

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

In the Matter of the Appeal of:

**Los Angeles County Probation Department
dba Barry J Nidorf Juvenile Hall
16350 Filbert St.
Sylmar, CA 91342**

Employer

Inspection No.
1415736

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

Employer is a government entity that administers correctional programs for detained juveniles. On May 24, 2019, the Division, through Associate Safety Engineer Tomas Micheo (Micheo), commenced an investigation of Employer's worksite, Barry J. Nidorf Juvenile Hall (BJNJH), located at 16350 Filbert Street in Sylmar, California. BJNJH is a juvenile hall that houses minors charged and convicted of crimes.

On November 22, 2019, the Division issued one Serious citation to Employer. The citation alleges that Employer failed to effectively implement its Injury and Illness Prevention Program (IIPP). The citation alleged two instances. Instance 1 asserted that Employer violated section 3203, subdivision (a)(6), by failing to implement effective controls such as administrative and work practice controls to minimize exposure to violent assaults by youth. Instance 2 asserted that Employer violated section 3203, subdivision (a)(7), by failing to ensure that employees were adequately trained to respond to increased workplace violence incidents.

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, the abatement requirements are unreasonable, and that the proposed penalty is unreasonable. Employer also asserted affirmative defenses.

This matter was heard by Sam E. Lucas, Presiding Administrative Law Judge (ALJ) for the Board. ALJ Lucas conducted the hearing on May 21, 2020, March 14, April 5, May 3 and 5, 2023, in Los Angeles County, California, with the parties and witnesses appearing remotely via the Zoom video platform. Steven Gatley, attorney with the law firm Lewis Brisbois Bisgaard & Smith LLP, represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division.

The ALJ issued a Decision on January 25, 2024. Regarding the two instances alleged in the citation, the ALJ ruled against the Division on one instance and for the Division on the other instance.

Instance 1:

Instance 1 asserted that Employer violated section 3203, subdivision (a)(6), alleging Employer failed to implement effective controls such as administrative and work practice controls to minimize exposure to violent assaults by youth. The ALJ found that the Division failed to establish Instance 1 of the citation. The ALJ concluded that the Division failed to demonstrate that Employer did not have sufficient staff or was not meeting its staffing ratios during the inspection period. (Decision, p. 5.) The ALJ also found that “[t]he Division did not show that Employer failed to supply proper tools to employees that would mitigate the hazard.” (Decision, pp. 5-6.) The ALJ’s Decision stated, “The evidence shows Employer identified the hazard of violence against its probation officers by juveniles at the facility and developed procedures to attempt to correct the hazard. The Division failed to meet its burden to show that Employer failed to implement effective controls to minimize employee exposure to violent assaults, and therefore failed to show a violation of section 3203, subdivision (a)(6).” (Decision, p. 6.)

Instance 2:

Instance 2 asserted that Employer violated section 3203, subdivision (a)(7), alleging that Employer failed to ensure that employees were adequately trained to respond to increased workplace violence incidents. (Exhibit 1, Amended.) Notwithstanding the ALJ’s conclusion that Employer had a “robust training program,” the ALJ found that the Division established Instance 2. (Decision, p. 7.) The ALJ found that there were policy changes that constituted a “new process” or “procedure” resulting in additional violence against staff, which required Employer to provide training and instruction on the new hazards associated with those changes. (Decision, pp. 6-7.) The Decision stated, “The evidence established that [the] levels and types of violence against staff increased significantly over time as a result of the changes to Employer’s policies and procedures, resulting in a workplace that looked much different than the one for which employees were initially trained.” (Decision, p. 7.) The Decision further noted, “Employer failed to ensure that all employees were adequately trained to respond to increasing workplace violence incidents. As such, Employer failed to effectively implement its IIPP, and a violation of section 3203, subdivision (a)(7), is established.” (Decision, p. 7.)

