

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

In the Matter of the Appeal of:

PLASKOLITE WEST, INC.
2225 Del Amo Boulevard
Compton, California 90220

Employer

**DOCKETS 14-R3D5-1407
and 1408**

DECISION

STATEMENT OF THE CASE

PLASKOLITE WEST, INC. (“Employer” or “Plaskolite”) manufactures acrylic plastics¹. Between September 24, 2013, and March 21, 2014, the Division of Occupational Safety and Health (“the Division”) through Hien Le, Associate Safety Engineer, conducted an inspection at 2225 Del Amo Boulevard, Compton, California, where Employer operated a manufacturing facility that had been the site of a fire and explosion on the evening of September 23, 2013. On March 21, 2014, the Division cited employer for violations of California Code of Regulations, title 8 section 342, subdivision (a), failure to immediately report a serious workplace injury or illness or death to the Division; section 3203, subdivision (a)(5), failure to implement an effective procedure to investigate occupational injury or illness; and, section 5164, subdivision (a), failure to evaluate the compatibility of hazardous substances before storing.²

Employer filed a timely appeal, contesting the existence of the violations, the classifications of the violations, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalties.

This matter was heard by Ursula L. Clemons, Presiding Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at West Covina, California on September 30, 2014, February 5, 2015, and February 6, 2015. Fred Walter, attorney, represented Employer. Melissa

¹ Employer manufactures polymethyl methacrylate acrylic plastics (“PMMA”). The main ingredients of PMMA are methyl methacrylate (“MMA”) and ethyl acetate (“EA”), along with a catalyst called Trigonox 101 (“Trig”), used to cause and speed up reaction between MMA and EA.

² Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8.

Peters, Staff Counsel, represented the Division. The parties presented oral and documentary evidence. The matter was submitted for decision on April 6, 2015. The submission date was extended to May 3, 2015 by the undersigned Presiding Administrative Law Judge.

ISSUES

1. Did Employer encounter exigent circumstances following the incident, which excused Employer from complying with the immediate reporting requirement of Section 342, subdivision (a)?
2. Did Employer fail to implement the element of its IIPP requiring that it follow a procedure to investigate occupational injury or occupational illness?
3. Did the Division correctly classify Employer's violation of section 3203, subdivision (a)(5), as a General Violation?
4. Did the Division impose reasonable abatement requirements upon Employer in requiring Employer to implement the elements of its IIPP requiring Employer to document its findings as to the cause of workplace accidents and any corrective actions taken?
5. Was the Division's assessment of \$1,125 for Employer's alleged violation of section 3203, subdivision (a)(5) reasonable?
6. Did Employer violate section 5164, subdivision (a), when supervisor Christopher Land ("Land") instructed employee Antonio Ramirez ("Ramirez") to store chemicals together in the waste room without first evaluating their compatibility?
7. Did Employer establish that it did not know, and could not have known through the exercise of reasonable diligence, of its failure to perform an evaluation of chemical compatibility prior to Land ordering Ramirez to move waste chemicals from a refrigerator into the waste storage area?
8. Was the Division's assessment of \$18000 for Employer's alleged violation of section 5164, subdivision (a) reasonable?
9. Did the Division impose reasonable abatement requirements upon Employer in requiring Employer to evaluate the compatibility of chemicals before storing them together?

FINDINGS OF FACT

1. On September 23, 2013, at approximately 7:00pm, a fire at Employer's manufacturing plant in Compton, California, (hereinafter "the plant")

caused reportable serious injuries and illnesses to two employees (hereinafter referred to as “the incident” or “the subject incident”).³

