BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1399613**
BMC WEST, LLC **25735 SPRINGBROOK AVE.** **SANTA CLARITA, CA 91350** **Employer**	**DECISION**

Statement of the Case

BMC West, LLC (Employer), sells lumber, hardware, and general building supplies. Beginning May 6, 2019, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Robin Fomalont (Fomalont), conducted an accident investigation at Employer's worksite, a building material retail establishment located at 2000 Tapo Street in Simi Valley, California (the site).

On October 16, 2019, the Division issued two citations to Employer, alleging four violations of the California Code of Regulations, title 8.[1] Citation 1, Item 1, classified as General, alleges that Employer failed to establish an effective Injury and Illness Prevention Program (IIPP) containing all required elements. Citation 1, Item 2, classified as Regulatory, alleges that Employer failed to maintain written training records. Citation 1, Item 3, classified as General, alleges that Employer failed to establish an effective Heat Illness Prevention Plan (HIPP). Citation 2, classified as Serious Accident-Related, alleges that Employer failed to ensure that a powered industrial truck was operated in a safe manner in accordance with applicable operating rules.

Employer filed a timely appeal contesting the existence of each alleged violation. In addition, Employer appealed Citation 2 on the grounds that the classification is incorrect, the proposed penalty is unreasonable, and the abatement requirements are unreasonable. Additionally, Employer raised numerous affirmative defenses to each citation, including, but not limited to, the Independent Employee Action Defense.[2]

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on August 21, 2020, September 29 and 30, 2022, March 14, 2023, April 11 and

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[2] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

April 28, 2023. ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video platform. Kathryn Woods, Staff Counsel, represented the Division. Manuel Melgoza of Donnell, Melgoza and Scates, LLP, represented Employer.

This matter was submitted on January 18, 2024.

Issues

1. Did Employer fail to establish an effective IIPP?

2. Did Employer fail to maintain written training records?

3. Did Employer fail to establish an effective HIPP?

4. Did Employer fail to ensure that a powered industrial truck was operated in a safe manner in accordance with applicable operating rules?

5. Did Employer establish any of its affirmative defenses?

6. Did the Division correctly classify Citation 2?

7. Did Employer rebut the presumption that the violation alleged in Citation 2 is Serious?

8. Did Employer's violation of section 3650, subdivision (t)(11), cause a serious injury to its employee?

9. Was abatement of Citation 2 unreasonable?

10. Did the Division propose reasonable penalties?

Findings of Fact

1. On April 17, 2019, Employer's employee Justin Bastow (Bastow) was operating a forklift at the site to move a dumpster (the load) from the back of the property to the front parking lot. The load was raised up high enough on the forks of the forklift that it obstructed Barstow's forward view.

2. Bastow's forklift struck a barbecue grill that another BMC employee, Jaime Terrazas (Terrazas) was cleaning, knocking the barbeque over onto Terrazas (the accident).

3. Employer's Injury and Illness Prevention Program (IIPP) provides that a Location Safety Coordinator is ultimately responsible for implementation of the IIPP. At the time of the accident, Employer did not employ a Location Safety Coordinator responsible for the site.

4. Dean Costello (Costello) was Employer's Location Manager at the site at the time of the accident.

5. Employer's IIPP lacked procedures for identifying and evaluating hazards whenever new substances, processes, procedures, or equipment are introduced to the workplace that represented a new occupational safety and health hazard; or whenever the employer is made aware of a new or previously unrecognized hazard.

6. Employer's training records for January and February 2019 only indicate the month and year of training, not the specific day the training occurred.

7. The monthly "Safety Meeting Sign Up Sheets" for January and February 2019 are altered photocopies of the same document with modifications which include different months, different training topics, different training providers, as well as the signature of a former employee, Manuel Torres (Torres).

8. At all relevant times, employees worked indoors and outdoors at the site.

9. Employer's Heat Illness Prevention Plan (HIPP) included a trigger temperature of 85 degrees Fahrenheit.

10. When the accident occurred, Bastow was driving the forklift forward with his forward view obscured by the load, instead of with a trailing load.

11. As a result of the accident, Terrazas suffered thoracic and lumbar compression fractures and a nondisplaced fracture of his tibia, along with associated knee and back pain. Terrazas was hospitalized and received treatment for more than 24 hours.

12. Bastow was experienced in driving forklifts as a general matter and was certified as a forklift operator at the time of the accident.

13. Employer's IIPP lacked elements critical to the successful implementation of a well-devised safety program.

14. The accident occurred in plain view in the parking lot in front of Employer's retail establishment, in view of multiple employees.

