BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeals of: **WAL-MART STORES INC. STORE # 1692** **508 SW 18TH STREET** **BENTONVILLE, AR 72716** **Employers**	**Inspection No. 1195264** **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

Walmart Stores Inc., Store #1692 (Employer) operates a business offering goods and services to consumers, including automotive work. On December 5, 2016, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Lex Eugene Eaton (Eaton), commenced an inspection of Employer's worksite located at 1120 S. Mt. Vernon Avenue in Colton, California (the jobsite). Eaton commenced the inspection on December 5, 2016, in response to a complaint regarding an incident that took place on August 9, 2016.

On March 27, 2017, the Division issued two citations to Employer alleging two violations: (1) a violation of 3203, subdivision (a)(6) [failure to implement and maintain an effective Injury and Illness Prevention Program for correcting unsafe or unhealthy conditions, work practices and work procedures]; and (2) a violation of section 3328, subdivision (g) [failure to maintain machinery and equipment that is in service in a safe operating condition].

Employer filed a timely appeal of the citations, contesting the existence of the alleged violations, the reasonableness of the proposed penalties, the abatement requirements, and the classification of Citation 2. Employer also pleaded affirmative defenses.[1]

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board or Board), in Riverside, California. Matthew M. Gurvitz, attorney with Venable, LLP, represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. This matter was submitted on February 7, 2019.

[1] To the extent Employer did not present evidence in support of its affirmative defenses, said defenses are deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

On February 19, 2019, the ALJ issued a decision dismissing each of the two citations and vacating the associated penalties.

The Division filed a Petition for Reconsideration asking the Board to reconsider the ALJ's decision vacating the citations, which the Board took under submission. In making this decision, the Board has engaged in an independent review of the entire record. The Board has additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Employer fail to correct unsafe or unhealthy working conditions, work practices, or work procedures pursuant to its Injury and Illness Prevention Program?

2. Did Employer fail to maintain machinery and equipment that was in service in a safe operating condition?

FINDINGS OF FACT

1. Employer has four bays at its auto care center (Tire and Lube Express) and each bay has two bay doors. The bay doors were manually operated and had a spring tensioning mechanism at the top.

2. On August 9, 2016, bay 1, door 2 (hereinafter BD2), lowered and an employee, Renee Duke (Duke), walked into, and/or collided with, the door.

3. During the Division's investigation, Eaton conducted a visual inspection of the bay door, but he did not operate the door, nor did he see it in operation.

4. Employer obtained maintenance and service on BD2 on December 8, 2016, through a third party company, McKinley Corporation.

5. On January 4, 2017, McKinley Corporation replaced door cables and a box lock on BD2, and lubricated its main spring.

ANALYSIS

1. **Did Employer fail to correct unsafe or unhealthy working conditions, work practices, or work procedures pursuant to its Injury and Illness Prevention Program?**

California Code of Regulations, title 8, section 3203, subdivision (a), provides, in relevant part:

> 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: […]
>
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
>
> (A) When observed or discovered; and,
>
> (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

Citation 1, Item 1, alleges:

> Prior to and during the course of the Inspection, including, but not limited to January 3, 2017 the employer failed to correct an unsafe condition with a falling Bay #2 Door. As a result, on or about August 09, 2016 the roll-up door in Bay 2 of the Tire and Lube Express area was not operating properly and drifted down causing injuries to at least one employee.

The Division asserts Employer failed to implement its Injury and Illness Prevention Program (IIPP) as required by failing to correct BD2, which the Division asserts did not operate correctly and created an unsafe condition. Implementation of an IIPP is a question fact. (*Ironworks Unlimited,* Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996).) An employer's IIPP may be satisfactory as written, but still result in a violation of section 3203, subdivision (a)(6), if the IIPP is not implemented, or through failure to correct known hazards. (*Contra Costa Electric, Inc.,* Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) "Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards." (*BHC Fremont Hospital, Inc.,* Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014) [citations omitted].) "The safety order requires employers to … take appropriate corrective action to abate the hazards." (*Ibid*.)

The Division has the burden to prove a violation by a preponderance of the evidence. (*International Paper Company,* Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).) To meet its burden with respect to the immediate citation, the Division must demonstrate BD2 was kept in an unsafe or unhealthy condition, which Employer failed to correct in a timely manner. The Division primarily rests its argument on two evidentiary supports. The Division first relies on an incident of August 9, 2016. The evidence demonstrates that on August 9, 2016, an incident occurred wherein BD2 lowered and an employee walked into the door. The employee who walked into the door, Duke, did not see BD2 lowering before she walked into it.

The Division contends BD2 lowered of its own accord and the occurrence of the accident demonstrates an unsafe condition existed with BD2. To support this argument, the Division relies on employee statements that other bay doors have slipped on occasion. The Division next relies on maintenance and service work conducted by third party, McKinley Corporation, on December 8, 2016 and January 4, 2017 to prove that BD2 had been kept in an unsafe condition, prior to the effectuation of the service and repairs.

Considering first the maintenance and repairs performed by McKinley Corporation on December 8, 2016 and January 4, 2016, the Board declines to find that such service and repairs establish that BD2 was kept in an unsafe condition.

