

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

PRP PAINTING
1200 N. San Fernando Road
Los Angeles, CA 90065

Employer

DOCKETS 15-R3D1-2907
through 2908

DECISION

Statement of the Case

PRP PAINTING (Employer) is a painting business. Beginning March 25, 2015, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Christine Hoffman (Hoffman), conducted an accident investigation at a place of employment maintained by Employer at 3100 Visions Street, Irvine, California (the site). On May 12, 2015, the Division cited Employer for two violations of California Code of Regulations, title 8.¹ Citation 1, item 1 alleged that Employer did not establish an effective Injury and Illness Prevention Program (IIPP). Citation 1, item 2 alleged that Employer failed to adopt a Code of Safe Practices (COSP). Citation 1, item 3 alleged that Employer failed to ensure that its procedures for complying with section 3395² (Heat Illness Prevention) were in writing and available at the site. Citation 1, item 4 alleged that Employer failed to develop and implement a written respiratory protection program. Finally, Citation 2 alleged that Employer failed to ensure that the ladder base section of a surface supported ladder was placed on secure and level footing, leading to an accident where an employee suffered multiple fractures to his right leg.

Employer filed a timely appeal contesting the existence of the alleged violations, and the reasonableness of the proposed penalties. (See Exhibit 1.)

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and

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

² Section 3395 was amended in 2015, before the Division issued the citation, but after the Division initiated its inspection. For purposes of this Decision, discussion of section 3395 is limited to the pre-2015 language that was operative at the time of the inspection.

Health Appeals Board, at West Covina, California on August 17, 2016. Robert Khachatoorian, Owner, represented Employer. Richard Fazlollahi, District Manager, represented the Division. The matter was submitted on August 17, 2016. The undersigned ALJ extended the submission date to September 14, 2016, on his own motion.

Issues

1. Did Employer establish an effective IIPP?
2. Did Employer establish a COSP?
3. Did Employer ensure that its procedures for complying with section 3395 (Heat Illness Prevention) were in writing and available at the site?
4. Was Employer required to develop and implement a written respiratory protection program?
5. Did Employer fail to ensure that the ladder base section of a surface supported ladder was placed on secure and level footing?
6. Did the Division correctly classify Citation 1, items 1 through 3?
7. Did the Division establish a rebuttable presumption that Employer's violation of section 3276, subdivision (c), was serious?
8. Did Employer rebut the presumption that its violation of section 3276, subdivision (c), was serious?
9. Did Employer's violation of section 3276, subdivision (c), cause a serious injury to Employer's employee?
10. Did the Division propose reasonable penalties?

Findings of Fact

1. On March 14, 2015, Employer's employee Benjamin³ sustained multiple fractures to his lower right leg when the surface-supported ladder that he was standing on gave way while he was painting wrought-iron railings alongside a building at the site.
2. Benjamin had set up the ladder so that the two front legs were placed in soft dirt alongside the building. The dirt was loose and not level. The two rear legs of the ladder were placed on solid concrete.
3. The ladder gave way underneath Benjamin because the dirt beneath the front legs was not secure and level.
4. Employer did not establish an IIPP as of the date of the incident or the Division's inspection.
5. Employer did not adopt a COSP as of the date of the incident or the Division's inspection.
6. Employer did not ensure that its procedures for complying with section 3395 (Heat Illness Prevention) were in writing and available at the site on the date of the incident or upon request from the Division.

³ Benjamin's last name was not provided at hearing.

7. Employer did not require the use of respirators at the site when the incident occurred, nor were respirators in use at the site during the incident.
8. The Division correctly classified Citation 1, items 1 through 4, because each violation bore a direct relationship to employee safety and health.
9. The failure to ensure that the ladder base section of the ladder that Benjamin was standing on was placed on secure and level footing created the realistic possibility that the ladder could shift under Benjamin and lead to serious physical harm such as broken bones and concussion which could require hospitalization for more than 24 hours.
10. The failure to ensure that the ladder base section of the ladder that Benjamin was standing on was placed on secure and level footing caused Benjamin's injuries.
11. The Division correctly calculated the proposed penalties for Citation 1, items 1 through 3. The Division incorrectly calculated the penalty for Citation 2 by applying adjustments for Extent and Likelihood.

