BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
GENERAL DYNAMICS NASSCO **2798 E. HARBOR DRIVE** **SAN DIEGO, CA 92113** **Employer**	**1262720** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

General Dynamics NASSCO (Employer) builds and repairs ships. Beginning on September 11, 2017, the Division, through Associate Safety Engineer Luis Vicario (Mr. Vicario), conducted an inspection at Employer's facility at 2798 East Harbor Drive, in San Diego, California (the jobsite), in response to an injury report. On February 27, 2018, the Division issued three citations to Employer, alleging five violations of California Code of Regulations, title 8. [1] Only Citation 1, Item 1 (Citation 1, or the citation) alleging a General violation of section 3203, subdivision (a)(4)(B) [failure to implement procedures for identifying new hazards, associated with rigging and lifting a rectangular load, during a walkthrough inspection] remains at issue.

Employer timely appealed, contesting the existence of the violations and asserting various affirmative defenses. Administrative Law Judge (ALJ) Rheeah Yoo Avelar conducted the hearing in this matter, with the parties and witnesses appearing remotely via the Zoom video platform, on December 7 and 8, 2021, and May 2, 2022. Kevin Bland of Ogletree Deakins Nash Smoak & Stewart, P.C., represented Employer. Lisa Wong, Staff Counsel, represented the Division.

The ALJ's Decision, issued on September 29, 2022, vacated Citation 1, finding that the evidence presented by the Division was insufficient to support a finding that Employer violated section 3203, subdivision (a)(4)(B), by failing to implement the hazard identification procedures in its written Illness and Injury Prevention Program (IIPP).

The Division's timely Petition for Reconsideration (Petition) followed. Employer filed an Answer opposing the Division's Petition. The Board took the Division's Petition under consideration on November 29, 2022.

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

The Division asserts that the ALJ's Decision does not accurately reflect the record. The Division argues that the ALJ incorrectly concluded that (1) no new substance, process, procedure, or equipment presenting a new hazard had been introduced into the workplace; and (2) Employer appropriately implemented its duty to inspect, identify, and evaluate workplace hazards. Arguments not raised in the Petition are deemed legally waived. (Lab. Code, § 6618.)

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

Did the Division establish, by a preponderance of the evidence, that rigging a rectangular load with two equal length straps was a new process or procedure, representing a new hazard introduced into the workplace?

FINDINGS OF FACT

1. On September 5, 2017, Employer's Rigging Supervisor, Gonzalo Fernandes (Mr. Fernandes), performed a walk-through safety inspection of the jobsite, and gave riggers Julius English (Mr. English) and Charles Carter (Mr. Carter) work assignments at the start of their shifts.

2. Mr. English and Mr. Carter were assigned to rig two desiccant dryers (the load). Each dryer weighed approximately 1000 pounds and was rectangular in shape.

3. Mr. English rigged the first dryer using a basket hitch consisting of two equal-length straps.

4. A "basket hitch" is a rigging method where two straps are crossed under the load in a perpendicular fashion.

5. Mr. English suffered serious injuries when the load slipped out of the straps and fell onto his legs.

6. Small, incremental, trial or test lifts may be required to find a load's center of gravity in order to balance it in a basket hitch.

7. Mr. English was conducting a test lift in an attempt to balance the load when his injury occurred.

8. Mr. English and Mr. Carter had completed Employer's Basic Rigging Certification training and were certified riggers.

9. Basket hitches were a rigging method used nearly every day, and Mr. Fernandes had personally observed Mr. English use a basket hitch to lift items between 50 and 80 times in the year prior to the accident.

10. Mr. Fernandes did not discuss the specific rigging procedure for the dryers with Mr. English and Mr. Carter, or direct them to rig the load in any particular way.

11. Mr. English was employed by staffing agency Venture Dynamics (Venture) at the time of the incident on September 5, 2017, and was provided to Employer under a written staffing agreement between Venture and Employer.

DISCUSSION

Section 3203 requires employers to establish, maintain, and implement an effective IIPP that meets the minimum requirements set forth in subdivision (a) of the regulation. Section 3203, subdivision (a)(4)(B), provides that an IIPP 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:
>
> […]
>
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard;

In Citation 1, Item 1, the Division alleged:

> Prior to and during the course of the investigation, including, but not limited to 09/05/2017, the employer did not implement Program procedures to identify and evaluate unsafe conditions and work practices related to rigging a desiccant dryer to lift onto Block 517. The required pre-movement walkthrough inspections did not identify and evaluate the hazards associated with rigging a rectangular shaped unit with straps of equal lengths. The failure to identify associated hazards resulted in an unbalanced load which became unstable and slipped out of the straps.

