BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1437436**
PAR ELECTRICAL CONTRACTORS, INC. **4770 N. BELLEVIEW AVENUE, SUITE 210, SUITE 300** **KANSAS CITY, MO 64116** **Employer**	**DECISION**

Statement of the Case

PAR Electrical Contractors, Inc. (Employer) is an electrical construction company that repairs its own equipment. Beginning October 14, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Luis Vicario (Vicario), conducted an inspection arising from an injury at Employer's facility at 525 Corporate Drive, in Escondido, California (the site).

On March 2, 2020, the Division issued three citations to Employer alleging six violations of California Code of Regulations, title 8.[1] The Division alleges that Employer failed to: timely report a serious workplace injury; maintain complete safety and health training records; completely answer a Form 5020 report; implement its accident investigation procedures; train and instruct an employee on the use of a disc grinder; and ensure an employee refrained from wearing gloves while operating a disc grinder.

Employer filed timely appeals of the citations, contesting the existence of the violations, the reasonableness of abatement requirements and time allowed, and the reasonableness of the proposed penalties. Employer also contested the classifications of citations 2 and 3. Employer asserted various affirmative defenses as to all of the citations.[2]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on March 22, 23, and 24, 2022. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Karen Tynan and Robert Rodriguez of Ogletree Deakins Nash Smoak

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

& Stewart, P.C., represented Employer. Nancy Steffan, Staff Counsel, represented the Division. The matter was submitted on August 16, 2022.

The parties presented the following stipulations at the commencement of the hearing:

1. Employer, PAR Electrical Contractors, Inc., consented to the Division's inspection of its premises at 525 Corporate Drive, in Escondido, California, on October 14, 2019.

2. PAR Electrical Contractors, Inc., was the correctly cited employer in Inspection Number 1437436.

3. Craig Frankenberger was an employee of PAR Electrical Contractors, Inc., on September 10, 2019.

4. Craig Frankenberger's injury of September 10, 2019 was ultimately a "serious" injury within the meaning of Labor Code section 6302, subdivision (h).

5. Citations 1, 2, and 3 were timely served.

6. PAR Electrical Contractors, Inc. timely filed its appeal of the citations in Inspection Number 1437436.

7. Exhibit J24 is a true and correct copy of Employer's accident report, which was produced to the Division on December 27, 2021.

Issues

1. Did Employer fail to timely report a serious injury?

2. Did Employer fail to include training dates and identities of training providers on its health and safety training documentation?

3. Did Employer fail to complete a Form 5020 after an injury event?

4. Did Employer fail to implement the accident investigation procedures in its Injury and Illness Prevention Program (IIPP)?

5. Did Employer fail to provide training and instruction to an employee whose job duties included operation of a disc grinder?

6. Did Employer fail to prohibit the use of gloves that created an entanglement hazard?

7. Are the proposed penalties reasonable?

Findings of Fact

1. Craig Frankenberger (Frankenberger) was an employee of Employer at all times relevant to the inspection herein.

2. On September 10, 2019, at approximately 7:30 a.m., Frankenberger injured his left thumb while operating a 20-inch disc grinder (disc grinder) at work.

3. Frankenberger shouted out to a nearby coworker, Greg Keyser (Keyser), who tried to stabilize Frankenberger's bleeding thumb before running to notify Employer's Safety and Shop Parts Manager, Roel Nieto (Nieto), and Employer's Shop Manager, Todd Hillman (Hillman), of the injury.

4. Nieto drove to Frankenberger, placed him in a vehicle, and then drove to the hospital a quarter mile away, traveling for no more than two minutes.

5. Nieto called Hillman to ask if Frankenberger's thumb was still at the site.

6. An employee found the severed thumb tip in the glove Frankenberger wore at the time of injury. No more than 20 minutes elapsed between Frankenberger's injury and the removal of the thumb tip from the glove.

7. Frankenberger met with the hand surgeon at approximately 6:30 p.m. and his thumb was amputated at approximately 8:00 p.m.

8. Employer reported the injury on September 11, 2019 at 4:15 p.m.

9. Frankenberger's training records do not consistently include training dates or identities of training providers.

10. Several fields on Employer's Form 5020, including type of employer, time employee began work, date returned to work, department where event occurred, specific activity employee was performing when event or exposure occurred, are incomplete.