However, the ALJ’s Decision reclassified the citation from Serious to General finding,

There is evidence in the record of actual injuries to employees that may result from violent incidents, but there is no evidence that the actual injuries sustained required inpatient hospitalization for purposes other than observation, resulted in the loss of a member of the body or serious disfigurement, or that the injuries resulted in “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.” Accordingly, the Division failed to meet its burden of proof to establish that the citation was properly classified as Serious.

(Decision, p. 9.)

The Division filed a timely Petition for Reconsideration. The petition is limited in scope. It seeks an order from the Board overturning the reclassification of the citation from Serious to General. The Division waived all other arguments other than reclassification. (Lab. Code, § 6618 [“The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration.”].)¹ Since the Division’s petition solely focuses on the ALJ’s reclassification of the citation, the Division waived any argument that the ALJ erred by vacating Instance 1. Likewise, because Employer failed to file its own petition, it waived any argument that the ALJ erred when he affirmed Instance 2 of the citation.

ISSUE

1. Did the ALJ err when he reclassified the citation from Serious to General?

FINDINGS OF FACT

1. There is no evidence that Micheo was current on his division-mandated training.
2. Micheo had never previously conducted an inspection of a juvenile correctional facility.
3. Micheo admitted he was not an expert on the training of probation officers.
4. Although several probation officers testified to receiving injuries while working at BJNJH, they did not testify to receiving any injury that resulted in inpatient hospitalization for purposes other than medical observation, the loss of any member of the body, any serious degree of permanent disfigurement, or impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency.

DECISION AFTER RECONSIDERATION

1. Did the ALJ err when he reclassified the citation from Serious to General?

When determining whether a citation is properly classified as Serious, the relevant statute requires application of a burden shifting analysis. A rebuttable presumption of a Serious violation arises if the Division demonstrates “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (Lab. Code, § 6432, subd. (a).) The Division’s initial burden has two parts. (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1192534, Decision After Reconsideration (Aug. 26, 2022).) First, the Division must demonstrate the existence of an “actual hazard created by the violation.” (*Ibid.*) Second, the Division must

¹ Section 391 states, “A petition for reconsideration shall set forth specifically and in full detail the grounds upon which the petitioner considers the order or decision to be unjust or unlawful, and every issue to be considered by the Appeals Board on reconsideration. Any objection or issue not raised in the petition for reconsideration is deemed waived by the petitioner.”

demonstrate a “realistic possibility” that death or serious physical harm could result from the actual hazard. (*Ibid.*)

For the Division to meet its initial burden, the record must support the existence of an “actual hazard” created by the violation. The term “actual hazard” is defined as, relevant here, “[t]he 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.” (Lab. Code, § 6432, subd. (a)(2).) The record demonstrates the existence of an actual hazard. The ALJ held that the levels and types of violence against staff increased significantly over time as a result of changes to Employer’s policies and procedures and Employer failed to ensure that all employees were adequately trained to respond to this increase in violence. (Decision, p. 7.) The parties waived argument over this finding. (Lab. Code, § 6618.) The absence of appropriate training to address an increase in violence against staff is an unsafe or unhealthful practice, means, or method.

Turning to the next part of the analysis, the Division must demonstrate a realistic possibility that death or serious physical harm could result from the actual hazard. (Lab. Code, § 6432, subd. (a).) The term “realistic possibility” means that the Division’s demonstration must be within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) Labor Code section 6432, subdivision (e), provides that “serious physical harm,” means any injury 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, or (4) permanent impairment of a part of the body. (*Ontario Refrigeration Service, Inc.*, Cal/OSHA App. 1327187, Decision After Reconsideration (March 22, 2022).) The ALJ’s Decision found that the Division failed to meet its burden to demonstrate a realistic possibility of serious physical harm. (Decision, p. 9.) We agree.