Analysis

1. Did Employer establish an effective IIPP?

Section 1509, subdivision (a), states:

Every Employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

The Division issued Citation 1, item 1 to Employer, alleging:

Prior to and during the course of the inspection, but not limited to March 25, 2015, the employer failed to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) in accordance with section 3203 of the General Industry Safety Orders.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

Hoffman credibly testified that she gave a Document Request Sheet to Employer's foreman, Juan Herrera (Herrera), on March 25, 2015 during her inspection. (Exhibit 5.) The Document Request Sheet requested Employers "Written Injury and Illness Prevention Program." Hoffman testified that Employer never provided its IIPP to the Division prior to the issuance date of the citation. Employer had the opportunity to provide an IIPP but did not, and did not explain its failure at the hearing. (See *Kaiser Steel Corporation*, Cal/OSHA App 75,-1135, Decision After Reconsideration (June 21, 1982) [the Appeals Board may consider an employer's failure to explain or deny adverse evidence or facts]; see Evid. Code, § 413; see also *Shehtanian v. Kenny* (1958) 156 Cal.App.2d 576 [failure to offer any evidence on a certain issue, though production of such evidence was clearly within the defendant's power, raised an inference that the evidence, if produced, would have been adverse].)

For the foregoing reasons, the Division established by a preponderance of the evidence that Employer violated section 1509, subdivision (a).

2. Did Employer establish a COSP?

Section 1509, subdivision (b), states:

Every employer shall adopt a written Code of Safe Practices which relates to the employer's operations.

The Division issued Citation 1, item 2 to Employer, alleging:

Prior to and during the course of the inspection, including, but not limited to, on March 25, 2015, the employer failed to adopt a Code of Safe Practices which relates to the employer's operations.

As noted previously, the Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. Hoffman testified that her Document Request Sheet included a request for Employer's Code of Safe Practices. (Exhibit 5.) Employer did not provide a COSP in response to the Division's request. Employer had the opportunity to produce a COSP but did not, and did not explain its failure at the hearing.

For the foregoing reasons, the Division established by a preponderance of the evidence that Employer violated section 1509, subdivision (b).

3. Did Employer ensure that its procedures for complying with section 3395 (Heat Illness Prevention) were in writing and available at the site?

At the time of the inspection, section 3395, subdivision (f) stated:

(f) Training.

.....

(3) The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

The Division issued Citation 1, item 3 to Employer, alleging:

Prior to and during the course of the inspection, including but not limited to March 25, 2015, the employer failed to ensure that the procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H) and (I) were in writing and made available to employees and to representatives of the Division upon request.

Employer did not dispute that it was an employer subject to the Heat Illness Prevention safety order, and the photographs taken by Hoffman (Exhibit 2, collectively) establish that the site was an outdoor place of employment. Hoffman included a request for Employer's HIPP in her Document Request Sheet. (Exhibit 5.) Employer did not provide an HIPP to the Division in response to the request, and did not explain its failure at the hearing.

For the foregoing reasons, the Division established by a preponderance of the evidence that Employer violated section 3395, subdivision (f).

4. Was Employer required to develop and implement a written respiratory protection program?

Section 5144, subdivision (c), states in relevant part:

Respiratory protection program. This subsection requires the employer to develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use.

The Division issued Citation 1, item 4 to Employer, alleging:

Prior to and during the course of the inspection, including, but not limited to, on March 25, 2015, the employer failed to develop and implement a written

respiratory protection program with required worksite-specific procedures and elements for required respirator use.

Section 5144, subdivision (c) is applicable “in any workplace where respirators are necessary to protect the health of the employee” or “whenever respirators are required by the employer.” (Section 5144, subd. (c)(1).)

