BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
WESTERN OILFIELDS SUPPLY COMPANY **dba RAIN FOR RENT DBA LAKE COMPANY** **5101 OFFICE PARK DRIVE, SUITE 100** **BAKERSFIELD, CA 93309** **Employer**	**1498595** **DECISION**

Statement of the Case

Western Oilfields Supply Company, doing business as Rain for Rent and also doing business as Lake Company (Employer), provides clients with irrigation solutions. On October 21, 2020, the Division of Occupational Safety and Health (the Division), through Assistant Safety Engineer Napoli Sams, commenced an inspection of a work site located at 1515 North Shirk Road in Visalia, California, after report of an injury at the site on September 25, 2020.

On March 11, 2021, the Division cited Employer for two violations: failure to identify and evaluate the hazards posed by a hydraulic press machine; and failure to adequately guard the clamp on a hydraulic press machine.

Employer filed a timely appeal of the citations, contesting the existence of the violations for both citations. Additionally, for Citation 2, Employer appealed the classification of the violation and the reasonableness of the penalty. Employer asserted a series of affirmative defenses for each of the citations.[1]

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), from Sacramento County, California. The parties and witnesses appeared remotely via the Zoom video platform on May 25 and 26, 2023, and September 28, 2023. David Donnell, Attorney, of Donnell, Melgoza & Scates LLP, represented Employer. Tanya Michelle Henson, Staff Counsel, represented the Division. The matter was submitted on April 30, 2024.

[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. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issue

1. Did Employer fail to implement its Injury and Illness Prevention Program by failing to identify and evaluate the hazards posed by the hydraulic press machine?

2. Was the amendment of Citation 2 to include an alternate theory of liability permissible?

3. Is the clamp on the hydraulic press machine a "point of operation" or a "pinch point"?

4. Did the Division establish that Employer failed to adequately guard the hydraulic press machine involved in the accident?

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

6. Did Employer rebut the presumption that the classification of the violation in Citation 2 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?

7. Did the Division establish that the citation was properly characterized as Accident-Related?

8. Is the proposed penalty for Citation 2 reasonable?

Findings of Fact[2]

1. Employer's Injury and Illness Prevention Program (IIPP) requires that its safety managers conduct periodic inspections.

2. Employer's IIPP requires "monthly and periodic safety inspections."

3. Employer's training and safety documents identify the hazard of contact with the hydraulic press machine.

[2] Findings of Fact Nos. 4 and 13 are stipulations by the parties.

4. On September 25, 2020, Moises Terriquez (Terriquez) suffered an injury to his right hand that required inpatient hospitalization.

5. At the time of his accident, Terriquez was feeding pipes into a machine that had two hydraulic presses: the first pressed a large clamp around the pipe to hold it in place as the second pressed a fitting, or "sleeve," onto the end of the pipe.

6. After feeding the pipe into the machine through the clamp, Terriquez left his hand on the pipe as he pressed the start button, which resulted in the clamp closing on his hand and causing injury.

7. The guard surrounding the clamp had an opening of four or five inches and the opening was less than six inches from the point where the pipe was fed into the clamp.

8. The clamp pressed directly on the pipe to hold it firmly in place during the pressing of the sleeve onto the end of the pipe.

9. Amputation or permanent disfigurement is a realistic possibility if an employee's hands come into contact with a point of operation such as the clamp involved in the accident.

10. The machine, including the location of its guard in relation to the clamp, was in plain view of Employer's management team.

11. If the hydraulic press machine had been adequately guarded, Terriquez would not have been able to come into contact with the clamp and would not have sustained the injuries suffered during his accident.

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

Analysis

1. Did Employer fail to implement its Injury and Illness Prevention Program by failing to identify and evaluate the hazards posed by the hydraulic press machine?

California Code of Regulations, title 8, section 3203, subdivision (a)(4),[3] 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:
>
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards[.]

