BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1455641**
AMSWEDE RECYCLING **149 REED COURT** **CHULA VISTA, CA 91911** **Employer**	**DECISION**

Statement of the Case

Amswede Recycling (Employer) operates a recycling facility. Beginning January 14, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer William Moffett, conducted an inspection of a job site located at 149 Reed Court in Chula Vista, California, in response to a report of an injury that occurred on October 7, 2019.

On April 27, 2020, the Division issued one citation to Employer, consisting of four items. Citation 1, Item 1, alleges that Employer failed to report a serious injury of an employee to the Division. Citation 1, Item 2, alleges that Employer failed to implement and maintain an effective Injury and Illness Prevention Program. Citation 1, Item 3, alleges Employer failed to establish, implement, and maintain an effective written Heat Illness Prevention Program. Citation 1, Item 4, alleges that Employer failed to develop and implement effective control procedures to ensure the operator of a haulage vehicle was aware of employees on foot in the vicinity of the haulage vehicle.

Employer filed a timely appeal of the citation contesting the existence of the violations, the classifications of the violations, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalties. Additionally, Employer asserted several affirmative defenses.[1]

This matter was heard by Mario Grimm, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) in West Covina, California, via the Zoom video platform on February 17 and 25, 2022. Ruben Rodriguez,

[1] Except where discussed in this Decision, 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).)

Environmental Health Consultant, represented Employer. Darcy Murphine, Senior Safety Engineer, represented the Division. The matter was submitted for decision on May 26, 2022.

Issues

1. Did Employer fail to report the serious injury of an employee to the Division?

2. Did Employer fail to establish, implement, and maintain an effective written Injury and Illness Prevention Program?

3. Did Employer fail to establish, implement, and maintain an effective written Heat Illness Prevention Plan?

4. Did Employer fail to develop and implement effective control procedures to ensure the operator of a haulage vehicle was aware of employees in the vicinity of the haulage vehicle?

5. Are the classifications of the violations correct?

6. Are the abatement requirements unreasonable?

7. Are the proposed penalties reasonable?

Findings of Fact

1. On October 7, 2019, Employer's employee, Randall Allen (Allen), was injured when he was struck by a front loader at Employer's recycling facility.

2. Michael Stenvall (Stenvall), Employer's Safety Manager, called 911. No one associated with Employer observed the actual accident or had visual confirmation of Allen's injury.

3. Allen was taken to the hospital in an ambulance and was hospitalized for six days, during which time he underwent surgery and received pain medication to treat his injury.

4. Two days after the accident, Andrew Peoples (Peoples), Office Manager, visited Allen in the hospital. Allen reported to Peoples that he was in the hospital to have his wound cleaned and was being held for high blood pressure issues. Peoples did not inquire further about Allen's injury or the reason he was in the hospital.

5. On October 10, 2019, Allen sent a text message to a group of Employer's employees, including Stenvall, stating that he was getting out of the hospital early, but later that day

sent another text message indicating he was not being released because his "levels" were not coming down.

6. On October 13, 2019, Allen sent a text message to the same group of employees indicating that he was being released from the hospital that day.

7. Stenvall made no attempt to get clarification from Allen regarding his injuries or the reason Allen had been in the hospital for several days.

8. Employer did not report Allen's injury to the Division.

9. Employer's Injury and Illness Prevention Program (IIPP) does not have procedures for handling imminent hazards that cannot be immediately abated without endangering employees or property.

10. Employer's Heat Illness Prevention Plan (HIPP) does not contain sufficient information regarding preventative cool-down rest, does not instruct employees or supervisors to transport employees to a location where they can be reached by emergency medical services, and does not have procedures for ensuring that clear and precise directions to the work site can and will be provided to emergency responders if needed.

11. Employer's control procedures for ensuring that haulage vehicle operators were aware of on-foot workers consisted of giving notice to the operator that an on-foot worker would be in the operator's area. The operator and on-foot worker were then expected to maintain a 20-foot distance from one another.

12. Employer's control procedures did not require more than visual communication between the operator and on-foot worker.

13. Matthew Finlan (Finlan), Machine Operator, who was operating the front loader that struck Allen, had a visual of Allen as he approached the area where Allen was on foot performing a safety check of his truck. Finlan lost sight of Allen as he passed him.

14. Finlan was not informed that Allen would be in the area where he was operating the front loader and did not make any attempt to communicate with Allen once he had visual of Allen on foot.

15. Citation 1, Item 1, pertains to a reporting requirement established by regulation, Citation1 Items 2, 3, and 4, are each specifically determined not to be of a serious nature, but have a relationship to the occupational safety and health of employees.