The cited safety order is part of article 107 (commencing with section 5139) of group 16 of subchapter 7 of chapter four of title 8. The stated purpose of article 107 is to set up “minimum standards for the prevention of harmful exposure of employees to dusts, fumes, mists, vapors, and gases.” (Section 5139.) A “harmful exposure” is defined as an exposure to dusts, fumes, mists, vapors, or gases in excess of any permissible limit set by section 5155, or “of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function.” (Section 5140.)

Here, the Division offered no evidence that respirators were either 1) necessary to protect Benjamin (or any other employee) at the site when the incident occurred, or 2) required by Employer. Benjamin was on a ladder painting decorative wrought-iron railings with a small handheld brush (see Exhibit 2-20) when the incident occurred. There was no evidence that his activity exposed himself or others to a harmful exposure, as the term is used in article 107. Furthermore, there was no evidence that Employer required the use of respirators at the site, or that Employer permitted the voluntary use of respirators at the site. Juan Herrera, Employer’s foreperson for the site, testified that Employer’s employees had occasionally used respirators, and he was unaware of a respiratory protection program. Nonetheless, his testimony did not pertain to any activities conducted at the site within 6 months of when the Division issued its citation. Accordingly, the Division did not establish the applicability of the cited safety order, or employee exposure.

For the foregoing reasons, therefore, the Division failed to prove by a preponderance of the evidence that Employer was required to develop a respiratory protection program. Accordingly, the Division failed to prove that section 5144, subdivision (c) applied to Employer’s operations at the site on the date of the incident.

5. Did Employer fail to ensure that the ladder base section of a surface supported ladder was placed on secure and level footing?

The relevant portion of section 3276, subdivision (e)(7) states:

(7) Footing Support. The ladder base section of surface supported ladders shall be placed on a secure and level footing.

The Division issued Citation 2 to Employer, alleging:

Prior to and during the course of the inspection, including, but not limited to, on, [sic] March 14, 2015, the employer failed to ensure the ladder base section of a surface supported ladder was placed on a secure and level footing, [sic] as a result an employee used a portable ladder (Werner 6 foot A-frame ladder) front base section on soft ground (loose dirt inside of a planter) exposing an employee to a fall resulting in serious injuries.

Herrera and Benjamin both (and independently of each other) told Hoffman the incident occurred while Benjamin was standing on the second rung of the ladder (depicted in Exhibit 2-7). During the inspection, Herrera set up the ladder for Hoffman and demonstrated how he believed the incident occurred. The ladder was set with the back legs on solid concrete, and the front legs in soft, loose dirt. (Exhibit 2-8.) Herrera stood on the second rung of the ladder to show where he believed Benjamin was standing. (Exhibit 2-9.) Herrera demonstrated how Benjamin would have been reaching across the ladder to paint the wrought iron railing when the ladder beneath him shifted and fell. (Exhibit 2-10.) He then set the ladder down on its side to show how he found it when he came to aid Benjamin after the incident. (Exhibits 2-11, 2-12.)

Despite the demonstration Herrera provided to Hoffman, at hearing, Herrera testified that he did not know how the ladder was placed or how the incident occurred. His testimony, however, was not deemed credible by the undersigned because it contradicts both the physical evidence (in particular, Herrera's reenactment, which is depicted in Exhibit 2) and what he told Hoffman. Hoffman's testimony and the evidence produced at hearing (in particular, Exhibits 2-8, 2-9, 2-11, and 2-12) demonstrate that Benjamin placed 2 of the 4 ladder legs on unlevelled, loose dirt. Employer had the opportunity to present evidence of how it believed the accident occurred, but other than Herrera's less than credible testimony that Benjamin had "slipped" by his own accord, Employer failed to offer any evidence to contradict the Division's evidence.

For all of the foregoing reasons, therefore, the Division proved by a preponderance of the evidence that Employer violated section 3276, subdivision (e).

6. Did the Division correctly classify Citation 1, items 1 through 3⁴?

“In addition to ‘directly’ appealing the classification, classification is also at issue whenever a party contests the reasonableness of the penalty. This is because the classification directly affects the proposed penalty amount.” (*Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013), fn. 3; accord *City of Los Angeles, Housing Authority [HACLA]*, Cal/OSHA App. 05-2541, Decision After Reconsideration (Nov. 15, 2011).)

