BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1437389**
EZ MIX, INC. **11374 TUXFORD ST.** **SUN VALLEY, CA 91352** **Employer**	**DECISION**

Statement of the Case

EZ Mix, Inc., (Employer) is a cement manufacturer and processor. Beginning October 11, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Brent Evins, conducted an inspection of Employer's manufacturing site located at 3355 South Industrial Drive, in Rialto, California (the site).

On February 28, 2020, the Division issued two citations alleging that Employer failed to have a dedicated written lockout-tagout procedure specifically for a Chantland conveyor belt (Citation 1) and failed to provide and require the use of an extension tool when an employee is adjusting a running conveyor belt (Citation 2). Employer filed timely appeals of both citations. During the hearing, Employer withdrew its appeal of Citation 1, leaving only Citation 2 at issue. In its appeal of Citation 2, Employer contested the existence of the violation, the classification of the citation, and the reasonableness of the proposed penalty. Employer also raised a series of affirmative defenses.[1]

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On December 6, 2022, March 14, 2023, March 15, 2023, and May 11, 2023, ALJ Murad conducted the video hearing from Los Angeles and San Bernardino counties, with all participants appearing remotely via the Zoom video platform. Attorney Eugene McMenamin of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Keith Mackenzie, Staff Counsel, represented the Division.

The matter was submitted on July 28, 2023.

[1] Except where discussed in the 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).)

Issues

1. Was Employer in compliance with section 3314, subdivision (c)(1)?

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

3. Did Employer rebut the presumption that 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 was properly characterized as Accident-Related?

5. Is the proposed penalty for Citation 2 reasonable?

Findings of Facts[2]

1. On September 13, 2019, Employer directed its employee, Henry Gonzalez (Gonzalez), to replace the Chantland conveyor belt (conveyor belt or belt) at the site.

2. Gonzalez was instructed to have the conveyor belt ready for the morning shift, so he adjusted and tracked the conveyor belt by himself.

3. The conveyor belt needed to be running and moving to be adjusted and tracked so that the belt was centered and running correctly on the rollers.

4. Gonzalez wore gloves and used an open-end box wrench with a closed ratchet end to adjust the belt.

5. Gonzalez's co-worker Armando Cervantes, (Cervantes) and Gonzalez's supervisor, Ramon Garcia (Garcia) both usually used a 9/16th socket with a socket ratchet wrench handle to track and adjust the conveyor belt.

6. The use of the 9/16th socket and ratchet wrench extended the employee's hand so that while adjusting the belt, the employee's hand was approximately 12 inches away from the conveyor belt roller.

[2] Finding of Fact 12 and 13 were established at the hearing by stipulation of the parties.

7. Employer did not provide a 9/16th socket and socket ratchet wrench extension tool to Gonzalez.

8. Gonzalez was never trained to use a 9/16th socket and socket ratchet wrench to adjust and track a conveyor belt.

9. The correct and safe extension tool to be used was the 9/16th socket and socket ratchet wrench, which Employer had to provide, but was never disclosed, shown to, required to be used or provided to Gonzalez for him to use.

10. Gonzalez was adjusting and tracking the moving conveyor belt using his box wrench when either his wrench slipped or his glove got caught in the roller on the belt or a combination of both, and his arm was drawn into the conveyor belt, resulting in a broken arm.

11. Since Gonzalez's hand was too close to the conveyor belt roller, his arm was drawn into the conveyor belt resulting in his injury.

12. There was a realistic possibility of serious physical harm arising from the hazard created by the violation identified in Citation 2.

13. The penalty for Citation 2 was calculated in accordance with the penalty-setting regulations.

Analysis

1. Was Employer in compliance with section 3314, subdivision (c) (1)?

California Code of Regulations, title 8, section 3314, subdivision (c) (1)[3], provides:

(c) Cleaning, Servicing and Adjusting Operations.
(1) If the machinery or equipment must be capable of movement during this period in order to perform the task, the employer shall minimize the hazard by providing and requiring the use of extension tools (eg., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means by thorough training.