16. Employer offered no evidence regarding the reasonableness of any abatement requirements or that abatement was even at issue.

17. The penalties were calculated in accordance with the penalty-setting regulations.

Analysis

1. Did Employer fail to report the serious injury of an employee to the Division?

California Code of Regulations, title 8, section 342, subdivision (a),[2] provides:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment. […]

Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

At the time of the injury, section 330, subdivision (h), provided, in relevant part:

"Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation […] .

In Citation 1, Item 1, the Division alleged:

On October 7, 2019 at approximately 12:30 p.m. an employee of Amswede Recycling Inc. suffered a serious injury working on or around the dump truck. The employer did not report the injury to the Division.

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

In order to establish a violation of section 342, subdivision (a), the Division must demonstrate that Employer failed to report a serious injury or illness suffered by an employee at work or in connection with work within the required timeframe. Employer does not dispute that it did not report Allen's injury to the Division. Employer argues that Allen did not have a serious injury.

a. Did Employer's employee suffer a serious injury?

"The Division may demonstrate the existence of a serious injury or illness by showing [the] following elements, without limitation: (1) an injury or illness occurred in a place of employment or in connection with a place of employment; (2) the injury required inpatient hospitalization in excess of 24 hours; and (3) the hospitalization occurred for other than medical observation." (*Target Corporation*, Cal/OSHA App. 1251879, Decision After Reconsideration (Jul. 22, 2021).)

Allen testified that his leg was injured when it was run over by a front loader on October 7, 2019, while working at Employer's recycling facility. Allen explained that he was in the process of walking around his roll-off truck, performing a safety check, and as he was about to get back in his truck, he was struck on his back by the first tire of the front loader. The first tire knocked him down, and he was then run over by the second tire. Stenvall, who was Employer's Safety Manager at the time, called 911. Allen was taken to the hospital by an ambulance. Allen testified that, upon arrival at the hospital, he was informed by hospital staff that he had an eight-inch incision on his leg and exposed tendons and was taken into surgery. Allen was released from the hospital six days later on October 13, 2019.

Employer argued that Allen did not have a serious injury because Allen had no observable injury at the time of the accident and stated that he was being held in the hospital for observation due to high blood pressure, which Employer understood to be a preexisting condition. While these arguments may be relevant to Employer's knowledge, they are insufficient to refute Allen's testimony that he had surgery to treat his injury while in the hospital. The fact that Stenvall and other employees did not see any bodily injury at the time of the accident does not necessarily mean that Allen was only in the hospital for medical observation. Similarly, while it may be that Allen was held in the hospital for observation of his blood pressure, this does not negate the fact that he also had surgery for his injury.

The possibility that one of the reasons Allen was held at the hospital was for a preexisting high blood pressure issue is not determinative as to whether Allen had a serious injury. The Appeals Board has held that "[i]f an employee is hospitalized for more than 24 hours during which time he receives treatment for the condition which arose at work, the illness is reportable."

(*YNT Harvesting*, Cal/OSHA App. 08-5010, Denial of Petition for Reconsideration (Mar. 14, 2013).) Allen was hospitalized after suffering an injury at work, received surgery to treat the injury, and was in the hospital for three days before being held because his "levels" were not dropping. (Ex. D.) As such, the injury was serious as defined by section 330, subdivision (h).

Furthermore, Allen testified he was medicated with pain medication while in the hospital for his injury, which Employer did not dispute. The Appeals Board addressed the term "medical observation" in *Target Corporation, supra*, Cal/OSHA App. 1362970:

> The word 'observe' is defined to mean, relevant here, 'to watch carefully especially with attention to details or behavior for the purpose of arriving at a judgment' or 'to make a scientific observation on or of.' An 'observation' is defined to mean, relevant here, 'an act of recognizing and noting a fact or occurrence often involving measurement with instruments' or 'a judgment on or inference . . . from what one has observed.' For something to constitute 'other than medical observation,' it must not fit within the foregoing definitions; it must be other than.

Medicated is defined as "to treat (someone or something) with or as if with medicine."[3] Based on the definition of medicated, receiving medication is treatment. As Allen was treated with medication while in hospital, he was in the hospital for other than medical observation.

Based on the foregoing, Allen's injury was serious because he was injured at his work place resulting in an inpatient hospitalization of more than 24 hours for other than medical observation.

b. Did Employer have knowledge of the employee's serious injury?