The Division classified each of Citation 1, items 1 through 4, as General. A general violation is defined as “a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.” (Cal. Code Regs., tit. 8, § 334, subd. (b).)

The Division classified Citation 1, item 1, alleging Employer failed to establish an effective Injury and Illness Prevention Program (IIPP), as general. Hoffman testified that not having an IIPP created a risk that employees would be exposed to hazardous conditions in the workplace that would go undiscovered and unaddressed due to lack of inspection. Employer offered no evidence to rebut the classification. Thus, the Division established a relationship between the violation and the health and safety of Employer’s employees.

The Division classified Citation 1, item 2, alleging Employer failed to adopt a Code of Safe Practices (COSP), as general. Hoffman competently testified that because no COSP was available to employees, employees were not aware of its contents (assuming the document exists). The COSP describes safe work practices, therefore, its absence in the workplace relates to employee safety and health, and the Division’s burden is met as to Citation 1, item 2.

The Division classified Citation 1, item 3, alleging Employer failed to make its written HIPP available at the site, as general. Hoffman testified credibly that the lack of a program created a likelihood that employees could suffer heat illness in the field because without an HIPP being made available to them, employees are not aware of the risk factors for heat illness or how to respond to symptoms of heat illness in the field. Hoffman’s testimony was sufficient to establish a relationship between the violation and employee safety and health, and consequently supported the Division’s classification of this item.

⁴ Citation 1, item 4 need not be discussed because the Division failed to establish a violation occurred.

7. Did the Division establish a rebuttable presumption that Employer's violation of section 3276, subdivision (c), was serious?

Labor Code section 6432, in relevant parts, states the following:

(a) 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.

[...]

(g) 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.

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).)

Hoffman testified that she holds a Bachelor of Science degree in Occupational Safety and Health. She spent approximately 7 years as a loss control consultant at the State Compensation Insurance Fund (SCIF) prior to joining the Division, where she has spent the last approximately 3 years employed as an Associate Safety Engineer. As a SCIF loss control consultant, Hoffman conducted field work addressing safety issues and performing risk assessments for insureds. While at SCIF, Hoffman received substantial training in areas including general construction, fall protection and ladder safety. She has also received comprehensive training since joining the Division, including ladder safety training and respiratory safety training. Hoffman also credibly testified that she is current in all of her Division-mandated training. Therefore, the Division established Hoffman's competence to offer testimony to establish each element of the serious violation and to 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 properly classified as serious.

As stated above, the Division established that Employer violated section 3276, subdivision (e), by permitting Benjamin to climb a ladder that was not placed on secure and level footing. Hoffman testified that she learned that Benjamin fractured the tibia and fibula of his right leg as a result of the fall. She further testified that in her experience, including her training and prior investigations of falls from ladders, failing to place the ladder base section of a surface supported ladder on a secure and level footing creates a realistic possibility that an employee can fall from the ladder, resulting in broken bones, head injuries, concussions, and even death.

The existence of serious physical harm as a result of the violation of the safety order combined with the actual hazard caused by Employer's failure to ensure that the ladder base section of a surface supported ladder was on a secure and level footing, establishes a rebuttable presumption that the violation was properly classified as serious.

8. Did Employer rebut the presumption that its violation of section 3276, subdivision (c), was serious?

Labor Code section 6432, subdivision (c), states:

(c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

- (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
- (2) The employer took effective action to eliminate employee exposure to the hazard

created by the violation as soon as the violation was discovered.

Failing to exercise supervision adequate to ensure employee safety is equivalent to not exercising reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Davis Development Company*, Cal/OSHA App. 10-3360, Decision After Reconsideration (June 18, 2014).)

