BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1537831**
A.M.B.E.H. INDUSTRIES, INC. **dba A&M QUALITY WASH** **2857 E. PICO BLVD.** **LOS ANGELES, CA 90023** **Employer**	**DECISION**

Statement of the Case

A.M.B.E.H. Industries, Inc. (Employer), dyes fabric and garments. Beginning June 24, 2021, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Eva Rosalind Dimenstein (Dimenstein), inspected Employer's work site at 2150 East Sacramento Avenue, Los Angeles, California.

On September 9, 2021, the Division issued two citations to Employer for five alleged violations of title 8 of the California Code of Regulations.[1] All of the citations remain at issue: no written Injury and Illness Prevention Program; no effective COVID-19[2] Prevention Program; no Heat Illness Prevention Program; ladder set-up without side rails; and failure to guard skylights.

Employer filed timely appeals of each citation, contesting the reasonableness of the abatement requirements and the proposed penalties of each alleged violation. An appeal from a penalty puts at issue the classification of the violation, which the Division then has the burden to prove. (*Anderson, Clayton & Company, Oilseed Processing Division,* Cal/OSHA App. 79-131, Decision After Reconsideration (Jul. 30, 1984); *Quang Trinh,* Cal/OSHA App. 93-1697 et. al., Decision After Reconsideration (Jun. 25, 1998).)

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board on August 31, 2022, and September 8, 2022. ALJ Jones conducted the video hearing with all participants appearing remotely via the Zoom video platform. Victor Copelan, District Manager, represented the Division and Michael

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[2] As used in this Decision, 'COVID-19" refers to SARS-CoV-2, the virus that causes a respiratory disease called coronavirus disease 19 (COVID-19).

Khakshooy (Khakshooy), Owner, represented Employer. The matter was submitted for decision on September 27, 2022.

Issues

1. Did the Division establish that Citation 1, Items 1 through 4, were properly classified as General?

2. Did the Division establish that Citation 2 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation alleged in Citation 2, was Serious by demonstrating that it did not know, and could not with the exercise of reasonable diligence, have known of the existence of the violation?

4. Did the Division establish that Citation 2, Item 1, was properly characterized as Accident Related?

5. Did the Division propose reasonable penalties for each of the alleged violations?

6. Are the abatement requirements for each of the alleged violations reasonable?

Findings of Fact

1. Employer's failure to establish, implement or maintain an effective IIPP put employees at risk of not knowing how to safely conduct themselves in the workplace.

2. Employer's failure to establish, implement or maintain an effective COVID-19 Prevention Program put employees at risk of infectious disease illness in the workplace.

3. Employer's failure to establish, implement or maintain an effective HIPP put employees at risk of illness or injury due to the risk of heat illness in the workplace.

4. Employer's failure to set up a portable ladder with the side rails extending 36 inches or more above the upper landing surface exposes employees to falls from the improperly erected ladder.

5. Employer's failure to guard skylights exposed handyman Francisco Gomez to a 20 feet fall through the roof onto the warehouse floor.

6. The Division calculated the proposed penalty in accordance with the penalty setting regulations.

7. Abatement requirements were not unreasonable.

Analysis

1. Did the Division establish that Citation 1, Items 1-4, were properly classified as General?

Employer did not contest the existence of the violation. Employer neither checked off the appeal form's "existence" box, nor moved to expand the grounds for its appeal. As such, the existence of the violation is established as a matter of law. The Appeals Board has held that an employer may not raise a violation's existence as an issue where it did not challenge the existence of the violation on its appeal form. (Cal. Code Regs., tit. 8, §361.3; *Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (Jul. 19, 2000).)

An appeal from a penalty puts at issue the classification of the violation, which the Division then has the burden to prove. (*Anderson, Clayton & Company, Oilseed Processing Division,* Cal/OSHA App. 79-131, Decision After Reconsideration (Jul. 30, 1984); *Quang Trinh,* Cal/OSHA App. 93-1697 et. al., Decision After Reconsideration (Jun. 25, 1998).) Thus, although Employer did not appeal on the grounds that the classifications of the violations were incorrect, the Appeals Board has long held that "[t]he classification of a violation bears directly on the propriety of the penalty and must be considered." (*Anderson, Clayton & Company, Oilseed Processing Division, supra,* Cal/OSHA App 79-131.)

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems,* Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "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).)

Section 334, subdivision (b), states that a 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."

Citation 1, Item 1:

Section 3203, subdivision (a), provides in relevant part:

> Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing...

Citation 1, Item 1, alleges:

> Prior to and during the course of the inspection, including but not limited to, on 6/24/21, the employer did not establish, implement and maintain a written, effective Injury and Illness Prevention Program (IIPP). They did not have a written IIPP.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 1, and nothing in the record suggests that Employer complied with the cited Safety order by establishing, implementing and maintaining an effective written IIPP.