The Appeals Board will uphold a citation for failure to report a serious injury where the Employer knew of the serious injury, or should have known that the injury was serious had it made a diligent inquiry into the matter. (*Burbank Recycling, Inc.*, Cal/OSHA App. 10-0562, Decision After Reconsideration (Jun. 30, 2014).) The Appeals Board also cited *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003), to offer the following discussion regarding measuring whether the employer had "constructive knowledge" of an employee's serious injury:

> We find that in addressing the constructive knowledge requirement in section 342(a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of

[3] https://www.merriam-webster.com/dictionary/medicating <accessed May 26, 2022>

> the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical treatment, Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h).

An employer may not choose to remain ignorant about the nature of an employee's injury. (*Benicia Foundry & Iron Works, Inc., supra,* Cal/OSHA App. 00-2976.) "Once an employer has notice of a sufficient likelihood of the injury being serious, additional inquiry is required." (*General Truss Co, Inc.*, Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011), citing *J & W Walker Farms,* Cal/OSHA App. 09-1949, Decision After Reconsideration (Nov. 2, 2009).)

Here, Employer argued that it reasonably believed that Allen did not have a serious injury because Allen did not appear to be severely injured. Stenvall testified that he heard screaming, so he went to investigate and found Allen on the ground who stated that he had been run over by the front loader and his legs were crushed. Stenvall further testified that Allen did not appear to be injured, but he called 911 at Allen's request. Allen was assessed by the paramedics and taken to the hospital in an ambulance. Stenvall observed the paramedics begin to cut Allen's pant leg, but at that point left, and did not observe anything further and did not speak to the paramedics about Allen's injuries.

Finlan, who was driving the front loader that struck Allen, testified to a similar version of events as Stenvall. He heard screaming so he stopped the front loader, came out to investigate, found Allen on the ground who stated that his legs had been crushed by both tires of the front loader. Finlan asserted that Allen did not appear to be injured and he did not see any blood. Edgar Arazia (Arazia), Employer's Office Manager, testified that Allen did not appear injured because there was no dirt on his pants. Arazia testified that he observed the incident via video, but due to the vantage point of the cameras he did not see the actual accident. He only observed the two vehicles, the front loader passing Allen's truck, and Allen then hitting the ground. Both Finlan and Arazia testified that the police officers, who arrived on the scene, said Allen's injuries did not comport with his claim that he was run over by the front loader because his legs were not crushed.

While Employer may have had suspicions that Allen was exaggerating his injury or the events of the accident, it did not have conclusive information that Allen's injuries were not serious. None of Employer's witnesses actually observed the accident, had visual confirmation that Allen did not suffer bodily injury, or were otherwise given information about Allen's actual injuries at the time of the accident. The information Employer had was that Allen reported that he had been run over by the front loader, which one would reasonably suspect would lead to significant injury even if it did not appear that his legs had actually been crushed, and had been transported to the hospital.

Employer attempted to contact Allen while he was in the hospital. After being unable to reach Allen by telephone for two days, Peoples, Employer's Office Manager, went to the hospital to check on Allen. Peoples testified that he was told by Allen that Allen was in the hospital to have his wound cleaned and that he was supposed to be released, but was held due to high blood pressure. Peoples did not make any further inquiry about Allen's injury. As Employer still had inconclusive information, it should have made further inquiry into the nature of Allen's injury by simply asking Allen to provide clarification, but it did not do so.

Employer also argued that it was reasonable to believe that Allen had not suffered a serious injury based on Allen's statement that he was in the hospital for high blood pressure. Stenvall also testified that he was told by Allen that Allen was only in the hospital due to high blood pressure. However, Peoples' testimony contradicts Employer's argument that it could have reasonably believed that Allen was in the hospital only for observation of high blood pressure. As discussed above, Allen told Peoples he was in the hospital to have his wound cleaned. Stenvall asserted that he attempted to get Allen's medical records, but was unable to obtain the records. Even if this was the case, it does not excuse Employer's failure to report. Stenvall and Peoples were in communication with Allen and could have simply asked Allen to provide clarity on his hospital stay, but they did not do so.

Furthermore, Peoples reported on a Form 5020, Employer's Report of Occupation Injury or Illness for purposes of workers' compensation insurance, that Allen's injury was a possible sprained ankle, and he was sent to get an x-ray. (Ex. 5.) It is unclear what information led Peoples to report that Allen had a possible sprained ankle, but it shows that Employer did not actually believe that high blood pressure was the only reason Allen was in the hospital.

As set forth above, "once an employer has notice of a sufficient likelihood of the injury being serious, additional inquiry is required." (*General Truss Co, Inc.*, *supra*, Cal/OSHA App. 06-0782.) Employer knew Allen was injured at work, transported to the hospital by ambulance, had been in the hospital for several days, and indicated the he was wounded. While these factors may not have been enough to definitively conclude Allen had suffered a serious injury, it was

enough to cause employer to make a diligent inquiry, which it did not do. Instead, Employer relied on its conjecture about the accident and injury, and assumed that Allen had not been severely injured.