2. Ramirez was employed at the plant as an Oven Operator by Employer at the time of the incident.
3. Employer, through its Human Resources Director Josh Keck (“Keck”), reported the incident late, at approximately 7:04am on September 24, 2013.⁴
4. Employer’s plant operates 24 hours a day.
5. Between approximately 7pm and 8pm on the night of the incident, Land learned that there had been an explosion and fire at the plant, and that several employees had received burns and been taken away by ambulance.
6. Land could have made a report to the Division, or could have instructed employee Jason Shen (“Shen”) to make an injury and illness report to the Division within 8 hours of the incident.
7. Employer employs between 26 and 60 employees, warranting a 20 per cent adjustment for size. Employer has a good history with the Division, warranting a 10 per cent adjustment for history. Employer demonstrated good faith in response to the Division, warranting a 30 per cent adjustment for good faith.⁵
8. Employer did not implement the elements of its Injury and Illness Prevention Plan, in effect on the date of the incident, requiring Employer to document in a report the cause of workplace accidents and recommended corrective measures.
9. On September 24, 2013, after the explosion, Land spoke with Ramirez and learned that Ramirez had poured gallons of Trigonox 101 into the waste drum on the morning of the incident. Land did not document his conversation with Ramirez in a report.
10. Employer could have documented its findings as to the cause of the injuries to its employees, as well as any corrective actions taken, in a report.
11. Prior to the incident, Land, Employer’s plant manager, instructed Ramirez to move waste chemicals from a refrigerator and store them together in the waste storage area, without Employer first evaluating the compatibility of the chemicals in the refrigerator or the chemicals already present in the waste storage area.

³ This finding of fact is based on the stipulation of the parties at hearing.

⁴ This finding of fact is based on the stipulation of the parties at hearing.

⁵ The parties stipulated at hearing that Employer was entitled to these adjustments, should Citation 1, item 1, be affirmed.

12. Between 10am and noon on September 23, 2013, Ramirez placed various chemicals, including gallons of Trigonox 101, a catalyst, into Employer's already partially filled 55 gallon waste drum located in the waste storage area.
13. The waste drum already held MMA and EA, along with an inhibitor meant to prevent a reaction. When mixed with Trigonox 101, these chemicals had a propensity for reacting violently or becoming hazardous by reasons of oxidizing power, flammability and explosibility.
14. Land, a supervisor, did not know whether Employer had performed a compatibility evaluation of the chemicals in the refrigerator before he ordered Ramirez to store them in the waste room.
15. Ramirez had stored Trigonox 101 in the waste drum on several occasions prior to the incident.
16. Employer employs chemists knowledgeable about the physical and chemical properties of the chemicals used to manufacture PMMA.

ANALYSIS

1. Did Employer encounter exigent circumstances following the incident, which excused Employer from complying with the immediate reporting requirement of Section 342, subdivision (a)?

Section 342(a), provides in pertinent part that:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness⁶, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

⁶ Section 330(h) defines "serious injury or illness" as "any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement...."

In Citation 1, Item 1, the Division alleged: “Two employees of Plaskolite West Inc. sustained a serious injury on September 23, 2013. The employer did not immediately report a work-related serious injury to the Division as required by this section.”

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, DAR (June 16, 1983).) The elements of the violation are: (1) Employer shall (or must) report, to the Division of Occupational Safety and Health, (2) any serious injury or illness or death of an employee, (3) occurring in a place of employment or in connection with any employment. Here, the parties stipulated at time of hearing to the existence of serious, reportable injuries. The parties also stipulated that the incident and resultant injuries occurred on September 23, 2013, at approximately 7:10 pm, and that Employer made a report to the Division on September 24, 2013, at approximately 7:04 am. (See Exhibit 14.) Because Employer concedes that it did not make a report until approximately 12 hours after the incident, Employer’s violation of Section 342, subdivision (a), is established unless Employer demonstrates by a preponderance of the evidence the existence of exigent circumstances that would extend the reporting time to within 24 hours of when Employer knew, or through diligent inquiry would have known, of the death or serious injury or illness.

