitted that the “guard was off by 1/8” in its written response to the Division’s 1BY. Employer’s admissions are admissible in spite of Employer’s hearsay objection, because they go against Employer’s interest in that they undercut Employer’s argument that no violation occurred.¹⁰ Consequently, the admissions are afforded great weight.

Employer offered no evidence rebutting the evidence produced by the Division.

For the foregoing reasons, therefore, the Division proved a violation of section 4227, subdivision (b), by a preponderance of the evidence.

4. Did the Division establish a rebuttable presumption that Employer’s violation of section 4227, subdivision (b), was serious?

Section 6432, subdivision (a) provides that a rebuttable presumption of a serious violation exists if “there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (*International Paper Company*, Cal/OSHA App. 14-1189-1191, Decision After Reconsideration (May 29, 2015).) The term “realistic possibility” means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) Section 6432, subdivision (a)(2), further states that the actual hazard may consist of “the existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.”

⁹ A piston is “a sliding metal cylinder that reciprocates in a tubular housing, either moving against or moved by fluid pressure.” (McGraw-Hill Dictionary of Scientific and Technical Terms (6th Ed. 2003), p.1604.)

¹⁰ See California Evidence Code section 1230, which provides that statements that go against one’s pecuniary interest, or which subject the speaker (or in this case, the speaker’s business) to civil liability, are not made inadmissible by the hearsay rule because such statements would not be made by a reasonable speaker unless believed the statement were believed to be true.

Opinions about possibility must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).) Section 6432, subdivision (g) states that a Division safety engineer shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence of custom and practice of injury and illness and prevention in the workplace, if she can demonstrate that at the time of the hearing, her Division-mandated training is current.

Dimenstein testified that she was current in all of her Division-mandated training.¹¹ Dimenstein classified Citation 2 as serious because the height of the hold-down, at one-half of an inch, created a realistic possibility of the kind of crushing injury suffered by Prado. There was no dispute that Prado received a disfiguring crushing injury when his finger went underneath the guard, which was set higher than 3/8 inch from the table. In short, there was more than a hypothetical realistic possibility of serious physical harm. The parties do not dispute that the guard was adjusted more than 3/8 of an inch above the table, and Prado was able to stick his fingers past the guard into the area of the hold-down, which crushed his finger, resulting in him losing a portion of his finger. Pursuant to Labor Code section 6432, subdivision (e)(2), serious physical harm has occurred when there is a loss of any member of the body. Clearly, the loss of part of a finger qualifies as the loss of a body member.

Thus, because a realistic possibility of serious physical harm existed, the Division established a presumption of a serious violation.

5. Did Employer present sufficient evidence to rebut the presumption that its violation of section 4227, subdivision (b), was serious?

An employer can rebut the presumption that a violation is serious if it can prove that it "did not know and could not, with the exercise of reasonable

¹¹ On cross-examination, Employer's counsel Mr. Song challenged Dimenstein's qualifications to render an opinion based on her training and experience. Although Dimenstein admitted that she did not know exactly what was mandated and demurred that instead she was current because she took all the training that she was instructed to take. Nonetheless, there was no dispute that Dimenstein is a registered professional engineer (PE) in California, and has extensive knowledge and background obtained via her education (including a Bachelor's degree in Engineering), as well as over eight years with the Division, relevant to the issues presented. Given the scope of her educational and professional experience, the undersigned deems Dimenstein sufficiently competent to testify as to the elements of section 6432, subdivision (a).

diligence, have known of the presence of the violation.” (Cal. Lab. Code, § 6432, subd. (c).) “Employer may establish 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.

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered. (Labor Code section 6432(c); *International Paper Company*, Cal/OSHA App. 14-1189-1191, Decision After Reconsideration (May 29, 2015).)

However, failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation. (See *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).)

As noted above, Dimenstein testified as to the ways that Employer could have prevented the accident, through use of visual aids such as color coding, more effective training, or more effective supervision. On the last point, it was clear from the evidence that Prado was not adequately supervised. He credibly testified that he had used the metal shear on several occasions prior to the accident. The photographs (Exhibit 2) depicted the metal shear out in the middle of the production floor, where it would have been readily visible to a conscientious supervisor. In addition, Employer offered less than convincing evidence that it diligently inspected the metal shear. It was undisputed that adjusting the guards in front of the hold-downs was not easy and required two people. Employer offered some evidence that only a limited number of employees knew how to adjust the guards in front of the hold-downs. These facts make it all the more egregious that Employer failed to observe the hazard created by the hold-downs.

Thus, for the foregoing reasons, Employer failed to rebut the presumption that the violation of section 4227, subdivision (b), was serious.

6. Did the Division establish a causal link between the violation in Citation 2, and the serious injury that occurred?

In order for a serious violation to be characterized as “accident-related”, the Division must show by a preponderance of the evidence, a causal nexus between the violation and a serious injury. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing

Obayashi Corporation, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001.)

Prado testified that he was able to place his hand underneath the guard of the hold-down in order to hold the stock in place. It was undisputed that the guard in front of the hold-down under which Prado placed his hand, was adjusted more than 3/8 inch from the table. It was also undisputed that Prado suffered a crushing injury when the hold-down clamped down on his fingers. The evidence, therefore, established a causal nexus between the violation and the serious injury by a preponderance of the evidence.