Employer's skepticism about whether Allen's injury was serious is not sufficient to relieve Employer of its reporting obligations pursuant to section 342, subdivision (a). As the Appeals Board has held in numerous cases, any doubts as to the extent of the employee's injuries should be resolved in favor of reporting. (*Burbank Recycling, Inc., supra,* Cal/OSHA App. 10-0562.)

Employer did not report the serious injury to the Division as required by section 342, subdivision (a). Accordingly, the Division established a violation of section 342, subdivision (a).

2. Did Employer fail to establish, implement, and maintain an effective written Injury and Illness Prevention Program?

Section 3203 requires employers to have a written IIPP that meets the minimum requirements set forth in the regulation and that the IIPP must be established, implemented, and maintained effectively. In Citation 1, Item 2, the Division references section 3203, subdivisions (a)(2), (4), (6), and (7), which provide, in part, that an IIPP must:

> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
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> …
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> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
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> …
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> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
>
> (7) Provide training and instruction:
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> ….

In Citation 1, Item 2, the Division alleged:

> Prior to and during the course of the inspection including but not limited to January 14, 2020 the employers Safety Program was found to be deficient in that the program is missing the aforementioned sections required in accordance with 3203(a) of the General Industry Safety Orders.

"In order to have an effective written IIPP, an employer must, at a minimum, provide an IIPP which contains the seven elements enumerated in section 3203(a)." (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)

At the time of the inspection, Employer provided a copy of its IIPP to Associate Safety Engineer William Moffett (Moffett). (Ex.8.) Moffett testified that, upon review of Employer's IIPP, he was unable to locate sections pertaining to procedures to ensure compliance with safe and healthy work practices, procedures for identifying and evaluating work place hazards, methods and/or procedures for correcting unsafe or unhealthy conditions, and training.

During the hearing, Employer argued that it had a complete written IIPP in place and presented Exhibit G, an additional part of its IIPP. Peoples testified that this document was in effect since the start of his employment in 2016 or 2017 and was located in Employer's Operating Plan. The Division did not object to the admission of Exhibit G. Although Employer did not provide an explanation for why no one had previously provided the Division this part of its IIPP, based on Peoples' testimony it was available and in effect at the time of the inspection. Nonetheless, a review of both Exhibit 8 and G reveal that Employer's IIPP did not contain all of the required elements.

a. Procedures to ensure compliance with safe and healthy work practices.

Section 3203, subdivision (a)(2), requires employers to have a system in place for "ensuring that employees comply with safe and healthy work practices." Substantial compliance is achieved by using one of the following methods: "recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices." (§3203(a)(2).)

Here, in part 5, Employer's IIPP provides for discipline of employees who violate safety rules. (Ex. 8 and G.) Exhibit G outlines the potential disciplinary actions for a violation of Employer's safety rules, which include a verbal warning up to termination. Accordingly, Employer's IIPP was not deficient in the provisions required by section 3203, subdivision (a)(2).

b. Procedures for identifying and evaluating work place hazards.

"Section 3203(a)(4) requires that employers include procedures for identifying and evaluating work place hazards in their Injury and Illness Prevention Programs. These procedures must include 'scheduled periodic inspections to identify unsafe conditions and work practices.' (Section 3203(a)(4).)" (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) Inspections are also required when the IIPP is first established, when new substances, processes, procedures, or equipment are introduced to the work place, and when the employer learns of a new or previously unrecognized hazard. (§ 3203, subds. (a)(4)(A) through (C).)

Employer's IIPP contains provisions for identifying and evaluating work place hazards, specifically requiring monthly inspections and inspections when any of the events listed in section 3203, subdivisions (a)(4)(A), (a)(4)(B), and (a)(4)(C), occur. (Ex. G.) Employer's IIPP also contains a detailed checklist for performing inspections. (*Id*.) Therefore, Employer's IIPP meets the requirements for identifying and evaluating work place hazards.

c. Procedures for correcting identified hazards.

"Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards. [Citations omitted.]" (*BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) Correction of hazards must be made when observed, and in the event of an "imminent hazard which cannot be immediately abated without endangering employee(s) and/or property" an employer must "remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards." (§ 3203, subds. (a)(6)(A) and (B).)

