BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

PROCESS COOLING INTERNATIONAL DBA APPLIED
PROCESS COOLING CORPORATION (APCCO)
4812 ENTERPRISE WAY
MODESTO, CA 95356

Employer

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Process Cooling International, Inc., doing business as Applied Process Cooling Corporation (Employer), installs refrigeration equipment. Beginning May 11, 2017, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Yancey Yap, conducted an accident inspection at a place of employment maintained by E & G Gallo Winery at 5610 E. Olive Avenue, Fresno, California (the worksite).

On August 7, 2017, the Division cited Employer with four alleged violations of California Code of Regulations, title 8.1 The Division withdrew Citations 1 and 3 prior to hearing. Citation 2 is a serious citation alleging a violation of section 3329, subdivision (e) [failure to control energy within a refrigeration system during modification work]. Citation 4 is a serious citation alleging a violation of section 5189, subdivision (h)(3) [failure to ensure employees complied with applicable work practices and safety rules of the facility in which they were working].

Employer filed a timely appeal contesting the existence of the alleged violations, the classifications, the time allowed to abate, the changes required to abate, and the reasonableness of the proposed penalties. Employer also alleged affirmative defenses.2

The matter was heard before Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in Stockton, California on April 10, 2018, and September 18 and 19, 2018, in Modesto, California. Safety Consultant Paul Andersen represented Employer. Denise Cardoso, Staff Counsel, represented the Division.

1 Unless otherwise stated, all references are to the California Code of Regulations, title 8.
2 The Board will not consider affirmative defenses for which Employer did not present evidence at the hearing; they are deemed waived.
On December 4, 2018, the ALJ issued a Decision upholding Citations 2 and 4, and the associated penalties. Employer timely filed a petition for reconsideration. The Board granted the Employer’s petition for reconsideration, and the Division filed an Answer to the Employer’s petition for reconsideration.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

**ISSUES**

1. Did the ALJ correctly find a violation of section 3329, subdivision (e)?
2. Did the ALJ correctly find a violation of section 5189, subdivision (h)(3)?
3. Did the ALJ correctly uphold the classification of Citations 2 and 4 as Serious?

**FINDINGS OF FACT**

1. Employer was contracted by E & J Gallo Winery (Gallo) to install automatic purgers (“auto purgers”) on refrigeration systems in operation at the Gallo facility in Fresno.
2. The refrigeration systems utilize pressurized anhydrous ammonia (ammonia) as a refrigerant.
3. Anhydrous ammonia is a flammable industrial refrigerant and can cause burns, eye damage, asphyxiation, and death.
4. The auto purgers connect to the high pressure liquid (HPL) pipe that carries ammonia through the refrigeration system.
5. Before installation of the auto purgers, the HPL pipe had to be pumped out, to remove the ammonia. On May 8, 2017, the Employer’s employees began the pump-out process. This process involved closing four valves (“king valves”), to prevent ammonia from moving through the HPL pipe, and to retain the ammonia in high pressure receiver tanks. The closed valves were locked out and tagged out, but an isolation valve on the HPL pipe was left open and not tagged, because it was in its usual operating position. After isolating the ammonia by closing the valves, Bustos turned on the compressors to pull any remaining ammonia from the HPL pipe.
6. Employer did not have a written procedure for this pump-out procedure performed by Employer’s employees.
7. During the May 9, 2017 night shift, one of the king valves leaked ammonia into the HPL pipe, causing a Gallo employee to close the isolation valve when he smelled ammonia.
8. Employer was not informed that the isolation valve was closed during the night shift.
9. On May 10, 2017, Employer’s employee, Abraham Bustos (Bustos) walked the system looking for frost on the pipes (an indicator of ammonia), and to check that the valves were still locked out and tagged out. During the visual inspection Bustos did not smell ammonia, and proceeded with the line break procedure.
10. Bustos began the line break procedure by drilling into the HPL line.
11. Bustos did not take a measurement of the vapor pressure inside the line prior to beginning drilling.
12. During the line break procedure pressurized ammonia discharged through the hole Bustos drilled.