11. Hillman conducted a safety stand-down with staff at the site within minutes of Frankenberger's injury.

12. Hillman completed Employer's "Injury/Illness Investigation Form #008" (Form 008) with information showing examination of the causes and factors associated with the accident, findings, and corrective actions.

13. On his first day of work, Frankenberger received training on the disc grinder from a coworker by reviewing the manufacturer's manual together as well as directly on the machine approximately four or five additional times.

14. Frankenberger operated the disc grinder for seven years as a fabricator, typically using it approximately 10 to 15 times each day.

15. Frankenberger wore snugly fitting leather gloves at the time of his injury.

16. Frankenberger was shaping a piece of metal on the disc grinder when his workpiece caught in the machine, forcing his left hand up and against the wheel face of the disc grinder.

17. Frankenberger's hand was not entangled or pulled into any pinch points.

18. Associate Safety Engineer, Luis Vicario (Vicario) did not interview Frankenberger or examine Frankenberger's glove.

19. The proposed penalties for Citation 1, Item 1, Citation 1, Item 2, and Citation 1, Item 3, were not calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to timely report a serious injury?

At the time of the inspection, section 342, subdivision (a), found under Article 3 (Reporting Work-Connected Injuries), provided:

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any 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 not 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.

At the time of inspection, section 330, subdivision (h) provided the following:

> "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.

In Citation 1, Item 1, the Division alleges:

> Employer failed to timely report to the Division a serious injury accident that occurred to an employee on or about 09/10/2019.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) "'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." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

An employer's duty to inform the Division that a serious injury or illness occurred is not triggered solely by knowledge that an injured employee has been to a hospital. Rather, the safety order clearly specifies that the duty begins after the employer knows, or with diligent inquiry would have known, of the serious illness. In *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003), the Appeals Board determined that section 330, subdivision (h), provides "objective guidance to what constitutes a 'serious injury' which does not preclude employer knowledge at an earlier time where, under particular circumstances, and employer knows or with diligent inquiry could know that hospitalization for more than 24 hours is either required **or substantially probable**." (*Id.*,

emphasis added.) Thus, "it is the facts giving rise to [an employer's] actual or constructive knowledge of the serious injury which are dispositive for determining a violation of the eight-hour rule in section 342(a)." In that matter, the Appeals Board offered the following discussion regarding determining whether the employer had constructive knowledge of an employee's serious illness:

> We find that in addressing the constructive knowledge requirement in section 342, subdivision (a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical treatment, Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h).

After an employer receives objective indicators that suggest an injury may have been serious, even if it cannot be definitively resolved prior to the expiration of the eight hour reporting deadline, an employer should resolve all doubt in favor of making a timely report of the incident to the Division. (*Burbank Recycling, Inc.*, Cal/OSHA App. 10-0562 and 10-0563 (Jun. 30, 2014).) "Once an employer has notice of a sufficient likelihood of the injury being serious, additional inquiry is required." (*General Truss Co., Inc.*, Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011).) Further, if an employee must go to the hospital and the injury has not resolved by the end of the day, it is reasonable to infer that the injury is not minor, making further inquiry appropriate. (*D S Cargo DBA Clock Freight, Inc.*, Cal/OSHA App. 1124296, Decision After Reconsideration (Aug. 15, 2017).)

To establish a violation, the Division must demonstrate that an Employer failed to timely report to the Division a serious injury suffered by its employee in connection to work within the statutory period. It is uncontroverted that Frankenberger suffered his injury on September 10, 2019, at approximately 7:30 a.m. and that Employer reported the injury on September 11, 2019, at approximately 4:15 p.m.

Type and location of injury

Frankenberger testified that he was shaping a piece of metal on the wheel of the disc grinder when the workpiece bucked, causing injury to his thumb tip. He testified that there were no witnesses, but he shouted out to Keyser who was within 15 feet. Keyser testified that he saw

Frankenberger "bleeding out the top of his thumb." This prompted Keyser to run to find and place a clean rag on the thumb, and position Frankenberger against a countertop. The need to staunch blood flow and take distinct steps to stabilize the injured person indicate that the injury may not be minor.