Here, Employer's IIPP instructs the "need for action to correct workplace safety or health deficiencies" and to "[e]nsure that the person responsible for completing each corrective action is clearly documented." (Ex. 8.) The IIPP further instructs supervisors to "continuously observe their work areas for unsafe actions or conditions and correct any deficiencies noted." (*Id.*) Elsewhere in the IIPP, managers are instructed to act promptly to correct hazards. (*Id*.) However, there is nothing in Employer's IIPP about procedures for handling imminent hazards. Peoples testified that he did not know if Employer's IIPP contained such procedures and could not point to any in the IIPP. Therefore, Employer's IIPP did not have all the necessary elements required by section 3203, subdivision (a)(6).

d. Provide training and instruction.

The Division also alleges Employer's IIPP failed to contain, in writing, all the required training and instruction listed in section 3203, subdivision (7):

> (A) When the program is first established;
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> […]
>
> (B) To all new employees;
>
> (C) To all employees given new job assignments for which training has not previously been received;
>
> (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
>
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
>
> (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Employer's IIPP expressly provides that "[a]ll employees will receive safety training prior to starting work and whenever the hazards in their work area change." (Ex. 8 and G.) The IIPP also requires that supervisors and managers be trained on the IIPP and apprised of their responsibilities. (Ex 8.) The IIPP also requires training when an employee receives a new assignment or "new equipment or procedure is introduces and when a new hazard is identified." (Ex G.)

During the hearing, Peoples testified that Exhibit G did not have provisions for training employees on new procedures or for training supervisors. However, as set forth above, Employer's IIPP expressly provided for such training. Therefore, Employer's IIPP meets the minimum requirements for training set forth in section 3203, subdivision (a)(7).

"The Division need only show one missing component, of the many required by the safety order, in order to establish a violation. [Citations.]" (*Hill Crane Service, Inc*., Cal/OSHA App. 1135350, Decision After Reconsideration (Sep. 24, 2021).) As set forth above, the Division established that Employer's IIPP is deficient with regard to procedures for handling imminent hazards that cannot be immediately abated without endangering employees or property. Therefore, Citation 1, Item 2, is affirmed.

3. Did Employer fail to establish, implement, and maintain an effective written Heat Illness Prevention Plan?

In Citation 1, Item 3, the Division cited Employer for a violation of section 3395, subdivision (i), which provides:

> Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall at a minimum, contain:
>
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

In Citation 1, Item 3, the Division alleged:

> Prior to and during the course of the inspection including but not limited to January 14, 2020 the employer, whose employees perform outdoor work activities for recycling operations failed to establish, implement and maintain an effective written Heat Illness Prevention Pion as required by this subsection.

"Although it need not conform to the exact format or language of the regulation, an employer's HIPP must contain, at a minimum, all elements and sub-elements specified in the regulation." (*Hill Crane Service, Inc*., *supra,* Cal/OSHA App. 1135350, citing *L&S Framing, Inc*. Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 2, 2021).)

Here, Moffett testified that at the time of inspection he was provided Employer's HIPP, which consisted of a multi-page print out of a Heat Stress PowerPoint presentation. (Ex. 9.) Moffett testified that Employer's HIPP did not contain any of the elements required by section 3395, subdivision (i).

At the hearing, Employer submitted its HIPP dated January 2017 consisting of a one page written policy, a facility map, and Appendix A, which contained the first two slides from the Heat Stress PowerPoint presentation originally provided to Moffett at the time of inspection.

(Ex. I.) Peoples testified that this document and the Heat Stress PowerPoint presentation consisted of Employer's entire HIPP and it was in existence during his employment. The Division did not object to the admission of Exhibit I and acknowledged that it appeared to be part of Employer's HIPP.

Accordingly, Exhibits 9 and I are taken together as Employer's HIPP in effect at the time the citation was issued.

a. Procedures for the provision of water and access to shade.

Section 3395, subdivision (c), provides, in relevant part:

(c) Provision of water. Employees shall have access to potable drinking water … including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. […]

Section 3395, subdivision (d), provides:

(d) Access to shade.

(1) Shade shall be present when the temperature exceeds 80 degrees Fahrenheit. When the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling. The amount of shade present shall be at least enough to accommodate the number of employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other. The shade shall be located as close as practicable to the areas where employees are working. Subject to the same specifications, the amount of shade present during meal periods shall be at least enough to accommodate the number of employees on the meal period who remain onsite.

(2) Shade shall be available when the temperature does not exceed 80 degrees Fahrenheit. When the outdoor temperature in the work area does not exceed 80 degrees Fahrenheit employers shall either provide shade as per subsection (d)(1) or provide timely access to shade upon an employee's request.

(3) Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. An individual employee who takes a preventative cool-down rest (A) shall be monitored and asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.