13. As a vendor at the Gallo facility, Employer was required to comply with Gallo’s vendor work rules. Those rules required, among other things, that the Employer comply with the hazardous energy control regulations found in title 8, section 3314.

DISCUSSION

1. Did the ALJ correctly find a violation of section 3329, subdivision (e)?

Citation 2 alleges a Serious violation of section 3329, subdivision (e), a general industry safety order related to pipe lines. The regulation requires the following:

(e) At all times during the repair, modification, or maintenance work, energy within the system shall be controlled to prevent an uncontrolled release that could cause injury.

The Division’s citation reads as follows:

Prior to and during the course of the inspection, including, but not limited to 05-11-2017, the employer did not control the energy within the system during the modification work at refrigeration system plants 8, 9, 10, and 11. During the construction and installation of an automatic purger, the employer did not effectively isolate anhydrous ammonia (NH3). The NH3 contained within the high pressure receiver leaked past king valves, which were the only means used to isolate the hazardous and pressurized anhydrous ammonia. Approximately 7.09 lbs. of NH3 was released during the construction work. The uncontrolled release of NH3 has the potential to asphyxiate employees working in the area of release.

The Employer argues in its petition for reconsideration that the Division did not establish that the energy within the pipe was a hazard, and also argues that the release was controlled, as required by the regulation.

Regarding the first argument, while the Employer may be correct that the energy in the pipe itself was not a hazard, there is no question that an uncontrolled release of anhydrous ammonia, caused by the release of stored energy (i.e. pressure in the HPL), is hazardous. Testifying for the Division, Senior Safety Engineer Yancy Yap (Yap) explained that anhydrous ammonia is flammable, and exposure can lead to serious injuries such as asphyxiation, eye injuries or blindness, and burns. Employer’s reading of the regulation would entirely ignore the clause “to prevent an uncontrolled release that could cause injury.” “[C]ourts must strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous.” (Klein v. United States of America (Jul. 26, 2010) 50 Cal. 4th 68, 80.) The Board rejects Employer’s proposed interpretation of the regulation as inconsistent with its plain language.
Employer also disputes whether the release of anhydrous ammonia constitutes an “uncontrolled release that could cause injury,” as contemplated by the regulation. (Sect. 3329, subd. (e).) The ALJ’s Decision explains that on May 8, 2017, the Employer’s employees began the pump-out process. The closed valves were locked out and tagged out, but an isolation valve on the HPL was left open and not tagged, because it was in its usual operating position. The valve was also left open in case Gallo employees needed to close the valve due to significant escape of ammonia. (Decision, p. 5.)

Overnight, one of the king valves did leak ammonia into the HPL, causing a night shift Gallo employee to close the isolation valve when he smelled ammonia. The night shift neglected to inform Employer’s employees that they had to close an isolation valve. The next day, Employer’s employee, Bustos, conducted a visual inspection of the system. During the visual inspection Bustos did not smell ammonia, and concluded that it was safe to begin the line break procedure. Bustos admitted that he could have determined whether the system was evacuated by “using the service valves that I had left open,” but that he did not do so. Rather, Bustos began drilling a hole at the point where an auto-purger was to be installed.

The Board agrees with the conclusion of the ALJ that the leak that occurred when Bustos began drilling was uncontrolled. Bustos had an expectation that the line was fully evacuated, which would not have resulted in the release of over 7 pounds of ammonia, creating a five foot cloud of ammonia vapor. The release was both unexpected and uncontrolled, and, as discussed above, unrebutted testimony from Yap establishes the possibility of injury that could result from such a leak.

The record establishes that Bustos was drilling a hole to install the auto-purger, rather than to test to ensure the line was clear. Employer’s documentation of the event states, “Service Technician then began to drill hole in the HPL header in preparation for construction crew to begin piping work.” (Ex. 4, Incident Report.) Bustos also testified that if he was testing the line to ensure the system was evacuated, he could have done so by using the open service valves. Rather than a planned and controlled release, the release occurred while Bustos was preparing the line for installation of the auto-purger, which would be installed by another contractor in the hole that Bustos drilled. The evidence supports the conclusion that the release came as a surprise to Bustos, who was unaware that the king valve had been leaking. A violation of section 3329, subdivision (e) is established.