Employer offered no evidence of steps that it took to anticipate and prevent the violation, nor did Employer respond to the Division's 1BY. (Exhibit 5; see Lab. Code, section 6432, subd. (b).) Although Herrera testified that Employer conducts regular tailgate safety meetings, he admitted that he never told Benjamin not to place the ladder base in the dirt, because Herrera felt Benjamin was experienced. Herrera admitted that there was no way for Benjamin to complete the assigned task without getting on the ladder. Finally, Herrera admitted that he was on the other side of the building and could not see Benjamin when the accident occurred, which made it impossible for Herrera to adequately supervise Benjamin.

For all of the foregoing reasons, therefore, Employer failed to rebut the presumption that Citation 2 was properly classified as serious.

9. Did Employer's violation of section 3276, subdivision (c), cause a serious injury to Employer's employee?

In order for a citation to be characterized 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. (*MCM Construction, Inc.* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016), citing *Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011).)

The record supports a finding that Employer failed to ensure that the base section of the ladder that Benjamin was standing on, was placed on secure and level footing. The front legs of the ladder were placed in soft, unlevelled dirt. (Exhibit 2.) Herrera showed Hoffman how the ladder fell over while Benjamin was standing on the second rung, and landed on Benjamin's leg, causing fractures. Hoffman testified that the dirt was loose and therefore was not secure footing for the ladder. Although Herrera claimed that Benjamin was using his cell phone when the accident occurred, this was uncorroborated hearsay and was not credible in any event, because Herrera testified that he only learned of this fact the day before the hearing, which the undersigned found unlikely. The Division's evidence was simply much stronger and more logical than the evidence offered by Employer of how

Benjamin was injured. Given the physical location of the railings, the size and shape of the ladder, and brush Benjamin was using (all depicted in Exhibit 2), it is more likely than not that the front legs were placed in unlevelled, unstable dirt, resulting in it falling and injuring Benjamin.

Here, the evidence supported a finding that the accident was, more likely than not, caused by the ladder not being placed on secure and level footing. As a result, Benjamin suffered multiple fractures in his lower right leg. The Division met its burden of establishing, by a preponderance of the evidence, that it properly characterized Citation 2 as accident related.

10. Did the Division propose reasonable penalties?

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. (See Cal. Code Regs., §§ 333-336, which implements the factors.) Penalties calculated in accordance with the penalty setting regulations (Cal. Code Regs., §§ 333-336) are presumptively reasonable and will not be reduced absent evidence by Employer 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) 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. (*M1 Construction*, Cal/OSHA App. 12-0222, Decision After Reconsideration (July 31, 2014).)

The Division introduced its proposed penalty worksheet. (Exhibit 3.)

Citation 1, item 1:

Hoffman rated Severity⁵ as low, which was the lowest rating she could give. Hoffman testified that she rated Extent⁶ high because she did not receive

⁵ With respect to non-serious violations, section 335, subdivision (a)(1)(A)(ii) states:

When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:

LOW-- Requiring first-aid only.

MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.

HIGH-- Requiring more than 24-hour hospitalization.

an IIPP from Employer, thus, the violation was widespread and applied to 100% of Employer's operations at the site. She further testified that although she rated Likelihood⁷ as low when she issued the citation, she felt at the time of the hearing that it should have been rated medium because she determined 4 employees were exposed and found that a moderate risk of injury existed from not implementing an effective IIPP. Although Hoffman credibly testified to the extent to which employees have been injured in the industry in general due to ladders not being placed on secure and level surfaces, only Benjamin was exposed to the hazard created by the violation. Thus, Likelihood properly remains low under these facts. The Extent and Likelihood adjustments cancelled each other out in terms of the effect on the monetary penalty. (See section 336, subd. (b).) Finally, Employer offered no evidence to refute the above-described calculations. For the above reasons, Hoffman properly calculated the Gravity Based Penalty⁸ as \$1,000.

Turning to the adjustment factors, Hoffman testified that she rated Employer's Good Faith⁹ as poor, resulting in no downward adjustment (see

⁶ Section 335, subdivision (a)(2) states:

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% of the units are in violation.

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

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

⁷ Section 335, subdivision (a)(3) defines Likelihood as follows:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

⁸ The Gravity Based Penalty for a general violation is determined by evaluating the severity of the violation, and then applying the appropriate Extent and Likelihood adjustments. (Section 336, subdivision (b).)