While an employer may have a comprehensive written IIPP, the Division may demonstrate a violation of section 3203, subdivision (a)(4)(B), by showing that the employer failed to implement that plan. (*DPR Construction, Inc., et al dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021) (*DPR Construction*).) "Section 3203(a)(4) requires that employers include procedures for identifying and evaluating work place hazards in their Injury and Illness Prevention Programs. These procedures must include 'scheduled periodic inspections to identify unsafe conditions and work practices.'"(*Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) However, a written plan is not required for every potentially hazardous activity. (*Id*.)

To establish a violation of section 3203, subdivision (a)(4)(B), the Division has the burden to demonstrate, by a preponderance of the evidence, that (1) "new substances, processes, procedures, or equipment ... that represent a new occupational safety and health hazard" were introduced into the workplace; and (2) the employer failed to inspect, identify, and evaluate hazards posed by these new substances, processes, procedures, or equipment. (*Barrett Business Services, Inc.*, Cal/OSHA App. 12-1204, Decision After Reconsideration (Dec. 14, 2016).) Both elements must be established by a preponderance of the evidence to uphold an alleged violation.

"Preponderance of the evidence" is usually defined in terms of probability of truth, or evidence that, when weighed against opposing evidence, 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).) Here, the ALJ found that the Division failed to establish either element of the violation. The Division disputes this result, arguing that the ALJ failed to properly consider the entire evidentiary record.

The Board finds that the Division failed to meet its burden to establish both elements of section 3203, subdivision (a)(4)(B). We therefore affirm the ALJ's Decision vacating Citation 1.

1. Did the Division establish, by a preponderance of the evidence, that rigging a rectangular load with two equal length straps was a new process or procedure, representing a new hazard introduced into the workplace?

The Division argues that it presented sufficient evidence to demonstrate that a new hazard was presented by the rectangular load and the manner in which it was rigged. The Division's evidence consisted primarily of Employer's IIPP, training records, documents relating to Employer's investigation of the accident, and records of safety inspections, along with testimony from the Division inspector, Mr. Vicario. Neither Mr. English nor Mr. Carter testified, and the Division presented no witnesses other than Mr. Vicario. Mr. Fernandes and Duke Vuong (Mr. Vuong), Employer's Safety Manager at the time of the accident, testified on behalf of Employer. The Division conducted brief cross-examination of these witnesses.

The Division offers two theories regarding the alleged existence of a new workplace hazard in this matter. First, the Division argues that the use of a basket hitch with two equal-length straps on a rectangular load was the new hazard at issue, and that the ALJ's analysis failed to fully address this hazard. Second, the Division argues that Mr. English lacked the knowledge or experience to safely rig a rectangular load, and this process or procedure therefore presented a new hazard to him. We find that neither argument is supported by a preponderance of the evidence.

a. Did the Division's evidence establish that using two equal length straps in a basket hitch to rig a rectangular load created a new hazard?

The Division argues, first, it presented sufficient evidence to demonstrate that a new hazard was created when Mr. English rigged the rectangular load by using two straps of equal length in a basket hitch. The Division asserts that this method of rigging was incorrect, and resulted in an inherently unstable load, which could never have been balanced. The Division argues that this constituted a new substance, process, procedure, or equipment, representing a new hazard, introduced into the workplace. The Division's evidence is insufficient to establish such a finding.

Mr. Fernandes testified that the lift was a normal and routine task. He stated that rigging and lifting the dryer presented no unusual challenges, and in fact was "nothing different than what we normally did," indicating that the load's rectangular shape did not present a new hazard. (HT 5/2/2022, pp. 314:16-20, 315:8-9, 319:12-14.) He further testified that basket hitches were used as a rigging method on a daily basis. (HT 5/2/2022, p. 316:21-23.) Mr. Vuong also testified that rigging the dryer was "a typical job." (HT 5/2/2022, p. 284:2-19.) The Division's cross-examination of Mr. Fernandes did not clarify whether it was part of Employer's usual procedures

to use a basket hitch to rig a rectangular load, or to use two-equal length straps as part of that process. (HT 5/2/2022, pp. 324:6-325:21.) The Division's counsel simply never asked this significant question. The ALJ therefore properly credited Mr. Fernandes' "testimony that [the] assignment that day was one routinely performed with materials customarily used." (Decision, p. 7.)

