

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

In the Matter of the Appeal of:

**AEROTEK, INC. dba AEROTEK
9635 Granite Ridge Drive, Suite 300
San Diego, CA 92123**

Employer

Inspection No.

1200176

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Aerotek, Inc. dba Aerotek (Employer) is a staffing services company that provides temporary workers to other employers. On January 10, 2017, Associate Safety Engineer Louis Vicario (Vicario) of the Division of Occupational Safety and Health (the Division), conducted an inspection of Employer's worksite, a shipyard located at 2798 Harbor Drive, San Diego, California. On May 8, 2017, the Division issued one citation to Employer alleging two violations.

Employer filed a timely appeal and asserted various affirmative defenses. The Division withdrew Citation 1, Item 1, leaving only Citation 1, Item 2 at issue before the Administrative Law Judge (ALJ). That citation alleges a General failure to implement procedures to investigate an occupational injury or illness pursuant to Employer's Injury and Illness Prevention Program (IIPP).

This matter was heard by ALJ Christopher Jessup, for the California Occupational Safety and Health Appeals Board (the Appeals Board), in San Diego, California, on July 26, 2019. Employer was represented by attorney Joshua Henderson of Seyfarth Shaw, LLP. The Division was represented by Kathy Derham, District Manager. The ALJ issued a decision vacating the single citation on October 22, 2019.

The Board took the matter under reconsideration by its own motion on November 20, 2019. In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Employer comply with the requirement to investigate occupational injury or illness?

FINDINGS OF FACT

1. On December 8, 2016, Angel Cortez (Cortez), an employee of Employer, suffered an injury at a worksite at 2798 Harbor Drive, in San Diego, California.
2. Employer timely reported the injury to the Division.
3. After Cortez was injured, John Egoavil (Egoavil), Employer's regional safety manager, and Alex Tzikas (Tzikas), Employer's practice leader, interviewed Cortez about the accident.
4. Egoavil attempted to gain access to the worksite the day after the accident, but was denied by controlling employer, NASSCO. Egoavil again attempted to gain access to the jobsite on the Monday following the accident, but again was denied access.
5. Egoavil gained access to the jobsite on January 10, 2017, when he went to the jobsite as part of the Division's investigation.
6. Employer discussed the accident with NASSCO and determined the root cause of the accident.
7. Employer and NASSCO discussed corrective actions and agreed to a procedure designed to avoid future accidents stemming from the same root cause.
8. Employer attempted to obtain a copy of NASSCO's accident investigation report as part of its investigation, but was denied, as NASSCO has a policy of not providing said reports to other entities.
9. Employer documented the results of its investigation on its accident investigation report form the week after the accident.

DISCUSSION

- 1. Did Employer comply with the requirement to investigate occupational injury or illness?**

Citation 1, Item 2 alleges a General violation of section 3203, subdivision (a)(5), which requires an employer to:

- (5) Include a procedure to investigate occupational injury or occupational Illness.

The Division's alleged violative description states:

Prior to and during the course of the investigation, including, but not limited to 1/10/2017, the employer did not implement the accident investigation procedures specified in their written illness and injury prevention program. A copy of the investigation report was requested but not provided by the employer.

The parties do not dispute that Employer's IIPP includes a valid accident investigation procedure. Rather, the Division cited Employer because it alleges Employer failed to follow the accident investigation procedure in this instance. The procedures are accurately summarized by the ALJ at page four of the Decision, and require the Employer to:

1. Interview injured employees and any witnesses.
2. Review the area in which injury occurred.
3. Along with client determine root cause of the incident and corrective action required.
4. Obtain a copy of client's investigation and copies of photos if any were taken.
5. Document investigation finding and provide to management.
6. Report the incident to the nearest OSHA district office.

The ALJ's analysis turns on the Employer's observance of each of the six elements of the procedure. Ultimately, the ALJ concludes that the Employer's actions constituted substantial compliance with its accident investigation procedure, although it was unable to thoroughly engage in several of the steps, such as reviewing the area where the accident occurred. The employer that controlled the site (NASSCO) would not grant Employer access to the accident area, or provide Employer with a copy of its accident investigation report. Testimony credited by the ALJ and Board demonstrates that Employer made repeated attempts to follow its IIPP procedure, but was rebuffed by NASSCO. This lack of cooperation and information from NASSCO hindered Employer's ability to complete its investigation report, and Employer's safety manager did not want to submit to the Division a safety report that was incomplete.

Upon review of the record, the Board concludes that the ALJ correctly found that Employer does have an appropriate investigation procedure in its IIPP, and took steps that constituted substantial compliance with the IIPP, although it ultimately was not able to secure certain information from NASSCO, or conduct a complete investigation. The unique circumstances of this case, including the sensitivity of the worksite as a shipyard, and the resultant strict security protocols implemented by NASSCO, as well as Employer's demonstrated persistence in attempting to fully and properly complete the investigation procedures as described in its IIPP, compel this result. The Board is persuaded that Employer did take all appropriate steps to attempt to complete its investigation, and that substantial compliance exists.

DECISION

The Decision of the ALJ is upheld. The citation is vacated.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Board Member



Marvin Kropke, Board Member



Judith S. Freyman, Board Member



FILED ON: **05/01/2020**

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: 1200176

In the Matter of the Appeal of: AEROTEK, INC., dba AEROTEK

Site address: 2798 Harbor Drive, San Diego, CA

Citation Issuance Date: 05/08/2017

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	3203 (b)(1)	R	DOSH withdrew citation.		V	\$400.00	\$0.00
1	2	3203 (a)(5)	G	DAR issued. ALJ decision affirmed.		V	\$600.00	\$0.00
Sub-Total							\$1,000.00	\$0.00
Total Amount Due**								\$0.00

*See Abbreviation Key

**You may owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call 415-703-4310 or email accountingcalosha@dir.ca.gov if you have any questions.

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PENALTY PAYMENT INFORMATION

Please make your cashier's check, money order, or company check payable to: **Department of Industrial Relations**
Write the **Inspection Number** on your payment.

If sending via US Mail:

CAL-OSHA Penalties
PO Box 516547
Los Angeles, CA 90051-0595

If sending via Overnight Delivery:

US Bank Wholesale Lockbox
c/o 516547 CAL-OSHA Penalties
16420 Valley View Ave.
La Mirada, CA 90638-5821

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

*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
FTA	Failure to Abate	RR	Repeat Regulatory	WR	Willful Regulatory
G	General	RS	Repeat Serious	WRG	Willful Repeat General
IM	Information Memorandum	S	Serious	WRR	Willful Repeat Regulatory
NL	Notice in Lieu of Citation	SA	Special Action	WRS	Willful Repeat Serious
R	Regulatory	SO	Special Order	WS	Willful Serious
RG	Repeat General	WG	Willful General		