The Alleged Violation Description (AVD) for Citation 1 alleges:

> Prior to and during the investigation, including, but not limited to, on September 25, 2020, the employer failed to implement and maintain an effective injury and illness prevention program in that it failed to evaluate the hazard with the hydraulic press.

To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish that the employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard. (*OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).)

> Section 3203(a)(4) contains no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include "scheduled periodic inspections." (Section 3203(a)(4).)

(*Brunson Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

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

a. Identification of hazards on hydraulic press machine

The Appeals Board has addressed the issue of whether an employer identified hazards versus whether the Division agreed with the method of mitigation of those hazards:

> Employer believed that it had identified the hazard, and created a policy that effectively mitigated the hazard to drivers. While the Division may dispute this, Employer's conclusion was not unreasonable, given these unusual circumstances and the efforts Employer had put forth to improve its program and solicit expert advice. No section 3203, subsection (a)(4)(C) violation is found.

(*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).)

There was sufficient evidence that Employer had identified and evaluated the potential hazard of pinch points and hands potentially coming into contact with the manual press machine. Employer's "Safe Operation of Manual Press" contains instructions and safety warnings to machine operators such as, "Keep hands off pipe and away from jaws and rams while pressing." (Exh. M.) Each day, machine operators completed a Job Safety Analysis, which identifies pinch points as a hazard and warns employees to "Keep fingers out of moving parts." (Exh. 11.)

As in *Coast Waste Management, Inc*., *supra*, Cal/OSHA App. 11-2385, the fact that the Division disagreed with Employer's safety measures and issued a citation alleging a guarding violation does not mean that Employer had not identified and evaluated the hazard.

b. Periodic Inspections

Employer's written IIPP provides for periodic inspections to be performed by Branch Managers and Safety Managers, including completion of specific inspection forms, and audits by Employer's Environmental, Health and Safety Department. (Exh. 12.) The Division's Safety Engineer, Napoli Sams (Sams), testified that the Division determined that Employer had not implemented its IIPP because Employer did not produce inspection records that Sams requested in a document request during the course of the Division's investigation. The Division did not assert that Employer failed to conduct the inspections required pursuant to section 3203, subdivision (a)(4)(A)-(C).

The Document Request Sheet that Sams provided to Employer requested the following: "Safety Inspection Records hydraulic press 9/21 to 9/25." (Exh. 8.) Employer did not produce any records in response to this request. (Exh. 9.) Sams testified that the Division issued Citation 1 because the failure to provide records of an inspection during the five-day period prior to the

accident led him to the conclusion that Employer was not implementing its IIPP with regard to periodic inspections.

There is no support for finding that an employer who does not have written records of an inspection in any particular five-day period has violated section 3203, subdivision (a)(4). Section 3203, subdivision (a)(4), does not mandate inspections of any specific frequency, whether daily, monthly, or annually. Further, Employer's IIPP does not mandate inspections every five days. The IIPP requires managers to conduct "monthly and periodic safety inspections." (Exh. 12, p. 5.) The fact that there were no records of an inspection of the hydraulic press machine during the period of September 21 to 25, 2020, cannot be the basis for finding a violation of section 3203, subdivision (a)(4). As such, the Division failed to prove that Employer failed to conduct periodic inspections in conformance with its IIPP based on its overly narrow request for documents and similar presentation of evidence at hearing.

In the response to the Division's document request, Employer's Employee Health and Safety Manager, Marc Bocanegra (Bocanegra), stated "We do not have separate reports for inspection of the press, but it is inspected pre-shift as part of the JSA process." (Exh. 9.) The Division asserts that this is an admission that Employer's supervisors do not conduct periodic inspections at all. However, Bocanegra was responding to the Division's request for inspection reports from a specific five-day period, and this statement made directly responding to that request cannot be construed to mean that no inspections were ever performed by supervisors or management. Employer's IIPP includes periodic inspections. Looking at a five-day period, absent more, does not demonstrate that Employer was not implementing its IIPP.