2. Did the ALJ correctly find a violation of section 5189, subdivision (h)(3)?

Citation 4 alleges a Serious violation of section 5189, subdivision (h)(3), a process safety management regulation that has the following scope and purpose:

(a) Scope and Purpose. These regulations contain requirements for preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable or explosive chemicals. The establishment of process safety management regulations are intended to eliminate to a substantial degree, the risks to which employees are exposed in petroleum refineries, chemical plants and other facilities.
The cited regulation states:

(h) Contractors.

[...]

(3) Contractors shall assure that each of their employees have received training to safely perform their job and that the contract employees shall comply with all applicable work practices and safety rules of the facility.

The citation alleges:

Prior to and during the course of the inspection, including, but not limited to 05-11-2017 the employer did not provide training for its employees to comply with all applicable work practices and safety rules of the E&J Gallo Winery facility. All training records showing compliance with the Gallo facility safety rules were requested, the employer did not have them. The employer was engaged in the construction and installation of an automatic purger for refrigeration plant[s] 8, 9, 10, and 11.

The ALJ found that the employees of Employer received appropriate training; the sole issue is whether Employer’s employees complied “with all applicable work practices and safety rules of the facility.” The Decision finds that Employer’s employees failed to follow Vendor Work Rule 19, and Vendor Work Rule 32. (Ex. 11.)

Work Rule 19 states, “Vendor must adhere to the requirements set forth in Cal/OSHA standard, title 8, General Industry Safety Orders, Article 7, Section 3314, Cleaning, Repairing, Servicing and Adjusting Prime Movers, Machinery and Equipment.” Section 3314, in turn, mandates that every employer’s hazardous energy control procedures must be documented in writing. “The employer’s hazardous energy control procedure shall include separate procedural steps for the safe lockout/tagout of each machine or piece of equipment affected by the hazardous energy control procedure.” (§3314, subd. (g)(2)(A).) Employer failed to produce, either during the course of the Division’s investigation, or at hearing, a written hazardous energy control plan. Section 3314, subdivision (g)(2) requires that “[t]he employer's hazardous energy control procedures shall be documented in writing.”

Employer argues in its petition for reconsideration that because the Division and Employer agreed to withdraw Citation 1, the Division’s citation alleging a violation of section 3314, subdivision (g), the Division has admitted that no violation exists, and the Board lacks authority to find such a violation. Employer’s attempt to draw such a conclusion from the Division’s willingness to settle two of the citations is inappropriate, and rejected. Evidence Code section 1154 states, “Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.”

3 While the Board is not bound by the technical rules of evidence, the Board has traditionally relied on the Evidence Code for guidance, and does so again here. (See Pouk & Steinle, Inc., Cal/OSHA App. 03-1495, Decision After Reconsideration (June 10, 2010).)
Work Rule 32 was also alleged to have been violated by the Employer. That rule states, “Vendor will be responsible for confirming the identification of and hazards associated with cutting or welding on pipes or vessels. No cutting or welding will be performed on pipes or vessels that contained flammable material until the pipe or vessel is emptied and flushed with water or purged with an inert gas and quantitatively determined to contain residual vapors less than 10% LEL \(^4\) by reliable instrumentation.” As the ALJ found, the Employer did not confirm the pipe was empty through quantitative measurement, as required by Gallo’s work rules.

The violation is established through a preponderance of the evidence.

3. Did the ALJ properly uphold the Serious Classifications of Citations 2 and 4?

Under Labor Code, section 6432, subdivision (a), in order to create a rebuttable presumption that a “serious violation” exists in a place of employment, the Division must demonstrate that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. As to Citation 2, Yap testified that the actual hazard created by an uncontrolled release of ammonia was asphyxiation, blindness, burns to the skin, and even death. The Division met its initial burden to create a rebuttable presumption that a serious violation existed for Citation 2.