The Division produced limited evidence to support its claims that rigging a rectangular load in a basket hitch with equal-length straps was an incorrect procedure, or a process that presented a new hazard for Employer. Mr. Vicario testified that, in his opinion, the rigging method did not allow the dryer to be "secured and balanced," and this resulted in the hazard of the load slipping and falling. (HT 12/8/2021, pp. 138:6-13, 144:18-20, 146:17-20, 171:4-14.) Mr. Vicario conceded, however, that Mr. English was attempting to balance the load by performing a test lift when the accident occurred, and this indicated that Mr. English recognized, and was attempting to correct, the hazard of an unbalanced load. (HT 12/8/2021, pp. 169:10-22, 170:8-20, 173:3-6, 175:19-177:8, 182:17-21.) Mr. Vicario also testified that, according to Employer's records, Mr. English had completed Employer's rigging training. (HT 12/8/2021, pp. 173:8-174:12.)

The Division's Petition cites two exhibits: Employer's Investigation Report (Exhibit 7), and three photographs of the accident site taken in the course of Employer's investigation of the accident. (Exhibit 26.) The Division asserts that Exhibits 7 and 26 contain sufficient evidence to demonstrate that a new workplace hazard was created by rigging the rectangular dryer in a basket hitch with two equal-length straps, which resulted in an unbalanced load that could not have been brought into balance. (Petition, pp. 5, 11.) We disagree.

Employer's Investigation Report (Exhibit 7) identifies rigging the load with two straps of the same length as a contributing cause in the accident. It states that the straps became uneven when the rectangular load was lifted, causing one strap to tighten while the other remained slack. This "allowed the unit to tip over" and eventually to "slip all the way out of the slings." (*Id*.) Hearing testimony on Exhibit 7 was limited to verification that it was produced by Employer and provided to the Division during the discovery process. (HT, 12/8/2021, pp. 129:15-130:23, 135:17-137:10; HT 5/2/2022, p. 293:7-18.) The Division now asserts that the Decision failed to consider the "conclusions, details, and contents of the report." (Petition, p. 5.) However, the report reached no conclusions of the sort that would revive the Division's argument. While the report does find that the load was rigged with equal-length straps, which caused the load to become unbalanced, this is not, without more evidence, sufficient to conclude that this created a new hazard within the scope of the cited safety order.

Exhibit 26 consists of three photographs, which depict the dryer and crane involved in the accident, and a re-creation of how the dryer was rigged. According to this re-creation, the dryer was positioned vertically, and one side appears to be approximately twice as long as the other. The annotations on the photographs point out that rigging the rectangular load with equal-length straps caused the strap on the longer side to tighten, and the strap on the shorter side to remain slack, as tension was applied during lifting. There appears to be no dispute as to this point. Indeed, logic dictates that such a rigging would result in an unbalanced load, unless somehow corrected. The Division did not, however, produce evidence demonstrating that the load could not have been brought into balance, by adjusting the straps or some other means, nor did it produce evidence

that these other means were not being used or attempted by the employees. The Division's argument that the load "would never have been balanced" (Petition, p. 4) is therefore speculative.

The Division also introduced the "Rigging" section of Employer's IIPP. (Exhibit 31.) Section 6.24 of that document, titled "Synthetic Web Slings (Nylon, Polyester, Polypropylene)," provides, in relevant part:

> 6.24.8
> […]
> - Care should be taken when using basket hitches so that slings do not slip on the object being lifted. Slings used in a basket hitch shall have the load balanced to prevent slippage.
>
> […]
> 6.24.14
> - Loads in a basket hitch are balanced in the sling to prevent slippage.

Employer's IIPP thus identifies the hazard of raising an unbalanced load in a basket hitch, and requires that such loads be balanced before they are safe to lift.

As a whole, the Division's evidence does not demonstrate that the load was incorrectly rigged, that it could never have been balanced, and that the rigging method therefore represented a new hazard. It demonstrates only that the load was unbalanced at the time of the accident. Furthermore, Employer presented evidence demonstrating that, when the accident occurred, Mr. English was performing test lifts in an attempt to bring the load into balance, and that Mr. English's actions in rigging the load and performing test lifts were in compliance with Employer's rigging training. This evidence indicates that the hazard of an unbalanced load was not a new or unforeseen hazard.