(4) If an employee exhibits signs or reports symptoms of heat illness while taking a preventative cool-down rest or during a preventative cool-down rest period, the employer shall provide appropriate first aid or emergency response according to subsection (f) of this section.

Employer's HIPP provides: "All employees shall use the designated 'Shade' areas and ice drinking water noted in highlighted areas in the attached site Map (Attachment A)." (Ex. I.) Employer's IIPP also contains language requiring "cool drinking water (at least one quart per hour) and shade or a cool resting area are available for employees." (Ex. 8.)

While Employer's HIPP contains information on providing adequate shade and water to employees, the HIPP does not contain sufficient information regarding preventative cool-down rest. In the high heat procedures section of the HIPP, instructions are provided for reminding employees of their right to take a cool-down rest. (Ex. I.) However, there is no requirement that a person taking preventative cool-down rest be monitored and asked about symptoms of heat illness. Nor does Employer's HIPP instruct that those taking a preventative cool-down rest should be encouraged to remain in the shade and shall not be ordered back to work until symptoms have abated or have been in the shade for at least five minutes.

Accordingly, Employer's HIPP was deficient in its shade provisions.

b. High heat procedures.

The Division also alleges Employer's HIPP failed to contain, in writing, all required high heat procedures listed in section 3395, subdivision (e):

(e) High-heat procedures. The employer shall implement high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit. These procedures shall include the following to the extent practicable:

(1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purpose only if reception in the area is reliable.

(2) Observing employees for alertness and signs or symptoms of heat illness. The employer shall ensure effective employee observation/monitoring by implementing one or more of the following:

(A) Supervisor or designee observation of 20 or fewer employees, or

(B) Mandatory buddy system, or

(C) Regular communication with sole employee such as by radio or cellular phone, or

(D) Other effective means of observation.

(3) Designating one or more employees on each worksite as authorized to call for emergency medical services, and allowing other employees to call for emergency services when no designated employee is available.

(4) Reminding employees throughout the work shift to drink plenty of water.

(5) Pre-shift meetings before the commencement of work to review the high heat procedures, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary.

[...]

Here, Employer's HIPP contains a section entitled high heat procedures, which includes all the required elements set forth above. Accordingly, Employer's HIPP was not deficient in its high heat procedures.

c. Emergency response procedures.

Section 3395, subdivision (f), provides, in relevant part:

(f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:

(1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor or emergency medical services when necessary. …

(2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided.

(A) If a supervisor observes, or any employee reports, any signs or symptoms of heat illness in any employee, the supervisor shall take immediate action commensurate with the severity of the illness.

(B) If the signs or symptoms are indicators of severe heat illness (such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.

(C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with the employer's procedures.

(3) Contacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider.

(4) Ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

Employer's HIPP does not have a section entitled emergency response procedures, but the Heat Stress PowerPoint presentation makes some reference to the required elements, such as communication, signs and symptoms of heat illness, rendering first-aid, and contacting

emergency medical services. (Ex. 9.) However, Employer's HIPP does not instruct employees or supervisors that they should transport employees to a location where they can be reached by emergency medical services if necessary. Additionally, Employer's HIPP does not have any procedures for ensuring that clear and precise directions to the work site can and will be provided to emergency responders if needed.

Accordingly, Employer's HIPP lacks the minimum requirements for emergency response procedures set forth in section 3395, subsection (f).

d. Acclimatization methods and procedures.

Section 3395, subdivision (g), provides:

(g) Acclimatization.

(1) All employees shall be closely observed by a supervisor or designee during a heat wave. For purposes of this section only, "heat wave" means any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and at least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days.

(2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

Here, Employer's HIPP contains acclimatization procedures that mirror the language in section 3395, subdivision (g). Accordingly, Employer's HIPP was not deficient in its acclimatization procedures.

As set forth above, to find a violation, the Division only needs to show one missing component of the safety order. (*Hill Crane Service, Inc.*, *supra*, Cal/OSHA App. 1135350.) As set forth above, the Division established that Employer's HIPP is deficient with regard to the provisions for shade and emergency response procedures. Therefore, Citation 1, Item 3, is affirmed.

4. Did Employer fail to develop and implement effective control procedures to ensure the operator of a haulage vehicle was aware of employees in the vicinity of the haulage vehicle?

Section 3666, subdivision (a), requires "haulage vehicles and earthmoving equipment…and similar equipment shall comply with Article 10, Haulage and Earthmoving, of the Construction Safety Orders." Section 1592, subdivision (e), located in Article 10, provides: "Hauling or earth moving operations shall be controlled in such a manner as to ensure that equipment or vehicle operators know of the presence of rootpickers, spotters, lab technicians, surveyors, or other workers on foot in the areas of their operations."

