BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1299712**
KING FRESH PRODUCE LLC **4731 AVENUE 400** **DINUBA, CA 93618**	**DECISION**
Employer	

Statement of the Case

King Fresh Produce LLC (Employer or King Fresh) is a food processing business operating a facility located at 4731 Avenue 400, in Dinuba, California (the worksite). Beginning on March 7, 2018, in response to a report that a worker had been injured on the job, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ronald Chun (Chun), conducted an accident investigation at the worksite.

On July 27, 2018, the Division issued two citations to Employer for violations of title 8 of the California Code of Regulations.[1] Citation 1, Item 1, was not appealed by Employer. Employer filed a timely appeal of Citation 2.

Citation 2, classified as a Serious Accident-Related citation, alleged that Employer failed to stop the movement of equipment during cleaning and servicing operations resulting in a worker sustaining serious injuries when he was caught between a moving bin and parts of the machine.[2]

As to Citation 2, Employer contested the classification of the citation and the reasonableness of the proposed penalty. Employer also asserts that it was denied due process due to the Division's alleged failure to comply with Labor Code section 6432, subdivision (b)(2). Employer did not appeal the existence of the violation of the safety order.

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

[2] The parties stipulated that the worker suffered serious physical harm as defined by section 330, subdivision (h), and Labor Code section 6302, subdivision (h). See Exhibit J-1.

This matter was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), in Fresno, California, on December 4, 2019. Guy Teafatiller represented Employer. Michelle Bethge, Esq., Staff Counsel, represented the Division. The matter was submitted for decision on March 10, 2020.

Issues

1. Was Employer properly provided notice of the Division's intention to cite Citation 2 as Serious via the procedures described in Labor Code section 6432, subdivision (b)(1)?

2. Did the Division substantially comply with the requirements needed to issue a Serious citation?

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

4. Did Employer rebut the presumption that the violation 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?

5. Is Citation 2 properly classified as Accident-Related?

6. Did the Division propose a reasonable penalty for Citation 2?

Findings of Fact

1. The Division issued Citation 2 eleven days after Employer received the Notice of Intent to Classify Citation as Serious (1BY notice).

2. In the course of the inspection, before the issuance of the Serious citation, the Division interviewed three employees with knowledge of the accident and Employer's operations.

3. Prior to the issuance of the Serious citation, the Division examined documents obtained through document requests. The documents examined pertained to Employer's training, lockout/tagout procedures for the conveyor system, and the circumstances surrounding the accident.

4. On January 29, 2018, Juan Martinez (Martinez), an employee of Employer, suffered a pulmonary contusion injury when the equipment he was attempting to clean moved and caught him between a moving bin and parts of the machine.

5. Martinez's injuries required inpatient hospitalization and treatment for a period in excess of 24 hours.

6. The January 29, 2018, accident resulted from a failure to stop and de-energize the bin dumper prior to Martinez attempting to remove some fruit that was stuck in the equipment.

7. The penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Was Employer properly provided notice of the Division's intention to cite Citation 2 as Serious via the procedures described in Labor Code section 6432, subdivision (b)(1)?

Labor Code section 6432, subdivision (b)(1), contains the following language:

(b) (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:

(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.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

(2) The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision. The director shall prescribe the form for the alleged violation descriptions and solicitation of information. Any forms issued pursuant to this section shall be exempt from the rulemaking provisions of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code).

In sum, the Labor Code instructs the Division to consider the factors listed in subdivision (b)(1) prior to classifying a citation as Serious. This provides an employer with the opportunity to furnish information to the Division that may militate in favor of issuance of a less than serious citation. Labor Code section 6342, subdivision (b)(2), also allows the Division to create and issue a standardized form to collect the information listed in subdivision (b)(1).

In this case, the Division issued a 1BY notice on July 12, 2018. This 1BY notice was received by Employer on July 16, 2018. On July 27, 2018, only eleven days later, the Division issued Citation 2. As the dates are established by the stipulations of the parties shown in Exhibit J-1, it is found that the Division failed to allow the Employer 15 days to respond to the 1BY notice and provide the information listed in section 6432, subdivision (b)(1).

2. Did the Division substantially comply with the requirements needed to issue a Serious citation?

While a negative inference may be drawn from the Division's failure to comply with the 15 day requirement, drawing a negative inference is at the discretion of the fact finder under Labor Code section 6432, subdivision (d). *(Echo Alpha, Inc., John Stagliano, Inc., Evil Angel Productions, and John Stagliano Inc. dba Evil Angel Video,* Cal/OSHA App. 14-080, Decision After Reconsideration (Dec. 24, 2015), citing *Overnite Transp. Co. v. NLRB* (D.C. Cir. 1998) 140 F. 3d 259, 267. "[T]he decision of whether to draw an adverse inference has generally been held to be within the discretion of the fact finder.")

Notably, the Appeals Board held in Echo Alpha, *supra,* Cal/OSHA App. 14-080, that the above Labor Code provision does not *require* the trier of fact to make a negative inference due to the failure of the Division to provide a 1BY notice to an employer. Rather, the Appeals Board held that the decision to draw a negative inference is left to the discretion of the ALJ.

In *Echo Alpha, supra,* Cal/OSHA App. 14-080, the Appeals Board declined to overturn the ALJ's conclusion that a negative inference was not required in that case. Upon review of the record, the ALJ determined that the Division's inspector had substantially complied with the requirements of the Labor Code, by considering the factors listed in the Labor Code prior to issuing the citation as Serious. Further, the Appeals Board found that ALJ did not act in excess

of his powers by declining to draw a negative inference and reclassifying the citations as General. (See also *West Coast Arborists, Inc*., Cal/OSHA App. 1180192, Denial of Petition for Reconsideration (April 26, 2019).) In this case, the documentary evidence presented at the hearing and the testimony of Chun, Associate Safety Engineer, establish that the Division conducted a comprehensive inspection before issuing the Serious citation. In particular, the Division examined Employer's training, procedures and other information related to the hazards associated with lockout/tagout, specifically of the conveyor system, and what occurred at the time of the incident. Chun held three interviews with employees familiar with the accident and Employer's operations. Further, Chun issued two document requests, in response to which Employer provided nearly all the requested documents.