15. Employer disciplined multiple employees, including Bastow, as a result of the accident.

16. Driving an industrial truck weighing hundreds of pounds or more, like a forklift, with an obstructed view may cause a collision with an object or person and cause serious injury or death as a result.

17. Abatement through some combination of training and observation or supervision was a feasible means to prevent the accident.

18. The Division's penalties were calculated consistent with the penalty setting regulations.

Analysis

1. Did Employer fail to establish an effective IIPP?

Section 3203, subdivision (a), 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:

(1) Identify the person or persons with authority and responsibility for implementing the Program.
[. . .]
(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:

(A) When the Program is first established;

> Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Citation 1, Item 1, alleges:

Instance 1:

> Prior to and during the course of the inspection, the employer's written Injury and Illness Prevention program [*sic*] did not identify the person or persons with authority and responsibility for implementing the Program. Ref. 3203(a)(1)

Instance 2:

> Prevention program [*sic*] did not state that periodic inspections shall be made to identify and evaluate hazards when the Program is first established; whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and, whenever the employer is made aware of a new or previously unrecognized hazard. Ref 3203(a)(4) Prior to and during the inspection, the employer's written Injury and Illness

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) "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. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

Applicability

The parties do not dispute that Employer is subject to the requirements of section 3203, subdivision (a).

Violation

The Appeals Board has determined, "In order to have an effective written IIPP, an employer must, at a minimum, provide an IIPP which contains the seven elements enumerated in section 3203(a)." (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)

Instance 1

The Division can establish a violation of section 3203, subdivision (a)(1), by showing that an employer's IIPP fails to "identify a specific position, job title, or individual with ultimate responsibility for ensuring that the IIPP is implemented, pursuant to section 3203, subdivision (a)(1)." (*West Coast Arborists, Inc*., Cal/OSHA App. 1180192, Denial of Petition for Reconsideration (Apr. 26, 2019).)

Fomalont credibly testified that Employer's IIPP (Exhibit M; Fig. 1) identified the "Location Safety Coordinator" as the person responsible for implementing the IIPP but did not identify any individual by name.

1.1 BMC SAFETY AND HEALTH PROGRAM OVERVIEW

1.1.1 Responsibility

- The Location Safety Coordinator has the authority and the responsibility for implementing and maintaining the applicable program elements outlined in this manual at his or her respective location(s).
- Location Managers and supervisors are responsible for implementing and maintaining those elements in their work areas and for answering worker questions about the Program. The Location Manager is also responsible for the day-to-day administration of the program.
- Employees are required to report unsafe and unhealthy conditions immediately to their Supervisor.

(Figure 1 – Section 1.1.1 of Employer's IIPP [Exhibit M].)

Furthermore, Fomalont credibly testified that during her inspection, nobody she spoke with identified the Location Safety Coordinator.

Costello credibly testified that he was employed by Employer at the time of the inspection and that he was the Location Manager for the site on the date of the accident. Manuel Torres (Torres), who at the time of the accident was employed by Employer as the assistant manager at the site, corroborated Costello. Nobody, however, identified who the Location Safety Coordinator was, either during the inspection or the hearing.

Section 3203, subdivision (a)(1), requires that an IIPP identify the person "ultimately responsible" for implementing the employer's safety program. Although this may be accomplished through identifying the responsible position or job title, this method is only effective if such a position exists and is filled. Put another way, identifying a position or job title with ultimate responsibility for implementing the IIPP is inadequate to comply with section 3203, subdivision (a), when, as is the case here, nothing in the record suggests that the role was filled with an actual person. Here, nothing in the record shows that Employer employed a Location Safety Coordinator at the time of the accident. Employer had the opportunity to identify the Location Safety Coordinator to Fomalont during the inspection and had an additional opportunity to do so during the hearing. Employer's unexplained failure to identify, beyond title, who had ultimate responsibility for safety at the site supports a finding that the position was unfilled. (Evid. Code §§ 412, 413.)

Accordingly, because the Division established by a preponderance of the evidence that Employer did not employ a Location Safety Coordinator at the time of the accident, Employer did not identify the person or persons with authority and responsibility for implementing its IIPP, and therefore established a violation of section 3203, subdivision (a).

Instance 2

A citation may be upheld on the basis of a single instance, provided the Division meets its evidentiary burden on that instance. (*Golden State Boring & Pipe Jacking, Inc.,* Cal/OSHA App. 1308948, Decision After Reconsideration (Jul. 24, 2020).) As discussed, the Division met its burden of establishing Instance 1 of Citation 1, Item 1, by preponderant evidence that Employer violated section 3203, subdivision (a)(1). Nonetheless, for completeness of analysis, Instance 2 is discussed below.

