BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1251879**
TARGET CORPORATION **33 SOUTH 6TH STREET, #CC-1075** **MINNEAPOLIS, MN 55402** **Employer**	**DECISION**

Statement of the Case

Target Stores, Inc. (Employer) operates retail stores. Beginning August 7, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Alfred Daniel Sullivan, III (Sullivan), conducted an accident inspection at 3600 Rosemead Blvd., Rosemead, California (the job site), in response to an injury report.

On January 17, 2018, the Division issued two citations in accordance with California Code of Regulations, title 8.[1] Citation 1, Item 1, alleges that Employer failed to timely report to the Division a serious injury to an employee. Citation 2, Item 1, alleges that Employer failed to stack boxes to prevent falling.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, and the reasonableness of the proposed penalties. Employer also asserted a series of affirmative defenses for each citation.[2]

At the hearing, the parties presented a stipulation regarding Citation 2, Item 1, wherein Employer withdrew its appeal of the citation and accepted a reclassification of the citation from Serious to General, a reduced penalty, and a standard non-admissions clause. Therefore, the only issues remaining on appeal relate to Citation 1, Item 1.

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

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on December 5, 2019. Fred Walter, Partner at Walter & Prince, LLP, represented Employer. Martha Casillas, Staff Counsel, represented the Division. The matter was submitted for decision on April 1, 2020.

Issues

1. Did the Employer violate section 342, subdivision (a)?
2. What is the appropriate penalty for violation of Citation 1, Item 1?

Findings of Fact[3]

1. Celerino San Luis (San Luis) is an employee of employer.
2. San Luis was injured in the course of his employment with employer.
3. San Luis was transported to a local hospital for treatment and observation.
4. The hospital admitted San Luis on July 20, 2017 at 9:29 a.m., and discharged him on July 21, 2017, at 7:15 p.m.
5. During the course of San Luis' hospitalization, his care consisted of other than medical observation in that registered nurses were required to flush an intravenous line five times to keep the line open and available for additional pain medication and a computerized axial tomography (CAT) scan was used to evaluate San Luis' right parietal hemorrhagic contusion.
6. San Luis received inpatient hospitalization for over 24 hours for other than observation.
7. Employer reported the injury to the Division on July 28, 2017. Employer's report of the injury was untimely.
8. Employer employs over 100 employees.

Analysis

1. Did Employer violate section 342, subdivision (a)?

Section 342, subdivision (a), found under Article 3 (Reporting Work-Connected Injuries), Subchapter 2 (Construction Safety Orders), of Chapter 3.2 (California Occupational Safety and Health Regulations) provides:

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any

[3] Findings of Fact 1, 2, and 3 are stipulations of the parties.

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 no 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.

Section 330, subdivision (h), found under Article 1 (Definitions Under California Occupational Safety and Health Act of 1973), Subchapter 1 (Regulations of the Director of Industrial Relations), Chapter 3.2 (California Occupational Safety and Health (CAL/OSHA)) provides:

(h) "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 or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

Citation 1, Item 1 alleges:

Prior to and during the course of the inspection, including, but not limited to July 20, 2017, the employer did not report a serious employee injury to the nearest District Office of the Division of Occupational Safety and Health in a timely manner.

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. 1, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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).)

In order to establish a violation of section 342, subdivision (a), the Division must first establish that an employee suffered a serious injury or illness, or death in a place of employment or in connection with employment. Then the Division must also establish that employer failed to report a serious injury in a timely manner. The Appeals Board has consistently held that doubts about whether an injury must be reported are to be resolved in favor of reporting the injury to the Division. (See *Steve P. Rados, Inc.*, Cal/OSHA App. 97-575, Decision After Reconsideration (Nov. 22, 2000); *Pacific Gas and Electric*, Cal/OSHA App. 76-966, Order and Reconsideration after Writ of Mandamus (July 31, 1979).) According to Cal/OSHA Accident Report Form 36 (S), Employer reported the accident by telephone on July 28, 2017 to the Monrovia office of the Division. (Exhibits 6 and 9). Here, it is undisputed that the report was late.