The term “exigent circumstances” is not defined in the safety orders. The Appeals Board has held that the same rules of construction and interpretation, which apply to statutes, apply to safety orders (*Michael Paul Company, Inc.*, Cal/OSHA App 97-3320, Decision After Reconsideration (May 30, 2001); *Novo Rados Enterprises*, Cal OSHA App. 75-1170, Decision After Reconsideration (May 29, 1981).) Words not defined in a safety order must be given their plain and ordinary meaning. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010); *Lundgren v. Deukmejian (Roberti)* (1988) 45 Cal.3d 727, 735.)

Dictionaries are often used to determine the meaning of words not defined by statute or case law. “Exigent” is defined as “exacting or requiring immediate aid or action: pressing, critical” in *Webster’s Third New International Dictionary of the English Language Unabridged* (1986), p. 796. It is defined as “calling for immediate action or attention; urgent; critical” in *Webster’s New World Dictionary of American English, Third College Edition* (1988), p. 476.

Employer argues that exigent circumstances prevented it from fulfilling its obligation of reporting within 8 hours. An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at the hearing. (See *Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, DAR (June 21, 1982); *Roof Structures, Inc.*, Cal/OSHA App. 81-357, DAR (Feb. 24, 1983); and *The Koll Company*, Cal/OSHA App. 79-1147, DAR (May 27, 1983).

Land testified that he received a call from Employer's alarm company shortly after the incident, alerting him of a fire at the plant. Although Land was unable to reach any of the employees at the plant, he immediately set off for the plant. By the time he arrived at the plant, at around 8:00 pm, Land learned that an explosion had occurred and that several employees received burns during the incident and had been transported away from the plant by ambulance. Ultimately, Employer made a report to the Division at 7:04 a.m., approximately 12 hours after Employer knew or through diligent inquiry would have known that its employees had suffered serious workplace injury or illness.

Employer's "exigent circumstances" defense was based on Land having encountered a chaotic scene when he arrived at the plant, which was corroborated by Division Associate Safety Engineer Hien Le (Le). Nonetheless, Employer did not offer any evidence that Land was unable to make a report during his commute from home to the plant, or immediately upon arriving. Furthermore, it was uncontroverted at hearing that Land sent employee Shen to check on the conditions of the injured employees. Employer failed to offer evidence that exigent circumstances prevented Shen from making a timely report to the Division. That Land was able to send Shen from the plant to check on the employees, rather than keep Shen at the plant, is further evidence that exigent circumstances did not prevent someone within Employer's organization from making a timely report.

Employer operates the plant 24 hours a day, with at least one supervisor present for each shift; therefore, Employer could have delegated injury and illness reporting to ensure that a report was made to the Division within 8 hours following when Employer became aware of the seriousness of the situation and the impending injury or illnesses of the employees. As noted above, Land had an hour between when he learned several employees had been taken to a hospital by ambulance, and when he arrived at the plant, to make a report to the Division. Besides Land, other personnel (in particular, Shen) were available who could have made a timely report to the Division. Thus, Employer failed to meet its burden of proof regarding its "exigent circumstances" defense.

In conclusion, the Division met its burden of proving that Employer did not timely report its employees' serious injuries and illness on September 23, 2013, and Employer failed to meet its burden of proving exigent circumstances. The base penalty for a violation of section 342, subdivision (a), is \$5,000. The Board recently determined that Labor Code section 6409, subdivision (1)(b) allows for modification to the proposed \$5,000 gravity based penalty, for factors of size, history and good faith in a case involving late reporting. (*Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012), *SDUSD-Patrick Henry High School*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012).)

Here, the parties stipulated that the gravity-based penalty may be adjusted 20% for Employer's size. Additionally, the parties stipulated that Employer has a good history with the Division, warranting an adjustment of 10% for History. Finally, the parties stipulated that Employer's good faith in response to the Division warrants an adjustment of 30%. In total, then, the parties stipulated to a 60% adjustment, totaling \$3,000, resulting in an adjusted penalty assessment of \$2,000 for Citation 1, Item. 1.

Employer's late report on September 24, 2013, therefore, results in an assessed penalty of \$2,000.