[3] All references are to California Code of Regulations, title 8, unless otherwise specified.

In Citation 2, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to September 12, 2019, the employer failed to provide and require the use of extension tools to an employee who was making adjustments on a running conveyor belt. As a result, an employee sustained serious injuries when he (sic) arm was drawn into the belt while in operation.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) "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. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Section 3314, subdivision (c) (1), requires energized machinery to be locked out and tagged out for cleaning, servicing, and adjusting. This regulation further provides and "recognizes that there are occasions or types of machines which must be in operation for cleaning, adjusting, and so on." (*Stanislaus Food Products Company*, Cal/OSHA App. 13-572 et seq., Decision After Reconsideration (Apr. 23, 2015).) It is in the nature of an affirmative defense. As such, Employer has the burden of proof at hearing of establishing its compliance with the provision. (*MK Auto, Inc.*, Cal/OSHA App. 12-2893-2894, Denial of Petition for Reconsideration (July 23, 2014).) Evidence of compliance with the provision "requires proof of three elements: (1) the equipment must be moving; (2) alternative means or methods to minimize the hazards are furnished; and (3) employees are trained in such alternatives." (Stanislaus Food Products Company, supra, Cal/OSHA App. 13-572.)

a. Did the conveyor belt have to be moving to adjust and track the belt?

The conveyor belt involved in the accident was replaced by Gonzalez and Cervantes. Once this type of conveyor belt is replaced, it must be tracked and adjusted to make sure it is tracking properly on the rollers. To make the tracking adjustment to the belt, the conveyor must be running to check the tracking. Associate Safety Engineer Brent Evins (Evins) took a photograph of the subject conveyor belt involved in the accident showing the locations of the tracking bolts (Exhibit 22). The tracking bolts on the conveyor must be adjusted to ensure the conveyor belt operates properly (Exhibit 23A). The tracking bolts are very close to the tensioning rollers. Evins confirmed that this conveyor must be in operation and moving to adjust and track the belt. Gonzalez then went on to adjust and track the moving conveyor belt by himself, and the accident happened.

Accordingly, the first element of the safety order is established, the conveyor belt must be moving to be tracked.

b. Did the Employer provide and require the use of extension tools or other methods and means to protect employees from injury while adjusting and tracking a moving conveyor belt?

Employer argues in its closing brief that there was no credible evidence presented by the Division that the box wrench Gonzalez used was deficient and that a different tool would minimize the hazard of adjusting a running conveyor belt.

Gonzalez used his own tools even though Employer had tools at the site available for his use. Gonzalez used a box ratchet wrench with an open end wrench to adjust the tracking bolt on the subject conveyor belt. (Exhibit O). Since Gonzalez used his box wrench tool to adjust the tracking bolt, Gonzalez's tool put his hands very close to the tension roller of the moving belt.

Gonzales testified that on the afternoon of the day of the accident he had a conversation with his boss, Garcia, about changing the conveyor belt. Gonzales testified that Garcia told him to change the belt and have it tracked and ready for the next morning shift. He had changed belts and tracked them before by himself. Garcia denied having this conversation with Gonzalez.

Garcia testified that on the morning of the accident he spoke with Cervantes, and they decided that the conveyor belt would be replaced and tracked. Garcia testified that the belt only would be replaced by Gonzalez. Cervantes and another mechanic were to track the belt the next day. Cervantes was to relay these instructions to Gonzalez.

Garcia further testified that tracking the belt without the assistance of others is a dangerous procedure. Garcia further testified that tracking a belt safely is a two-employee job. Garcia later testified that he, Garcia, was Gonzalez's supervisor. Garcia further admitted that in the Employer accident report (Exhibit 12), Employer did not list the cause of the accident being Gonzalez's failure to follow instructions to only install the belt and not track the belt. Garcia also testified that he felt Gonzalez used the wrong tool to track the belt but failed to state that as a cause in the accident report. Garcia further testified that the proper tool to adjust and track the conveyor belt was a 9/16th socket with a socket ratchet wrench, not an open box wrench.

