

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

In the Matter of the Appeal of:

CAL PAC SHEET METAL INC.
2720 South Main Street, Unit B
Santa Ana, CA 92707

Employer

**DOCKETS 13-R3D1-0547
and 0548**

DECISION

Introduction

Cal Pac Sheet Metal Inc., (Employer) is a sheet metal contractor with its business office in Santa Ana, California. Beginning December 28, 2012, the Division of Occupational Safety and Health (Division) through Brandon Hart, Associate Safety Engineer and Compliance Officer, conducted an investigation at a place of employment maintained by Employer at 17000 Red Hill Avenue in Irvine, California. On January 23, 2013, the Division cited Employer for the following violations¹: failing to implement and maintain an effective written Injury and Illness Prevention Program (IIPP); and for failure to ensure that its employees working from an aerial device were secured to the boom, basket or tub through the use of a safety belt, body belt or safety harness equipped with a safety strap or lanyard.

Employer filed a timely appeal contesting the existence of the alleged violations, their classifications, the abatement requirements and the reasonableness of all proposed penalties. Employer alleged the independent employee action defense.

This matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge for California Occupational Safety and Health Appeals Board, at West Covina, California on December 19, 2013. Mari Kurtz, President, and Tom Galin represented Employer. Richard Fazlollahi, District Manager, represented the Division. The parties presented oral and documentary evidence which is listed in the certification of record. The ALJ extended the submission date to June 16, 2014 on her own motion.

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

Issues

- 1) Did Employer fail to implement and maintain an effective written Injury and Illness Prevention Program by not following its own written procedures with regards to hazard correction at the work site, and the responsibilities of Employer's supervisors?
- 2) Is Employer's alleged violation of section 3648(o) excused because it occurred as a result of an independent employee action?

Findings of Fact

- 1) The Division's Associate Safety Engineer and Compliance Officer, Brandon Hart (Hart), while driving past the work site observed employees Cesar Garcia (Garcia) and Brandon Martin (Martin) in an aerial device without personal protective equipment (PPE) on December 28, 2012.
- 2) Employees Garcia and Martin were approximately 20 feet above ground in an aerial device without a harness or a lanyard.
- 3) Timothy Lee (Lee), Employer's foreman assigned Garcia and Martin to do ground work that included taking measurements.
- 4) Garcia and Martin went up in the aerial device to take measurements, which took three to five minutes.
- 5) Lee was not aware that Garcia and Martin had gone up in the aerial device without a harness or a lanyard.
- 6) Garcia and Martin received aerial device training as construction workers during their employment with Employer.
- 7) Garcia and Martin were well aware of Employer's requirement that employees use PPE when using an aerial device.

Analysis²

1. Employer maintained an effective written Injury and Illness Prevention Program and followed its written procedures with regards to hazard correction at the work site and the responsibilities of Employer's supervisors.

The Division cited Employer for violation of section 1509(a) which states that every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General

² Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

Industry Safety Orders. Section 3203(a) which requires that the Program be in writing has seven subparts.

- (1) Identify the person or persons with authority and responsibility for implementing the Program.
- (2) Include a system for ensuring employees comply with safe and healthy 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.
- (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices.
- (5) Include a procedure to investigate occupational injury or occupational illness.
- (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.
- (7) Provide training and instruction.

In the citation the Division specifically alleged that:

“On December 28, 2012, the Employer failed to implement and maintain an effective written Injury and Illness Prevention Program (IIPP), in that, the Employer failed to follow their own written procedures with regards to hazard correction at the work site, and the responsibilities of Employer’s supervisors.”

The alleged violation description (AVD) cited above uses the very terms that appear in subsection 3203(a)(6) which requires the Employer to provide proof of the action taken to correct the known hazard once an unsafe condition is found. (*Bay Area Rapid Transit District (BART)*, Cal/OSHA App. 09-1218, Decision After Reconsideration (Sep. 6, 2012).) In *BART*, the Board held:

“The safety order requires employers to establish, implement and maintain such procedures. Thus, a written plan that states action shall be taken on reported unsafe conditions may satisfy the requirement to establish a written plan. Such, however, does not show the plan was implemented. Rather, proof of implementation requires evidence of actual responses to known or reported hazards. Conversely, proof of failure(s) to respond to known or reported hazards establishes a violation of this section through a failure to implement a plan. (*Los Angeles County Department of Public*

Works, supra [employer's failure to train employee in accordance with its own sufficient written training program was a failure to implement the training portions of an IIPP as required by 3203(a).]"