The Division did not establish that Employer failed to implement its IIPP with regard to periodic inspections.

Thus, in addition to the Division failing to establish that Employer had not identified and evaluated the hazard, it also failed to establish that Employer did not perform periodic inspections in accordance with section 3203, subdivision (a)(4). Accordingly, Citation 1 is dismissed.

2. Was the amendment of Citation 2 to include an alternate theory of liability permissible?

Employer asserts that the amendment of Citation 2 to include an alternate theory of liability was unauthorized, violated Employer's due process rights, and was a violation of the six-month statute of limitations set forth in Labor Code section 6317.

Section 371.2, provides, in relevant part:

(a) Amendment of a citation or appeal is permitted in the following circumstances so long as any party opposing the amendment has an opportunity to demonstrate any prejudice that the requested amendment will create. In determining whether prejudice is shown by a party opposing an amendment, consideration shall be given to the specific evidence that the opponent of the amendment would be unable to present because of the timing of the request, if the amendment were granted.

(1) A request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time.

[…]

(b) Amendment of a citation or an appeal is not permitted when:

(1) The amendment concerns a general set of facts sufficiently different from the facts contained in the citation or appeal that the proposed amendment does not relate back to the original citation or appeal; and

(2) The violation alleged in the original citation occurred more than six months prior to the date of the request to amend the citation.

Labor Code section 6317, subdivision (e)(1), provides that "[a] citation or notice shall not be issued by the division more than six months after the occurrence of the violation." The Appeals Board has applied the "relation-back" doctrine, reflected in section 371.2, subdivision (b), to allow amendments to citations where the Division seeks to make changes to the original language on a citation issued more than six months before the proposed amendment. Where an amendment would not require proof of new facts and there is no prejudice to the employer, it may be allowed even if made after the six-month limitations period. (*Webcor Builders, Inc*., Cal/OSHA App. 06-3030, Denial of Petition for Reconsideration (Jan. 11, 2010).) But where the proposed amendment would require proof of new facts, it is barred unless made within the six-month statute of limitations period established in Labor Code section 6317. (*Id*.)

A few years ago, the Appeals Board granted a motion to amend a citation after the hearing had concluded. (See *L&S Framing, Inc*., Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 2, 2021) (*L&S*).) In *L&S*, the Division requested an amendment to allege a violation of an additional safety order as an alternate theory of liability. As with the instant matter, the Division did not request an amendment to the original AVD. The Appeals Board

found that, because the parties had litigated the issue that was the subject of the proposed amendment, the employer had not been prejudiced by the amendment.

> Absent proof of prejudice, "amendments may be permitted at any point during the course of litigation. See *Foman v. Davis* (1962) 371 U.S. 178, 181-182 ('in the interest of justice,' leave to amend may be necessary even at post-judgment stage)." (*Dole v. Arco Chemical Co.* (3rd. Cir. 1990) 921 F.2d 484, 488; § 371.2, subd. (a)(1).)

(*L&S, supra*, Cal/OSHA App. 1173183.)

When the employer in *L&*S filed a writ to Superior Court, and then filed an appeal of the Superior Court's ruling, the Appellate Court upheld the Appeals Board's granting of the requested amendment to add an alternate theory of liability.[4] The Appellate Court held that, "With regard to amending a pleading, '[i]f the same set of facts supports merely a different theory . . . no prejudice can result.' [Citation omitted.]" (*L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd*. (2023) 93 Cal.App.5th 995, 1012.)

In the instant matter, the Division did not seek to amend the AVD in Citation 2. As with *L&S*, the only amendment sought was the pleading of an alternate theory of liability if the evidence established that the part of the machine was a pinch point rather than a point of operation. Therefore, the facts at issue in the hearing of this matter were not expanded beyond the scope of the general set of facts alleged on the original citation. There was no assertion by Employer that there were witnesses or evidence that Employer was not able to offer in its defense as a result of the alternate theory of liability.