"Section 3203, subdivision (a)(4) requires that employers include procedures for identifying and evaluating work place hazards in the IIPP. These procedures must include 'scheduled periodic inspections to identify unsafe conditions and work practices.'" (*General Dynamics NASSCO,* Cal/OSHA App. 1300984, Decision After Reconsideration (Jan. 23, 2023), citing and quoting *Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

Fomalont testified that she reviewed Employer's IIPP and found that it was missing the elements of section 3203, subdivision (a)(4). Fomalont testified that Employer's procedures were found in section 1.1.5 "Hazard Assessment" on pages six and seven. (Exhibit M.)

Fomalont testified that Employer's IIPP lacked a provision for identifying hazards when the IIPP was first established, when new substances or processes are introduced that create a new hazard, and when the employer is made aware of a new, previously unrecognized hazard.

A careful review of section 1.1.5 of Employer's IIPP shows that it does not contain all the required elements. It lacks procedures for identifying hazards when the program was first established. Furthermore, the IIPP submitted into evidence does not contain the referenced "BMC Monthly Safety Inspection" form, and no such form was separately entered into evidence during or after the hearing.

The IIPP's section entitled "Hazard Correction" found in section 1.1.7, contains additional language regarding correction of hazards but does not include instructions for identifying or evaluating hazards. (Exhibit M.)

Nothing in Employer's IIPP discusses identifying or evaluating hazards when new substances or processes are introduced that create a new hazard. Although section 1.1.7 states that hazards will be corrected when observed and discovered, this language does not satisfy section (a)(4), because it is focused on the corrective action, and does not describe a procedure for identifying and evaluating newly discovered hazards. Although Employer argues that its IIPP necessarily requires hazard identification and evaluation because it contains language requiring training employees on newly introduced or discovered hazards, nothing in the record demonstrates that Employer actually had adopted written procedures in its IIPP to satisfy the requirements of section 3203, subdivision (a)(4). Finally, Employer had the opportunity to present evidence including its safety inspection form but did not, leading to an inference that the form does not exist. Therefore, for all of the foregoing reasons, it is found that Employer's IIPP did not contain all of the elements required by section 3203, subdivision (a)(4).

In sum, preponderant evidence introduced during hearing demonstrates that Employer violated section 3203, subdivisions (a)(1) and (a)(4). Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer fail to maintain written training records?

Section 3203, subdivision (b)(2), provides in relevant part:

(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)[3] 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 inspection, the employer did not maintain effective safety meeting sign-in sheets after January 2019. Ref 3202(b)

The safety order requires an employer to keep specified records of the steps taken to implement and maintain its IIPP. One type of record that must be kept is training records that include the employee's name, training dates, type of training, and training providers. (§ 3203, subd. (b)(2).)

Applicability

The parties do not dispute that Employer is subject to the requirements of section 3203, subdivision (b)(2).

Violation

Fomalont testified she received training records from Employer's counsel after requesting them during the inspection. (Exhibit S.) The records are each titled "Safety Meeting Sign Up Sheet," and purport to cover the period of January through June 2019. Fomalont testified that the records were not kept in accordance with the safety order. Specifically, she did not receive a training record for April 2019, and the records for January and February 2019 did not provide the exact dates of trainings. Fomalont further testified that she concluded that the records for January, February, and March 2019 were forged and did not reflect trainings that occurred. Fomalont based this on her interview of Torres, who told her that trainings did not occur in January, February, or March 2019. She also based her conclusion on a review of the signatures on the January, February, and March 2019 records, which appeared to her like "carbon copies" compared to the signatures on other months' sheets. (TR 9/30/2022 108:12-109:16.)

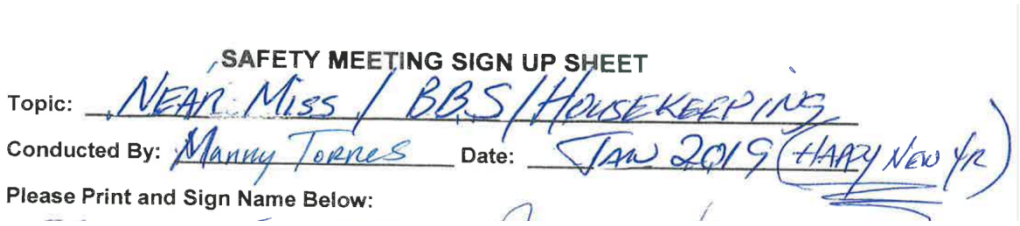
Torres provided contradictory testimony regarding the authenticity of Employer's training records. During direct examination, Torres testified that the training forms for January and February 2019 were forged. He testified he did not attend these trainings and that he did not

[3] Section 3203, subdivision (a)(7), requires that an employer provide training and instruction when the program is first established; to all new employees; to all employees given new job assignments for which training has not previously been received; whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; whenever the employer is made aware of a new or previously unrecognized hazard; and, for supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

sign the forms. Torres clarified during cross-examination that Employer asked him to falsify training records for the months of February, March, April, and May 2019, and that he started to create the documents but ultimately did not complete or sign them. In contrast, Costello testified that Employer did not ask anyone to forge training records and that he was unaware of any records having been forged.