The two document requests from the Division, made well before the issuance of Citation 2, show the Division's good faith attempt to meet the requirements of Labor Code section 6432, subdivision (b)(1). The Division gathered documents generally related to training for employees and supervisors relevant to preventing employee exposure to hazards. Also, documents were reviewed with regard to procedures for discovery and correction of hazards, supervision of employees exposed to hazards, as well as procedures for communication to employees regarding safety rules and procedures. (Lab. Code § 6432, subd. (b)(1)(A)-(D).)

Here, as discussed, the Division's conduct evinced a good faith attempt to comply with Labor Code section 6432. Furthermore, no representative of Employer testified to suggest that Employer's response to the 1BY notice would have been different had the Division waited an additional four days before issuing the citation. Therefore, it is found that the Division substantially complied with Labor Code section 6432 and a negative inference will not be drawn in this instance, even though the Division made errors in its issuance of the 1BY notice.

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

Citation 2 alleges a Serious Accident-Related violation of section 3314, subdivision (c), which provides:

> (c) Cleaning, Servicing and Adjusting Operations.
>
> Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations, Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

The Alleged Violation Description (AVD) in Citation 2 states:

On or about, including but not limited to, on 01/29/2018, King Fresh Produce failed to ensure the Bin Dumper, which was capable of movement, was stopped and the power source de-energized to prevent inadvertent movement prior to an employee attempting to remove fruit that was jammed in the machine. As a result, the employee sustained a serious pulmonary contusion injury when he was caught between a moving bin and parts of the machine.

Employer does not appeal the existence of the violation and stipulates that Martinez suffered serious physical harm as a result of an accident resulting from a violation of section 3314, subdivision (c).

As to the Serious classification of Citation 2, Labor Code section 6432, subdivision (a) and (e), state:

(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 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.

[...]

(e) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(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.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. *(United Parcel Service,* Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018), citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (April 24, 2015).)

On January 29, 2018, while in the process of attempting to remove fruit that was stuck in the food processing equipment, Martinez suffered a serious pulmonary contusion injury when he was caught between a moving bin and parts of the machine. The parties stipulated that Martinez was an employee of Employer and the injuries he sustained in the accident required inpatient hospitalization and treatment for a period in excess of 24 hours. The parties further agreed the injuries constituted a "serious injury" as defined under section 330, subdivision (h), and Labor Code section 6302, subdivision (h), and "serious physical harm" as defined by Labor Code section 6432, subdivision (e).

Chun testified that he had been an Associate Safety Engineer with the Division for twelve years at the time of the hearing and he had performed more than 900 inspections. He further testified that he was current in his mandated Division training at the time of the inspection. Chun was qualified, therefore, to testify as to the serious classification of Citation 2 (See Lab. Code § 6432, subd. (g).)

In Chun's opinion, there is a realistic possibility that a worker could sustain serious physical harm or death as a result of a piece of equipment or machinery not being properly de-energized to prevent inadvertent movement prior to an employee attempting to clean or service it.

In this case, not only was there the realistic possibility that serious physical harm could occur, but it was an actuality when Martinez sustained serious physical harm while clearing fruit from equipment that was not properly de-energized. Based on the stipulations of the parties and the evidence presented at the hearing, the Division established a rebuttable presumption that the citation was properly classified as Serious.

4. Did Employer rebut the presumption that the violation 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 that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(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.

Prior to allowing any employees to attempt to remove fruit stuck in the fruit processing equipment, Employer had a duty to ensure that the equipment was de-energized and, if necessary, blocked or locked out. The parties stipulated that the injury was the result of a violation of section 3314, subdivision (c).

There was a high risk of severe harm that could be expected to occur in connection with the equipment beginning to move while the worker is attempting to remove fruit stuck in the unit. As such, reasonable diligence required that Employer take additional steps to anticipate and prevent the violation. Employer failed to do so. Accordingly, Employer cannot rebut the classification of the citation by demonstrating a lack of knowledge pursuant to Labor Code section 6432, subdivision (c).

5. Is Citation 2 properly classified 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*, 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).)

Here, the parties stipulated:

> The January 29, 2018 accident resulted from a failure to stop and de[-]energize the bin dumper. [and]
>
> The injury to Juan Martinez was the result of a violation of section 8 CCR 3314(c).

As such, the parties' stipulations establish that Citation 2 was properly characterized as Accident-Related.

6. Did the Division propose a reasonable penalty for Citation 2?

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's appeal challenged the reasonableness of the penalty imposed on Citation 2. However, the parties stipulated before the hearing that the proposed civil penalty was calculated in accordance with the Division's policies and procedures pursuant to title 8 and the Labor Code. Accordingly, it is determined that the proposed penalty of $16,200 for Citation 2 is reasonable.

Conclusions

In Citation 2, the violation of section 3314, subdivision (c), was established as a matter of law because Employer did not appeal the existence of the violation. The citation was properly classified as Serious because there was a realistic possibility that serious physical harm could have occurred as a result of the violation. The citation was properly characterized as Serious Accident-Related. The penalty of $16,200 is reasonable.

Orders

It is hereby ordered that Citation 2 is sustained as Serious Accident-Related with a penalty of $16,200.

It is further ordered that the penalties are assessed as set forth in the attached Summary Table.

Dated: 03/20/2020

J. Kevin Elmendorf
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.**