

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

In the Matter of the Appeal of:

**SASCO
2750 MOORE AVENUE
FULLERTON, CA 92833**

Employer

Inspection No.
1210439

DECISION

Statement of the Case

SASCO (Employer) is a union electrical contractor, organized into several sub-groups. On February 14, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Muhammad Zubair (Zubair), conducted an accident investigation at the Los Angeles Airport (LAX) Terminal 7, Gate #74, Los Angeles, California (the site).

On February 14, 2017, the Division issued Employer two citations. The first citation alleged a Serious violation for failure to treat electrical equipment as energized until tested or otherwise proven to be de-energized, or, in the alternative, failure to lock out and tag out electrical disconnecting means in the open position. The second citation alleged a Serious violation for failure to use positive means to prevent transmission of electricity beyond the intentionally segregated parts of the electrical system.

Employer filed timely appeals of both citations, contesting their existence, their classifications, and the reasonableness of the penalties. Employer asserted affirmative defenses¹.

This matter was heard by Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Board), in West Covina, California on February 7, April 23, and December 19, 2019. Fred Walter, of Walter & Prince LLP, represented Employer. District Manager Victor Copelan represented the Division on February 7, 2019. Staff Counsel James Clark represented the Division on April 23, 2019. Staff Counsel Kathryn Woods represented the Division on December 19, 2019. This matter was submitted for decision on February 13, 2020.

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

Issues

1. Did Employer treat all electrical systems as energized until tested or otherwise proven to be de-energized; or, in the alternative, did Employer lock out and tag out electrical disconnecting means?
2. Did Employer fail to use positive means to prevent the transmission of electricity beyond the intentionally segregated parts of the electrical system?
3. Did the Division establish a presumption that Citations 1 and 2 were properly classified as Serious?
4. Did Employer rebut the presumption that the violations alleged in Citations 1 and 2 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?
5. Did the Division establish that Citation 2 was properly characterized as Accident-Related?
6. Were the proposed penalties reasonable?

Findings of Fact

1. On February 8, 2017, Night Foreman Greyson Gatts (Gatts), an employee of Employer, was injured at the site when he used a metal tape measure to measure a busway² for switchgear that he was installing.
2. There were 14 switchgear sections that Employer was installing at the site. Gatts was working on installation of the 14 switchgear sections. Section 12 was next to section 13. At the time of the accident, switchgear section 13 was energized. Gatts wanted to work on section 12, and he knew that section 12 should be de-energized before he began his work. Gatts saw that the circuit breaker for section 12 had been locked in the open position and tagged out.
3. Gatts believed that he properly used his tester to check for voltage at the end of the busway (located at the ceiling) for section 12, and that the tester did not indicate that the switchgear was energized.

² A busway is a large copper plate designed to conduct electricity.

4. Gatts's tester was tested after the accident and found to be in good operating condition. There was no explanation for why his tester did not show that section 12 was energized.
5. When Gatts used his metal tape measure to measure the end of the busway, the tape measure touched the busway, causing an arc flash. Gatts received electrical burns that required two weeks of hospitalization for treatment.
6. With the exercise of reasonable diligence, Employer would have known that section 12 was energized. Reasonable diligence required that Gatts examine the electrical drawings for installation of the 14 switchgear sections before work began. Gatts did not have actual knowledge that section 12 was energized. Gatts knew that section 13 was energized. Gatts did not review the electrical engineering drawings before measuring the busway. The drawings showed that switchgears 12 and 13 were not designed to be connected. However, switchgears 12 and 13 had been connected, thereby energizing switchgear 12, even though 12 had been locked out and tagged out.
7. Switchgear 12 was connected with 13 because the equipment manufacturer sent SASCO the switchgear with a window cut between them along with the exact holes, bus links, splice plates, and hardware needed to connect 12 and 13. It was not the practice of experienced installers to refer to line drawings to see where and how connections were to be made. The installation was characterized as "plug and play." By looking at the configuration of the electrical equipment, Employer's electricians believed that 12 and 13 were designed to be connected.
8. At the time of the accident, Gatts was a foreman and journeyman union employee. He had approximately six years experience installing switchgear. He knew that the electrical drawings, not the actual switchgear configuration, controlled how the switchgear should be connected.
9. Positive means to prevent section 12 from being energized by section 13, as set forth in the drawings, would have prevented the arc flash that caused Gatts to suffer his serious injury from electrical burns.
10. Assistant Safety Engineer Zubair was current on his division-mandated training.
11. The penalties were calculated consistently with the Division's policies and procedures.