The Division's motion to amend was filed on January 5, 2023, which was approximately five weeks before the first scheduled hearing. Employer had an opportunity to, and did, object to the motion to amend. When the order amending the citation was issued on January 26, 2023, the hearing was taken off calendar in order to give Employer additional time to prepare. The hearing did not commence until May 25, 2023.

Despite making the same arguments in its opposition to the Division's motion to amend, Employer continues to assert that it was inappropriate to amend the citation to assert a second theory of liability. This issue has been briefed, argued, ruled upon, and decided in a published opinion by the Third Appellate District Court of Appeal. (*L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd*., *supra,* 93 Cal.App.5th 995.) Employer has made no new

[4] The employer in *L&S* petitioned the California Supreme Court to review the decision and the petition was denied.

arguments that necessitate a reconsideration of the amendment. Therefore, the amendment of Citation 2 was appropriate and permissible.

3. Is the clamp on the hydraulic press machine a "point of operation" or a "pinch point"?

Citation 2 originally asserted a violation of section 4207, subdivision (a)(1), which requires guarding at a machine's point of operation. The citation was amended to assert an alternate violation of section 4002, subdivision (a), which requires guarding at other parts of machines that have a hazardous motion or pinch point.

Section 4207, subdivision (a)(1), provides:

(a) Every point of operation guard shall meet the following design, construction, application, and adjustment requirements:

(1) It shall prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard;

Section 4002, subdivision (a), provides:

(a) All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

In Citation 2, the Division alleges:

Prior to and during the course of the investigation, the hydraulic pipe fitting press used at employer's facility was not guarded adequately over the clamps. As a result, on or about September 25, 2020, an employee using the hydraulic press suffered a serious finger injury.

a. Section 4207, subdivision (a): Point of operation guard

Section 4184 sets forth that certain machines require guarding. In relevant part, section 4184 provides:

> (a) Machines as specifically covered hereafter in Group 8, having a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, in which an employee comes within the danger zone shall be guarded at the point of operation in one or a combination of the ways specified in the following orders, or by other means or methods which will provide equivalent protection for the employee.

The machine involved in the instant matter was a hydraulic press that pressed sleeve fittings on the end of pipes. Thus, section 4184, subdivision (a), requires that the machine "shall be guarded at the point of operation" where an employee comes within the danger zone.

"Danger zone" is defined as:

> Any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.

(§ 4188, subd. (a).)

The danger zone of this machine was the point where Terriquez fed the material through the clamp because that point is where "an employee may be caught between the material and a moving part of the machine." (§ 4188, subd. (a).)

Central to finding a violation of section 4207, subdivision (a), the Division has the burden of establishing that the part of the machine at issue is a point of operation as that phrase is defined in section 4188, subdivision (a):

> That part of a machine which performs an operation on the stock or material and/or that point or location where stock or material is fed to the machine. A machine may have more than one point of operation.

"The question is whether the injured employee was exposed to one or more *parts* of the [machine], which either performed an operation on the stock or material or was located at its entry point." (*Ernest & Julio Gallo Sonoma*, Cal/OSHA App. 98-1424, Decision After Reconsideration (Sept. 19, 2001), emphasis in original.)

(1) Was an operation being performed on the stock or material?

Point of operation guarding addresses hazards to an operator while a machine is performing an operation on the stock. The hydraulic press machine had two presses, one that closed the clamp to firmly brace the pipe in place while the other pressed a "sleeve" onto the end of the pipe.[5] The part of the machine involved in the accident was the clamp that pressed around the pipe. The clamp that held the pipe in place was directly performing an operation, securing the pipe against displacement, on the "stock or material" at issue.

Accordingly, the provisions of section 4207 are applicable to the part of the machine involved in the accident as a point of operation where the machine is acting on the material.