During the hearing and in post-hearing briefing, both parties at times conflated the *occurrence* of training with *documentation* of training. Section 3203, subdivision (b)(2), requires employers to *document* training given to employees as required by section 3203, subdivision (a)(7). Subdivision (a)(7), in contrast, is the safety order that requires employers to *conduct* training. The resolution of this citation, therefore, rests on a determination of whether trainings were properly documented, not whether they were in fact conducted. Because the Division chose not to cite Employer for a violation of subdivision (a)(7), and because Employer maintained during the hearing and in its post-hearing brief that monthly trainings occurred for every month between January and June 2019, it is presumed for purpose of this analysis that such training did in fact take place.

Turning to the issue of whether the trainings that took place were in fact documented as required, a close examination of the documents provides the clearest evidence that, in fact, several trainings were not appropriately documented in compliance with the safety order. Section 3203, subdivision (b)(2), requires that training records include a date of training. Employer's forms for January and February 2019 do not provide the dates of the trainings, only the month and year (see below), whereas the remaining documents provide precise calendar dates. Providing the month, without providing the exact calendar dates within the month, fails to meet the requirements of the safety order.


SAFETY MEETING SIGN UP SHEET

Topic: NEAR Miss / BBS / HOUSEKEEPING

Conducted By: Manny Torres Date: JAN 2019 (HAPPY NEW YR)

Please Print and Sign Name Below:

(Figure 2 – Top portion of Exhibit S, p. 1.)


SAFETY MEETING SIGN UP SHEET

Topic: PPE GEAR / BBS / HOUSEKEEPING

Conducted By: MANUEL TORRES Date: FEB. 2019

(Figure 3 – Top portion of Exhibit S, p. 2.)

The Division offered additional evidence at hearing to suggest that several of the records produced by Employer were forgeries. Specifically, the signatures on the purported training records for January and February, upon close inspection, show signs of manipulation in several locations. The top portion of the documents, which identifies the training topics, the training provider, and the date of the training, appear to have had the original information obliterated and replaced through a manual method such as the application of correction fluid. Furthermore, the employee signatures on the January 2019 record are completely identical to the signatures on the February 2019 record, whereas the signatures on the other training records of the year demonstrate the graphic differences expected when a name is signed at different points in time, even by the same person.

Although Employer attempted to characterize Torres as a disgruntled former employee and unreliable, his testimony largely corroborates Fomalont's testimony that some of Employer's training records appeared to be recreated from other existing training records to backfill missing records. Employer offered no evidence to satisfactorily explain these issues, and the appearance of the records for January and February 2019 is consistent with Torres's and Fomalont's testimony that Employer caused one or more training records to be forged. For the foregoing reasons it is therefore found that the training records for January and February 2019 were forged.

In conclusion, the Division established by preponderant evidence that Employer did not keep compliant training records for the period of January through June 2019, insofar as several of the records lacked the specific training dates and appeared to be forged. Thus, a violation of section 3203, subdivision (b)(2) is established and Citation 1, Item 2, is affirmed.

3. Did Employer fail to establish an effective HIPP?

Section 3395, subdivision (i) states:

> (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).

Citation 1, Item 3 alleges:

> Prior to and during the course of the inspection, the Employers [*sic*] written Heat Illness Prevention Program [*sic*] shade provisions were inadequate. Ref. 3395(i)

Applicability

The parties do not dispute that Employer is subject to the requirements of section 3395, subdivision (i), and uncontroverted evidence including witness testimony and photographs introduced during the hearing establish that Employer's employees work both indoors and outdoors at the site.

Violation

Fomalont testified that during the inspection she requested and received a copy of Employer's HIPP. (Exhibit K.) Fomalont credibly testified Employer's trigger temperature identified in this section was 85 degrees and thus outdated, and that the applicable trigger temperature for providing shade was 80 degrees Fahrenheit when she conducted her inspection. (§ 3395, subd. (d)(1).)