Employer's evidence included training documents used in its rigging certification training program: a 153-page Basic Rigging Certification PowerPoint (Exhibits O-U) and a 51-page Basic Rigging Participant Guide for trainees. (Exhibits V-X.) These documents demonstrate that Employer's rigging training program addressed the use of basket hitches. (Exhibit S, pp. 10, 13-15 [pp. 107, 110-112, Basic Rigging Certification PowerPoint]; Exhibit V, p. 20 [p. 14, Basic Rigging Participant Guide]; Exhibit X, pp. 2, 4, 5 [pp. 38, 40, 41, Basic Rigging Participant Guide].) The training documents specifically provide, "Basket Hitches should not be used on unbalanced loads or loads that are difficult to balance." (Exhibit S, p. 13 [p.110]; Exhibit X, p. 4 [p. 40].)

Loads that are unbalanced, or difficult to balance, are described in the training as "odd-shaped loads" whose center of gravity is not the same as their geometric center. (Exhibit R, p. 16 [p. 89, Basic Rigging Certification PowerPoint]; Exhibit W, p. 12 [p. 31, Basic Rigging Participant Guide].) The Division did not produce evidence to demonstrate that the dryer, a symmetrical rectangular shape, was difficult to balance, due to an odd shape, asymmetrical weight distribution, or any other factor.

The only specific reference in the training documents to rectangular loads is included in a simple instruction on how to calculate the volume of "a rectangular or square object." (Exhibit R, p. 11 [p. 84, Basic Rigging Certification PowerPoint]; Exhibit W, p. 10 [p. 29, Basic Rigging Participant Guide].) By contrast, considerable attention is given to rigging odd-shaped loads. This distinction between "odd-shaped" loads and rectangular or square objects implies, as Mr. Fernandes and Mr. Vuong testified, that rectangular loads were not unusual for riggers to encounter. This suggests that such loads present no new hazards solely due to their shape.

Employer's Basic Rigging Certification training also requires finding the center of gravity of a rigged item before it is lifted. It anticipates the issue of tilting loads, and warns against placing unbalanced loads in basket hitches. It instructs: "You must also determine the Center of Gravity, which is the point where the load is balanced." (Exhibit R, p. 9 [p. 82, Basic Rigging Certification PowerPoint]; Exhibit W, p. 9 [p. 28, Basic Rigging Participant Guide].) "Any load that tilts greater than five degrees while lifted must be placed back down and adjusted." (*Id*. at p. 15 [p. 88]; p. 12 [p. 31].)

The training also instructs riggers to use test lifts to ensure loads are balanced: "Take up the slack carefully, check load balance, move the load a few inches, and check load-holding action before continuing." (Exhibit T, p. 9 [p. 131, Basic Rigging Certification PowerPoint].) The training then details the steps to be used in making test lifts: "Apply the lifting force slowly while checking for load balance. […] Lift load two to three inches. […] Before proceeding with additional operations, stop to check for load-holding action. […] Once load-holding action has been verified, continue with the Basic Rigging Operation." (*Id*. at pp. 10-13 [pp. 131-135].)

Mr. Fernandes testified that test lifts were a routine element of preparing a load to be lifted in a basket hitch. (HT 5/2/2022, pp. 317:20-318:6, 320:2-321:8.) Mr. Fernandes stated that Mr. English was performing a test lift when the accident occurred. (HT 5/2/2022, p. 320:2-14.) Mr. Vuong also testified that test lifts were a routine part of the rigging process. (HT 5/2/2022, p. 279:5-21.) Altogether, the evidence indicates that Employer's procedures for rigging and lifting loads in a basket hitch recognized, and anticipated, that incremental trial lifts would be necessary to ensure the load was balanced, and that this process would sometimes require adjusting the rigging after one or more trial lifts. The ALJ therefore found, and we agree, "Employer's IIPP and training materials support a finding that balancing a load in a basket hitch involves a process that assumes loads may be tilted until they are adjusted." (Decision, p. 8.)