Employer's knowledge of cause of injury

Keyser testified that he then ran as fast as he could to notify managers Hillman and Nieto that Frankenberger cut his thumb. Within minutes, Nieto first drove to Frankenberger and then drove him to the hospital, providing Nieto an opportunity to observe him before, during, and after the transport. Keyser's urgency and Nieto's swift and comprehensive responses reveal they observed objective indicators that Frankenberger's injury from the grinder was severe enough to be incapacitating.

Additionally, Keyser testified that Hillman then gathered everyone at the site for a safety stand-down meeting to discuss what happened. At that time, Hillman received a call from Nieto asking if Frankenberger's thumb was still at the site. Employees searched and found the thumb tip inside the glove Frankenberger wore while operating the disc grinder, further establishing that Employer was aware that the disc grinder caused the injury.

Steps taken to obtain medical treatment

Keyser testified that Nieto secured a vehicle, drove back to Frankenberger's location, placed Frankenberger inside a truck, and drove him to the hospital. Keyser testified that the hospital was only a quarter mile away and visible from the shop.

Keyser testified that, after Nieto's call and the search for the missing thumb tip at the site of the injury, a co-worker, Dan Avalle (Avalle), picked up the glove remarking he, "could feel in the tip of the glove, that you know, like an end of a grape in there, in a sense." Keyser testified that Avalle cut the glove open, and pulled out the thumb tip still inside the glove. Keyser estimated that between 10 to 20 minutes elapsed between the injury and the retrieval of the thumb tip from the glove. Keyser immediately drove the thumb tip to the hospital in another vehicle. Employer was integral to taking steps to obtain urgent medical treatment.

In addition to the objective indicators described above, the discovery of a part of an employee's body still at the site, requiring urgent transport to the hospital to join the rest of the body already at the hospital signals that the injury is serious, triggering the duty to report. The Division thus established by a preponderance of the evidence that Employer did not timely report the injury. The record supports a finding of a violation of section 342, subdivision (a) and Citation 1, Item 1, is affirmed.

2. Did Employer fail to provide training dates and identities of training providers on its health and safety training documentation?

Section 3203, subdivision (b)(2), provides:

> (b) Records of the steps taken to implement and maintain the Program shall include:
> […]
> (2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

Citation 1, Item 2, alleges:

> Prior to and during the course of the investigation, including, but not limited to 10/14/2019, the employer provided safety and health documentation that did not include training dates and the identity of training providers in accordance with the requirements of this subsection.

The Appeals Board has held, "The purpose of section 3203(b)(2) is to establish a means for employers to have readily accessible proof that they have complied with the [section 3203(a)(7)(C)] training requirements." (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

The Division must demonstrate that Employer did not record and maintain sufficient documentation of safety and health training. The parties jointly provided Frankenberger's training records, consisting of 20 pages. None of the training entries identify the training provider. The initial ten pages of the training records do not identify the training dates.

Employer contends that its records for Frankenberger are in substantial compliance with the regulation. The safety order does in fact include provisions for substantial compliance:

> EXCEPTION NO. 1: Employers with fewer than 10 employees can substantially comply with the documentation provision by maintaining a log of instructions provided to the employee with respect to the hazards unique to the employees' job assignment when first hired or assigned new duties.

The substantial compliance exception clearly states that it only applies if an employer has 10 or fewer employees. Vicario's testimony that Employer has more than 100 employees is undisputed.

Thus, Employer does not qualify for the exception and remains subject to the requirements of the regulation.

For these reasons, the Division established by a preponderance of the evidence that Employer failed to provide trainer identities and training dates in training records as required by section 3202, subdivision (b)(2). Citation 1, Item 2, is thus affirmed.

3. Did Employer fail to complete a Form 5020 after an injury event?

Section 14001, subdivisions (a) and (c), provide:

> (a) Every employer shall file a complete report of every occupational injury or occupational illness to each employee which results in lost time beyond the date of such injury or illness or which requires medical treatment beyond first aid, as defined in Labor Code Section 5401(a). As used in this subdivision, "lost time" means absence from work for a full day or shift beyond the date of the injury or illness.
> […]
>
> (c) The report(s) required by subdivisions 14001(a) and (b) shall be made on Form 5020, Rev. 6, Employer's Report of Occupational Injury or Illness, reproduced in accordance with Section 14005, or by use of computer input media, prescribed by the Division and compatible with the Division's computer equipment. However, reports may be submitted on Form 5020, Rev. 5 until June 30, 1993.

