BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1333608**
CITY OF SANTA BARBARA PUBLIC WORKS STREET DIVISION **PO BOX 1990** **SANTA BARBARA, CA 93102-1990** **Employer**	**DECISION**

Statement of the Case

City of Santa Barbara Public Works Street Division (Employer), is a municipal division that, among other things, conducts street repair in Santa Barbara, California. Beginning July 27, 2018, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Lorenzo Zwaal (Zwaal), commenced an inspection at Employer's work site in the 700 block of East Anapamu Street in Santa Barbara, California. On January 9, 2019, the Division cited Employer for failing to provide effective heat illness prevention training and for failing to establish, implement, and maintain an effective heat illness prevention plan.

Employer filed timely appeals of the citations on the grounds that the safety orders were not violated, the classifications are incorrect, and the proposed penalties are unreasonable. Employer also asserted numerous affirmative defenses.[1]

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On January 12, 2021, ALJ Lucas conducted the hearing from Los Angeles, California, with the parties and witnesses appearing remotely via the Zoom video platform. David W. Donnell, attorney for Donnell, Melgoza & Scates LLP, represented Employer. William Cregar, Staff Attorney, represented the Division. The matter was submitted for decision on February 26, 2021.

[1] 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. 10926000, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did the Division establish that Employer failed to provide effective heat illness prevention training?

2. Did the Division establish that Employer failed to establish, implement, and maintain an effective Heat Illness Prevention Plan?

3. Are the violations properly classified as Serious?

4. Are the proposed penalties reasonable?

Findings of Fact

1. On July 11, 2018, Employer directed its employees, including Tyler Medearis (Medearis), to work laying asphalt on a street located in Santa Barbara, California.

2. On July 11, 2018, Employer had an operative Heat Illness Prevention Plan (HIPP) consisting of seven pages.

3. Employer did not train Medearis on the contents of its written HIPP.

4. The written HIPP did not include provisions to provide water free of charge to its employees, to encourage frequent water drinking by employees, or for providing access to shade when temperatures exceeded 80 degrees Fahrenheit.

5. The written contents of Employer's HIPP did not include procedures for providing for effective communication, observing employees for signs and symptoms of heat illness, designating authorized employees at each work site to call for emergency medical services, or providing for pre-shift meetings to review high heat procedures.

6. The written contents of Employer's HIPP did not include specific Emergency Response Procedures for reporting physical symptoms and making sure medical assistance is available.

7. The written contents of Employer's HIPP did not provide for any type of observation period for employees newly assigned to a high heat area.

8. The adjustment factors used to calculate the proposed penalties were calculated in accordance with the Division's policies and procedures.

Analysis

1. Did the Division establish that Employer failed to provide effective heat illness prevention training?

In Citation 1, Item 1, Employer was cited for a violation of California Code of Regulations, title 8, section 3395, subdivision (h)(1),[2] which provides:

> (h) Training.
>
> (1) Employee Training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:
>
> (A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
> (B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.
> (C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.
> (D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).
> (E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life threatening illness.

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

(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.
(G) The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.
(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

In Citation 1, the Division alleges:

Prior to and during the course of the investigation, the employer did not provide heat illness prevention training, meeting the requirements of this subsection to a non-supervisory employee prior to working on the asphalt crew. As a result, on or about July 11, 2018, the employee suffered an exertional heat illness.

