

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

ABM FACILITY SERVICES, INC. dba
ABM BUILDING VALUE
1150 South Milliken Avenue
Ontario, CA 91767

Employer

Dockets. 12-R3D6-3496
through 3498

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taking the petition for reconsideration filed by ABM Facility Services, Inc. dba ABM Building Value (Employer or “ABM”) under reconsideration, renders the following decision after reconsideration.

JURISDICTION

The Division of Occupational Safety and Health (Division) conducted an accident-related inspection at a place of employment in Ontario, California on May 18, 2012. On November 16, 2012, the Division issued citations to Employer, alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Employer filed a timely appeal of the citations. Citation 1, Item 1 alleges a General violation of section 3203(a) [failure to implement and maintain an effective IIPP]. Citation 2, Item 1 alleges a Serious, Accident Related violation of section 2320.2(a) [conducting work on an energized system]. Citation 3 alleges a Serious violation of section 2320.4(a)(2) [ensure the disconnecting means is in the open position before working on de-energized electrical equipment]. A hearing was held before an Administrative Law Judge (ALJ) of the Board in West Covina, California on October 15, 2013, March 13, 2014 and on July 15, 2014. The ALJ upheld Citations 1 and 2, and vacated Citation 3 in a Decision issued on September 15, 2015.

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Employer filed a timely petition for reconsideration of the ALJ's Decision. The Board took the Employer's petition for reconsideration under submission on December 2, 2015. The Division filed a response to the Employer's petition and Board's order taking the petition for reconsideration under submission.

ISSUES

- (1) Was a violation of section 3203(a) shown by the Division?
- (2) Employer has asserted the defense of Independent Employee Action (or IEAD). The Division alleges that the deceased employee, Phillip Weeks (Weeks), had supervisory duties related to safety. Was Weeks a supervisor as relates to the Cal/OSH Act and IEAD?
- (3) If Weeks was not a supervisor, and the IEAD applies, did the ALJ correctly apply the elements of IEAD?

FINDINGS OF FACT

After an independent review of the evidentiary record, the Board makes the following findings of fact:

1. Phillip Weeks (Weeks) was employed by Employer. He was fatally electrocuted on May 18, 2012 while attempting to replace an emergency ballast in a ceiling at the BMW Ontario worksite.
2. Monty Miles (Miles) worked as an Assistant Engineer at the BMW Ontario worksite. He was present and assisting Weeks at the time of the accident on May 18, 2012.
3. Employer had both a written Illness and Injury Prevention Program (IIPP) and an Electrical Safety Program (ESP).
4. Miles and Weeks did not complete any forms or checklists prior to beginning work to replace the emergency ballast. The forms and checklists include such items as: "Job Briefing and Planning Checklist", "Equipment/Tool Inspection Checklist", and "Energized Work Permit".
5. Neither Weeks nor Miles donned personal protective equipment prior to engaging in the emergency ballast job. This includes but is not limited to: gloves, protective eyewear, or a flash suit.
6. Power in the area where Miles and Weeks were working was not de-energized pursuant to Employer's Lockout/Tagout procedure prior to beginning the emergency ballast installation.
7. Sean Sharifpour (Sharifpour), Weeks, and Miles did not conduct the periodic worksite inspections called for by Employer's ESP. No checklists for said inspections were completed, including but not limited to the "Periodic Inspection Checklist for Control of Hazardous Energies".

DECISION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding, including the petition for reconsideration filed by Employer. The Board has taken no new evidence.

(1) Was a violation of section 3203(a) shown by the Division?

Citation 1 alleges a violation of section 3203(a):

(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.

(2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.

(3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.

Exception: Employers having fewer than 10 employees shall be permitted to communicate to and instruct employees orally in general safe work practices with specific instructions with respect to hazards unique to the employees' job assignments as compliance with subsection (a)(3).

(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;

[...]

(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.

[...]

The alleged violative description reads as follows:

On, and before May 18 2012, the Employer, ABM Facility Services, Inc. dba ABM Building Value, had established, but did not implement and maintain an effective IIPP. The Employer's system for ensuring the employees comply with safe and healthy work practices is ineffective in that the Chief Engineer was not following his own safety rules. In addition, the employer did not effectively evaluate unsafe work practices associated with electrical work procedures at the BMW Group Training Center located at 1177 S. DuPont Ave Ontario CA.

The following company procedures were not followed when working on electrical systems:

1. A Job Briefing and Planning Check List were not completed prior to working on the energized system.
2. An Equipment/Tool Inspection Check list was not completed prior to working on the energized system.
3. A Hazard Risk Evaluation was not performed prior to working on the energized system.
4. An Energized Work Permit had not been issued to the Chief Engineer prior to working on the energized system.