Citation 1, Item 3, alleges:

> Prior to and during the course of the investigation, including but not limited to 10/14/2019, the employer did not file a completed Form 5020 report as required by this section of an occupational injury that occurred on or about 09/10/2019.

The Appeals Board has consistently interpreted the word "shall" to be mandatory. (See, e.g., *Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 14, 2012); *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006).) The application of this regulation is non-discretionary, requiring employers to file a complete report of occupational injuries or illnesses that result in lost time from work. Section 14001, subdivision (c), requires employers to complete these reports on the Form 5020 or a designated computer program.

The Appeals Board construes regulations by giving words their common sense meaning based on the evident purpose for which the regulation was enacted. (*The Herrick Corporation*, Cal/OSHA App. 07-4095, Decision After Reconsideration (Mar. 26, 2012), citing *In re*

Rojas (1979) 23 Cal. 3d 152, 155.) Although there is nothing in the safety orders that specifically defines "complete" or that explains what the Occupational Safety and Health Standards Board intended with the phrase "complete report," its inclusion specifies that the report must be answered in its entirety.

Employer's Form 5020 is unsigned and several fields are incomplete, including: type of employer, time employee began work, date returned to work, department where event occurred, specific activity employee was performing when event or exposure occurred, etc.

Employer asserts that its Form 5020 is in substantial compliance. However, the regulation does not provide any exception permitting substantial compliance, or contain any indication that the information required by Form 5020 is optional in any part. Further, section 14001 is contained in a chapter entitled, "Division of Labor Statistics and Research," suggesting that circumstantial details may be revelatory in the aggregate, and that their solicitation is thus purposeful.

For the foregoing reasons, the Division established a violation of section 14001, subdivision (a). Therefore, Citation 1, Item 3, is affirmed.

4. Did Employer fail to implement the accident investigation procedures in its IIPP?

Section 3203, subdivision (a)(5), provides:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> […]
> (5) Include a procedure to investigate occupational injury or occupational illness.

Citation 1, Item 4, alleges:

> Prior to and during the course of the investigation, including, but not limited to 10/14/2019, the employer failed to implement the accident investigation procedures specified in their written Injury and Illness Prevention Program (IIPP). The employer failed to provide a copy of the investigation required by the written IIPP provided by the employer.

Employer's Injury and Illness Prevention Program (IIPP) requires, in relevant part:

> Procedures for investigating workplace accidents and hazardous substance exposure include:

1. Visiting the accident scene as soon as possible.
2. Interviewing injured workers and witnesses.
3. Examining the workplace for factors associated with the accident/ exposure.
4. Determining the cause of the accident/ exposure.
5. Taking corrective action to prevent the accident/ exposure from recurring.
6. Recording the findings and corrective actions taken.

Despite the Division's requests at the time of inspection, Employer did not provide proof that it implemented its IIPP accident investigation procedures. After citations were already issued, Employer produced its "Injury/ Illness Investigation Form #008" (Form 008) during discovery, to provide proof that it implemented its IIPP accident procedures.

As discussed above, Nieto arrived at the accident scene minutes after the injury to take Frankenberger to the hospital. Hillman was conducting a safety stand-down at the accident scene with staff when Nieto called thereafter to request a search of the thumb tip. These events demonstrate that Employer visited the accident scene as soon as possible, as required in its accident procedures.

Employer's Director of Safety, Christopher Larsen (Larsen), testified to describe additional steps Employer took to investigate this workplace accident satisfying the requirements of its accident procedures. He identified Form 008 as the standard initial reporting form. Employer's Form 008 arising from Frankenberger's injury event contains an examination of the workplace for the cause and factors associated with the event. It also contains photos and summarizes the safety meeting Hillman conducted immediately after the event at the site of the injury. Vicario testified that, had Employer provided Form 008 during the investigation when it was requested, Employer would have been in compliance.