The safety order requires that Employer provide effective heat illness training to its employees, including Medearis. 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. 11, 2019).) "'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." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

On direct and cross examination, Medearis testified regarding the events that gave rise to the inspection in this appeal, establishing facts that are substantially undisputed. On July 11, 2018, Medearis was assigned to work at an outdoor place of employment laying asphalt with a paving crew on a street in Santa Barbara. His shift started at about 6:30 a.m. At about 1:00 p.m., Medearis began experiencing some cramping in his forearms. Medearis testified that he had no other symptoms at that time. He reported the cramping to his supervisor, who told him to drink water and rest if needed. His supervisor also assigned Medearis a less strenuous job of sweeping on a

side street. His symptoms worsened at about 4:00 p.m., when he began to experience nausea and severe abdominal cramping. Medearis reported these worsening symptoms to his supervisor, who suggested taking Medearis to a nearby medical center. However, when Medearis got to his supervisor's truck and sat down, Medearis testified that his "whole body shut down." Emergency services (911) were called and Medearis was transported to a nearby hospital. Medearis testified that he was diagnosed as having low kidney creatinine levels and dehydration, with a secondary diagnosis of rhinovirus.[3] No testimony was taken at hearing regarding the length of his hospital stay, but the Division notes in its written recording of Medearis's statement of the incident that he was released at 10:30 the next morning.

Employer argued that Medearis was trained in heat illness prevention. To support this position, Employer introduced multiple "Class Attendance Sheets." (Exhibits C and D.) However, based on the topics and dates of training, Exhibits C and D do not clearly establish that Medearis was trained due to the topics and dates of training. Medearis testified that he started working for Employer on January 2, 2018. While three Class Attendance Sheets show topics related to heat illness safety training, the dates of those trainings were June 18, 2015, June 1, 2017, and July 19, 2018. (Exhibit C.) As such, two of the trainings took place prior to Medearis's hire and one training took place after the incident at issue. The Class Attendance Sheets in Exhibit D do not show topics related to heat illness safety training.

It is noted that at the bottom of each of these Class Attendance Sheets the following appears: "Remember to drink plenty of water this week and utilize your shade cover during breaks due to high heat." Employer argues this shows that Medearis was trained on the topic of heat illness prevention. As the topic of the trainings were not heat illness prevention and there was no other evidence substantiating that the training contained the elaboration on Employer's HIPP, this sentence alone does not suffice to establish training on Employer's HIPP. The absence of documentation showing that Medearis was trained by Employer in heat illness topics, during the operative time period, in comparison with Employer's practice of documenting other training topics, supports an inference that Employer did not provide the training to Medearis on heat illness topics. (See *Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002) [the absence of documentation showing employee was provided high-voltage hazard training is prima facie evidence of the fact that training did not occur].)

The weight of the evidence supports a finding that Employer failed to train Medearis on its heat illness prevention training. Consequently, Employer violated section 3395, subdivision (h)(1). Accordingly, Citation 1 is affirmed.

[3] Medearis had experienced flu-like symptoms two and three days prior.

2. Did the Division establish that Employer failed to establish, implement, and maintain an effective Heat Illness Prevention Plan?

In Citation 2, Item 1, Employer was cited for a violation of section 3395, subdivision (i), which provides, in relevant part:

> (i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
>
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

In Citation 2, the Division alleges:

> Prior to and during the course of the investigation, the employer's ,written Heat Illness Prevention Program did not comply with the required procedures for the provisions of water and access to shade, the high heat procedures referred to in subsection (e), Emergency Response Procedures in accordance with subsection (f), and acclimatization methods and procedures in accordance with subsection (g).

Exposure to the Hazard Addressed by the Safety Order

There is no dispute that section 3395 applied to the work conducted by Employer, and that actual exposure to the hazard of heat illness existed at this worksite. Medearis, an employee of Employer, testified that he was helping a work crew lay asphalt on a city street on July 11, 2018. Likewise, there is no disagreement that Employer had an operative HIPP in effect on July 11, 2018, and there is no disagreement as to the contents of Employer's HIPP. A copy of Employer's seven-page HIPP was submitted at hearing. (Exhibit 4.) At issue is whether the HIPP's contents fulfill Employer's obligations under the safety order. The Division contends that Employer's HIPP, while in general covering many required heat illness topics, did not contain all the specific written elements that the safety order requires. Namely, section 3395, subdivision (i), requires Employer's

HIPP to contain procedures for the provision of water and access to shade, the high heat procedures referred to in subsection (e), Emergency Response Procedures in accordance with subdivision (f), and acclimatization methods and procedures in accordance with subsection (g).