(2) Was material being fed into the machine?

Additionally, a part of a machine may be a point of operation if it is the point where the stock or material is being fed into the machine. (§ 4188, subd. (a).) Section 4188, subdivision (b), defines "feeding" as: "The process of placing or removing material within or from the point of operation."

At the time of the accident, Terriquez and a coworker, Steven Topete (Topete) were placing pipes into the hydraulic press machine. Each pipe was placed into the machine through the clamp so that the end would be in the correct position in relation to the hydraulic press at the far end of the machine. Topete testified that he held one end of the pipe as Terriquez stood closer to the machine and put the other end of the pipe through the clamp, pushed a button to close the clamp around the pipe, and waited as the second hydraulic press pushed a sleeve fitting onto the far end of the pipe. (Hrg. Tr., May 25, 2023, p. 40.) The men then removed the pipe and turned it around to perform the same operation on the other end. (*Ibid.*)

The opening through which the pipe was fed into the machine was, therefore, a point of operation under the second provision of the definition of "point of operation" found in section 4188, subdivision (a).

[5] The second hydraulic press that pressed the sleeves on the end of the pipes, located at the far end of the machine, was not at issue.

b. Section 4002, subdivision (a): Pinch point guarding

(1) Was the clamp a pinch point?

As amended, Citation 2 asserts that Employer violated section 4002, subdivision (a), which provides:

> (a) All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

Section 4188, subdivision (b), defines "pinch point" as:

> Any point *other than the point of operation* at which it is possible for a part of the body to be caught between the moving parts of a press or auxiliary equipment, or between moving and stationary parts of a press or auxiliary equipment or between the material and moving part or parts of the press or auxiliary equipment.

(Emphasis added.)

Having found that the clamp was a point of operation, it is found not to be a "pinch point." However, if it was deemed not a point of operation, then it would be found to be a pinch point, because it is a part of the machine that creates a pressing, squeezing, or similar action hazard that was not guarded by the frame or by location.

Section 4002, subdivision (a), is not applicable to the part of the machine at issue.

3. Did the Division establish that Employer failed to adequately guard the hydraulic press machine involved in the accident?

Having determined that the part of the machine involved in the injury was a point of operation, the remaining question is whether the point of operation was properly guarded.

Section 4207, subdivision (a)(1), for which Employer was cited, requires that the point of operation be guarded to "prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard."

As further instruction for employers, section 4207, subdivision (a)(2), directs that guards "shall conform to the maximum permissible openings of Figure G-8 and Table G-3." The referenced Figure G-8 and Table G-3, located in section 4186, provide the measurements for the width of guards based on the distance from the point of operation. The closer to the point of operation the guard is, the smaller the permissible opening.

There was an expanded metal guard around the clamp on the machine. After the accident, Employer added an extended guard to the part of the machine where the pipes were fed into the clamp.[6] Sams took photographs of the extended guard and made his measurements based on the machine in its condition at the time of his inspection of the machine involved in the accident, which was after the extended guard had been added. (See Exh. 28, 30, and 31.) The measuring tape reflects an opening of four to five inches. Based on the photographs, the opening of the extended guard did not significantly change the width of the original opening, it just extended the opening farther from the point of operation. Looking at the photographs, including the pictures with measuring tape giving a base of comparison, it is a reasonable estimate that the edge of the clamp was less than six inches from the edge of the original guard. Based on Figure G-8 and Table G-3, if the point of operation is only six inches from the guard, the opening is only permitted to be three-quarters of an inch in width.

The opening of the guard at the time of the accident was insufficient to "prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard." (§ 4207, subd. (a)(1).) It was several inches wide, and Terriquez was able to get his hand through it to contact the point of operation at the clamp.