In Citation 1, Item 4, the Division alleged:

> Prior to and during the course of the inspection including but not limited to January 14, 2020 the employer failed to develop and implement effective control procedures to ensure the moving and hauling operations where a Volvo front loader is utilized to move recyclable materials about in the yard is controlled in a manner to ensure that the equipment operators are aware of the location of employees on foot in the vicinity of the equipment.
> Ref. T8 CCR 3666 GISO & T8 1592(e)

In order to establish a violation of section 1592, subdivision (e), the Division needs to prove that an employer failed to implement control procedures to ensure an operator of hauling or earth moving equipment knew of the location of employees on foot in the vicinity of the equipment. (*R & L Brosamer, Inc*., Cal/OSHA App. 03-4832, Decision After Reconsideration (Oct. 5, 2011), citing *Teichert Const. v. California Occupational Safety and Health Appeals Bd*. (2006) 140 Cal.App.4th 883, 891-892).) The meaning of this safety order has been analyzed by the Court of Appeal:

> The safety order is designed to protect workers on foot and imposes an affirmative obligation upon an employer to control such operations. Hauling and earth moving operations inherently involve movement of equipment and vehicles in the defined area and the location of such vehicles changes within the area of operation. Only where control measures are used by the employer to ensure that operators know of workers on foot in their immediate vicinity will the safety order have the intended effect of protecting workers on foot from the hazards of hauling and earth moving equipment.

(*Teichert Const. supra,* at 891-892.)

The regulation requires that operations be controlled. Control means "to exercise a directing, restraining, or governing influence over; to direct, to counteract, to regulate. (Citations omitted.)" (*HB Parkco Construction, Inc*., Cal/OSHA App. 07-1731, Decision After Reconsideration (Mar. 26, 2012), citing *Teichert Const. supra,* 140 Cal.App.4th 883.) Generally

informing equipment operators that workers on foot will be in the area, and to look out for them, does not ensure the operators obtain knowledge of those workers' location sufficient to satisfy the requirements of the safety order. (*Teichert Const. supra,* 140 Cal.App.4th 883.) The Appeals Board has found that a system where workers on foot were responsible for avoiding the movement of earth moving equipment is an inadequate control procedure. (*R. L. Brosamer, Inc., supra,* Cal/OSHA App. 03-4832.) Additionally, a system that required an operator and on-foot worker to make eye contact and acknowledged each other through waving or other clear method to be determined by the employees is insufficient to establish control and does not ensure that an operator knows of the exact location of workers on foot. (*HB Parkco Construction, Inc., supra,* Cal/OSHA App. 07-1731.)

Here, there was no dispute that the front loader operated by Finlan was a haulage vehicle. Moffett testified that Employer's code of safe practices contained some control procedures. While Moffett could not precisely recall the written procedures other than a requirement that workers wear a high visibility vest, he testified that the procedures were insufficient because there was no mechanism for ensuring that operators knew of the presence of workers on the ground within their immediate area. According to Finlan, Employer's control procedures consisted of someone in the office or the on-foot worker informing the driver by radio that the on-foot worker would be in the driver's area. Finlan explained that the operator and the on-foot worker were then required to remain 20 feet apart at all times.

Employer's control procedures were inadequate because the procedures consisted of mere notice to the operator that the on-foot worker would be in the operator's area and then obligated the employees to somehow establish and maintain a 20-foot distance. While Finlan also testified that he had the ability to communicate with the on-foot worker by radio, mobile phone, or hand signals, other than Finlan's general statement that he had those communication options, Employer offered no further explanation of the communication procedures in place to ensure that an operator is aware of an on-foot worker's location at all times in order to maintain the 20-foot distance. The fact that there was no predetermined means of communication between an operator and on-foot worker, alone, suggests that Employer did not have adequate control procedures in place.

Looking to the accident itself calls into question whether Employer's control procedures required anything more than employees to watch out for each other. Finlan testified that as he was driving the front loader, he had a visual of Allen and maintained a 20-foot distance at all times. Contrary to Employer's procedures, Finlan was not informed that Allen would be in his area. Employer argued that Allen was not expected to be at work that day and should not have been on foot in the area where the accident occurred. This might explain why Finlan was not informed of Allen's presence. However, it does not follow that, after seeing Allen, Finlan would have continued his work without stopping to come into compliance with Employer's control

procedures by establishing communication with Allen if such communication was in fact required. There was no evidence that Finlan or Allen attempted to communicate with one another.