Employer does not dispute that the trigger temperature in Employer's HIPP was incorrect. Rather, Employer conflates its written program with the conditions at the site both during the hearing and in its post-hearing brief. The parties do not dispute that there were shaded, and in some cases air-conditioned, areas available and accessible to employees at the site. Employer offered no evidence, however, that its HIPP contained the correct temperature for triggering the requirement to provide shade, despite having the opportunity to litigate the issue during the hearing. (See Evid. Code §§ 413, 1221.)

In sum, Employer's HIPP contained inadequate language describing when shade must be provided, because it incorporated an outdated trigger temperature of 85 degrees Fahrenheit. Accordingly, the Division established a violation of section 3395, subdivision (i), by preponderant evidence, and Citation 1, Item 3, is affirmed.

4. Did Employer fail to ensure that a powered industrial truck was operated in a safe manner in accordance with applicable operating rules?

Section 3650, subdivision (t)(11), requires:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:
(11) The driver shall slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing.

Citation 2 alleges:

Prior to and during the course of the inspection, an employee drove a Hyster S80FTBCS forklift, Serial Number J004V02917P, forward while carrying a dumpster load that obstructed his view in the direction of travel. As a result, on or about April 17, 2019, an employee who was performing maintenance work on a barbeque grill suffered a serious injury when the forklift hit the grill causing it to tip over onto the employee. Ref 3659(t)(11)

Applicability

The parties do not dispute that Employer is subject to the requirements of section 3650, subdivision (t), and undisputed evidence received during the hearing supports a finding that an employee was operating an industrial truck covered by section 3650, subdivision (t) at the time of the accident.

Violation

In order to establish a violation, the Division must prove that an employee failed to slow down or sound the horn while operating an industrial truck at a location where vision is obstructed. Alternatively, the Division may establish a violation by proving that an employee failed to travel with the load trailing where the load would obstruct the employee's vision while driving forward.

Fomalont testified that she issued Citation 2 because, at the time of the accident, Bastow was driving a forklift with a load that obstructed his forward view and did not have the load trailing. Fomalont learned about the violation in several ways. She interviewed Torres, who told her "Justin Bastow was driving the forklift with a load of a dumpster raised in front of him, obstructing his view, and that Justin Bastow was driving forward with such a load…." (TR 9/30/22 46:10-13) Fomalont also testified that employee David Molina (Molina), who witnessed the accident, recreated the accident for her during the inspection. (Exhibits 6, 8.)

Fomalont credibly testified that employees Bastow, Torres, Molina, and Don Bradley (Bradley) all told her that Bastow was driving a forklift forward while carrying a dumpster on its forks that was obstructing his forward view when the accident occurred. (TR 9/30/22 54:7-9.)

Employer's accident investigation report (Exhibit AD) includes statements from Bastow and Bradley indicating that Bastow was driving a forklift forward while carrying a dumpster on the forks. In addition, photographs attached to the report show that the forklift was carrying a dumpster, and the dumpster was raised to a height that obstructed Bastow's forward view. Based on the foregoing, it is therefore found that Bastow was driving a forklift forward with his view obstructed by the load the forklift was carrying when the accident occurred.

Employer had the opportunity to present evidence to refute the Division's evidence, but did not present any contradictory evidence. In fact, Employer concedes in its closing brief that Bastow violated multiple safety rules while driving the forklift, and that he "clipped" the barbeque that fell on Terrazas while driving forward with a raised dumpster on his forks which obstructed his forward view. Although much of the evidence of the violation was hearsay, the hearsay corroborates the statements and photographs contained in Employer's accident investigation report (Exhibit AD), which Employer adopted and is therefore treated as an admission. In sum, the evidence supports the conclusion that Employer violated section 3650, subdivision (t)(11). Citation 2 is therefore affirmed.

5. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App.1092600, Denial of Petition for Reconsideration (May 26, 2017).) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the hearing. Employer only addressed the Independent Employee Action Defense (IEAD) and the *Newbery* defense during the hearing and in its post-hearing brief, with respect to Citation 2 only. Therefore, discussion of Employer's affirmative defenses shall be limited to those defenses that were actually litigated, and all other defenses are deemed waived.

a. Did Employer establish the IEAD as to any of the citations?

In order to successfully assert the affirmative defense of IEAD, an employer must establish the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The IEAD is an affirmative defense, thus Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Citation 2 alleges that Employer failed to ensure that a powered industrial truck was operated in a safe manner in accordance with applicable operating rules, specifically by allowing an employee to travel forward with a load that obstructed the employee's vision.

Element 1: Was Bastow experienced in the job being performed?