⁹ Good faith is defined in section 335, subdivision (c) as:

(c) The Good Faith of the Employer--is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of CAL/OSHA, and any indications of the employer's desire to comply with the Act, by specific

section 336, subd. (d)(2)), which was appropriate given that Employer offered no evidence before or during the hearing of an operative IIPP. She gave Employer a 20% adjustment for size (see section 335, subd. (b) and section 336, subd. (d)(1)), and Employer offered no evidence that it was entitled to further adjustment based on the number of employees. Finally, Hoffman gave Employer a 10% adjustment for History, the maximum adjustment permitted under the regulations. (See section 335, subd. (d) and section 336, subd. (d)(3).) Applying the adjustment factors, Hoffman arrived at an adjusted penalty of \$700, which she then further reduced by 50% by applying the abatement credit found in section 336, subdivision (e), which resulted in a proposed penalty of \$350. (See Exhibit 3.)

Based on the foregoing, and based on Employer's failure to rebut any of the Division's evidence, the Division correctly set the penalty for Citation 1, item 1 at \$350.

Citation 1, item 2:

Hoffman rated Severity, Extent and Likelihood as low, and based on the record the undersigned finds no reason to deviate from the Division's ratings.¹⁰ Employer offered no evidence prior to or during the hearing of a COSP. The resulting \$500 Gravity Based Penalty was further reduced 30% based on making the same adjustments as described with respect to Citation 1, item 1. The resulting Adjusted Penalty of \$350 was further reduced by 50% by giving Employer an abatement credit, resulting in a proposed penalty of \$175.

Based on the foregoing, and based on Employer's failure to rebut any of the Division's evidence, the Division correctly set the penalty for Citation 1, item 2 at \$350.

Citation 1, item 3:

For Citation 1, item 3, Hoffman rated Severity and Likelihood as low, which gave Employer the maximum reductions allowed for those factors. With regard to Extent, she rated it high because she never received an HIPP from

displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:

GOOD-- Effective safety program.

FAIR-- Average safety program.

POOR-- No effective safety program.

¹⁰ Hoffman testified that Likelihood should have been rated as moderate because employees were not aware of how to perform their jobs safely due to the lack of a COSP, but the Division otherwise failed to offer any evidence to overcome the presumption that the Division correctly calculated the penalty with regard to Likelihood.

Employer. The record supported the Extent rating, because without an HIPP, 100% of Employer's worksites were non-compliant and 100% of its employees were exposed. Thus, she arrived at a Gravity Based Penalty of \$1,000, which the undersigned finds is reasonable and supported by the record.

Hoffman further adjusted the penalty 30% for Size and History, for the reasons and in the manner previously described. The \$700 Adjusted Penalty was further reduced by 50% by applying the abatement credit, resulting in a proposed penalty of \$350, which the undersigned finds reasonable, and which was supported by the uncontroverted evidence offered at hearing.

Based on the foregoing, and based on Employer's failure to rebut any of the Division's evidence, the Division correctly set the penalty for Citation 1, item 3 at \$350.

Citation 2:¹¹

Section 336, subdivision (c) states:

(c) Serious Violation

(1) In General - Any employer who violates any occupational safety and health standard, order, or special order, and such violation is determined to be a Serious violation (as provided in section 334(c)(1) of this article) shall be assessed a civil penalty of up to \$25,000 for each such violation. Because of the extreme gravity of a Serious violation an initial base penalty of \$18,000 shall be assessed.

[¶]. . . [¶]

(3) Serious Violation Causing Death or Serious Injury, Illness or Exposure - If the employer commits a Serious violation and the Division has determined that the violation caused death or serious injury, illness or exposure as defined pursuant to Labor Code section 6302, the penalty shall not be reduced pursuant to this subsection, except the penalty may be reduced for Size as set forth in subsection (d)(1) of this section. The penalty shall not exceed \$25,000.