2. Did Employer fail to implement the element of its IIPP requiring that it follow a procedure to investigate occupational injury or occupational illness?

The Division cited Employer for violation of Section 3203, subdivision (a)(5), which reads:

(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:

(5) Include a procedure to investigate occupational injury or occupational illness.

In the Citation, the Division alleged: "The September 23, 2013 accident investigation report did not contain all elements as indicated in the company Injury and Illness Prevention Program [IIPP] section 7. The accident investigation report did not include:

1. The cause of the accident.

2. Record the findings and corrective action taken.”

To establish the violation, the Division must prove that flaws in an IIPP amount to a failure to “establish”, “implement” or “maintain” an “effective” program. In the instant case, the issue is whether Employer failed to implement its IIPP, which is a question of fact. (*Ironworks Limited*, Cal/OSHA App 93-024, Decision After Reconsideration (Dec. 20, 1996).) The Board has previously held that merely having a written IIPP is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) A single, isolated failure to “implement” a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, OSHAB 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fisher Transport, A Sole Proprietorship*, OSHAB 90-762, Decision After Reconsideration (Oct. 16, 1991).) On the other hand, the Board has also held that an IIPP can be proved not effectively maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, OSHAB 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Section 7 of the IIPP (Exhibit 7) states, in pertinent part:

7. ACCIDENT/EXPOSURE INVESTIGATION

Procedures for investigating workplace accidents and hazardous substance exposures include:

- e. Determining the cause of the accident/exposure.
- g. Recording the findings and corrective actions taken.⁷

Land acknowledged that Employer’s accident report submitted to the Division, dated September 25, 2013 (Exhibit 8), did not contain any determination as to the cause of the incident, nor did it contain any corrective actions.⁸ Ramirez testified he told Land the day after the incident that on the day of, he poured Trigonox 101 into the waste drum normally used for storing MMA and EA. That, along with Land’s statements to Le, establishes that Employer knew the cause of the injuries and illnesses to its employees (or at least had a strong working theory) before Le returned to the plant on February 10, 2014, but failed to record its findings, in violation of its own IIPP.

⁷ Section 7 of Employer’s IIPP lists 7 investigation procedures, but the Division only cited Employer for failure to implement the above-quoted procedures.

⁸ The report stated that “At approximately 6:45 pm on Monday, September 23, a fire started inside the Plaskolite West facility located at 2225 E. Del Amo Blvd., Compton, CA 90220. It is believed that the fire began in the waste materials storage area. It then spread through an underground drain trough to the compounding...” Land also testified that there were more findings made after Exhibit 8 was prepared, but he was not sure whether a further report was ever provided to the Division. At hearing, the parties stipulated to the fact that a fire caused injury and illness to several employees. The parties did not stipulate to the cause of the fire.

Specifically, when Le returned to the plant on February 10, 2014, to complete her investigation, Land told her the incident was caused when Ramirez placed Trigonox 101, an oxidizing peroxide catalyst, into the 55 gallon waste storage drum, and replaced the top of the drum. The chemicals sat for hours building up pressure, until the accumulated pressure caused the top of the drum to propel upwards, striking a steam pipe mounted above it. This caused a spark, which ignited vapors in the atmosphere of the waste storage area, and the resulting explosion created a fire which travelled under the floor of the waste storage area to the adjacent compounding room via a drain connecting the two rooms. (See Exhibit 16.⁹)

Employer did not implement an effective IIPP with respect to the investigation of injuries to its employees.¹⁰ It is undisputed from the evidence at hearing that Employer had the means to comply with its IIPP. Although Employer's IIPP contained procedures for investigating these injuries, there was no evidence at hearing that Employer investigated how the fire was able to travel to the compounding room from the waste storage area, much less that Employer made a report containing its findings. Similarly, Employer did not offer any evidence that it documented corrective measures to prevent explosions or fires originating in the waste storage area from spreading to other areas and injuring employees.