While Finlan stated that he had a visual on Allen and maintained a 20-foot distance, the preponderance of the evidence demonstrates that Finlan lost visual of Allen. Finlan did not testify that he had a visual of Allen the entire time he was in the vicinity of the front loader. Finlan testified that, once he was almost past the truck Allen was driving, he heard screaming and jumped out to find out what had happened. Finlan testified that Allen was 10 feet from the truck on the ground.

Finally, Employer argued that on-foot workers and customers were not permitted in the area where Finlan was operating the front loader. This argument is unpersuasive. Other than to make the assertion, Employer offered no evidence that there was any signage or demarcation to make clear that the area was hazardous due to the operation of haulage vehicles and on-foot traffic was not permitted. Similar to the above, it is not reasonable to conclude that Employer actually had this procedure in place in light of Finlan failing to take any action other than to continue his operation after seeing Allen on foot in the area. Surely, had Finlan not expected any on-foot traffic, upon seeing Allen, he would have stopped his operation until the violation of Employer's control procedure was corrected.

Based on the foregoing, it is found that Employer's control procedures were insufficient to ensure an operator of a hauling equipment knew of the location of employees on foot in the vicinity of the equipment. Accordingly, Citation 1, Item 4, is affirmed.

5. Are the classifications of the violations correct?

a. Regulatory Violation.

Section 334, subdivision (a), provides:

> Regulatory Violation - is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

In Citation 1, Item 1, the Division classified Employer's violation of section 342, subdivision (a), as a Regulatory violation. Section 342, subdivision (a), requires the reporting of work-connected fatalities and serious injury. As this is a reporting requirement, it falls within the

definition of a Regulatory violation. Employer offered no evidence to rebut the classification. Therefore, the Regulatory classification of Citation 1, Item 1, is established.

b. General Violations.

Section 334, subdivision (b), provides: "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 Citation 1, Item 2, the Division classified Employer's violation of section 3203, subdivision (a), as General. Moffett testified that a complete IIPP is important to employee safety. Employer offered no evidence to establish otherwise. Thus, a relationship to occupational safety and health of employees exists, and the General classification is sustained.

In Citation 1, Item 3, the Division classified Employer's violation of section a violation of section 3395, subdivision (i), as General. Moffett testified that having a HIPP is related to employees' health and safety. Employer offered no evidence to refute the classification. Therefore, the General classification of Citation 1, Item 3, is established.

In Citation 1, Item 4, the Division classified Employer's violation of section 1592, subdivision (e), as General. Moffett testified that not having adequate control procedures to ensure that haulage vehicle operators are aware of workers on foot could lead to employee injury. Employer offered no evidence to the contrary in relation to the classification. Accordingly, the General classification of Citation 1, Item 4, is sustained.

6. Are the abatement requirements unreasonable?

Once the Division has established a violation of the applicable safety order, it is the employer's burden to establish that the abatement requirements are not reasonable. (See *Home Depot USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).)

Here, Employer offered no evidence regarding the unreasonableness of any abatement requirements. Indeed, for Citation 1, Item 1, the citation reflects that the violation for section 342, subdivision (a), was corrected during inspection. As for Citation 1, Items 2 through 4, Employer received the abatement credit in the calculation of the penalties for each Item. (Ex. 11.) As such, abatement was not raised as an issue in this matter.

7. Are 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. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The Division submitted into evidence the Proposed Penalty Worksheet and Moffett testified about the calculations used to establish the proposed penalties for the citations. Employer did not present any evidence or argument to rebut the presumption that the penalties were reasonable and calculated in accordance with the Division's policies and procedures.

Conclusion

In Citation 1, Item 1, the Division established a Regulatory violation of section 342, subdivision (a), because Employer failed to report to the Division a serious injury suffered by an employee. The proposed penalty is found to be reasonable.

In Citation 1, Item 2, the Division established a General violation of section 3203, subdivision (a), because Employer's IIPP did not contain all required elements. The proposed penalty is found to be reasonable.

In Citation 1, Item 3, the Division established a General violation of section 3395, subdivision (i), because Employer's HIPP did not contain all the required elements. The proposed penalty is found to be reasonable.

In Citation 1, Item 4, the Division established a General violation of section 1592, subdivision (e), because Employer failed to have sufficient control procedures to ensure an operator of a hauling equipment knew of the location of employees on foot in the vicinity of the equipment. The proposed penalty is found to be reasonable.

Order

It is hereby ordered that Citation 1, Items 1, 2, 3, and 4, and the associated penalties are affirmed as set forth in the attached Summary Table.

Dated**:** 06/22/2022

MARIO L. GRIMM
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.**