As a result, the Chief Engineer was electrocuted while working on an energized system causing his fatality. The employer had approximately 2 employees working at the BMW Training Center facility.

The Division's citation makes two allegations: (1) Employer did not implement and maintain an effective IIPP because it did not ensure that its employees follow safe and healthy work practices as set forth in its Electrical Safe Practices (ESP) program, and (2) Employer failed to evaluate unsafe work practices as related to electrical work at the worksite. In its petition, Employer argues that the Division has wrongly conflated its ESP with its IIPP. This misstates the issue. The Division's citation addresses Employer's alleged failure to implement its IIPP, through an alleged failure to ensure that its employees follow rules that were set forth in the ESP.

More specifically, section 3203 subdivision (a)(2) requires every employer to have a system in place for "ensuring that employees comply with safe and healthy work practices." (*Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 09-1920, Decision After Reconsideration (Mar. 5, 2013).) In

Marine Terminals Corp., the Board explained that section 3203 subdivision (a)(2) describes

[F]our methods that can be used by an employer to ensure that its employees comply with safe work practices: recognition of employees, training and retraining programs, disciplinary actions, or any other such means that ensures compliance. The listed methods are written with the disjunctive ‘or,’ and the final method allows for, ‘any other such means that ensures compliance,’ indicating that any one (or more) of the previous three methods are sufficient to ensure compliance. (Citation.)

Because the standard has been crafted in this way, it should not be difficult for an employer to demonstrate compliance, through testimony and evidence showing that it has met any one of these four listed methods. As in *Marine Terminals Corp.*, Employer in this case has introduced un rebutted testimony on “training and retraining,” establishing that employees were required to take monthly, online training courses that went over relevant topics, including electrical safety. Training records were produced for the two employees at the Ontario facility. Because the safety order is written in the disjunctive, the Employer’s demonstration that it has met one of the methods described is enough to show compliance. (See also, *Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013).) The Division has not shown that Employer failed to comply with *any* of the methods described in section 3203 subdivision (a)(2)—and Employer has shown compliance with at least one of the listed methods.

The citation also alleges Employer has failed to evaluate unsafe work practices as required under section 3203 subdivision (a)(4).² The Board has found that section 3203 subdivision (a)(4)

[C]ontains no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include ‘scheduled periodic inspections’. (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

Whether the scheduled periodic inspections that were required by the Employer’s own safety rules actually occurred is the issue before the Board. The Division’s inspector, Micheo, testified that he requested a variety of

² The Board has stated that in order to prove a violation, the Division need only demonstrate that one of the multiple instances charged by a citation is violative of the safety order. (*Chevron U.S.A., Inc.*, Cal/OSHA App. 13-0655, Decision After Reconsideration (Oct. 20, 2015).)

documents from Employer: periodic lockout/tagout inspection documents, control of hazardous energy forms, equipment tool checklist, equipment tool inspection forms, as well as job briefing and planning checklists. Micheo was aware that Employer had provision for completing the inspections described in the citation, and had forms for recording the events. However, Employer failed to send records of completed inspections to the Division, and instead only sent blank templates. While not dispositive, the lack of records may be used to support an inference that Employer failed to complete the inspections called for in its program. (*Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration (May 28, 2014).)

Sean Sharifpour (Sharifpour), the regional manager in charge of the Ontario worksite, was questioned regarding safety inspections. Sharifpour testified to having no background in electrical work or as a building engineer. He relied on his safety team, located primarily on the east coast, but testified that everyone was responsible for inspections. Sharifpour had never filled out a “Periodic Inspection Checklist for Control of Hazardous Energies”, and did not know who was responsible for doing so.³ He had never conducted the inspection. Mark Safsten, Employer’s Director of Safety, testified that it was Sharifpour who was responsible for enforcing the Employer’s safety policies and procedures at the Ontario worksite, although a number of safety employees, including Safsten and a safety specialist for the BMW account were responsible for determining how the safety procedures would be implemented, and provided support to Sharifpour. Safsten acknowledged that a hazard risk evaluation is called for by Employer’s program. No evidence was presented to show that such an inspection had been performed prior to the accident on May 18, 2012. Employee Miles, who was present at the accident, was unclear as to who was responsible for safety inspections, and did not recall a job hazard assessment occurring prior to beginning the ballast work.

Based upon the testimony and evidence presented, the Board upholds the ALJ’s finding that a general violation of section 3203 subdivision (a)(4) occurred. While Employer had various written programs in place, those written programs were not implemented—the scheduled periodic inspections required by subdivision (a)(4) to identify unsafe work practices and by Employer’s ESP did not take place. The Division’s proposed penalty of \$935 is upheld.⁴

³ The inspection form states: “Each authorized employee must be assessed at least annually to verify the accuracy of the LOTO procedure and the understanding of the employee’s responsibilities. Any observed deviations from the written lockout procedure or inadequacies in the employee’s required knowledge must be noted. Refresher training must be conducted to correct these deficiencies.” (Exhibit C, Bates Number ABM00072.)