Dimenstein credibly testified that a violation of this nature could lead to injury ranging from first aid to hospitalization. Dimenstein testified that the IIPP is an important part of an Employer's safety plan. Dimenstein testified that Employer did not conduct safety inspections nor did Employer conduct safety training. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The failure to establish, implement and maintain an effective IIPP increases the risk that employees will become sick or injured in the workplace. Dimenstein's testimony is credited, and it supports a conclusion that Citation 1, Item 1, was properly classified as General.

Citation 1, Item 2:

Section 3205 (c) states:

> Written COVID-19 Prevention Program. Employers shall establish, implement, and maintain an effective, written COVID-19 Prevention Program, which may be integrated into the employer's injury and Illness Prevention Program required by section 3203, or be maintained in a separate document.

Citation 1, Item 2, alleges:

> Prior to and during the course of the inspection, including, but not limited to on 6/24/21, the employer did not establish, implement and maintain an effective COVID-19 Prevention Program, in accordance with this section. They did not have a written COVID-19 Prevention Program.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 2, and nothing in the record suggests that Employer complied with the cited safety order.

Dimenstein testified that Employer provided masks to all employees but had no written COVID-19 Prevention Program. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The failure to have a written COVID-19 Prevention Program increases the risk that employees will be exposed to illness. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 2, was properly classified as General.

Citation 1, Item 3:

Section 3395(i), subdivision (i) states:

> (i) 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).

Citation 1, Item 3 alleges:

> Prior to and during the course of the inspection, including, but not limited to, on 6/24/21 the employer did not establish, implement and maintain an effective Heat Illness Prevention Plan (HIPP) in accordance with this section. They had no written HIPP.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 3, and nothing in the record suggests that Employer complied with the cited safety order. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The failure to have a written HIPP increases the risk that employees will be exposed to illness. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 3, was properly classified as General.

Citation 1, Item 4:

Section 3276, subdivision (e) provides in relevant part:

> (11) Access to Landings. When portable ladders are used for access to an upper landing surface, the side rails shall extend not less than 36 inches above the upper landing surface to which the ladder is used to gain access; or when such an extension is not possible, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grab-rail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

Citation 1, Item 4 alleges:

> Prior to and during the course of the inspection, including but not limited to, on 6/24/21, the extension ladder used at this facility to access the roof was not set up with the side rails extending 36 inches or more above the upper landing surface to which the ladder was used to gain access.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 4, and nothing in the record suggests that Employer complied with the cited safety order. Dimenstein credibly testified that this violation related to safety and health in that the top of the ladder did not have the required three-foot extension above the ladder and falls from a ladder can result in serious injury. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 4, was properly classified as General.

2. Did the Division establish that Citation 2 was properly classified as Serious?

Citation 2, Item 1:

Section 3212 states:

> (e) Any employee approaching within 6 feet of any skylight shall be protected from falling through the skylight or skylight opening by any one of the following methods:
>
> (1) Skylight screens installed above the skylight. The design, construction, and installation of skylight screens shall meet the strength requirements equivalent to that of covers specified in subsection (b) above. They shall also be of such design, construction and mounting that under design loads or impacts, they will not deflect downward sufficiently to break the glass below them. The construction shall be of grillwork, with openings not more than 4 inches or of slatwork with openings not more than 2 inches wide with

length unrestricted, or of other material of equal strength and similar configuration.

(2) Skylight screens installed below the skylight. Existing screens (i.e. burglar bars) shall meet the following requirements if they will be relied upon for fall protection:
   (A) Screens installed at the same level or higher than the walking/working surface shall meet the strength of requirements of subsection (b).
   (B) Screens installed within 2 feet of the walking/working surface shall meet the strength requirements of subsection (b) with increased strength based on the fall distance below the walking/working surface as determined by a qualified person. In no case shall the strength of the screen below the skylight be less than the strength requirements of subsection (b). A screen more than 2 feet below the walking/working surface shall not serve as fall protection.
   (C) A screen shall not be used for fall protection in accordance with subsection (e)(2)(A) or (e)(2)(B) if the broken skylight glazing will pose an impalement hazard to a worker who has fallen through the skylight and is lying on top of the screen. Skylights containing tempered, laminated, or plastic glazing, or similar materials shall not be considered to impose an impalement hazard.
   (D) The scree construction shall be of grillwork, with openings less than 12 inches in the least horizontal dimension.
(3) Guardrails meeting the requirements of Section 3209.
(4) The use of a personal fall protection system meeting the requirements of Section 1670 of the Construction Safety Orders.
(5) Covers, including the skylight itself, meeting the requirements of subsection (b) installed over the skylights, or skylight openings. Where the skylight itself serves as a cover, the skylight shall be required to meet only the strength requirements of subsection (b). Further, for skylights serving as covers, the employer shall obtain documentation from the manufacturer that the skylight will meet the strength requirements of subsection (b) for the dates that work will be performed in the vicinity of the skylight. Such documentation shall be obtained prior the start of work and shall be made available upon request.