Employer argued that the original guard was sufficient to prevent accidental or inadvertent contact with the zone of danger. The language of section 4207, subdivision (a)(1), establishes that the guards are required to prevent contact with the point of operation, and there is no language indicating that the contact to be prevented is accidental or inadvertent. Indeed, the use of the words "reaching through, over, under or around" implies an intentional action. Thus, any assertion that the Division was required to establish that the guard failed to prevent accidental contact is unpersuasive. Guards must be designed to stop an employee from contacting the point of operation either inadvertently or intentionally.

Based on a preponderance of the evidence, the Division established that the opening of the guard at the time of the accident did not comply with the provisions of section 4207, subdivision (a). Citation 2 is affirmed.

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[6] When Sams originally visited Employer's facility, he was given misinformation that the machine he was inspecting was the one involved in the accident. He was later informed that they had shown him the wrong machine. By the time Sams returned to inspect the machine involved in the accident, Employer had modified it with an extended guard at the point of operation where Terriquez had been injured. (Exh. 22-MOD and 27-MOD.)

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

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

> (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 demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
>
> (1) 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).)

> (g) 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.

Sams testified that he was current on all training mandated by the Division at the time of the hearing. As such, he is deemed competent to testify regarding the Serious classification of Citation 2. Sams testified that there is a realistic possibility that "employees' fingers or hand [may] be [caught] in [the] machine and cause amputation or disfigurement." (Hrg. Tr., May 25, 2023, p. 110.)

In the instant matter, the parties stipulated that Terriquez suffered an injury that required inpatient hospitalization that met the definition of serious physical harm pursuant to Labor Code section 6432, subdivision (e). Thus, there was not only a realistic possibility of serious physical harm, but the violation resulted in actual serious physical harm.

The Division established the rebuttable presumption that Citation 2 was properly classified as Serious.

5. Did Employer rebut the presumption that the classification of the violation in Citation 2 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.

Labor Code section 6432, subdivision (b)(1), provides that the following factors may be taken into account:

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

Employer did not assert that it was unaware that the machine was not properly guarded. Indeed, hazardous conditions in plain view, by their very nature, can be detected by the exercise of reasonable diligence. (*99 Cents Only Stores, LLC #383*, Cal/OSHA App. 1314092, Decision After Reconsideration (Nov. 8, 2023), citing to *Home Depot USA, Inc.*, Cal/OSHA App. 15-2298, Decision After Reconsideration (May 16, 2017).)

The guard and proximity of the clamp to the edge of the guard were in plain view. Accordingly, Employer failed to take 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 by failing to establish an effective safety policy.

Employer did not rebut the presumption that the citation was properly classified as Serious.

6. Did the Division establish that the citation was properly characterized 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 LP dba Webcor Builders,* 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).)

The violation was that Employer failed to adequately guard a point of operation on the hydraulic press machine. Because the guard was not sufficient to prevent employee contact with the point of operation, Terriquez' hand got caught between a pipe and the clamp. As such, Terriquez' injury was caused by the violation. The parties stipulated that the injury to Terriquez' hand was a "serious injury" as defined by section 330, subdivision (h).

Therefore, Citation 2 is properly characterized as Accident-Related.

7. Is the proposed penalty for Citation 2 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 that the penalty for Citation 2 was calculated in accordance with the Division's policies and procedures. Having affirmed the Serious classification and Accident-Related characterization, the penalty for Citation 2 is found to be reasonable.

Conclusion

The Division failed to establish a violation of section 3203, subdivision (a)(4). The citation is dismissed.

The Division established that Employer failed to adequately guard a point of operation in violation of section 4207, subdivision (a)(1). The citation was properly classified as Serious, Accident-Related, and the proposed penalty was reasonable.

Order

It is hereby ordered that Citation 1 is dismissed and the penalty is vacated.

It is hereby ordered that Citation 2 is affirmed and the penalty of $18,000 is sustained.

It is further ordered that the penalty indicated above and set forth in the attached Summary Table be assessed.

Dated: 05/10/2024

Kerry Lewis
Presiding 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.**