Despite tardy production, the Form 008 provides documentation that Employer implemented the six-step investigation procedure contained in its IIPP. Vicario's testimony also supports a finding that Employer was in compliance with section 3203, subdivision (a)(5). Thus, Employer's appeal is granted and Citation 1, Item 4, is vacated.

5. Did Employer fail to provide training and instruction to an employee whose job duties included operation of a disc grinder?

Section 3203, subdivision (a)(7), provides, in relevant part:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
[…]

(7) Provide training and instruction:
(A) When the program is first established;
Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
(B) To all new employees;
(C) To all employees given new job assignments for which training has not previously been received;
(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
[…]

Citation 2, Item 1, alleges:

Prior to and during the course of the investigation, including, but not limited to 09/10/2019, the employer did not provide training and instruction to an employee whose job duties include operating a Central Machinery 20-inch Disc Sander/Grinder in accordance with the manufacturers [*sic*] operating instructions and the requirements of this subsection.

"The purpose of section 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through 'training and instruction.'" (*Timberworks Construction, Inc*., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) The Division may prove a violation of section 3203, subdivision (a)(7), by showing that the implementation of training required by this section is inadequate. (*FedEx Freight, Inc*., Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018).) The training provided by an employer must be of a sufficient quality to make employees "proficient or qualified" on the subject of the training. (*Ibid.*)

In *FedEx Freight, Inc*., *supra,* Cal/OSHA App. 1099855, the Appeals Board found that the employer failed to satisfy the training requirements of section 3203, subdivision (a)(7), because it did not provide any hands-on training or mentoring, leaving an employee to his own unguided observations.

Section (A) of the safety order requires training for all staff when the program is first established. The Division did not provide any information to support a finding that training was deficient when the program was first established.

Subsections (B) and (C) of the safety order require training of new employees and employees engaged in new assignments, respectively. Frankenberger testified that he began work with Employer as a fabricator and mechanic approximately 10 years ago. While Frankenberger's documented training did not reflect training on the disc grinder, he testified that he did indeed receive such training. He credibly testified that on his very first day of work with Employer, Tom

Ferguson (Ferguson), a fellow fabricator in the shop, trained him on how to use the disc grinder. Frankenberger testified that they sat down together and read through the manufacturer's operation manual. He also testified that Ferguson provided an additional four or five training sessions on the disc grinder.

Keyser testified that prior to using any equipment within the fabrication shop, Employer provided formal training. Keyser recalled in particular that Ferguson also provided him training on the disc grinder.

To show Employer violated subsection (D) of the safety order, the Division must demonstrate that a new process, procedure, or equipment was introduced into the workplace. Frankenberger testified that he had worked as a fabricator for Employer for approximately seven years. He estimated that, on a typical work day, he uses the disc grinder 10 to 15 times during the day. The Division did not show that Employer introduced any new process, procedure, or equipment.

There is no dispute that undocumented or on-the-job training may comply with section 3203, subdivision (a)(7). However, the Division suggests that Frankenberger's training failed to meet the standard because a supervisor did not provide the training. The Division argues that Employer did not provide proof that Ferguson was qualified as a trainer. However, the Division carries the burden of proof and it did not demonstrate that Ferguson was unqualified to provide training.

The Division also suggests that an inconsistency between witnesses' testimonies shows that Employer's training on the disc grinder violated the standard. The Division points out that while Larson testified Employer requires gloves because the disc grinder is abrasive and workpieces get hot; and Keyser testified Ferguson trained him to wear gloves because a workpiece may be sharp or hot; Frankenberger testified that Ferguson instructed him, "if you want to wear gloves, wear gloves 'cause the metal gets hot." The Division asserts that if Ferguson told Frankenberger that gloves were optional, then the training was inadequate to educate him about the hazards of the disc grinder even as those hazards are understood by Employer.

However, Frankenberger provided extensive testimony demonstrating that the training provided by Employer was of a sufficient quality to make him "proficient or qualified" on how to operate and also avoid hazards of the disc grinder. He described avoidance of upward-rotating surfaces of the grinding disk, use of face and eye shielding to protect from resulting sparks, use of fitted gloves to avoid cuts and burns, etc. He also explained when it was appropriate to use a miter gauge to hold a wooden workpiece needing straight shaping and when a metal workpiece needing rounded or custom shaping must instead be hand-held.