7. Did the Division correctly calculate the proposed penalties?

Penalties calculated in accordance with the penalty setting regulations (section 333 through 336) are presumptively reasonable and will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Citation 1, item 1:

Referring to the Division's C-10 Proposed Penalty Worksheet (See Exhibit 1), Dimenstein stated that she rated Extent as Medium.¹² Extent is defined in Title 8 as follows:

When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW - When an isolated violation of the standard occurs, or less than 15 percent of the units are in violation.

MEDIUM -When occasional violation of the standard occurs or 15 - 50 percent of the units are in violation.

HIGH - When numerous violations of the standard occur, or more than 50 percent of the units are in violation.

¹² Dimenstein rated Severity and Likelihood as Low, the maximum downward adjustment permitted for those factors. Therefore, further discussion is omitted as unnecessary for the benefit of Employer.

Prado testified that he needed significant medical treatment, including surgery, following the accident. Dimenstein's assessment of Medium Severity, therefore, was well supported by the evidence. Employer did not challenge the other adjustments made for abatement, size, history or good faith, or argue that Dimenstein made a mathematical error. The evidence otherwise supported Dimenstein's calculations resulting in the proposed penalty of \$280.

Citation 1, item 2:

As set forth above, the undersigned determined that there was insufficient evidence of employee exposure. Therefore, the penalty for Citation 1, item 2, shall be ordered vacated and further discussion of the calculation of the penalty is omitted as unnecessary.

Citation 2:

The base penalty for a serious violation is \$18,000. (Section 336, subdivision (c)(1)) Serious violations further characterized as "accident related" are subject to downward adjustment only for size. (Section 336, subdivision (c)(3)) Here, as discussed above, the Division established a serious accident related violation by a preponderance of the evidence. Thus, Dimenstein correctly assessed a base penalty of \$18,000 for Employer's violation. (See Exhibit 1.) Furthermore, Dimenstein offered uncontroverted testimony that Employer employed more than 100 employees, and therefore was unentitled to any adjustment for size. Thus, the proposed penalty of \$18,000 was reasonable.

For the foregoing reasons, therefore, the Division proposed reasonable penalties for Citation 1, item 1, and Citation 2.

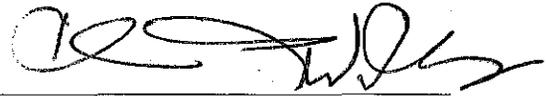
Conclusions

For all of the foregoing reasons, the Division established, by a preponderance of the evidence, violations of section 3203, subdivision (a) [Citation 1, item 1] and section 4227, subdivision (b) [Citation 2]; but, the Division failed to establish a violation of section 4227, subdivision (e) [Citation 1, item 2]. The Division established by a preponderance of the evidence that the violation of section 4227, subdivision (b), was properly classified as serious, and that it caused a serious injury to Employer's employee. Employer failed to rebut the serious classification of Citation 2. Finally, the Division correctly applied the penalty setting regulations and proposed reasonable penalties for Citation 1, item 1, and Citation 2.

Orders

It is hereby ordered that Citations 1, item 1, and Citation 2 are affirmed and the penalties are assessed as indicated above and as set forth in the attached Summary Table. It is further ordered that Citation 1, item 2, is vacated along with the associated penalty. Total penalties are assessed in the amount of \$18,280.

Dated: August 1, 2016
CHW:ml



CLARA HILL-WILLIAMS
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

ACTIVAR CONSTRUCTION PRODUCTS GROUP

DOCKETS 15-R4D1-0878 and 0879

Date of Hearing: April 5, 2016

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Photos A- H and J- K	Yes
3	Er's 1-BY response, 1/21/15	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Division's Documentation Worksheet	Yes
B	Guillermo Prado training records	Yes

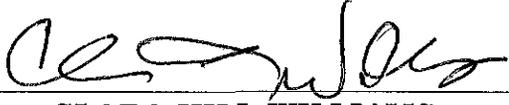
Witnesses Testifying at Hearing

1. Eva Rosalind Dimenstein
2. Guillermo Prado
3. Salvador Carranza

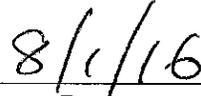
CERTIFICATION OF RECORDING

I, CLARA HILL-WILLIAMS, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above

matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.



CLARA HILL-WILLIAMS



Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**ACTIVAR CONSTRUCTION PRODUCTS GROUP
DOCKETS 15-R4D1-0878 and 0879**

Abbreviation Key:	
G=General	Reg=Regulatory
S=Serious	W=Willful
Er=Employer	R=Repeat
Ee=Employee	DOSH=Division
A/R=Accident Related	

Inspection No. 1015521

DOCKET	CITATION	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	APPEAL	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
15-R4D1-0878	1 1	3203(a)(1)	G	Affirmed	X	\$280	\$280	\$280
	1 2	4227(e)	G	Appeal granted	X	\$375	\$0	\$0
15-R4D1-0879	2 1	4227(b)	S	Affirmed	X	\$18,000	\$18,000	\$18,000
Sub-Total						\$18,655	\$18,280	\$18,280

Total Amount Due*

\$18,280

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments should be made to:**
Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

**ALJ: CHW/ml
POS: 08/01/16**