Although there was some evidence that Bastow had little experience using a forklift to move a dumpster from the back of the site to the front, evidence at hearing established that Bastow was experienced in driving forklifts as a general matter and was certified at the time of the accident. (TR 9/30/22 168:4-13; Exhibit F) Thus, the first element of the IEAD is met.

Element 2: Does Employer have a well-devised safety plan?

As discussed by the Appeals Board in *Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017):

> The second element of the IEA defense requires the employer to demonstrate that it has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Chevron U.S.A., Inc*. Cal/OSHA App. 89-283, Decision After Reconsideration (Feb. 8, 1991).) The Board has analyzed this element by looking at the written policies and procedures of the employer, as well as taking testimony as to what constitutes the day-to-day safety practices of the employer. (See, *Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).) Indeed, demonstration of an extant and effective Illness and Injury Prevention Program, as well as relevant training records and information regarding what constitutes Employer's training program for impacted employees, are typically the showings an employer must make to meet this element.

The Division did not cite Employer for its written safety program but, as noted previously, the record demonstrates Employer's IIPP and HIPP were found to be deficient. Under these facts, it is determined that Employer lacked an extant and effective IIPP, because Employer's IIPP lacked elements critical to the successful implementation of a well-devised safety program.

Therefore, Employer did not establish that it had a well-devised, much less effective, safety program.

Element 3: Did Employer enforce its safety program?

Providing a level of supervision reasonably necessary to detect and correct hazardous conditions and practices is essential to effective enforcement, and the adequacy of supervision is a fact-intensive inquiry that requires a case-by-case determination. (*Fed Ex Ground, Inc.,* Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020).) While it may be true that one-to-one supervision is neither practical nor required, supervision must be adequate. (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).)

Here, the record shows that Employer did not provide an adequate level of supervision. Costello testified that Bastow was the "yard sales and service supervisor." (TR 4/28/23 22:21-22) However, Costello denied that Bastow had the authority to hire, fire or discipline employees, and stated that his supervisory duties were limited to such things as certifying employees on saws and assigning routine job assignments.

Costello testified that Joe Martinez, a superintendent, would have been responsible for disciplining safety violations and for conducting safety walk-throughs and inspections at the site. However, Costello also testified that safety walk-throughs called, "yard walks," did not occur very often, and only occurred as frequently as once a month. He also testified that the safety director would "occasionally" come and do a yard walk, maybe twice per year.

According to Costello, Employer also used a "Behavioral Based Safety" program to enforce its safety program. He testified that this program tasked employees with random observation of other employees, and documentation and discussion of any observed violations, in order to "encourage" workplace safety. Costello denied that the program was disciplinary in nature. Finally, Costello testified that "we work in a lumber yard with forklifts. There's going to be a near miss every once in a while," suggesting that Employer was aware of potential safety infractions, but nothing in the record suggests that Employer took appropriate steps to supervise forklift operations to protect against near misses, relying instead on forklift operators having undergone training and certification.

It must be noted that the accident occurred out in the open at a busy building material retailer. The parties do not dispute that Terrazas was sitting on a bucket cleaning a barbecue grill in the parking lot at the front of Employer's retail location, in preparation for a workplace event. Bastow was operating a forklift to bring a dumpster to the parking lot for that event. Multiple witnesses, including managerial witness Costello, testified that Bastow stopped his forklift in the parking lot to speak with Bradley, before then continuing on and striking the barbecue. Nothing

in the record suggests that Bradley, or any other employee, attempted to document or discuss Bastow's unsafe forklift driving at any point prior to the accident, including while Bastow was stopped and speaking to Bradley.

Based on a totality of the evidence, it is found that Employer did not enforce its safety program with respect to employee supervision and safe operation of forklifts.

Elements 4 and 5

Employer offered testimonial evidence to establish that it has a policy of sanctions against employees who violate its safety program, and Costello credibly testified that both Bradley and Bastow were disciplined following the accident. Employer also offered evidence that Bastow was trained and certified to operate the forklift, and had received training about how to safely drive a forklift in reverse when the forward view is obstructed by the load. Therefore, he should have known that what he was doing was contra to Employer's safety requirements.

As the IEAD is an affirmative defense, Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.) Employer failed to establish the second and third elements of its affirmative defense. Even assuming for sake of argument that Employer established the first, fourth and fifth elements, a failure to prove a single element of the IEAD defeats the defense, thus Employer's IEAD fails.

b. Did Employer establish the Newbery defense as to any of the citations?