Regarding Citation 4, the Division argued that there was a realistic possibility of death or serious harm, including asphyxiation, blindness, and skin burns, caused by the actual hazard of employees not being provided the knowledge required to work with hazardous chemicals. Yap testified that without having a written lockout/tagout procedure, employees could misunderstand which valves are open or closed, resulting in an inadvertent release of hazardous chemicals.

Once the Division meets its initial burden of proving a rebuttable presumption of a serious violation, the employer may rebut that presumption by showing that it did not, and could not, with the exercise of reasonable diligence, have known of the presence of the violation. (Lab. Code § 6432, subd. (c); Levy Premium Foodservice Limited Partnership dba Levy Restaurants, Cal/OSHA App. 12-2714, Denial of Petition for Reconsideration (Aug. 25, 2014).) The Labor Code provides two separate elements that must be met in order to rebut the presumption:

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.

---

\(^4\) LEL is lower explosive limit.
Concerning Citation 2, Bustos failed to ensure that the isolation valves were still in the open position before beginning his drilling. As the ALJ found in her Decision, “Employer did not claim that Bustos violated its safety procedures by failing to check the status of the isolation valves.” (Decision, p. 12.) Employer did not show that it took all reasonable steps, such as checking the valves before drilling, to prevent an uncontrolled release. As to Citation 4, Employer also did not demonstrate that it took all reasonable steps to ensure that its employees comply with Gallo’s work rules. The Serious classifications of Citations 2 and 4 are upheld.

DECISION

The Decision of the ALJ is upheld. The Division established a serious violation of section 3329, subdivision (e), and section 5189, subdivision (h)(3).

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Board Chairman
Judith S. Freyman, Board Member

FILED ON: 08/23/2019
In the Matter of the Appeal of:
PROCESS COOLING INTERNATIONAL INC dba APPLIED PROCESS COOLING CORPORATION (APCCO)

Citation Issuance Date: 08/07/2017

<table>
<thead>
<tr>
<th>ITEM</th>
<th>SECTION</th>
<th>TYPE</th>
<th>CITATION/ITEM RESOLUTION</th>
<th>AFFIRMED</th>
<th>PENALTY PROPOSED BY DOSH IN CITATION</th>
<th>FINAL PENALTY ASSESSED</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>3314 (g)</td>
<td>S</td>
<td>DOSH withdrew citation in exchange for waiver of costs.</td>
<td>V</td>
<td>$10,125.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>2</td>
<td>3329 (e)</td>
<td>S</td>
<td>DAR issued. Board affirmed citation and penalty.</td>
<td>A</td>
<td>$10,125.00</td>
<td>$10,125.00</td>
</tr>
<tr>
<td>3</td>
<td>5189 (f) (4)</td>
<td>S</td>
<td>DOSH withdrew citation in exchange for waiver of costs.</td>
<td>V</td>
<td>$13,500.00</td>
<td>$0.00</td>
</tr>
<tr>
<td>4</td>
<td>5189 (h) (3)</td>
<td>S</td>
<td>DAR issued. Board affirmed citation and penalty.</td>
<td>A</td>
<td>$10,125.00</td>
<td>$10,125.00</td>
</tr>
</tbody>
</table>

Sub-Total: $43,875.00

Total Amount Due*: $20,250.00

*You may 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.

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to: Department of Industrial Relations

2. Write the Inspection No. on your payment

3. If sending via US Mail:  
   CAL-OSHA Penalties  
   PO Box 516547  
   Los Angeles, CA  90051-0595  

   If sending via Overnight Delivery:  
   US Bank Wholesale Lockbox  
   c/o 516547 CAL-OSHA Penalties  
   16420 Valley View Ave.  
   La Mirada, CA  90638-5821

   Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

   -DO NOT send payments to the California Occupational Safety and Health Appeals Board-

Abbreviation Key:
G=General R=Regulatory Er=Employer
S=Serious W=Willful Ee=Employee A/R=Accident Related
RG=Repeat General RR=Repeat Regulatory RS=Repeat Serious