In *Ironworks Limited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996) the Appeals Board (Board) granted an employer's appeal of a citation for violation of § 1509(a), in accordance with the requirements of § 3203. In *Ironworks Limited, supra*, the Board held:

"...The issue of implementation involves fact questions, e.g. did the employer provide its employees with training, were employee safety meetings held, did the employer post information about employee safety and did employer conduct periodic inspections to evaluate workplace hazards. . . ."

Proof of failure(s) to respond to known or reported hazards establishes a violation of this section through a failure to implement a plan. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002) [employer's failure to train employees in accordance with its own sufficient written training program was held to be a failure to implement the training portions of an IIPP as required by 3203(a).) Thus, the Division must provide evidence of the failure of either the contents of the written document concerning identifying and responding to hazards, or there must be evidence of Employer's inaction in either discovering or responding to discovered hazards.

The documentation presented shows the written materials comply with the IIPP requirements. Employer's IIPP states that supervisors are the first level authority, with their efforts toward accident prevention on daily assignments largely determining whether or not a high degree of safety will exist on the job; requiring continuous awareness of work being performed in the job area to ensure that no unsafe practices or conditions are permitted to exist; ensuring the use of proper protective equipment and suitable tools for the job; ensuring that employees are properly instructed in safe work practices and work methods at the time they are given work assignments; that safety requirements are enforced; and conducting inspections within a designated area for hazard recognition analysis and control³. Employer's IIPP recognizing hazard recognition, analysis and control provides: "Before hazards can be controlled, they must be recognized as such and appropriately identified within the realm of the work place in which they exist and relative to controls already in place." Employer lists "investigation

³ Employer's IIPP (See Exhibit 7 pages 2, 4 and 5) identified Lee as the foreman responsible for implementing a system, for communicating with employees and providing a method for correcting unsafe or unhealthy conditions. Employer's IIPP contains a "HAZARD RECOGNITION, ANALYSIS AND CONTROL" provision (see p. 5) which lists tools to identify hazards.

of all accidents, injuries, illnesses and unusual events that occur” (See Exhibit 7, p.5, #3), as one of 12 tools used to identify hazards. Thus, if there is a violation shown by the Division, it must be through evidence showing Employer acted out of conformity with these adequate procedures and thus failed to identify or respond to a hazard that arose in the workplace.

In the instant matter, the Division’s Associate Safety Engineer and Compliance Officer, Brandon Hart (Hart), while driving past the work site, observed employees Cesar Garcia (Garcia) and Brandon Martin (Martin) in an aerial device without personal protective equipment (PPE) on December 28, 2012. The employees were approximately 20 feet above ground in the aerial device without a harness or a lanyard. They had been assigned by Employer’s foreman Timothy Lee (Lee) to do ground work, but went up in the aerial device to take measurements. The evidence showed Lee was not aware that the workers had gone up in the aerial device. The entire task of taking measurements took three to five minutes and both Garcia and Martin admitted they were lazy and complacent in not wearing the PPE when they had been trained to do so.

Foreman Lee credibly testified that he observed PPE in Garcia and Martin’s bucket the morning of the same day they were observed by Hart in the aerial device without PPE. Employer concedes that Hart observed Garcia and Martin in the basket of an aerial device approximately 20 feet above the surrounding grade without any means of fall protection on December 28, 2012. Lee testified that Martin and Garcia had been trained to use fall protection in aerial devices and had never had an infraction before the December 28, 2012 incident⁴. Lee further testified that he implemented the IIPP by conducting tailgate meetings for every site; conducting daily safety meetings, and inspecting the employees’ PPE (harness and lanyards). Corroborating Lee’s testimony, Garcia and Martin testified that they received aerial device training as construction workers during their employment with Employer. Garcia and Martin were well aware of Employer’s requirement that employees use PPE – when using an aerial device.

Hart issued the citation on January 23, 2013, specifically alleging that Employer failed to “follow their own written procedure with regards to *hazard correction on the work site* and the responsibilities of their supervisors.

There is substantial un-contradicted evidence that the hazard identification and training obligations of the supervisor outlined in the IIPP were undertaken by Lee. There is only a five-minute interval when employees did not follow the training or instructions. Lee testified that he received an infraction from Employer, as supervisor for Garcia and Martin not having the PPE in the aerial device (See Exhibit F). The Division has the burden of proving that Employer knew that Garcia and Martin were in the aerial device without PPE and failed to respond to the known or reported hazard. However, the Division was not successful in establishing Employer was aware that Garcia and Martin were in

⁴ See Employer’s training records, Exhibits A and C.

the aerial device without PPE. While Hart testified that he observed Foreman Lee in the area when he saw Martin and Garcia, Lee stated he was in the building, which was corroborated by Garcia and Martin's testimony. Lee further testified that he was inside the building when he received a call from Hart informing him that he had just observed employees in the aerial device without fall protection.