Provision of Water and Access to Shade

The Division alleges that Employer's HIPP failed to contain, in writing, Employer's procedures for the provision of water and access to shade, as required by section 3395, subdivision (i)(1). Section 3395, subdivisions (c) and (d), provide:

> (c) Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable, including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged.
>
> (d) Access to shade.
>
> (1) Shade shall be present when the temperature exceeds 80 degrees Fahrenheit. When the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling….
> (2) Shade shall be available when the temperature does not exceed 80 degrees Fahrenheit. When the outdoor temperature in the work area does not exceed 80 degrees Fahrenheit employers shall either provide shade as per subsection (d)(1) or provide timely access to shade upon an employee's request.

Employer alleged that its HIPP contained sufficient references to water and shade in its HIPP to satisfy the requirements of section 3395. However, a review of the document reveals Employer's HIPP did not include provisions to provide water free of charge to its employees, to

encourage frequent water drinking by employees, or for providing access to shade when temperatures exceeded 80 degrees Fahrenheit.

High Heat Procedures

The Division also alleges Employer's HIPP failed to contain, in writing, all required high-heat procedures listed in section 3395, subdivision (e):

> (e) High-heat procedures. The employer shall implement high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit. These procedures shall include the following to the extent practicable:
>
> (1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purpose only if reception in the area is reliable.
> (2) Observing employees for alertness and signs or symptoms of heat illness. The employer shall ensure effective employee observation/monitoring by implementing one or more of the following:
> (A) Supervisor or designee observation of 20 or fewer employees, or
> (B) Mandatory buddy system, or
> (C) Regular communication with sole employee such as by radio or cellular phone, or
> (D) Other effective means of observation.
> (3) Designating one or more employees on each worksite as authorized to call for emergency medical services, and allowing other employees to call for emergency services when no designated employee is available.
> (4) Reminding employees throughout the work shift to drink plenty of water.
> (5) Pre-shift meetings before the commencement of work to review the high heat procedures, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary.
> […]

A review of Employer's HIPP reveals three mentions of the phrase "heat wave," two mentions of specific temperatures (85 degrees and 95 degrees), and two mentions of employee breaks. Absent, however, are specific elements required by section 3395: subdivision (e)(1), regarding procedures for providing for effective communication; subdivision (e)(2), regarding

observing employees for signs and symptoms of heat illness; subdivision (e)(3), regarding designating authorized employees at each work site to call for emergency medical services; subdivision (e)(4), regarding reminding employees to drink plenty of water; and subdivision (e)(5), regarding pre-shift meetings to review high heat procedures. Mark Howard (Howard), Risk Manager for Employer, testified at hearing that Employer is currently doing many of these things in the field. However, section 3395, subdivision (e), requires that the high heat procedures be in writing and including in the HIPP, and, therefore, Employer's field practice alone does not satisfy the safety order.

Emergency Response Procedures

The Division further alleges Employer's HIPP failed to contain, in writing, Employer's emergency response procedures. Section 3395, subdivision (f), requires:

> (f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:
>
> (1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor or emergency medical services when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purpose only if reception in the area is reliable. If an electronic device will not furnish reliable communication in the work area, the employer will ensure a means of summoning emergency medical services.
> (2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided.
> […]
> (3) Contacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider.
> (4) Ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

"The safety order requires that an employer's HIPP have written emergency response procedures in place. (Section 3395, subdivision (i)(3).) These can be integrated into an employer's IIPP or contained in a separate document. (Section 3395, subdivision (a), Note No. 1, and subdivision (i).) In order to comply with section 3395, subdivision (f)(2), the employer's own procedures must be followed in response to an employee displaying signs or symptoms of 'possible

heat illness.'" (*Aptco, LLC.*, Cal/OSHA App. 1332715, Decision After Reconsideration (Jan. 27, 2021).) Howard testified at length regarding the contents of the HIPP, including pointing out six places in Employer's HIPP that address emergency response procedures. However, a review of those sections reveals only cursory mentions of reporting physical symptoms and making sure medical assistance is available. Employer's HIPP does not include specific procedures for how Employer plans to respond to a medical emergency in the field, as required by this subdivision. Consequently, the Division has met its burden of showing a violation of this subdivision.