Gonzalez also spoke with his co-worker Cervantes about the jobs assigned to him by Garcia. Cervantes helped Gonzalez change the belt. Cervantes then told Gonzalez that he was leaving and suggested that Gonzales wait until tomorrow to track the belt. Gonzales knew it was easier and safer to have two people track the belt. However, Gonzales testified that his boss,

Garcia told him to have the conveyor ready for the morning shift, so he went ahead to track the belt by himself. He was given an order by his boss, and he was going to do the job as instructed.

Garcia testified that Employer's lead mechanic was Cervantes. Garcia also testified that Cervantes was Gonzalez's supervisor in the maintenance department. Cervantes testified that he was just a mechanic not a lead mechanic. Cervantes further testified that he was not a supervisor over anyone but was only a regular employee. At the time of the Gonzalez accident, Cervantes had worked for Employer 17 years. Cervantes testified he had no supervisory authority over Gonzalez.

Cervantes testified that he helped Gonzalez change the conveyor belt. Once the belt was installed, Cervantes' shift was ending so he said to Gonzalez words to the effect, "why don't you leave the tracking to tomorrow." Cervantes never directly told Gonzalez to not track the belt. Cervantes thought Gonzalez would take too long to track the belt, so they could do it very quickly together the next day. (Hrg. Tr. Day 4, pg. 700, ln. 4-10.)

Cervantes credibly testified the safest way to track a conveyor belt was to use a 9/16th socket attached to a socket ratchet wrench. When using this extension tool, Cervantes testified that an employee's hand is a bit more than one foot away from the conveyor roller. (Trans. Day 4, P.695, L5-9). Garcia also credibly testified the safest way to track the conveyor belt is to use a 9/16th socket and socket ratchet wrench. Cervantes and Garcia never told Gonzalez what tool to use to track a conveyor belt. 9/16th sockets and socket ratchet wrenches were available and would be provided by Employer to Gonzalez if Gonzalez knew to ask for them and knew to use them. This extension tool would have put Gonzalez's hand at least one foot away from the running roller of the conveyor belt. This extension tool was never offered to Gonzalez, nor was Gonzalez told to use this extension tool.

Based upon the photographic evidence and testimony presented, a 9/16th socket attached to a socket ratchet wrench extension tool, when used as described by Cervantes and Garcia, placing the employee's hands at least twelve inches away from the tension roller, is the safest way to adjust and track the moving conveyor belt. Gonzalez's box wrench put his hands much closer to the tension roller. The testimony was that this extension tool keeps the employee's hands at least twelve inches away from the conveyor's tension roller. Employer should have provided and required Gonzalez to adjust and track a moving conveyor belt with the 9/16th socket attached to a socket ratchet wrench.

Employer's employees, Gonzalez's boss Garcia and co-worker Cervantes both credibly testified the safest way to track the conveyor belt was to use a 9/16th socket attached to a socket ratchet wrench. This tool keeps the employee's hand at least a foot away from the running

conveyor belt while the tracking procedure is taking place. Evins further testified an extension tool was necessary to safely track the moving conveyor belt.

Based on the foregoing, the second element of the safety order is established. The extension tool that should have been provided and supplied to Gonzalez to track and adjust the moving conveyor belt was a 9/16th socket attached to a socket ratchet wrench was not provided.

c. Did Employer provide its employees adequate training with respect to the use of extension tools or comparable alternative methods for the adjusting and tracking?

Appeals Board decisions construing section 3314, subdivision (c) (1), have required employers to satisfy both the second and third requirements to prevail with this defense. In *Thyssenkrupp Elevator Corporation* Cal/OSHA App. 11-2217, Decision After Reconsideration (Mar. 11, 2013), the Board affirmed a citation for a violation of section 3314, subdivision (c) (1). The Board held that the employer had not established either the second or the third requirement. The Board noted:

> If a machine must be in operation for the work to be done, additional tools or other methods or means to protect employees from injury must be provided. (§ 3314 (c) (1).) No tools were provided. The evidence does not provide sufficient detail about Employer's training of its escalator servicing personnel to conclude that such training amounted to "other method or means to protect employees from injury . . .” Accordingly, we affirm the violation and penalty proposed in the citation.