The evidence has established that one incident of Garcia and Martin failing to comply with an Employer's IIPP and Employer's failure to immediately observe the hazard without evidence of significant deficiencies in Employer's IIPP did not constitute a violation of the requirement to implement and maintain an effective IIPP. The evidence showed Employer maintained an effective written IIPP and followed its written procedures with regards to hazard correction at the work site, and the responsibilities of Employer's supervisors.

2. The violation of section 3648(o) is excused as an independent employee act.

The Division further alleged that on December 28, 2012, Employer's employees violated section 3648(o).

Section 3648(o) states that "an employee, while in an elevated aerial device, shall be secured to the boom, basket or tub of the aerial device through the use of a safety belt, body belt or body harness equipped with a safety strap or lanyard."

Employer asserts that it is excused from liability because the violation resulted from an independent employee act. The independent employee action defense relieves an employer of responsibility for violations by employees who "act against their employer's best safety efforts." (*Mercury Service, Inc.*, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980).

The independent employee action defense is a Board created defense to the existence of a violation. Because it is an affirmative defense, the burden of proving by a preponderance of the evidence (*Central Coast Pipeline Construction Co., Inc.*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980)) rests upon the employer. (*Ernest W. Hahn, Inc.*, Cal/OSHA App. 77-576, Decision After Reconsideration (Jan.25, 1984).)

The Appeals Board in *Mercury Service, Inc.*, *supra*, held that establishing the independent employee action defense requires affirmatively proving 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. (*Ibid.* p.3.)

Failure to prove any one of the elements negates the independent employee action defense in its entirety. (*Ferro Union, Inc.*, Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000).)

The first element requiring that the job is performed by an experienced employee is met. Martin and Garcia were experienced crewmen. Garcia had been in the construction business for eight years and had been trained by the carpenters' union and during his one year and three months employment with Employer, in the use of an aerial device, requiring PPE when going up in the aerial device. Martin had worked for Employer for three years and had also received training in the use of the aerial device from Employer. Both Garcia and Martin had certificates of training from Employer (See Exhibits A and C).

The second element, requiring employer to have a well-devised safety program, includes training employees in matters of safety respective to their particular job assignments is also met. Employees Martin and Garcia testified that they received safety training from Employer in 2012, which included PPE fall arrest and equipment operation and participated in daily tail gate meetings. At the hearing Lee confirmed that Martin and Garcia received training regarding PPE and operating an aerial device. At the hearing Lee identified Employer's IIPP, which specifically discussed ensuring the use of proper protective equipment and suitable tools for the job (See Exhibit 7).

The third element of the independent employee action defense requires that Employer effectively enforce its safety program, which includes training employees in matters of safety respective to their particular job assignments.

In *Tri-Valley Growers*, Cal/OSHA 94-3555, Decision After Reconsideration (Sep. 15, 1999), in applying the independent action defense as stated in *Mercury Service, supra*, the Board affirmed the ALJ's decision based upon Employer's failure to prove the third element of the independent employee action defense. In *Tri Valley Growers, supra*, the injured employee testified that he and other employees routinely cleaned machines while the machines were on. The employee testified that none of Employer's safety personnel ever admonished him for cleaning the machines while they were on. Employer did not impeach or contradict the injured employee's testimony. Employer's clean-up supervisor for the first shift testified that lockout procedures were discussed at safety meetings. The subject was discussed five days prior to the accident at which the injured employee was in attendance. The Board held [s]afety meetings alone do not

constitute effective enforcement of a safety program. Systematic inspections for hazardous conditions and practices and a sufficient measure of competent supervision must also be demonstrated to meet the third element. (*Atchison, Topeka and Santa Fe Railway Company*, OSHAB 86-170, Decision After Reconsideration (March 17, 1988).)

In *Tri-Valley Growers, supra*, Employer's clean-up supervisor testified that she had never witnessed an employee place his or her hand into a machine while the machine was on. Moreover, in her opinion, the injured employee was careful and cautious. However, the injured employee's testimony that the machines were routinely cleaned while they were on was not contradicted by Employer. [A]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices. (*City of Los Angeles Department of Water & Power*, OSHAB 86-349, Decision After Reconsideration (April 4, 1988) pg. 5.) While it is undisputed that Employer *discussed* the lockout procedures with its employees, Employer was not diligent in assuring that the employees adhered to the policy. Reasonable supervision would have exposed the injured employee's practice of cleaning the machines while they were on.