The Division met its burden of proving that Employer failed to implement its IIPP by failing to document the cause of the injuries to its employees, as well as any corrective actions taken. To the contrary, the evidence showed that Employer did not record any findings as to how its employees were injured, other than to note that employees were in fact injured in a fire, and Employer documented no corrective measures to ensure that if there is a fire in the future, that Employer's employees will not be subjected to the same hazard from spreading as existed on the date of incident.

3. Did the Division correctly classify Employer's violation of section 3203, subdivision (a)(5), as a General Violation?

The Division classified Citation 1, item 2 as a General violation. A General violation is defined as "a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." (Cal. Code Regs., tit. 8, § 334, subd. (b).) Employer's failure to follow its adopted procedures for investigating its employees' injuries and illness, documenting its findings, and documenting any corrective actions

⁹ Land's statements to Le as to how the incident occurred are recorded in Le's Field Documentation Worksheet. Land's recorded statements constitute an adoptive admission as to how the incident occurred and how the affected employees were injured. (See Evid. Code, §§ 1220 – 1222.)

¹⁰ Employer did change some of its practices after the incident. For instance, it implemented a revised Chemical Management Policy on October 30, 2013(Exhibit 10), which Land testified was made to improve safety. Nonetheless, Employer did not document findings and corrective actions in a report as required by its IIPP, thus resulting in a failure to implement its IIPP.

taken, directly relates to its employees' safety and health, for the reason that Employer did not establish that its employees are still not at risk of similar illness and injuries as occurred.¹¹

4. Did the Division impose reasonable abatement requirements upon Employer in requiring Employer to implement the elements of its IIPP requiring Employer to document its findings as to the cause of workplace accidents and any corrective actions taken?

An employer may appeal from a citation by challenging the "reasonableness of the changes required by the division to abate the condition." (Cal. Lab. Code, § 6600.) The Board will affirm required changes if they are deemed "reasonable". (See, e.g. *Southern California Rapid Transit District*, Cal/OSHA App. 85-974, Decision After Reconsideration (Nov. 6, 1987).) Le testified that in order to comply with Section 3203, subdivision (a)(5), Employer must implement the procedures set forth in its IIPP pertaining to investigating workplace injuries and illnesses. Employer's IIPP required it to document the cause and to also document any corrective measures taken. Employer offered no evidence at hearing that it was unable to document workplace injuries according to the procedures in its IIPP and consistent with Section 3203, subdivision (a)(5). While it is true in some cases that an Employer might not be able to determine with absolute certainty what caused a particular injury or illness, here the evidence showed that Employer had all the information it needed and simply failed to follow its own procedures.¹² Additionally, Employer may apply to the Standards Board for a variance if it feels that Section 3203, subdivision (a)(5) should not be applied to it.

5. Was the Division's assessment of \$1,125 for Employer's alleged violation of section 3203, subdivision (a)(5) reasonable?

Although the parties did not stipulate that the penalty proposed by the Division is correctly calculated, the Division's proposed penalty of \$1,125 is consistent with Section 336, subdivision (c) and is warranted given the adjustment credits of Good Faith, History and Size as indicated in Section 1, above.

6. Did Employer violate section 5164, subdivision (a), when supervisor Christopher Land ("Land") instructed employee Antonio Ramirez

¹¹ For instance, Employer has not addressed the fact that fire was able to travel underground from the waste storage area to the adjacent compounding room.

¹² Employer raised numerous additional grounds for appeal and affirmative defenses in its appeal form regarding Citation 1, Item 2 (See Exhibit 1), but only presented evidence regarding the grounds and defenses described above. For the foregoing reason, therefore, Employer's other asserted grounds and affirmative defenses are deemed waived.

(“Ramirez”) to store chemicals together in the waste room without first evaluating their compatibility?