Citation 2, Item 1 alleges:

> Prior to and during the course of the inspection, the employees approaching within 6 feet of the skylight were not protected from falling through the skylight or skylight opening. As a result, on or about 6/17/21, an employee who was cleaning the roof fell through a skylight and sustained serious injuries.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 2, Item 1, and nothing in the record suggest that Employer complied with the cited safety order by ensuring that it had protected employees from falling through the skylight opening.

Dimenstein is an Associate Safety Engineer who has been employed by the Division for approximately fourteen- and one-half years. Dimenstein holds a Bachelor of Engineering degree from California Polytechnic State University, San Luis Obispo. She testified that she is current in her mandated Division training. Dimenstein is deemed competent to offer testimony to establish each element of the Serious classification pursuant to Labor Code section 6432, subdivision (g).

Dimenstein credibly testified that she classified this violation as Serious because there is a realistic possibility that an employee could fall through the skylight and sustain serious injury and or death. Dimenstein testified that there is a realistic possibility that a fall such as this one from 20 feet onto a hard surface could result in serious physical injury or death.

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

> 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.
>
> […]

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (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.
>
> (Lab. Code §6432, subd. (e).)

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.

The violation at issue is Employer's failure to protect employees approaching within 6 feet of the skylight from falling through the skylight. Dimenstein, who was current on her Division mandated training at the time of the hearing, testified that a realistic possibility of serious physical harm exists in cases such as this where an employee cleaning the roof fell through a skylight, resulting in a broken right elbow (Exhibit 7). Accordingly, the Division established that the violation was properly classified as Serious.

Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. Employees without fall protection whose work requires them to clean the roof of a building with skylights are exposed to the risk of falling through unguarded skylights. The Division's evidence is credited, and it supports a conclusion that Citation 2, Item 1, was properly classified as Serious.[3]

3. Was the violation a cause of the serious injury?

A. Serious injury

In order to establish that the citation was properly classified as Accident-Related, the Division must establish that an employee suffered a "serious injury" and that a causal nexus exists between the violation of the safety order and the employee's serious injury. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018).) Here, Gomez was hospitalized for several days and underwent surgery for a broken right elbow. Thus, Gomez suffered a "serious injury".

[3] Labor Code section 6432, subdivision (b)(1) requires the Division, prior to issuing a citation classified as Serious to first "make a reasonable attempt to determine and consider" certain enumerated information under subdivision (b)(2), the Division meets its obligation if, "not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized from containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision." Here, the Divisions' Exhibit 2 (1 BY and proof of mailing and delivery of 1BY and other documents) demonstrate that the Division did what is required under section 6432, subdivision (b), and Employer did not offer any evidence suggesting that the Division failed to comply with this statutory obligation.

B. Causal nexus

The Division must make a showing that the violation more likely than not was a cause of the injury. "The violation need not be the only cause of the accident, but the Division must make a showing [that] the violation more likely than not was a cause of the injury." *MCM Construction, Inc.,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).). Here, the failure to protect the employee from falling through the skylight was the cause of the injury. Thus, the Division established a causal nexus between the violation and Gomez's injury. Accordingly, the accident-related classification is upheld.

4. Were the abatement requirements unreasonable as to the required changes?

Employer's appeal asserted that the abatement requirements are unreasonable. However, the Division does not mandate specific means of abatement; rather, employers are free to choose the least burdensome means of abatement. (*Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004).) In order to establish that abatement requirements are unreasonable an employer must show that abatement was not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Caligraphics,* Cal/OSHA App. 90929, Decision After Reconsideration (Aug. 28, 1991).) In this matter, Employer offered photos of the newly installed skylight guards and receipt totaling $12,950. (Exhibit A) This does not appear to be unreasonably expensive. Therefore, it is found that the abatement requirements were not unreasonable.

5. 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).)

Here, the Division submitted its Proposed Penalty Worksheet (Exhibit 1) and supporting testimony from Dimenstein. Employer did not present evidence that the calculations were incorrect. Accordingly, the proposed penalties are affirmed.

CONCLUSION

The evidence supports a determination that the Division properly classified Citation 1, Items 1 through 4, as General. The evidence further supports a determination that the Division

correctly classified and characterized Citation 2 as Serious Accident-Related. The evidence supports a determination that the penalties were reasonably calculated.

ORDER

Citation 1, Items 1 through 4, are affirmed as General violations, and their associated penalties are affirmed and assessed as set forth in the attached Summary Table.

Citation 2, Item 1 is affirmed as Serious Accident-Related, and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Jacqueline Jones

Dated: 10/25/2022

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Jacqueline Jones
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.**