Similarly, in *MK Auto Inc.* Cal/OSHA App. 12-2893, supra, the Board upheld a citation for violation of section 3314 subdivision (c), rejecting an employer's argument that it had complied with section 3314, subdivision (c) (1). The record supported a conclusion that the employer (an auto repair shop) had not required the use of extension tools or other devices, as required by section 3314, subdivision (c) (1), (Id). In addition, although the injured employee was a trained mechanic, there was no evidence that the employer had trained him on the use of extension tools or other methods or means to minimize the hazards of working on the operating motor, (Id). Therefore, the Board held, “since the conditions of the exception in section 3314 subdivision, (c) (1), were not met, the section does not provide a defense,” (Id).

At the time of the accident, Gonzalez was using his box wrench when his hand and arm were drawn into the belt breaking his forearm. He did not recall if his hand slipped off the wrench or if the glove he was wearing got caught in the rollers or a combination of both caused the accident. (Exhibit H.) Gonzalez testified was never told to use another tool or trained to use any other tool other than his open box wrench to track a conveyor belt.

Cervantes and Garcia never told or trained Gonzalez on what tool to use to track a moving conveyor belt. Sockets and socket ratchet wrenches were available and could be provided by Employer to Gonzalez if Gonzalez knew to ask for them and knew to use them. This extension tool would have put Gonzalez's hand at least one foot away from the running roller of the conveyor belt. This extension tool was never offered to Gonzalez, nor was Gonzalez told to use this extension tool. Gonzalez was never trained to use the safest extension tool to track the moving conveyor belt, the 9/16th socket attached to a socket ratchet wrench.

Gonzalez testified that he was not trained by Employer on how to track a running conveyor belt. He watched it being done and followed what he saw. Garcia also testified that Gonzalez was not completely trained in how to track a running conveyor belt. Even though Employer had an opportunity to present evidence of training, no further testimony or evidence was presented by Employer about training on how to adjust and track the running conveyor belt. Gonzalez was never adequately trained to use an extension tool to track and adjust the conveyor belt. No training was provided.

The third element of the safety order is established. Gonzalez was to be trained in the use of the extension tool. Gonzalez was never trained to use an extension tool to track and adjust the conveyor belt.

The evidence presented was that there was (1) a moving conveyor belt that had to be in motion to track the belt;(2), the correct and safe extension tool, the 9/16th socket and socket ratchet wrench, which Employer had to provide, was never disclosed, shown to, or required to be used by Gonzalez, and (3), Gonzalez was never trained in the proper procedure to track a moving conveyor belt with the use of the extension tool, that being, the 9/16th socket and socket ratchet wrench. Employer did not establish that it was in compliance with this provision.

Based on the evidence presented, the Division has established that Employer failed to provide and require the use of extension tools to an employee who was adjusting a running conveyor belt. For these reasons, Citation 2 is affirmed.

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

Labor Code section 6432, subdivisions (a) and (b), provide, in relevant part:

> (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself

to establish that the violation is serious. The actual hazard may consist of, among other things:
[...]
(b) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes 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.

(Labor Code section 6432, subdivision (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).)

Further, 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.

Evins testified he was current with his Division-mandated training. As such, Labor Code section 6432, subdivision (g), is applied to deem Evins presumptively competent to testify regarding the serious classification of Citation 2.

Evins received a report from Employer that Gonzalez, one of its employees, had his arm caught in a running conveyor belt resulting in fractures to his forearm. Evins testified that this injury was the result of Gonzalez's hand and forearm being drawn into the running conveyor belt. Gonzalez told Evins that his injury required surgery to place a metal plate and pins in his forearm and hand.

The broken bones in Gonzalez's forearm, which required surgery, demonstrates that there was not only a realistic possibility of serious physical harm, but it was an actuality in this case. The evidence supports the classification as serious. Furthermore, the parties stipulated that the injury suffered by Gonzalez was serious as defined under title 8 and California Labor Code 6432, subdivision (c).