Sullivan testified that the report of a serious injury to the Division was eight days late and should have been reported. The Parties agree that San Luis' injury was serious and that it required medical attention. The issue in dispute is whether the injured worker was hospitalized more than 24 hours for "other than medical observation." To establish a violation, the Division must demonstrate that San Luis'injury was serious as defined in Section 330(h) and that the injury led to inpatient hospitalization for a period in excess of 24 hours for "other than medical observation."

a) Did the injury lead to inpatient hospitalization for a period in excess of 24 hours for other than medical observation?

Only serious illnesses are reportable. In order to meet the statutory definition of a serious illness, the Division must show there was an illness that required inpatient hospitalization for a period in excess of 24 hours for other than medical observation occurring in a place of employment, or in connection with any employment. Methodist Hospital of Southern California Discharge Summary of San Luis' records hospitalization from 7/20/2017 to 7/21/2017. (Exhibit 8 and D)[4] The Discharge Summary describes the accident as 64 year old San Luis working at Target and hit in the head by a box. A CT scan showed right parietal hemorrhagic contusion.

The Division argued that San Luis received medical treatment during his hospitalization which consisted of an "Intravenous push (IV)" on July 20, 2017 and July 21, 2017. The Employer argued that San Luis treatment ended when he left the emergency room and was admitted to the hospital as an inpatient. Employer further argued that the medical records demonstrate that San Luis' admission was for the purpose of "evaluation" and "observation" only, not for treatment, and that during the course of this observation period he received no medical treatment. These arguments are not consistent with Board precedent, the statutory and

[4] At hearing a joint motion for a protective order of medical records was made and granted. Exhibit 8 and D are admitted under protective order pursuant to joint motion from the parties.

regulatory definitions of "serious," and is contrary to the principle articulated in *Carmona v. Division of Industrial Safety and Health* (1979) 25 Cal. 3d 465. Neither Labor Code section 6302, subdivision (h) nor section 330, subdivision (h) uses the term "treatment". The definition found in both requires inpatient hospitalization for more than 24 hours for "other than medical observation".

To establish a violation, the Division must demonstrate that San Luis's injury was serious as defined in Section 330(h) and that the injury led to inpatient hospitalization for a period in excess of 24 hours for other than medical observation.

San Luis was performing work duties when a box fell on his head. Medical records, including a computerized axial tomography scan (CAT scan), indicate that San Luis suffered a head injury, specifically, a right parietal hemorrhagic contusion.

Mary Kochie (Kochie), a Division Nurse Consultant III, testified for the Division. Kochie has over forty years of experience as a licensed Registered nurse. Kochie credibly testified that she assisted Sullivan by reviewing the medical records. Kochie testified that San Luis' medical records indicate that he was admitted on July 20, 2017, at 9:29 a.m. and discharged on July 21, 2017 at 7:15 p.m. The Division thus established San Luis received inpatient hospitalization for more than 24 hours.

Kochie testified that San Luis' medical records revealed that a registered nurse administered four milligrams of morphine, a narcotic used to relieve pain, through an "intravenous push" lasting about seven minutes on July 20, 2017, at 12:16 p.m. Kochie opined that the administration of the medication was treatment, something other than mere observation. Kochie additionally testified that San Luis had a subdural hematoma requiring that an intravenous line remain open for administration of pain medication. In order to keep the intravenous line clean, San Luis received numerous saline flushes.[5] Kochie opined that a saline flush is treatment, because only registered nurses are authorized to perform this procedure. Here, it is noted that five saline flushes of the intravenous line was performed while San Luis was an inpatient. Kochie testified that the intravenous line was left open for flushes and the administration of additional pain medication on an as needed basis.

[5] These saline flushes occurred on July 20th at 2:00 p.m., 4:43 p.m., and 9:11 p.m., and also on July 21st at 5:23 a.m. and 4:17 p.m.

Dr. Mark Langdorf (Langdorf), a Board Certified Emergency Medicine practitioner with over 33 years of experience, both as a practitioner and professor of emergency medicine, testified for Employer as an expert on patients with head trauma.[6] Langdorf reviewed the same medical records from San Luis' hospital visit and opined that San Luis did not receive any treatment after admission to the hospital.

