

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

AVALON BAY COMMUNITIES, INC.
4440 Von Karman Ave, Ste. 300
Newport Beach, CA 92660

Employer

DOCKET 15-R3D2-0751

DECISION

Statement of the Case

Avalon Bay Communities, Inc. (Employer) is a general construction contractor. Beginning September 23, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Paul Espino conducted a complaint inspection at a place of employment maintained by Employer at 701 Breeze Hill Road, Vista, California (the site). On January 25, 2015, the Division cited Employer for a general violation of section 1527, subdivision (a)(1)(C)¹, failure to provide soap for a hand washing station.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, the time allowed to abate, the changes required to abate, and the reasonableness of the proposed penalty. Employer alleged multiple affirmative defenses².

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on February 24, 2016. Kevin D. Bland, Attorney, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.,

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

² Affirmative defenses for which no evidence was presented will not be discussed. They are deemed waived. See section 361.3 (Issues on Appeal) and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).

represented Employer. Kathleen Derham, District Manager, represented the Division. The matter was submitted on March 24, 2016³.

Issues

1. Did Employer fail to have a readily available supply of soap or other suitable cleansing agent at a hand washing station adjacent to a portable toilet pursuant to section 1527, subdivision (a)(1)(C)?
2. Was the violation properly classified as general?
3. Did the Division propose a reasonable penalty?

Findings of Fact

1. The site was a multi-level residential apartment construction site⁴.
2. Employer was the general contractor. Employer had at least two employees on site at all times. One of the employees was Project Superintendent Marco Martinez (Martinez). Martinez and his assistant walked the entire site several times during the day.
3. A maximum of 70 employees, including employees of subcontractors, worked at the site.
4. Employer supplied five dual washing units, for a total of 10 washing stations. Each washing unit contained two complete hand-washing stations with a basin, water, towel dispenser and soap dispenser. A dual washing station consisted of two stations were back to back.
5. The dual washing station nearest the leasing office did not have soap in either of the soap dispensers. The other four dual washing stations were fully supplied.
6. Lack of soap creates the hazard of infection. The hazard of infection relates to employee health.
7. The proposed penalty was calculated in accordance with the penalty setting regulations.

Analysis

1. Did Employer fail to have a readily available supply of soap or other suitable cleansing agent at a hand washing station adjacent to a portable toilet pursuant to section 1527, subdivision (a)(1)(C)?

Section 1527, subdivision (a)(1)(C) states:

- (a) Washing Facilities.

³ Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

⁴ Employer stipulated that the Construction Safety Orders applied.

(1) General. Washing facilities shall be provided as follows: A minimum of one washing station shall be provided for each twenty employees or fraction thereof. Washing stations provided to comply with this requirement shall at all times: ...

(C) Have a readily available supply of soap or other suitable cleansing agent; ...

Section 1504 defines “readily available” as “in a location with no obstacles to prevent immediate acquisition for use.”

The Board has held that “readily available” means that hand washing facilities must be close enough to the toilet for employees to wash their hands before returning to work to minimize transmission of disease to other employees. (*Davey Tree Surgery Company*, Cal/OSHA App. 00-032, Decision After Reconsideration (June 14, 2002).) Hand washing includes the use of soap or other cleansing agent. (*Id.*)

The Division alleged as follows:

Prior to and during the course of the inspection, the Employer failed to provide soap for each hand washing station adjacent to the portable toilets at the worksite.

The parties agreed that Employer’s dual washing unit closest to the leasing office did not have soap available⁵. The hazard associated with a lack of soap is the risk of spreading transmissible diseases to other employees⁶. Martinez and his assistant were exposed to the hazard because they walked the site daily.

In order to get soap after wetting his hands, an employee could walk to another station to get soap, rinse, and dry his hands. The site was approximately seven acres. Associate Safety Engineer Paul Espino (Espino) testified that the other washing stations were so far away as to prevent immediate access for use. It cannot be found that soap was readily available.

Employer was required to have a total of four washing stations, or two dual units. Although Employer voluntarily provided more washing stations than the safety order required, Employer must ensure that they are safe and

⁵ Employer made this admission in its brief and in Martinez’s testimony at hearing. The Appeals Board has held that “Briefs and arguments are reliable indications of a party’s position on the facts as well as on the law, and a reviewing court may make use of statements therein as admissions against the party.” *Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012), fn. 3, citing *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152, citing *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn.3, and *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 23, fn. 1.