Analysis

1. Did Employer treat all electrical systems as energized until tested or otherwise proven to be de-energized; or, in the alternative, did Employer lock out and tag out electrical disconnecting means?

Citation 1, Item 1 alleged a violation of California Code of Regulations, title 8, section 2320.3³, or, in the alternative, section 2320.4.

Section 2320.3 provides as follows:

Tests

All electrical equipment and systems shall be treated as energized as required by section 2320.2 until tested or otherwise proven to be de-energized.

Section 2320.4 provides as follows:

De-Energized Equipment or Systems

(a) An authorized person shall be responsible for the following before working on de-energized electrical equipment or systems unless the equipment is physically removed from the wiring system:

...

(2) Locking the disconnecting means in the “open” position with the use of lockable devices, such as padlocks, combination locks or disconnecting of the conductor(s) or other positive methods or procedures which will effectively prevent unexpected or inadvertent energizing of a designated circuit, equipment or appliance.

(3) Tagging the disconnecting means with suitable accident prevention tags conforming to the provisions of section 2320.6 and GISO⁴ Section 3314(e).

The Alleged Violation Description (ADV) for Citation 1, Item 1, alleges:

Prior to and during the course of the investigation, including, but not limited to, on 02/14/2017, in the main electrical room at Terminal 7 of LAX Airport, an electrical power source was connected to the premises wiring system

³ All section references are to California Code of Regulations, title 8, unless otherwise indicated.

⁴ “GISO” stands for General Industry Safety Order.

on the load side of section 13 of the MSB substation switchgear. This was done without the use of positive means to prevent transmission of electricity beyond the intentionally segregated part of the premises wiring system on the load side of section 12. An energized electrical bus duct (480v) was treated as de-energized without being tested during a conduit addition for circuit breaker ‘NPD’.

The Division has the burden of proving a violation by a preponderance of the evidence. (*C.C. Myers, Inc.*, Cal/OSHA App. 00-008, Decision After Reconsideration (Apr. 13, 2001); *Cambro Manufacturing*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) “ ‘Preponderance of the evidence’ is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence.” (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied.)

Where the Division has alleged multiple instances or alternatives, the Board has repeatedly held that the Division need only demonstrate that one of the multiple instances or alternatives charged by a citation is violative of the safety order in order to establish a violation. (*Shimmick Construction Company Inc.*, Cal/OSHA App. 1059365, Decision After Reconsideration p.4 (July 5, 2019), citing *ABM Facility Services, Inc. dba ABM Building Value*, Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015).)

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.

Gatts testified that he tested section 12 verify that section 12 was de-energized. The circuit breaker for section 12 was locked out and tagged out. Gatts knew that section 13 was energized, but he did not know it was interconnected with section 12, thereby energizing section 12. Gatts testified that he used his hand-held tester to determine if section 12 was energized by going to the end of sections 12’s busway, located at the ceiling, and raising his tester. Gatts testified that his tester tested negative for voltage. Gatts’s tester was tested after the accident and was found to be working normally. Gatts had no explanation for why his tester did not test positive. Employer did not offer any explanation for why the tester did not test positive.

It is not reasonable to believe that the tester failed to work when nothing was wrong with it. The more reasonable belief is that Gatts thought he had performed the test, but actually had not; or else, Gatts did not perform the test precisely in the manner required, so the tester did not show the presence of voltage.

Based on the above, it cannot be found that Gatts treated section 12 as energized until tested or otherwise proven to be de-energized. The Division established a violation of section 2320.3.