On direct examination, Langdorf opined that the running of an intravenous line alone is not treatment because it is only used to keep the vein open for any needed medication. However, on cross examination, Langdorf testified that a saline flush of an intravenous line is neither observation nor treatment, and does not fit into either category. On cross examination Langdorf was asked, "Is the administration of an intravenous saline flush medical observation?" Langdorf responded, "I don't know." Langdorf on cross examination testified that an intravenous saline flush is not a treatment but it doesn't have a category." This candid testimony is credited and reveals that conducting an intravenous saline flush is more than mere observation. According to Kochie's testimony, conducting an intravenous saline flush can only be done by a licensed registered nurse. Additionally, Langdorf also testified that a CAT scan is an evaluation, which is other than observation. The Appeals Board has previously held that reasonable inferences can be drawn from the evidence at hearing. It can be inferred from Langdorf's testimony that the injured suffered a serious injury because he received something other than observation.

Based on the foregoing, the preponderance of the evidence suggests that San Luis's hospitalization of over 24 hours was for other than observation. The evaluation of the injury with a CAT scan, and the intravenous saline flushes administered by registered nurses are other than just observation. Therefore, the Division established that San Luis suffered a serious injury in accordance with section 330, subdivision (h).

Accordingly, the Division established that the Employer failed to timely report to the Division a serious injury or illness suffered by an employee at work. Citation 1, Item 1 is affirmed.

2. **What is the appropriate penalty for violation of Citation 1, Item 1?**

Labor Code section 6602 assigns to the Appeals Board the task of approving, modifying, or vacating penalties proposed by the Division. Labor Code section 6409.1, subdivision (b), requires a civil penalty of $5,000 for violations of section, 342, subdivision (a). Labor Code section 6319, subdivision (c), directs that penalties be given due consideration for appropriateness based on the gravity of the violation, and size, good faith and history of the employer. Section 335 further identifies and defines the factors considered in the assessment of

[6] Employer presented Langdorf as an expert witness at the hearing and the Division did not challenge his competency as an expert witness or raise any objections. Accordingly, Langdorf meets the criteria in Evidence Code §720 and his testimony has been given the appropriate weight.

the civil penalties. The penalty assessment for late report violations of section 342, subdivision (a), is subject to modifications for size, good faith, and history under Labor Code section 6319, subdivision (c). (*Central Valley Engineering & Asphalt,* Cal/OSHA App. 08-5001, Decision After Reconsideration and Remand (Dec. 4, 2012).)

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).)

Employer did not present any evidence that the Division's adjustment factors were miscalculated[7]. The Good Faith of an employer is based upon the quality and extent of the safety program the employer has in effect and operating. (§335, subd. (c)) It includes the employer's awareness of CAL OSHA, and any indication of employer's desire to comply with the California Occupational Safety and Health Act. Section 336, subdivision (d)(2), allows for no reduction, or a reduction of 15 percent or 30 percent depending on the level of an employer's Good Faith. Here, Sullivan credibly testified that Employer's safety program met the minimum requirements and that it was an average safety program. Sullivan reviewed Employer's training programs and testified that they were lacking in part due to a failure to provide personal interaction among the employees and that the majority of the training was done via video. Additionally, Employer did not check on the injured worker after his admission to the hospital.

Section 335, subdivision (b), and section 336, subdivision (d)(1) provide that no adjustment may be made for Size when an employer has over 100 employees. Here, no adjustment is available for Employer based on its size of more than 100 employees. The Division noted in its penalty calculation sheet that Employer was entitled to a reduction of 15 percent for Employer's good faith, and 10 percent for its history. The evidence as presented via the testimony of Sullivan is consistent with those reductions. Together, these amount to a reduction of 25 percent of $5,000, or $1,250. The appropriate penalty to be assessed is therefore $3,750.

Conclusions

The evidence supports a finding that Employer violated section 342, subdivision (a), by failing to timely report to the Division a serious injury suffered by the employee. The amended penalty of $3,750 is reasonable.

[7] Employer argued that good faith should be raised but presented no convincing evidence on this issue.

Order

It is hereby ordered that Citation 1, Item 1 is affirmed and the associated penalty is modified as set forth in the attached Summary Table. Citation 2, Item 1, is reclassified from Serious to General and the modified penalty is set forth in the attached Summary Table. Further, the settlement terms for Citation 2, Item 1 are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing, whatsoever by employer. Neither employer's agreement to compromise Citation 2, Item 1 nor any statement contained in this agreement regarding Citation 2, Item 1, shall be admissible in any other proceeding, either legal, equitable, or administrative except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

04/29/2020

Dated**:**

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.**