Initially, the service and repair work performed by McKinley Corporation was vaguely characterized in the record. As correctly observed by the ALJ, the mere fact that parts were serviced or replaced, without more explanation, does not per se demonstrate an unsafe condition existed with BD2. Absent information demonstrating the specific reason for the service and replacement work performed, and absent evidence concerning the function of the specific parts that were serviced and replaced (and the connection to employee safety), the Board cannot conclude an unsafe condition existed, even if those parts were damaged. To find an unsafe condition existed in this case, given the dearth of explanatory information offered by the Division, would simply require too much speculation. As discussed within the ALJ's decision,

> The Division provided no evidence about the condition of the parts that were replaced. More specifically, the Division did not demonstrate that parts that were replaced were worn or damaged to the point where failure was happening, imminent, or even likely. (Decision, p. 6.)

Further, "evidence was not adduced at hearing demonstrating the function of the door cables or the box lock that were replaced." (Decision, p. 6.) In sum, the Division failed to demonstrate any service or repair work was integral to the safe operation of BD2, much less demonstrate an unsafe condition actually existed prior to the service and repair work.[2]

Turning to the second evidentiary support relied upon by the Division to support the citation—the accident of August 9, 2016—the Board again declines to find the accident demonstrates that the door was kept in an unsafe condition. There is no doubt that BD2 descended on August 9, 2016, leading to an incident where Duke collided with BD2. But while the door's descent is undisputed, the cause of the door's descent is far from clear.

Discussing the accident, Duke testified that she had just written up a customer and was entering the bay to hang the customer's keys. As she walked into the bay, another associate, Andrew McBride (McBride), was pulling a yellow chain across the entrance of the bay to secure it. Duke told McBride to hold on and, as she entered the bay, she felt pressure on her head and

[2] While Eaton could have helped fill this evidentiary gap, his evaluation of the door was cursory. It is observed that during his inspection he engaged in only a visual inspection of the door. He did not operate BD2 or see it operated at any point during his investigation

face, which she stated was BD2 lowering. A recording of the incident was entered into the record in the form of a three-hour video. (Exhibit 4b.) Approximately halfway through the video, BD2 lowers down slowly, stops approximately halfway between the ground and its top point, and the employee, Duke, appears to walk into the door. McBride then appears to push the door back up to its fully open position.

As discussed by the ALJ in the Decision, the Division failed to present evidence sufficient to prove that the cause of BD2's descent was a malfunction or other unsafe condition. "The Division presented no other percipient witnesses to establish whether the door malfunctioned or whether it was merely pulled down by the employee who was already situated at the door, [McBride]." (Decision, p. 5.) That some employees had told Eaton of other occasions where they had seen other bay doors purportedly slip, drift, or close without provocation, does not suffice to prove a malfunction with BD2 in this specific instance. The discussions pertaining to these other instances were simply too vague to support a violation. No employees testified regarding any previous concerns with BD2. Further, the evidence concerning the other alleged instances of door slippage or closure also suggested a potential alternate cause for the closure of the doors. For example, Isaac Villafar (Villafar), one of the employees interviewed, told Eaton the doors only came down when they were not pushed all the way up, noting he had not seen a door come down that was all the way up. Likewise, while Duke said she had seen another door come down on its own, she could not say if it had been opened all the way up. In short, the Division failed to demonstrate that the incident of August 9, 2016 was the result of an unsafe condition with BD2, rather than the result of some other cause.[3]

Ultimately, it was the Division's burden to prove an unsafe condition existed with BD2 that was not corrected. The Division failed to meet its burden. As the Board stated in *Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005):

> In *California Shoppers, Inc*., the court discussed the general rules characterizing the availability of inferences in the fact finding process, including the rule that "[i]f the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary…" (quoting *Reese v. Smith* (1937) 9 Cal.2d 324, 328.)

While the Division has put forth several theories in an effort to demonstrate Employer kept BD2 in an unsafe condition, we concur with the ALJ that the Division failed to carry its burden.

[3] We observe no statute of limitations concerns stemming from consideration of the August 9, 2016 incident. Had we found an unsafe condition with BD2 concerning the August 9 incident, the continuing violation rule would overcome any statute of limitations defense. The Board has previously held regardless of when a violation is initiated, its "occurrence" continues until it is corrected. (See *Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (April 5, 2002).) However, as discussed by the ALJ, "As no violation is found stemming from the August 9, 2016, incident, and the Division explicitly disclaimed connection to that incident, there is no violation of the statute of limitations for the issuance of the March 2017 citations." (Decision, p. 5.)

2. **Did Employer fail to maintain machinery and equipment that was in service in a safe operating condition?**

Section 3328, subdivision (g), provides, "[m]achinery and equipment in service shall be maintained in a safe operating condition." Citation 2, Item 1, alleges:

> Prior to and during the course of the inspection, including, but not limited to January 3, 2017 the employer failed to ensure equipment was maintained in a safe operating condition. As a result, on or about August 09, 2016 the roll-up door in Bay #2 of the Tire and Lube Express area was not operating properly and drifted down causing injuries to at least one employee.

As discussed above with regard to the preceding citation, the Division failed to meet its burden of proof to demonstrate that BD2 was in an unsafe condition. Therefore, the Division likewise failed to meet its burden of proof to establish that BD2 was not maintained in a safe operating condition and Citation 2, Item 1, is dismissed.

DECISION

The Board affirms the Decision of the ALJ and vacates the citations.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair

/s/ Judith S. Freyman, Board Member

FILED ON: 11/04/2019