Employer asserts that the cited violations were unforeseeable, and therefore Employer should be relieved of liability under the defense recognized by the Court of Appeal in *Newbery Electric Corp. v. Occupational Safety and Health Appeals Board*, (1981) 123 Cal.App.3d 641. The elements of the defense require proof of the nonexistence of four criteria:

1) that the employer knew or should have known of the potential danger to employees;
2) that the employer failed to exercise supervision adequate to assure safety;
3) that the employer failed to ensure employee compliance with its safety rules; and
4) that the violation was foreseeable.

(*Gaewhiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041.)

Furthermore, "the key factor in *Newbery* is unforeseeability, based upon independent action by an employee or employees in contravention of an employer's well-designed safety program." (*Bellingham Marine Industries, Inc.,* Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Here, as discussed in prior sections above, Employer did not have a well-designed safety program. Moreover, the accident occurred in the open in the parking lot in front of Employer's retail office at the site where Employer had ample opportunity to detect Bastow's unsafe forklift driving and take corrective measures. However, the evidence at best shows only that Employer relied primarily on random, voluntary observation by fellow employees and did not provide an adequate system to ensure compliance with safety standards.

Thus, for the foregoing reasons, Employer did not establish the *Newbery* defense as to any of the citations.

6. Did the Division correctly classify Citation 2?

Labor Code section 6432, subdivision (a), in relevant part, 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 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:
> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

Labor Code section 6432, subdivision (e), provides:

> "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.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

The evidence produced during the hearing demonstrates that the Division complied with Labor Code section 6432, subdivision (b)(1), by sending Employer a Notice of Intent to Classify Citation as Serious (1BY). (Exhibit A.)

At the time of the hearing, Fomalont testified she had been employed by the Division for approximately six years, including four and a half years as an Associate Safety Engineer. Prior to working for the Division, Fomalont gained significant experience working in private industry in environmental health and safety positions. Fomalont received a Bachelor of Science degree in Environmental Policy Analysis and Planning with a minor in Statistics from University of California - Davis in 1985, and she received a Master of Science in Environmental Health Science with a specialty in industrial hygiene from University of California – Los Angeles in 1992. Fomalont testified that she is current in her Division-mandated training.

Fomalont testified that she classified Citation 2 as Serious because there was a realistic possibility that a serious accident could result from driving a forklift forward with the view obscured by a large load in a location where employees, customers, debris and other objects were present. She likened it to driving blindfolded. (TR 9/30/22 161:17-24.) It is commonly understood that forklifts are heavy industrial trucks designed to carry loads weighing hundreds of pounds or more. It is reasonable to infer that an employee driving a forklift forward with their view obstructed could strike an object or employee and cause serious injury or death as a result.

Fomalont credibly testified that Terrazas suffered a serious injury as a result of the violation, which is additionally corroborated by his medical records (Exhibit BA[4]), which show that Terrazas suffered thoracic and lumbar compression fractures and a nondisplaced fracture of his tibia, along with associated knee and back pain and was hospitalized for treatment for more than 24 hours.

Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as Serious.

[4] Exhibit BA, which consists of medical records containing Terrazas's personally identifying information, is ordered to be kept under seal pursuant to section 376.6.

7. Did Employer rebut the presumption that the violation alleged in Citation 2 is Serious?

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 that:

> (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.
>
> (*Id*.)

The Appeals Board has held that a hazard in plain view can constitute a Serious violation, and that an Employer's failure to detect such a hazard negates the argument that the employer acted reasonably and responsibly. (See e.g., *RNR Construction, Inc.*, *supra*, Cal/OSHA App.1092600; *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014) ["hazardous conditions, plainly visible to the naked eye, constitute serious violations since the employer could have discovered them through reasonable diligence."].) Here, credible evidence was presented establishing that the accident took place in Employer's parking lot in front of its retail store in plain view of other employees who did nothing to correct the violation when it was observed. Employee Bradley spoke with Bastow immediately before the accident, when it should have been apparent that Bastow was driving the forklift forward with his view obscured. However, as noted previously, nothing in the record suggests that Bradley, or any other employee, attempted to document or discuss Bastow's unsafe forklift driving before the accident, including while Bastow was stopped and speaking to Bradley.

Based on the foregoing facts, it is determined that Employer did not rebut the Serious classification for Citation 2.

8. Did Employer's violation of section 3650, subdivision (t)(11), cause a serious injury to its employee?

For a citation to be characterized as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*RNR Construction, Inc.*, *supra*, Cal/OSHA Insp. No. 1092600.)

Here, the evidence establishes that Terrazas suffered a serious crushing injury to his back when the forklift operated by Bastow made physical contact with a barbecue grill that Terrazas was sitting behind and cleaning in anticipation of a workplace event. Fomalont testified that Terrazas was hospitalized for more than 24 hours for treatment. Indeed, when Employer reported the accident to the Division, it informed the Division that Terrazas had been hospitalized as a result of the accident. (Exhibit AD.)