The Division argues that the Decision "erroneously emphasizes incremental trial lifts as the ultimate factual issue in the tilting or tipping of the desiccant dryer," overlooking that "the issue is with the incorrect rigging of the load that led to the tilting and slipping." (Petition, p. 5.) There is no evidence in the record, however, beyond Mr. Vicario's conjecture, that the load was rigged incorrectly. This was the Division's burden to demonstrate, and it failed to do so. The Division further attributes the ALJ's findings to "presumptions due to [an] analytical gap" by the ALJ, which caused the ALJ to over-rely on practices and procedures detailed in the Employer's IIPP and training materials. (Petition, pp. 4, 7.) We disagree. Ultimately, the Division's argument is akin to *res ipsa loquitur*: the occurrence of an accident implies that the load must have been incorrectly rigged. But this argument does not satisfy the Division's evidentiary burden to prove

the alleged violation. If the mere fact that an accident occurred were sufficient proof of a violation, it would, in essence, eliminate the Division's burden of proof in such matters.

The Board has held, "The law of California requires that when evidence is equally susceptible to two reasonable interpretations, one of which leads to liability and one that does not, the trier of fact is bound to choose that interpretation against the party carrying the burden of proof." (*Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005), citing *People v. Miller* (1916) 171 Cal. 649, 654; *California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 45.) Here, while the Division puts forth theories that are in the realm of possibility, it failed to meet its evidentiary burden. In short, the Division did not present evidence sufficient to establish that the use of two equal-length straps in a basket hitch, to rig a rectangular load, represented a new hazard. The ALJ therefore concluded, and we agree, that the Division failed to meet its burden of proof on the first element.

To provide context for our conclusion, we briefly review relevant Board precedent, in which the Board has found that the Division satisfied its burden to demonstrate the existence of a new workplace hazard under section 3203, subdivision (a)(4).

- In *Hansford Industries, Inc., dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 31, 2021), the Board found a new hazard under section 3203, subdivision (a)(4), where a crew was left without managerial supervision to perform the task of planning and carrying out the movement of an irregularly shaped, 37 foot, 2000 pound metal staircase by forklift. The Division presented evidence that each large metal item produced by that employer was unique, and that the process of moving this particular staircase therefore involved a new substance, process, procedure, and/or equipment, representing a new hazard in the workplace.

- In *DPR Construction*, *supra*, Cal/OSHA App. 1206788, the Division's evidence demonstrated that the employer knowingly allowed employees to work on a ten-inch wide plank, elevated over six feet above the ground, without scaffolding, in violation of a safety order specifying a minimum 20-inch width requirement for such work platforms. These circumstances represented a new hazard under 3203, subdivision (a)(4).

- In *OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016), the Division's evidence demonstrated that the employer required an inexperienced employee to climb a utility pole during inclement weather conditions. The Board found that these combined circumstances created a new workplace hazard under section 3203, subdivision (a)(4).

- In *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015), the Board found a new hazard under section 3203, subdivision (a)(4), where the employer permitted employees to modify an all-terrain vehicle (ATV) for work use. The Division's evidence demonstrated that these modifications included a rack which affected the ATV's center of gravity, making it more likely to tip over, and wheels larger than the manufacturer's recommendations and contrary to the manufacturer's operations manual. These modifications represented a new workplace hazard.

- In *Barrett Business Services, Inc.*, *supra*, Cal/OSHA App. 12-1204, the Division presented evidence demonstrating that a new hazard was created, under section 3203, subdivision (a)(4), when the employer altered the worksite by sealing the building's back dock area and covering air vents, blocking ventilation into the building.

While the Board does not always find it necessary to engage in a detailed analysis of the first element, as it has done here, these decisions demonstrate that a new hazard consists of a demonstrably new, changed, or unfamiliar element in the workplace. All this is not to say that a hazard did not exist here. It certainly did, and Mr. English was grievously injured as a result. The hazard, however, was not demonstrated to be within the scope of the cited safety order. The Division had the burden to prove, by a preponderance of the evidence, that this hazard was the result of a new "process[], procedure[], or equipment." (§ 3203, subd. (a)(4)(B).) The Division failed to meet this burden.

We therefore affirm the ALJ's finding that, "The Division did not show that slings of equal length could not be adjusted to balance and support a rectangular but otherwise symmetrical load. The Division provided no evidence to show that the rectangular load was difficult to balance and inappropriate for a basket hitch." (Decision, p. 7.)

b. Did the Division's evidence establish that Mr. English lacked the knowledge or experience to rig a rectangular load?

The Division asserts that Mr. English did not know how to safely rig a rectangular load, and this process or procedure therefore represented a new hazard to him. The Division argues, "Even if the desiccant dryer is deemed a regular substance or equipment that is introduced to the workplace at issue, facts established that rigging a desiccant dryer was new and unfamiliar to the injured worker." (Petition, p. 12) However, the Division failed to present convincing evidence in support of this claim, while Employer presented evidence that Mr. English was a certified rigger and experienced in the task being performed when the accident occurred.