Frankenberger was not a new employee, requiring new employee training. The disc grinder was not a new piece of equipment. The hazards of the disc grinder and its processes were already identified. The Division failed to show that employees were not trained according to the manufacturer's manual, or show deficiencies in any employee's ability to recognize and avoid hazards of the disc grinder. Thus, the Division did not establish by a preponderance of the evidence that Employer failed to provide training and instruction on use of the disc grinder. Therefore, Employer's appeal is granted and Citation 2, Item 1, is vacated.

6. Did Employer fail to prohibit the use of gloves that created an entanglement hazard?

Section 3384, subdivision (b), provides:

> (b) Hand protection, such as gloves, shall not be worn where there is a danger of the hand protection becoming entangled in moving machinery or materials.

Citation 3, Item 1, alleges:

> Prior to and during the course of the investigation, an employee wore gloves where there was a danger of the gloves becoming entangled in moving machinery or materials. As a result, on or about 09/10/2019, an employee was seriously injured while operating a Central Machinery 20-inch Disc Sander/ Grinder when his glove became entangled in the rotating disc sander/ grinder which resulted in an amputation injury.

Section 3384, subdivision (b), is the second half of a safety order that is entitled, "Hand Protection," wherein the first half of the regulation requires:

> (a) Employers shall select, provide and require employees to use appropriate hand protection when employee's hands are exposed to hazards such as those from skin absorption of harmful substances, cuts or lacerations, abrasions, punctures, chemical burns, thermal burns, radioactive materials, and harmful temperature extremes.
> EXCEPTION: Hand protection for cuts, lacerations, and abrasions shall not be required when the employer's personal protective equipment hazard assessment, required by Section 3380(f) of this Article, determines that the risk of such injury to the employee's hands is infrequent and superficial.

Vicario testified that the manufacturer's manual directs users to avoid wearing loose clothing but confirmed that the manual was silent regarding the use of gloves. The manual states, "[d]o not wear loose clothing or jewelry as they can be caught in moving parts. Protective, electrically non-conductive clothes and non-skid footwear are recommended when working." The

manual thus appears to support the use of fitted protective equipment contemplated in section 3384.

Frankenberger testified that, on the day of his injury, he wore gloves while shaping a ten-inch long piece of metal on the disc grinder. He explained that metal shaping generates heat and that gloves protect hands from the heat, sharp edges, and sparks of the metal. He credibly testified that his gloves fit "snug" and "tight," reaching to his fingertips "at the end." Frankenberger identified photographs of the leather glove that he wore at the time of his injury. The leather is broken-in. Clearly molded through use, dirt profiles the palm, wrinkles accommodate corresponding inner joints, and slight wear reveals the points of contact of a habitual grasp. Although empty, it distinctly bears the shape of a glove with a neat fit.

Frankenberger described the components of the disc grinder: the sanding face of the wheel spins clockwise, a horizontal work table conceals the bottom half of the wheel face, and a safety guard above the wheel resembling a fender directs sparks downward. Employer provided a photograph of the machine showing slender gap of approximately one quarter inch between the face of the spinning wheel from the worktable. Frankenberger identified the downward-travelling quadrant, corresponding to the 12 o'clock through three o'clock positions on a clock face, of the wheel's surface as the work surface. He identified the upward-travelling quadrant, corresponding to the nine o'clock through 12 o'clock positions, as a danger zone.

Frankenberger testified that while he was shaping his workpiece, his hands were approximately eight to ten inches away from the face of the wheel. He testified that he was working on the wheel's downward-travelling surface, avoiding the upward-travelling quadrant. The workpiece suddenly bucked. As it was thrown up, it pushed his hand into the face of the grinder wheel. Frankenberger credibly testified that his hand "didn't go down in a crevasse or the safety device didn't cause me to do anything. (*sic*)" He specified "it was just the piece of metal."

Frankenberger testified that his thumb did not hit or interfere with the safety guard, as Hillman surmises in his report in Employer's Injury Investigation Form 008. Frankenberger testified that his gloves did not get drawn into any pinch point, as the Division alleges in the citation. Frankenberger testified that he did not recall if he spoke with Hillman about the incident, and confirmed that he did not speak with Vicario.