The Division predominantly relied on the testimony of Micheo to meet its initial burden. Micheo holds a bachelor’s degree in health science with an environmental health option. (TR [3.14.23], p. 19.) Micheo testified he had been an associate safety engineer for 11 years and conducted over 500 inspections. (TR [3.14.23], pp. 17-18; TR [4.5.23], p. 3.) Micheo classified the citation as Serious because he learned of violent assaults against staff at the facility and concluded that a violent assault can result in serious injury. (TR [3.14.23], p. 151.) He testified that a violent assault on a human being can result in serious injuries, including head trauma, fractures, disfigurement, or fatal injury. (TR [3.14.23], p. 151.) However, the ALJ correctly refused to credit Micheo’s testimony.

As already noted, the actual hazard in this case was the absence of appropriate training to address increases in violence against staff. The Division did not demonstrate that Micheo had sufficient competency to testify regarding the realistic consequences that could arise from the asserted deficiencies in Employer’s training. Micheo was not current on his Division-mandated training and thus could not benefit from Labor Code section 6432, subdivision (g).² Further, he

² Labor Code section 6432, states, “A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that their 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.”

did not demonstrate that his opinion had an otherwise valid evidentiary foundation, “such as expertise on the subject, reasonably specific scientific evidence, an experience-based rationale, or generally accepted empirical evidence.” (See *Shimmick Construction Company, Inc.*, Cal/OSHA App. 1192534, Decision After Reconsideration (Aug. 26, 2022).) Micheo had never previously conducted an inspection of a juvenile correctional facility (TR [4.5.23], p. 7), and admitted that he was not an expert on training of Probation Officers (TR [4.5.23], p. 89). Micheo’s investigation also suffered from several deficiencies. He could not recall receiving or reviewing any of the officer’s training transcripts and had no idea of the total amount of training these employees had received. (TR [4.5.23], pp. 82-90.) Therefore, the ALJ correctly concluded that the Division did not demonstrate that Micheo had sufficient experience, training, or expertise regarding the identified hazards, and his opinion testimony could not be credited. (Decision, p. 9.)

The Division’s other witnesses also failed to demonstrate a realistic possibility of serious physical harm. The Division called several officers, including Brian Lindsey (Lindsey), Jessica De La Cruz (De La Cruz), and Ray Poole (Poole). They testified to actual injuries that occurred at BJNJH both to themselves and others as a result of violent interactions with the juveniles. Lindsey said he received a kick in the head resulting in a concussion. He further testified that he suffered three concussions altogether, during his employment. Poole said he was struck in the head and had a door repeatedly slammed on his chest. De La Cruz testified to being injured during interventions both before and after 2019, including an event in approximately 2011 that resulted in surgery to her hand and wrist.

The aforementioned witnesses also testified to observing other employees get injured as a result of workplace violence incidents, noting that their fellow employees suffered knee, back, and shoulder injuries. However, although the various witnesses identified and discussed injuries to themselves and others at the hearing, the ALJ is correct in holding, “there is no evidence that the actual injuries sustained required inpatient hospitalization for purposes other than observation, resulted in the loss of a member of the body or serious disfigurement, or that the injuries resulted in ‘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.’” (Decision, p. 9, citing Lab. Code, § 6432, subd. (e).) While it may well be that a concussion causes significant or permanent impairment, there was no testimony on the point in the record. There was also no testimony that Lindsey required inpatient hospitalization for his concussion. Likewise, while De La Cruz did require surgery, she did not say whether her surgery was performed on an inpatient or outpatient basis, nor whether it satisfied any other criteria such that it constituted serious physical harm. Further, the other injuries discussed in the record were only vaguely characterized. Therefore, the ALJ correctly held that Division simply did not meet its initial burden on the point.

In concluding that the Division failed to meet its initial burden, we reiterate that the Division cannot meet “its burden unless it introduces some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring.” (*MDB Management Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (April 25, 2016).) The Board “will not assume facts that are not in evidence, or take official notice on our own initiative in order to satisfy the Division’s initial burden of proof on a serious violation.” (*Ibid.*)

DECISION

The Decision of the ALJ is affirmed for the reasons stated herein, and the petition for reconsideration is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member
Marvin P. Kropke, Board Member



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