Mr. Fernandes testified that Mr. English had completed Employer's rigging training certification program and was a certified rigger. (HT 5/2/2022, p. 312:7-10.) Mr. Fernandes defined a "certified rigger" as "someone that's been on the job for a while [and] that's trained," and, more specifically, had completed Employer's rigging certification training. (HT 5/2/2022, pp. 324:7-325:14.) Mr. English's training records, presented by the Division, demonstrate that he completed this training. (Exhibit 10.) The record shows that Mr. English's first date of work for Employer was November 17, 2016, and he completed Employer's "Rigging School" (i.e., the rigging certification training program) on October 28, 2016, prior to starting work. (Exhibit 10.) The accident occurred on September 5, 2017, meaning that Mr. English had, at minimum, almost a year of rigging experience at Employer's worksite. His training was current, in compliance with Employer's requirement that riggers be re-trained every two years. (Exhibits 8, 10.)

The Division, however, argues that Mr. English was presumptively inexperienced as a rigger because he was paired to work with Mr. Carter (Petition, pp. 3, 9, 10, 11, 13), and, on that basis, repeatedly and incorrectly refers to Mr. English as still in training. (*Id.* at pp. 3, 6, 7, 9, 10, 13.) The Division then goes on to draw the conclusion that Mr. English did not know how to properly rig and balance a rectangular load, based on his use of the equal length straps. (*Id.* at pp.

4, 7, 11, 13.) The Division posits that Mr. English's use of equal length straps is in itself evidence of "the injured worker's inability to correctly rig the load while in the midst of hands-on training." (*Id*. at p. 7.) Therefore, the Division concludes, "The aforementioned [use of equal length straps] underscores rigging a rectangular load or desiccant dryer was, at minimum, new to Mr. English; presenting a new hazard at the workplace for this particular employee." (*Id*. at p. 13.)

This conclusion is not supported by the record. The Division bases its argument upon isolated statements, or mischaracterized hearing testimony. Contrary to the Division's assertion, there is no evidence in the record that Mr. English was still undergoing training. In fact, as noted, he had completed Employer's rigging certification program almost a year before the accident. Mr. Vicario, far from stating that Mr. English was a trainee, testified that Mr. English was paired with Mr. Carter because Mr. English was a temporary employee hired from a staffing agency, and that it was Employer's standard practice to pair "temps" with permanent employees. (HT 12/7/2021, p. 90:8-11.) This testimony is supported by the field notes taken by Mr. Vicario in the course of his investigation. (Exhibit 25.)

In addition, a section of Employer's IIPP, titled "Accounting for Employees," introduced by the Division, provides that all "potentially dangerous" operations require use of a "Buddy System." (Exhibit 23, section 6.3.) Mr. Vuong explained that, although it was Employer's custom to pair employees "new to rigging" with a "buddy" to "reinforce" their training (HT 5/2/2022, p. 267:8-10), *all* riggers "typically work with a buddy." (HT 5/2/2022, p. 283:3-18.) The fact that Mr. English was paired with Mr. Carter during a potentially hazardous operation is therefore not conclusive evidence that Mr. English did not know how to rig and balance a rectangular load.

The Division's evidence also failed to establish that the hazard of an unbalanced load was new to Mr. English. The Division's only witness, Mr. Vicario, implied that he believed Mr. English was inexperienced at the task because the load continued to slip during the process of performing test lifts. (HT 12/8/2021, pp. 168:14-17, 176:11-25.) Mr. Vicario conceded, however, the use of test lifts actually indicated that Mr. English recognized the hazard of an unbalanced load, and was attempting to correct it. (HT 12/8/2021, pp. 173:3-6, 175:19-177:8, 182:4-21.) The ALJ therefore found it "reasonable to infer that English recognized that he could not complete the lift without adjustments to address the hazard of an unbalanced load slipping." (Decision, p. 6.) We agree.