Frankenberger testified that after he pulled away from making contact with the surface of the grinding wheel, the glove was intact, not torn or ripped open. However, the glove in the photographs is damaged. It bears what appears to be recent damage comprised of one incision, one unstitched seam, and two superficial abrasions.

Frankenberger testified that the incision and unstitched seam were openings made after the incident to retrieve his thumb tip. The two light abrasions occur parallel to each other on the thumb of the glove. Frankenberger could not confirm that the contact with the rotating grinder caused these abrasions. He testified that the workpiece could also have caused the abrasions, explaining that metal can be very sharp. The abrasions are narrow, discrete, and shallow. The glove does not bear roving creases or tears corresponding to a leather article caught in a high speed machine designed to abrade metal.

Vicario testified that he issued the citation based solely on Employer's 300 Form and 5020 Form which both attribute the partial thumb amputation to the glove getting caught in the machine. Vicario testified that he was familiar with the type of glove at issue and generally considered this type of glove to fit loosely. He testified that he believed them to be made of leather. He explained that a porous leather glove would stick to the machine's abrasive rotating surface, get drawn in, and become entangled. Vicario conceded that he did not interview Frankenberger or examine the glove. He testified that he visited the shop but did not take any measurements of the disc grinder. He identified a pinch point between the grinding wheel and the work table, but did not explain how a leather work glove could fit in the slender pinch point.

As described previously, Keyser testified that employees searched the shop for Frankenberger's thumb tip. Keyser testified that a coworker found the glove, felt something inside, and cut it open to pull out the thumb tip "which was still in the cotton material." However, no woven fabric or missing patches are visible in any of the photographs of the glove. Keyser testified that he had witnessed Frankenberger's thumb bleeding enough to prompt Keyser to quickly grab a clean rag and have Frankenberger lean on a countertop. However, no blood stains appear in any of the photographs. Notwithstanding these details, the Division did not – and without Vicario's actual examination, could not – dispute the glove's provenance. Thus, it is found that Frankenberger wore the leather glove shown in the photographs at the time of injury.

The Division did not overcome either Frankenberger's credited testimony or the photographic evidence showing the glove fit well, and did not, and likely could not, become entangled. Thus, it is found that the glove created no entanglement hazard. For these reasons, Employer's appeal is granted and Citation 3, Item 1 is vacated.

7. 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.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co*., Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

In the immediate matter, the Division introduced its proposed penalty worksheet, but did not assert it calculated the penalties according to Division policy and procedure. Vicario offered testimony pertaining to each of the applicable penalty criteria.

Citation 1, Item 1

Section 336, subdivision (a)(6), provides that a statutory penalty of $5,000 must be assessed for late report violations of section 342, subdivision (a). In *Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012), the Appeals Board determined that Labor Code § 6409.1 (b), allows for modification to the proposed $5,000 penalty for failing to timely report a serious injury pursuant to section 342, subdivision (a). Section 336, subdivision (a)(1), limits the factors that may be applied to modify regulatory violations to only size, good faith, and history. Citation 1, Item 1, is a regulatory violation.

Size

Section 336, subdivision (d) provides that no reduction may be applied for employers with more than 100 employees. Employer has over 100 employees and thus does not qualify for any penalty reduction based on size.

Good Faith

Section 335, subdivision (c), provides that a Good Faith adjustment be applied based on the quality and extent of an employer's safety program, and includes indications of an employer's desire to comply with safety regulations. Section 336, subdivision (d)(2), provides that the ratings are "good" for an effective safety program and a reduction of the Gravity-based penalty by 30

percent, “fair” for an average safety program and a penalty reduction by 15 percent, and “poor” for no effective safety program and no reduction to the penalty.[3]

Vicario testified that he determined Employer’s Good Faith was poor because the Employer failed to provide its accident investigation report despite several requests and subpoenas. He thus applied no adjustment to the penalty for Good Faith.

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that a rating of “fair” may be applied to an employer if it has not had a negative history of violations in the past three years, based upon no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees. A fair rating receives a maximum five percent reduction of the penalty. A rating of “good” may be applied if within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.