⁴ Employer’s petition for reconsideration appears to assert the IEA Defense as a defense to Citation 1. The Board has stated “IEAD is not an available defense when an employer has an affirmative requirement to protect its employees. (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeal Bd.* (1985) 167 Cal.App.3d 1232, 1242 [IEAD recognizes that “where the employer has done its best to comply with OSHA, the purposes of the act would not be furthered by punishing it for the violation.”] (*Marine Terminals Corp. dba Evergreen Terminals* Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).) Implementation of an Employer’s Illness and Injury Prevention Program is an affirmative duty

(2) Employer has asserted the defense of Independent Employee Action (or IEAD). The Division alleges that the deceased employee, Phillip Weeks, had supervisory duties related to safety. Was Weeks a supervisor as relates to the Cal/OSH Act and IEAD?

Citation 2 alleges a violation of section 2320.2(a). Employer's petition addresses only the IEA Defense (IEAD), rather than the underlying alleged violation, or classification of the citation.⁵ The Board will not disturb the ALJ's finding of a violation of the safety order, but reviews the Decision on the sole issue of the Employer's asserted defense.

Section 2320.2(a) is an electrical safety order:

(a) Work shall not be performed on exposed energized parts of equipment or systems until the following conditions are met:

(1) Responsible supervision has determined that the work is to be performed while the equipment or systems are energized.

(2) Involved personnel have received instructions on the work techniques and hazards involved in working on energized equipment.

(3) Suitable personal protective equipment and safeguards (i.e., approved insulated gloves or insulated tools) are provided and used.

[...]

(4) Approved insulated gloves shall be worn for voltages in excess of 250 volts to ground.

(5) Suitable barriers or approved insulating material shall be provided and used to prevent accidental contact with energized parts.

The Division's alleged violative description asserts the following:

On May 18, 2012, a fatal workplace incident occurred at a place of employment located at 1175 S. DuPont Ave., Ontario, when a Chief Engineer employed ABM Facility Services dba ABM Building Value was electrocuted while working on an energized 277 volt fluorescent lighting system. Prior to commencing work on the energized system at the time of the incident, the employer did not

of the Employer, one which exists to protect employees. The IEA Defense is not available to defend against an alleged failure by Employer to properly implement its IIPP pursuant to section 3203.

⁵ Within Employer's petition and Division's response, the parties do not dispute the ALJ's finding of a violation of Citation 2, and therefore it is affirmed. By failing to timely assert an objection to the ALJ's finding on this matter in a petition for reconsideration, the parties waive any objections. (Labor Code section 6618; see also, *Sully-Miller Contracting Co. v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App.4th 684, 691-692 fn. 4.)

ensure that conditions such as, but not limited to the following were met:

1. Responsible supervision determined that the work needed to be performed while the equipment or system was energized.
2. Suitable personal protective equipment and safeguards were provided and used by the employee, such as insulated gloves.
3. Approved insulated gloves were worn when working on 277 volts.
4. Suitable eye protection was provided and used.
5. An arc flash suit or other suitable apparel was not provided and used.

The IEA Defense has five elements (see *infra*), all of which must be established in order for the employer to prevail on the defense. Notably, the defense is not available where the employee at issue is in a supervisory role responsible for safety. Therefore, we first turn to the question of Weeks' disputed status—Employer asserts that Weeks was an employee with no authority or supervisory role, and the Division claims that Weeks had supervisory duties in relation to Miles. The Board often looks to *Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, for guidance on the issue of what constitutes a supervisor in the Cal/OSHA context. The Court of Appeal in that case stated that a supervisor is:

[R]esponsible for more than just their personal safety; they are responsible for the safety of the workers under their supervision. They are their employer's representatives at the work site and directly ensure their employer's compliance with statutory and regulatory requirements. (*Davey Tree*, *supra*, p. 1242).

Davey Tree explains the rationale behind this rule:

When an employer has placed significant responsibilities on an employee, so that the employee may be viewed as the employer's safety representative at the worksite, the employer must bear the responsibility for that employee's actions, because those actions determine the credibility of the employer's compliance with OSHA, and unless the employer bears direct responsibility for them, its safety program is meaningless. (*Davey Tree*, *supra*, p. 1242).

While they may be indicative of authority in an organization, titles and business cards alone do not determine an employee's role or responsibility for safety. Here, the Division has failed to establish by a preponderance of the evidence that employee Weeks was a supervisor responsible for safety.