Employer's expert medical witness, Dr. Timur Durrani (Durrani)[5], testified that he reviewed Terrazas's medical records to form opinions in regard to this proceeding. (Exhibits BA and BC.) Durrani did not dispute the contents of the medical records, although he stated that they appeared to be incomplete. Durrani testified that Terrazas sustained fractures to two vertebrae in his back, and that ordinarily this type of injury would have required hospitalization for observation and diagnostic imaging, but he also credibly testified that the hospitalization would have ordinarily included treatment to control pain. (TR 4/28/23, 113:6-114:16.) Administration of treatment to control pain during inpatient hospitalization resulting from a workplace accident meets the definition of a serious injury under section 330, subdivision (h), at the time of the inspection. Thus, the evidence establishes that Terrazas suffered a serious injury resulting from the violation identified in Citation 2.

Here, Bastow drove a forklift forward with his front view obscured by a load and collided with a barbecue grill. The contact between the forklift and the barbecue as a result of his obscured front view was the direct cause of Terrazas's back injury that resulted in inpatient hospitalization for more than 24 hours. Thus, for the foregoing reasons, Citation 2 is properly characterized as Accident-Related.

9. Was abatement of Citation 2 unreasonable?

The Division does not mandate specific means of abatement; rather, the employer is free to choose the least burdensome means of abatement. (*Starcrest Products of California, Inc*., Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004), citing *The Daily Californian/Caligraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) To establish that abatement requirements are unreasonable an employer must show that

[5] The Division did not challenge Durani's qualifications as a medical expert, and the evidence received at hearing shows that he is experienced in both emergency and occupational medicine. (See Exhibit BC.)

abatement is not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Caligraphics*, Cal OSHA/App. 90-929, *supra*.)

An employer may seek a variance from the Occupational Safety and Health Standards Board if it can show that "an alternate program, method, practice, means, device, or process which will provide equal or superior safety for employees." (See Labor Code § 143; *United States Cold Storage of California*, Cal/OSHA App. 11-1342, Denial of Petition for Reconsideration (Dec. 21, 2012); *Gates & Sons, Inc*., Cal/OSHA App. 79-1365, Decision After Reconsideration (Dec. 15, 1980).)

Abatement would have consisted of ensuring that an employee did not operate a forklift in a forward direction with the operator's field of vision obscured by a load. This could be accomplished in numerous ways, including some combination of training and observation or supervision. Nothing in the record suggests this would be unfeasible, impractical, or unreasonably expensive to accomplish. Thus, Employer did not meet its burden of establishing that abatement is unfeasible, impractical, or would be unreasonably expensive.

10. Did the Division propose reasonable penalties?

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).)

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).)

Here, the Division introduced its proposed penalty worksheet (Exhibit 2), and Fomalont credibly testified that she applied the penalty setting regulations when she calculated the penalties for Citation 1, Items 1, 2, and 3, and Citation 2.[6] The evidence at hearing supported

[6] Although Employer did not specifically appeal the reasonableness of the proposed penalties for the non-Serious violations, the Division's evidence included its proposed penalty worksheet that contained its calculations of all the

Fomalont's calculations, and Employer offered no compelling evidence warranting a different calculation.

In summary, the record supports a finding that the Division proposed reasonable penalties for Citation 1, Items 1, 2 and 3, and Citation 2.

Conclusion

The evidence supports a conclusion that Employer violated section 3203, subdivisions (a)(1) and (a)(4), by failing to identify the person or persons with authority and responsibility for implementing the IIPP and by failing to include in the IIPP procedures for conducting periodic inspections to identify and evaluate hazards.

The evidence supports a conclusion that Employer violated section 3203, subdivision (b)(2), by failing to document safety and health training required by subdivision (a)(7).

The evidence supports a conclusion that Employer violated section 3395, subdivision (i), by failing to ensure that its HIPP contained the appropriate trigger temperature for provision of shade.

The evidence supports a conclusion that Employer violated section 3650, subdivision (t)(11) by failing to ensure that an industrial truck driver whose forward view was obstructed by a load traveled with the load trailing instead. The citation was properly classified as Serious, properly characterized as Accident-Related, and the abatement requirements and the proposed penalty are reasonable.

Order

Citation 1, Items 1, 2, and 3, and Citation 2, and their associated penalties are affirmed and their penalties are assessed as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 02/16/2024

Howard I Chernin
Administrative Law Judge

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penalties. The proposed penalty worksheet is found to be prepared in compliance with the penalty setting regulations as to all the appealed violations.

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.**