Accordingly, the Division established the rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

3. Did Employer rebut the presumption that the violation 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?

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

> (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) [; and]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards;
> (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards;
> (C) Supervision of employees exposed or potentially exposed to the hazard; and
> (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

The burden is on Employer to rebut the presumption that the citation was properly classified as Serious. (*Bigge Crane & Rigging, Co.,* Cal/OSHA App. 1380273, Decision After Reconsideration (Apr. 7, 2023). Further, the Board has held that a failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence and will not excuse a violation on a claim of lack of employer knowledge. (*Stone Container Corporation,* Cal/OSHA App. 89-042, Decision After Reconsideration (Mar. 9, 1990); See also

Gateway Pacific Contractors, Cal/OSHA App. 10-R2D3-1502-1508, Decision After Reconsideration (Oct. 4, 2016).)

The evidence presented was that Gonzalez was not trained in how to track the conveyor belt, specifically he was not trained to use the proper extension tool. Furthermore, Employer also did not even provide Gonzalez with the correct tools to adjust and track the belt. The safe extension tool was a 9/16th socket with a socket ratchet wrench handle. Gonzalez was never told that the correct and safest tool to be used to track the belt was a 9/16th socket with a socket ratchet wrench handle.

Additionally, Employer failed to directly instruct Gonzalez and failed to ensure that Gonzalez did not track the belt without assistance. Cervantes relayed a suggestion that Gonzalez wait until the next day instead of telling him not to track the belt. Additionally, Cervantes was not Gonzalez's superior, as was admitted to by Cervantes in his testimony. Cervantes was a co-worker. A co-worker suggesting doing the tracking the next day is not the same as if the boss, Garcia, had told Gonzalez to stop work on the conveyor belt when Cervantes left the worksite. Clearly there was a failure to give Gonzalez correct direction, and Employer knew of this issue but failed to correct it.

Therefore, Employer did not meet its burden to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer has not rebutted the presumption that the citation was properly classified as Serious. Accordingly, Citation 2, is properly classified as Serious and is affirmed.

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

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction LP dba Webcor Builders*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) 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." (Id., citing *MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The violation was Employer's failure to provide an extension tool for Gonzalez to adjust and track the conveyor belt and keep the employee's hands further away from the conveyor belt rollers. The failure of Employer to provide the extension tool and also training to Gonzalez more likely than not resulted in Gonzalez's hand being closer to the danger zone of the tension roller, which resulted in this accident and his arm being crushed. As such, Gonzalez's injury was caused by the violation.

Therefore, Citation 2 is properly characterized as Accident-Related.

5. Is the proposed penalty for Citation 2 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).)

The parties stipulated that the penalty in Citation 2 was correctly calculated.

Citation 2 is a Serious Accident-Related citation. Based upon the evidence presented, and the above reference stipulation, the penalty set for Citation 2, was calculated within the Division's policies and procedures.

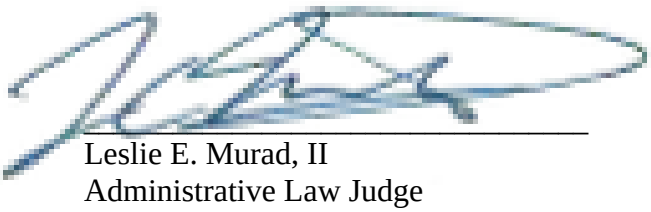
Accordingly, the penalty of $18,000.00 is reasonable.

Conclusion

The Division established that Employer violated section 3314, subdivision (c) (1), by failing to provide and require the use of extension tools to an employee who was making adjustments on a running conveyor belt. The violation was properly classified as Serious Accident-Related. The proposed penalty is reasonable.

Order

Employer withdrew its appeal of Citation 1. Citation 1 and the penalty remain as issued. Citation 2 is affirmed, and the penalty is sustained as set forth in the attached Summary Table incorporated herein.



Dated: 08/28/2023

Leslie E. Murad, II
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.**