As noted previously, the evidence established that Employer committed a serious violation of section 3276, subd. (e), which resulted in serious

¹¹ Discussion of the proposed penalty associated with Citation 1, item 4 is purposefully omitted because the undersigned finds good cause to grant Employer's appeal from that item.

physical harm to Benjamin. Accordingly, Hoffman correctly arrived at a Gravity Based Penalty of \$18,000 for Employer's violation. Hoffman testified that her adjustment for Extent was improper, which is supported by the record and the clear language from section 336, quoted above.¹² Thus, the Gravity Based Penalty should have remained \$18,000, and should have only been adjusted 20% for Size. Applying the Size adjustment results in a proposed penalty of \$14,400. Finally, Employer failed to rebut any of the Division's evidence with regard to how it calculated the penalty for Citation 2.

Based on the foregoing, and based on Employer's failure to rebut any of the Division's evidence, the Division incorrectly set the penalty for Citation 2 at \$10,800, and it is properly set at \$14,400.

Conclusions

Employer's appeal from Citation 1, items 1 through 3, is denied. Employer's appeal from Citation 1, item 4, is granted. Employer's appeal from Citation 2 is denied.

Orders

It is hereby ordered that Citation 1, items 1 through 3 are affirmed and penalties are assessed as set forth in the attached Summary Table. It is hereby further ordered that Citation 1, item 4 is vacated. It is hereby further ordered that Citation 2 is affirmed and the penalty is assessed as set forth in the attached Summary Table. Total penalties are assessed in the amount of \$15,275.

Dated: September 16, 2016
HIC:ao

HOWARD I. CHERNIN
Administrative Law Judge

¹² Exhibit 2 also stated "Citation 2, item 1 serious accident related, only adjustment for size, and no abatement credit."

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

Name: PRP Painting
Dockets 15-R3D1-2907-2908

Date of Hearing: August 17, 2016

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	YES
2	Photographs taken by Christine Hoffman during inspection (21 pp.)	YES
3	Division's C-10 Proposed Penalty Worksheet	YES
4	Division's 1BY Notice of Intent to Classify as Serious	YES
5	Division's Document Request Dated March 25, 2015	YES

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
	NONE	

Witnesses Testifying at Hearing

Juan Herrera
Christine Hoffman

CERTIFICATION OF RECORDING

I, HOWARD I. CHERNIN, 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.

HOWARD I. CHERNIN

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**PRP PAINTING
DOCKETS 15-R3D1-2907/2908**

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

IMIS No. 1048841

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
15-R3D1-2907	1	1	1509(a)	G	Affirmed as set forth in Decision	X		\$350	\$350	\$350
		2	1509(b)	G	Affirmed as set forth in Decision	X		\$175	\$175	\$175
		3	3395(f)(3)	G	Affirmed as set forth in Decision	X		\$350	\$350	\$350
		4	5144(c)	G	Vacated as set forth in Decision		X	\$655	\$655	\$0
15-R3D1-2908	2		3276(e)(7)	S A/R	Affirmed as modified in Decision	X		\$10,800	\$14,400	\$14,400
Sub-Total								\$12,330	\$15,930	\$15,275
Total Amount Due*										\$15,275

<p>NOTE: <i>Please do not send payments to the Appeals Board. All penalty payments should be made to:</i> Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142</p>
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(INCLUDES APPEALED CITATIONS ONLY)

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

**ALJ: HIC/ao
POS: 09/16/2016**

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 100 North Barranca Street, Suite 410, West Covina, California, 91791.

On September 16, 2016, I served the attached **DECISION** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at West Covina, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Robert Khachatooriyan, Owner
PRP PAINTING
1200 N. San Fernando Road
Los Angeles, CA 90065

DOSH DISTRICT OFFICE
2000 East McFadden Avenue, Suite 122
Santa Ana, CA 92705

DOSH LEGAL UNIT
ATTN: Amy Martin, Chief Counsel
1515 Clay Street, 19th Floor
Oakland, CA 94612

DOSH LEGAL UNIT
320 West Fourth Street, Suite 400
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 16, 2016 at West Covina, California.

Declarant