Mr. Fernandes testified that he had supervised and observed Mr. English at work on a daily basis for almost a year. (HT 5/2/2022, p. 311:7-11.) Based on his personal observations, he described Mr. English as an experienced rigger. (HT 5/2/2022, pp. 311:12-18.) Mr. Fernandes did note that if "experienced riggers" had a question about a procedure, they could come to him for assistance, and he considered that to be "hands on training." (HT 5/2/2022, pp. 313:17-314:1.) There is no indication that Mr. Fernandes was referring to Mr. English himself as still undergoing training. To the contrary, Mr. Fernandes described Mr. English as "more experienced," compared to "newer guys" who required closer supervision. (HT 5/2/2022, p. 313:12-21.)

Mr. Fernandes further testified that using nylon straps to rig loads in a basket hitch was done on a daily basis, in the normal course of Mr. English's work. (HT 5/2/2022, p. 316:15-23) He estimated that he had personally seen Mr. English using a basket hitch with nylon slings between 50 and 80 times. (HT 5/2/2022, pp. 316:24-317:10) On these occasions, Mr. English had followed, and thereby demonstrated familiarity with, Employer's rigging policies and procedures.

(HT 5/2/2022, p. 317:11-14.) In Mr. Fernandes' opinion, Mr. English was sufficiently experienced to perform test lifts and assess whether a load was balanced. (HT 5/2/2022, pp. 321:9-17; 322:1-8.) As Employer's Answer points out, the Division never questioned Mr. Fernandes regarding his knowledge, if any, of Mr. English's experience in rigging a rectangular load, or using two equal-length straps in a basket hitch. (Answer, p. 4.)

The Division asserts that Mr. Fernandes' testimony, "even if deemed credible," is "not evidence that [English] knew how to use a basket hitch to rig a one-ton rectangular load" (Petition, p. 7.) The Division further asserts, "The Employer's testimony are [sic] based largely on generalities of their procedures and practices or presumptions; there was no testimony that the Employer knew whether either Mr. English or Mr. Carter knew how to rig a rectangular one-ton load." (Petition, p. 13.) However, it is not Employer's burden to demonstrate that these employees knew how to safely rig the load. It is the Division's burden to demonstrate that they did not. Once the Division presents evidence to support a finding, the burden then shifts to Employer to rebut that evidence. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004); *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) Here, the Division failed to introduce any evidence that Mr. English, did not, in fact, know how to properly rig the load.

Mr. English refused to be interviewed or to cooperate with the Division's investigation. (HT 12/8/2021, pp. 174:24-25, 175:5-7.) Both Mr. Carter and Mr. English were subpoenaed by the Division, but neither testified at the hearing. The record does not indicate whether the Division attempted to enforce compliance with either subpoena, per section 372.5, which provides, in relevant part, "If any witness refuses to attend or testify or produce any papers required by a subpoena issued by the Appeals Board, a party may file with the Appeals Board a petition for judicial enforcement." (§ 372.5, subd. (a).) Employer indicated that it also subpoenaed Mr. Carter, but that he was "out of town" and therefore "not going to be able to appear" at the videoconference hearing. (HT 12/7/2021, p. 100:12-25.) Mr. Carter was apparently still unavailable when the videoconference hearing was continued in May, 2022.

In the absence of evidence from the Division, such as testimony from any employee who was actually involved in, or witnessed, the incident, the ALJ reasonably credited Mr. Fernandes' testimony regarding his first-hand knowledge of Mr. English's rigging experience. "An administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence." (*Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal. 3d 721, 728.)

The Board has recognized that industrial workplaces are dynamic environments in which conditions can change unexpectedly, causing new hazards to arise, and that these hazards sometimes involve inexperienced employees. (See, e.g., *OC Communications, Inc*., *supra*, Cal/OSHA App. 14-0120 [new hazard created by inexperienced employee working on a utility pole during inclement weather conditions]; *DPR Construction*, *supra*, Cal/OSHA App. 1206788 [new hazard created by inexperienced employee working at an elevated height on a ten-inch wide platform].) Nonetheless, it is the burden on the Division to demonstrate that the circumstances or conditions presented a new hazard to that particular employee. Here, the Division failed to do so. If the Division is to rely on Mr. English's supposed lack of experience to establish this element of the cited violation, it must provide some evidence, beyond conjecture, to support that argument.

The ALJ therefore concluded, "The Division did not establish a rectangular load with nylon slings in a basket hitch was a new process or presented new hazards to English." (Decision, p. 7.) We agree. Because we find that the Division failed to establish the first element of the alleged violation, we need not address the second element.

DECISION

For the reasons stated, we affirm the ALJ's Decision vacating Citation 1, Item 1.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 05/08/2023