Acclimatization Methods and Procedures

Finally, the Division alleges that Employer's HIPP does not contain, in writing, the acclimatization procedures required by section 3395, subdivision (g), which provides:

(g) Acclimatization.

(1) All employees shall be closely observed by a supervisor or designee during a heat wave. For purposes of this section only, heat wave means any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and at least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days.
(2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

There are several references to acclimatization in the HIPP, pointed out by Howard in his testimony. None of those references to acclimatization, however, provide for any type of monitoring period other than an indeterminate "sufficient period of time." It is also noted that the two mentions in the HIPP of this "sufficient period of time" are only triggered when "employees work more than one hour in any consecutive task in dry-bulb air temperature in excess of 85 degrees Fahrenheit" and when the employee is "working consecutively for two-hours in an air temperature in excess of 95 degrees Fahrenheit." These mere mentions of type period or not enough for Employer to be in compliance with subdivision (g).

When a citation alleges more than one instance of a violation of a safety order, it is enough to sustain a violation if just one instance is proven. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) Here, the evidence supports a finding of a violation of four instances of section 3395, subdivision (i). Accordingly, Citation 2 is affirmed.

3. Are the violations properly classified as Serious?

Labor Code section 6432, subdivision (a), states:

> 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.
> […]

"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.

(Lab. Code §6432, subd. (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).)

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.

The evidence offered by the Division to establish a Serious classification was limited and cursory. Zwaal at the time of hearing was not a safety engineer or industrial hygienist for the Division and no testimony was offered to establish that Zwaal was current with his division-mandated training at the time of the hearing. The Division did not otherwise demonstrate that Zwaal's opinion testimony regarding classification should be credited. Therefore, Zwaal is not deemed competent to offer testimony as to the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violations are serious. His testimony regarding the realistic possibility of serious physical harm as to both citations is not credited.

The Division may establish that a realistic possibility that death or serious physical harm could result from the hazards created by the violations by offering evidence other than the opinion of Zwaal. The Division, however, "cannot meet its burden unless it introduces at least 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 (Apr. 25, 2016).) "The Board will not assume facts not in evidence nor will it take official notice on its own initiative to satisfy the Division's burden of proof on a Serious violation. (*Environmental Construction Group*, Cal/OSHA App. 1129260, Decision After Reconsideration (May 16, 2019).) The parties stipulated to the admission of a report by Mary Kochie, R.N. (Kochie), prepared by her for the Division to determine whether a heat illness occurred. (Exhibit 7.) The report focuses on the specific events of Medearis's illness presented on July 11, 2018, and the resulting diagnosis of a heat illness. The report does not discuss heat illness as it relates to Employer's HIPP other than to allege that Medearis had not been trained on the HIPP. The report also does not address whether Medearis's hospital stay was for purposes of other than medical observation.

The violation at issue in Citation 1 is Employer's failure to implement an effective heat illness training program by not training Medearis. The violation at issue in Citation 2 is Employer's failure to establish, implement, and maintain an effective HIPP. Neither the report from Kochie nor the testimony of Zwaal establish the types of injuries (or the possibility of injuries occurring) that could result from a failure to provide heat illness prevention training or the failure to establish, implement, and maintain an effective HIPP. The evidence also does not show beyond a preponderance of the evidence that Medearis suffered serious physical harm in this instance.

Consequently, the Division failed to establish that there was a realistic possibility that serious physical harm or death could result from the violations. Citations 1 and 2 are both reclassified as General violations.