⁶ See *Davey Tree Surgery Company*, *supra*, p. 3.

healthful and that they comply with all applicable safety orders. (*Southern California Edison*, Cal/OSHA App. 06-2062, Denial of Petition for Reconsideration (June 20, 2006), citing *Tulip Corporation dba Automotive Battery Products Co.*, Cal/OSHA App. 81-773, Decision After Reconsideration (June 25, 1982).)

Therefore, the Division met its burden to prove a violation of section 1527, subdivision (a)(1)(C).

2. Was the violation properly classified as general?

A general violation is defined in section 334, subdivision (b) as follows:

General Violation—is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.

In order to show a general violation the Division need only show that the safety order was violated and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.* Cal/OSHA App. 97-2733 (Dec. 11, 1998).)

An opinion must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably 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).)

The opinion of one officer on a topic concerning which he is competent to offer opinion testimony is sufficient to establish a prima facie case and, when the opinion goes un rebutted, is enough to base a finding. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009); *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998).)

Espino testified that lack of soap created health hazards such as the spread of infection and bacterial diseases due to unclean hands. His opinion was based upon training he received regarding construction sites and sanitation. It is found that his opinion was based on a valid evidentiary foundation. Therefore, it is further found that the violation has a relationship to employee health.

Accordingly, the violation was properly classified as general.

3. Did the Division propose a reasonable penalty?

Penalties calculated in accordance with the penalty setting regulations (sections 333-336) are presumptively reasonable. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Labor Code section 6319, subdivision (c) sets forth the factors which the Director of the Department of Industrial Relations must include when promulgating penalty regulations: size of the employer, good faith, gravity of the violation, and history of any previous violations. (sections 333-336)

In *M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014), the Board held that if the Division introduces the proposed penalty worksheet and testifies that the calculations were completed in accordance with the appropriate regulations and procedures, it has met its burden to show the penalties were calculated correctly, absent rebuttal by the Employer.

Here, Espino referred to the proposed penalty worksheet (Exhibit 2). Going into some detail, he testified that the calculations were completed in accordance with the penalty setting regulations. Employer did not rebut his testimony. Based on the above precedent, the Division has met its burden to show that the penalty was calculated correctly.

Therefore, the proposed penalty of \$560 is found reasonable.

Conclusion

Employer's handwashing facility did not have soap readily available. The lack of readily accessible soap had an effect on employee health. Citation 1, Item 1, was properly classified as general. The penalty was calculated in accordance with the Division's policies and procedures and is reasonable.

Order

Citation 1 is affirmed and the \$560 penalty is assessed.

It is further ordered that the penalty indicated above and set forth in the summary table be assessed.

DALE A. RAYMOND
Administrative Law Judge

DAR: ao
Dated: April 18, 2016

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
AVALON BAY COMMUNITIES, INC.
Docket 15-R3D2-0751**

Date of Hearing: February 24, 2016

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet, Form C-10	Yes
3	Photo of job site from street	Yes
4	Espino Notes 9-23-14 walk around	Yes
5	Photo of job site from interior	Yes
6	Photo of one side of soap dispenser without soap	Yes
7	Photo of reverse side of soap dispenser without soap	Yes
8	Espino notes 9-23-14 of Erick Donahoe interview	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
	A through J not offered	
K	Photo of job site—far view of portable toilet facilities and washing station	Yes
L	Photo of job site—close up of portable toilet facilities	Yes

Witnesses Testifying at Hearing

Paul Espino

Marco Martinez

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

DALE A. RAYMOND

Signature

Date

SUMMARY TABLE DECISION

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AVALON BAY COMMUNITIES, INC.
Docket 15-R3D2-0751

Abbreviation Key: Reg=Regulatory
 G=General W=Willful
 S=Serious R=Repeat
 Er=Employer DOSH=Division

IMIS No. 317232965

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
15-R3D2-0751	1	1	1527(a)(1)C	G	ALJ affirmed violation	X		\$560	\$560	\$560

Total Amount Due*

\$560

(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.

Please call (415) 703-4291 if you have any questions.

ALJ: DR/ao
 POS: 04/18/2016