Here, the facts are distinguished from the facts in *Tri-Valley, supra*. Garcia and Martin testified that they participated in daily tail gate meetings and that Lee conducted tail gate meetings every day. At the tail gate meetings they were admonished not to go up in the aerial device without a lanyard and harness. At the hearing Lee also testified that he conducted tail gate meetings every day and observed Martin and Garcia with their PPE on the morning before Hart observed the employees in the aerial device without PPE. The evidence does not indicate that Lee as supervisor, allowed a hazardous condition or unsafe practices that existed in *Tri-Valley* to persist at Employer's work site.

In establishing the fourth element of the independent employee action defense, an employer must show it has a policy of sanctions against employees who violate the safety program. The fourth element was met as shown by the testimonies of Lee, Martin and Garcia acknowledging that Martin and Garcia were disciplined for violating Employer's safety program because they used the aerial device without fall protection. At the Hearing Martin and Garcia testified that they were given warning notices and suspended for two days without pay (See Exhibits B and D). Martin testified that he and Garcia were required to take a "Remedial Fall Protection" course for violating Employer's safety rules (Exhibits A and C). Employer's IIPP (Exhibit 7, p. 19) "Employee Compliance" states:

"Employees have been advised in writing and orally that safe work conditions, safe work practices and required personal protective equipment are mandatory and will be enforced by the following:

1. Informing workers of the provisions of our IIPP Plan.
2. Evaluating the safety performance of workers.

3. Providing training to employees whose safety performance is deficient.
4. Discipline for non-compliance. Discipline will include:
 - A. Oral warning
 - B. Written warning
 - C. Suspension or probation
 - D. Termination
5. Certain rules violations [sic] are so serious that they could result in your immediate dismissal from the job.
6. Repeated violations cannot and will not be tolerated.”

The fifth element is established if an employee caused a safety infraction which he or she knew was contra to the employer's safety requirements. Here the fifth element is met because both Martin and Garcia testified that they had been trained in the use of aerial devices and knew they were violating Employer's safety requirements when they went up in the aerial device to obtain measurements.

The evidence has established the five elements of the Independent Employee Action Defense. Garcia and Martin's violation of the safety standard by using the aerial device without PPE was an independent employee action, which relieves Employer of its responsibility for this violation.

Decision

Therefore, the Employer's appeal is granted. The proposed penalties for Citation 1, Item 1 and Citation 2, are dismissed.

IT IS SO ORDERED.

DATED: July 3, 2014

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**CAL PAC SHEET METAL INC
DOCKETS 13-R3D1-0547/0548**

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 315532341

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-0547	1	1	1509(a)	G	ALJ affirmed appeal. The proposed penalty is dismissed		X	\$305	\$305	\$0
13-R3D1-0548	2	1	3648(o)	S	ALJ affirmed appeal. The proposed penalty is dismissed		X	\$9,000	\$9,000	\$0
Sub-Total								\$9,305	\$9,305	\$0

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$0

<p>NOTE: Payment of final penalty amount should be made to:</p> <p style="text-align: center;">Accounting Office (OSH) Department of Industrial Relations PO Box 420603 San Francisco, CA 94142 (415) 703-4291, (415) 703-4308 (payment plans) *Please do not mail payments to the Appeals Board*</p>

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ: CHW/ao
POS: 07/03/2014**

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
CAL PAC SHEET METAL, INC.
Dockets 13-R3D1-0547/0547**

DATE OF HEARING: December 19, 2013

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1.	Jurisdictional documents
2.	Photograph
3.	Photograph
4.	Photograph
5.	Photograph
6.	Photograph
7.	IIPP
8.	Field document worksheet
9.	C-10 Proposed penalty worksheet
10.	IBY

EMPLOYER'S EXHIBITS – Admitted

<u>Exhibit Letter</u>	<u>Exhibit Description</u>
A.	Safety – training – Garcia
B.	EE Warning Notice – Garcia
C.	Safety Training – Martin
D.	EE Warning Notice - Martin
E.	Training Records – Lee
F.	Infraction - Lee

Witnesses Testifying at Hearing

1. Cesar Garcia
2. Brandon Martin
3. Timothy Lee
4. Brandon Hart

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically

recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Dated: July 3, 2014

Clara Hill-Williams
Administrative Law Judge