Unrebutted testimony from Weeks' coworker, as well as Weeks' supervisor and other members of ABM management established that Weeks did not have the authority to discipline his coworker for safety violations, did not have any responsibilities related to safety training, and had no jobsite authority generally related to hiring, firing, or disciplinary matters.

(3) If Weeks was not a supervisor, and the IEAD applies, did the ALJ correctly apply the elements of IEAD?

Having found that Weeks had no supervisory role in relation to safety, the Board will address Employer's IEA Defense. There are five elements, all of which must be proved for an employer to prevail on a claim of IEAD. Those elements are: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training 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 which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The parties dispute whether the deceased employee was experienced in the job being performed. The Division maintains that installation of emergency ballast is a significantly different procedure from installation of standard ballast, in part because emergency ballast includes a backup battery pack (a 3.6 volt rechargeable battery) enclosed within the emergency ballast. The testimony establishes that Weeks was an experienced electrician of many years who had replaced ballasts in the past. Employer also provided testimony from Eric Sorensen (Sorensen), an ABM Senior Vice President and electrician of 28 years, regarding replacement of ballast. According to Sorensen, who had first met Weeks when they were apprentices in 1986, and had then known Weeks at various points in his career, an experienced electrician such as Weeks would have learned to replace emergency ballast in his apprenticeship program, as well as regular ballast. Sorensen testified that the lockout/tagout procedures for both regular and emergency ballast remain the same.

Safsten also testified that Weeks had received training in Employer's ballast installation procedure, and that in Employer's program there was no substantive difference between installation of emergency and regular ballast. Miles testified that he and Weeks had installed ballasts in the past. The Board credits the testimony of Sorensen, Safsten, and Miles on these points, and finds that Weeks had the requisite amount of experience in installation of ballasts, including emergency ballasts.

The next element is whether the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments. Employer kept records of employee safety training, and introduced these records into evidence to demonstrate that Weeks had recently taken training related to electrical safety. Employer's training and safety program covered installation of ballasts. Both employees had received classroom training and taken computer-based safety training modules on lockout/tagout and a variety of other subjects relevant to their work. The safety training portion of Employer's safety program has been demonstrated to be adequate, and employer has met this element of the defense.

Element 3 is effective enforcement of the safety program. "[E]nforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) The Division's inspector Micheo testified that records related to safety inspections were not completed, and Miles testified that he was unclear as to who was responsible for safety inspections or for enforcing safety rules. (See, *Ferro Union, Inc.*, Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000) [Leaving compliance with safety order to discretion of employee is impermissible delegation of obligation to ensure compliance].) Miles also testified that on more than one occasion, he and Weeks did not follow the Employer's lockout/tagout rules. (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010) [Lax enforcement of a written lock out/tag out policy establishes employer wasn't reasonably diligent in enforcing its safety plan].) Sharifpour was not only unaware of this failure to follow lockout/tagout procedures, but appeared to be unaware of his responsibilities as supervisor to conduct periodic inspections to ensure his employees were in compliance with Employer's safety program. (See, *Emerson Russell Maintenance Co.*, Cal/OSHA App. 08-4166, Denial of Petition for Reconsideration (Sep. 23, 2010), writ denied Alameda County superior court (Nov. 15, 2011) ["While it is true that Employer cannot discipline or sanction its employees if it does not know of infractions, we do not agree that the only available inference here is that there were no other infractions."].) Unsurprisingly, the two employees in Ontario had neither been coached nor disciplined for their failure to follow the lockout/tagout program. Employer failed to ensure that its employees were following the procedures that they had been trained on. Element 3 of the defense is not met.

Element 4 asks whether the employer has a policy of sanctions which it enforces against those employees who violate its safety program. Employer entered into the record disciplinary records from various accounts it holds across the country, showing that it has enforced lockout/tagout rules. Miles testified to his understanding of the Employer's safety program, and that he had received an infraction for an unrelated incident, although this was

subsequent to the May 18 accident. The Division was able to demonstrate that as relates to the Ontario place of work, the two employees had violated Employer's written lockout/tagout procedure with no consequences. The element is not met.

The final element is that the employee caused a safety infraction which he or she knew was contra to the employer's safety requirements. Weeks was indisputably an experienced electrician and based on statements he made to Miles, knew that he was engaged in a dangerous work practice when he failed to lockout/tagout on the day of the accident. Given Employer's training program, Weeks' background and experience as an electrician, and his statements to his coworker shortly before the accident, we can reasonably infer that Weeks' was aware that his actions were both dangerous and contra to Employer's safety program.

The Board upholds the ALJ's finding that the affirmative defense is not established. A serious, accident-related violation is affirmed in Citation 2, with the accompanying penalty of \$22,500.

DECISION

The Decision of the ALJ is upheld, but for the reasons described above.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: DEC 24, 2015