In the alternative, there was no dispute that an authorized person⁵ did not lock out or tag out section 13. In its brief, Employer concedes it was true that that “ ‘an electrical power source was connected to the premises wiring system on the load side in section 13.... This was done without the use of positive means to prevent transmission of electricity beyond the intentionally segregated part of the premises on the load side of section 12.’ ” (Appellant’s Post-hearing Brief, pp. 3-4.)

Based upon the above, the Division established a violation of section 2340.3 and 2340.4.

2. Did Employer fail to use positive means to prevent the transmission of electricity beyond the intentionally segregated parts of the electrical system?

Section 2320.9 provides:

Backfeeding or interconnection

No electrical power source, permanent or temporary, shall be connected to a premises wiring system, or parts of such a system, unless positive means are used to prevent the transmission of electricity beyond the premises wiring system, or beyond any intentionally segregated parts of such system.

⁵ Section 2300, subsection (b), defines “authorized person” as “A qualified person delegated to perform specific duties under the conditions existing.” Section 2300, subsection (b), defines “qualified person” as “A person, designated by the employer, who has received training in and had demonstrated skills and knowledge in the construction and operation of electric equipment and installations and the hazards involved.”

The AVD for Citation 2, Item 1, provides:

Prior to and during the course of the investigation, in the main electrical room at Terminal 7 of LAX Airport, an electrical power source was connected to the premises wiring system on the load side of section 13 of the MSB substation switchgear. This was done without use of positive means to prevent transmission of electricity beyond the intentionally segregated part of the premises wiring system on the load side of section 12. As a result, on 02/08/2017, an employee received an electric arc flash suffering a serious injury.

Eaton Engineering (Eaton) manufactured the switchgear equipment in question and supplied Employer with drawings (Exhibits 3B, F, I) showing which cross-links should be installed. Eaton Operations Manager Thomas Santrach testified that he found cross-links installed between section 12 and section 13 that were contrary to the drawings. (Exhibit I) Gatts testified that sections 12 and 13 were, in fact, connected, contrary to the drawings. Gatts did not look at the drawings until after his accident.

Employer, in its closing brief, conceded that “a power source was connected to the load side of switchgear #13, without using positive means to prevent transmission to the load side of switchgear #12” in violation of section 2320.9 (Appellant’s Post-hearing Brief, p. 4.)

Based on the above, the Division established a violation of section 2320.9

3. Did the Division establish a presumption that Citations 1 and 2 were properly classified as Serious?

Labor Code section 6432, subdivision (a), defines a Serious violation as follows:

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.

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

(e) “Serious physical harm,” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

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

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

Zubair testified that his Division mandated training was current, and, therefore, he is deemed competent to offer his opinions regarding each element of a Serious violation.

Since Gatts was hospitalized, and his injuries resulted in a serious degree of permanent disfigurement, Gatts’s injury falls within the Labor Code section 6432, subdivision (e) definition of “serious physical harm.”

a. Citation 1

Zubair testified that the actual hazard created by the violation is inadvertent contact with electricity. Neither was section 12 treated as energized, nor were all sources of electricity to

section 12 locked out and tagged out. This created the hazard that Gatts would come in contact with an energized part, which is what happened here with the busway for section 12. An arc flash causing burns resulted. If section 12 had been treated as energized, or if it had been totally locked out and tagged out, Gatts would not have been injured. Thus, there was a realistic possibility of serious physical harm as a result of the violation. Zubair also testified that death was a realistic possibility in this case. Employer did not dispute Zubair's opinion on this issue. Therefore, the Division established a presumption that Citation 1 was properly classified as Serious.

b. Citation 2

Zubair testified that the actual hazard created by the violation is similar to the hazard associated with Citation 1. It is inadvertent contact with electricity because positive means were not used to prevent transmission of electricity from section 13 to section 12. This created the hazard that Gatts would come in contact with an energized part, which is exactly what happened. Serious physical harm or death was a realistic possibility. The contact resulted in an arc flash and burns. If section 12 had been electrically isolated, Gatts would not have been injured. Thus, there was a realistic possibility of serious physical harm as a result of the violation. Employer did not dispute Zubair's opinion on this issue. Therefore, the Division established a presumption that Citation 2 was properly classified as Serious.