4. Are the proposed penalties 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. (*RNR Construction, Inc.*, supra, Cal/OSHA App. 1092600), citing *Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The parties stipulated at hearing that the penalties were calculated by the Division pursuant to California Code of Regulations, title 8. As such, the factors analyzed by the Division to determine Extent and Likelihood, along with the adjustment factors of Good Faith, History, and Size, are presumptively reasonable. The Severity of the violation was originally rated as High because it was classified as Serious. However, because the citations are reclassified from Serious to General, the Base Penalty for both, from which all other adjustments are made, must be reduced in accordance with section 336.

Section 336, subdivision (b), provides that a Base Penalty will be set initially based on the Severity of the violation. Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
>
> [...]
>
> ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation.

> Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.
>
> MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.
>
> HIGH-- Requiring more than 24-hour hospitalization.

Citation 1

To determine the proper Severity, it is necessary to evaluate the type and amount of medical treatment required for an injury most likely to be sustained as a result of an employee not being trained on Employer's HIPP. In this instance, Medearis's injury required that he be transported to the hospital by emergency services. He received medical attention at the hospital, but was released within 24 hours. As such, the Severity is properly characterized as Medium. A General violation with a Medium Severity has a Base Penalty of $1,500. (§ 336, subd. (b).)

The Division's Proposed Penalty Worksheet indicates that the Division assigned a Medium Extent and Likelihood, resulting in no adjustment to the Base Penalty, for a Gravity-Based Penalty of $1,500. (§ 336, subd. (b).)

Section 336 provides for further adjustment to the Gravity-Based Penalty for Good Faith, Size, and History. The Division's Proposed Penalty Worksheet indicates that Employer was entitled to a 15 percent adjustment for Good Faith, no adjustment for Size, and a five percent reduction for History. Because the parties stipulated that these adjustment factors were calculated in accordance with Division policies and procedures, these adjustment factors are applicable. As such, the adjustment factors result in a penalty reduction of 20 percent of the Gravity-Based Penalty which equals an Adjusted Penalty of $1,200. (See § 336, subd. (d).)

Citation 2

As discussed above for Citation 1, to determine the proper Severity, it is necessary to evaluate the type and amount of medical treatment required for an injury most likely to be sustained as a result of Employer having a HIPP that is missing some required written elements. As discussed above, Medearis's injury required that he be transported to the hospital by emergency services. He received medical attention at the hospital, but was released within 24 hours. As such,

the Severity is properly characterized as Medium. A General violation with a Medium Severity has a Base Penalty of $ 1,500. (§ 336, subd. (b).)

The Division's Proposed Penalty Worksheet indicates that the Division assigned a Low Extent, with a corresponding 25 percent reduction in penalty, and Medium Likelihood, resulting in a total adjustment to the Base Penalty of 25 percent, for a Gravity-Based Penalty of $1,125. (§ 336, subd. (b).)

Section 336 provides for further adjustment to the Gravity-Based Penalty for Good Faith, Size, and History. The Division's Proposed Penalty Worksheet indicates that Employer was entitled to a 15 percent adjustment for Good Faith, no adjustment for Size, and a five percent reduction for History. Because the parties stipulated that these adjustment factors were calculated in accordance with Division policies and procedures, the adjustment factors are applicable. As such, the application of adjustment factors results in a penalty reduction of 20 percent of the Gravity-Based Penalty in which equals an Adjusted Penalty of $900. (See § 336, subd. (d).)

Conclusion

The Division established that Employer violated section 3395, subdivisions (h)(1) and (i). The citations are reclassified to General and the penalties are reasonable as modified herein.

Order

It is hereby ordered that Citation 1 is affirmed and the penalty of $1,200 is assessed, as set forth in the attached Summary Table.

It is hereby ordered that Citation 2 is affirmed and the penalty of $900 is assessed, as set forth in the attached Summary Table.

Dated: 03/26/2021

SAM E. LUCAS
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.**