Vicario testified that he reviewed Employer’s history “from the OSHA website” and the Division presented what appears to be a history report. However, Vicario did not explain how to interpret the document to determine the appropriate rating. He did not specify whether or when the Division issued any prior citations and if they were vacated or affirmed. The Division did not provide other evidence to demonstrate Employer’s history and so the maximum 10 percent reduction of the penalty may be applied.

The application of the ten percent reduction for History results in a reduction of the minimum regulatory penalty of $5,000 by $500, resulting in a penalty of $4,500 for Citation 1, Item 1.

Citation 1, Item 2

Citation 1, Item 2, is a regulatory violation. Section 336, subdivision (a), provides that a minimum statutory penalty of $500 must be assessed for Regulatory violations. This amount is subject to modifications for Size, Good Faith, and History under Labor Code section 6319, subdivision (c). No other adjustments or abatement credit may apply. (Sec. 336, subd. (a)(1).)

As determined above, a ten percent reduction for History may be applied. The $500 penalty is thus reduced by $50, resulting in a penalty of $450 for Citation 1, Item 2. It is noted that the

[3] Section 335 provides the factors that determine the Gravity of a violation. Section 336 provides the minimum Base Penalty that must be assessed based on the Gravity of a violation. It then defines a Gravity-based penalty as the resulting figure after the application of several adjustment factors that may increase or decrease the Base Penalty.

Division's proposed penalty on its penalty calculation worksheet totaled $475, whereas the Division's proposed penalty on the citation package totaled $400. No reason was provided for the Division's calculation discrepancy. The regulation does not permit other modification factors and thus constrains further reduction. Whereas the Citation put Employer on notice that the proposed penalty was $400, further discounts may not be applied to reach this amount. Therefore, the resulting penalty remains at $450.

Citation 1, Item 3

Citation 1, Item 3, is also a regulatory violation. Section 336, subdivision (a), provides that a minimum statutory penalty of $500 must be assessed for Regulatory violations. This amount is subject to modifications for Size, Good Faith, and History under Labor Code section 6319, subdivision (c). No other adjustments or abatement credit may apply. (Sec. 336, subd. (a)(1).)

Again, a ten percent reduction for History applies. The $500 penalty is thus reduced by $50, resulting in a penalty of $450 for Citation 1, Item 3. It is noted here as well that the Division's proposed penalty on its penalty calculation worksheet totaled $475, whereas the Division's proposed penalty on the citation package totaled $400. No reason was provided for this discrepancy. Here too, the regulation does not allow further reduction. The resulting penalty is thus $450.

Conclusion

The evidence supports a finding that Employer violated section 342, subdivision (a), for failure to timely report a serious injury. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 3203, subdivision (b)(2), for failure to include training dates and identities of training providers in safety and health documentation. The proposed penalty, as modified herein, is reasonable.

The evidence supports a finding that Employer violated section 14001, subdivision (a), for failure to complete all of the fields in a Form 5020. The proposed penalty, as modified herein, is reasonable.

The evidence does not support a finding that Employer violated section 3203, subdivision (a)(5), for failure to implement the accident investigation procedures in its IIPP.

The evidence does not support a finding that Employer violated section 3203, subdivision (a)(7), for failure to provide training and instruction to an employee whose job duties include the

use of a disc grinder in accordance with the manufacturer's operating instructions and the requirements of the subsection.

The evidence does not support a finding that Employer violated section 3384, subdivision (b), for failure to prohibit the use of gloves that create an entanglement hazard.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is modified to $4500.00.

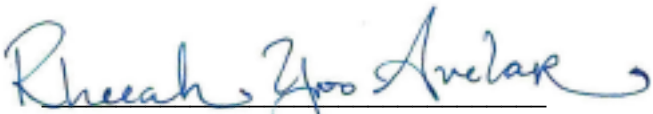
It is hereby ordered that Citation 1, Item 2, is affirmed and the penalty is modified to $450.00.

It is hereby ordered that Citation 1, Item 3, is affirmed and the penalty is modified to $450.00.

It is hereby ordered that Citation 1, Item 4, and its associated penalty, are vacated.

It is hereby ordered that Citation 2 and its associated penalty, are vacated.

It is hereby ordered that Citation 3 and its associated penalty, are vacated.



Dated: 08/31/2022

Rheeah Yoo Avelar
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.**