4. Did Employer rebut the presumption that the violations alleged in Citations 1 and 2 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

Pursuant to Labor Code section 6432, Employer can rebut the presumption of a Serious violation on the following grounds:

(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.

The Board has consistently held that the knowledge and actions of a supervisor are imputed to the employer. (*Ventura Coastal, LLC*, Cal/OSHA App. 317808970, Decision After Reconsideration (Sept. 22, 2017); *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 13, 2013); *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008).)

Gatts was the night Foreman on the day of the accident. As a supervisor, his knowledge and actions are attributed to Employer. Although it is credible that Gatts did not have actual knowledge that section 12 was energized, he did not take reasonable action to prevent the violations.

The accident occurred because a window was cut between sections 12 and 13 which were not provided for in the line drawings. Eaton provided the exact number of bus links and splice plates needed to connect 12 and 13 via the “window.” Gatts testified that he did not look at the engineering drawings before sections 12 and 13 were connected. Instead, he relied upon the way that the equipment was manufactured. The holes and the hardware were there in the exact amount and size needed to connect 12 and 13. Gatts testified that it was industry practice to rely upon the equipment configuration to determine parts that should be connected because it was self-evident.

Industry practice is not a defense to a violation. (*Ekedal Concrete, Inc.*, Cal/OSHA App. 13-0131, Decision After Reconsideration (Mar. 28, 2016).)

Reasonable diligence required comparison of the engineering line drawings with the actual hardware configurations, regardless of industry practice. Industry practice assumes that the manufacturer will be perfect and never make a mistake manufacturing electrical systems. Expecting perfection 100% of the time is not reasonable.

Therefore, Employer has not shown that it could not have known of the violations alleged in Citations 1 and 2 with the exercise of reasonable diligence. Employer has not carried its burden of proof to rebut the presumption that Citations 1 and 2 were properly classified as Serious.

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

In order to establish that Citation 2, Item 1, was properly classified as Accident-Related, the Division must show a causal nexus between Employer's violation of the safety standard and the employee's serious injury. (*MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016); *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) The Division must show "the violation more likely than not was a cause of the injury." (*Ibid.*)

"An inference is a deduction about the existence of a fact that may be logically and reasonably drawn from some other fact or group of facts found to exist." (*Barrett Business Services, Inc.*, Cal/OSHA App. 315526582, Decision After Reconsideration (Dec. 14, 2016).) "The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016), citing *Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).)

In this case, if section 12 had not been connected with section 13 or if positive means had been used to prevent transmission of electricity beyond section 13, then Gatts would not have come into contact with electricity or with an arc flash when he measured the busway for section 12. Therefore, it must be found that the violation was more likely than not a cause of Gatts's injury.

Accordingly, Citation 2 was properly classified as Accident-Related.

6. Were the proposed penalties reasonable?

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

In this matter, the parties stipulated to the propriety of the penalties if the serious classifications were upheld. (Exhibit 2) As the citations are affirmed, and no additional evidence was presented regarding the penalty calculations to call them into question, the proposed penalties are found reasonable and affirmed for each citation.

Conclusion

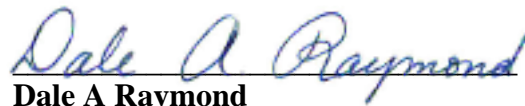
Citation 1: Employer violated sections 2320.3 and 2320.4 by failing to treat an electrical system as energized until tested or otherwise proven to be de-energized and by failing to lock out and tag out the disconnecting means for an electrical system. The violation was properly characterized as serious. The proposed penalty was reasonable.

Citation 2: Employer violated section 2320.9 by failing to prevent the transmission of electricity from one section of switchgear to another. As a result, a foreman received an electric arc flash which caused a serious injury. The violation was properly classified as Serious and characterized as Accident-Related. The proposed penalty was reasonable.

Order

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

Dated: 03/11/2020


Dale A Raymond
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**