The Division cited Employer for violation of Section 5164, subdivision (a), which reads:

(a) Substances which, when mixed, react violently, or evolve toxic vapors or gases, or which in combination become hazardous by reason of toxicity, oxidizing power, flammability, explosibility, or other properties, shall be evaluated for compatibility before storing. Incompatible substances shall be separated from each other in storage by distance, or by partitions, dikes, berms, secondary containment or otherwise, so as to preclude accidental contact between them.

In the Citation, the Division alleged:

On September 23, 2013, the employer did not evaluate the compatibility of all chemicals before they were mixed and stored in the 55-gallon drum at the waste materials storage area next to the compounding room. An explosion occurred and caused a fire that spread through an underground drain trough to the compounding room. Two employees of Plaskolite West were injured as a result of the fire. One employee sustained a serious injury and the other employee sustained a serious illness.¹³

The Division has the burden of proving 1) that Employer or one of its employees stored chemicals; 2) that the chemicals react violently, or evolve toxic vapors or gases, or in combination become hazardous by reasons of their toxicity, oxidizing power, flammability, explosibility, or other properties; and, 3) that Employer failed to evaluate the chemicals for compatibility before storing them.

The evidence is undisputed that Employer or one its employees stored chemicals. Land, Ramirez, and Le all testified that on the morning of the incident, Land instructed Ramirez to store waste chemicals together, and Ramirez actually mixed together multiple chemicals, including Trigonox 101, an oxidizing peroxide catalyst, in Employer’s waste storage drum. Thus, because the evidence was undisputed that Employer or one of its employees stored chemicals, the Division met its burden of establishing the first element.

¹³ The parties stipulated to the Serious classification and Accident-Related characterization.

The evidence was also undisputed that the chemicals mixed together by Ramirez are the types of chemicals that, based on their properties, fall within the cited safety order. Land and Le both testified as to their knowledge of the properties of the various chemicals utilized by Employer. Land, who did not study chemistry, knew that MMA and EA (the main components of acrylic), react once a catalyst such as Trigonox 101 is added, creating heat and pressure, and he admitted to knowing that MMA and EA are both flammable.¹⁴ Le, who studied chemistry, biology and biochemistry in college, and possessed experience gained working in chemical research and development, the reaction of MMA with Trigonox 101 causes an exothermic process releasing heat, and that too much Trigonox would cause unwanted results, and could cause an explosion. She also testified that MMA and EA are flammable and produce flammable vapor. Based on Land and Le's testimony, the Division established the second element.

Here, Land admitted that he instructed Ramirez to move chemicals from a refrigerator into the waste storage area, and further admitted that he did not supervise Ramirez to ensure proper completion of the task. It is not clear from the record that Land even knew what chemicals were in the refrigerator at the time, and Ramirez testified that his supervisor, Luis Verduzco ("Verduzco"), did not know either. Land further testified that he did not know what was in the waste drum.¹⁵

While Land stated that he knew "in theory", what chemicals are compatible, he did not know if Employer had specifically evaluated the compatibility of the chemicals prior to storing them in the same area. Land believed the chemicals used by Employer were compatible because when used together, they make acrylic; however, his understanding of chemical compatibility within the meaning of section 5164, subdivision (a), was proven deficient by Le, who testified that compatibility testing is different from following a recipe. Le testified that compatibility evaluation consists of determining the chemicals' physical and chemical properties and ensuring they will not react or change physical or chemical properties when you mix them.

¹⁴ Land testified that he did not know whether oxidizers, such as Trigonox 101, are incompatible with combustible materials. This was just one of many instances during his testimony when Land, who was responsible for ensuring safety at the plant, demonstrated a serious lack of knowledge as to basic properties of the chemicals used under his supervision.

¹⁵ Land testified that he never instructed Ramirez to put the chemicals in the waste drum. He did, however, instruct Ramirez to store chemicals together (albeit in their packaging) in the waste room without first evaluating their compatibility with one another.

The third element requires that an employer evaluate compatibility prior to storing. Employer, offered no evidence that it ever evaluated the compatibility of the chemicals that Land instructed Ramirez to move to the waste storage area; in fact, Land admitted that he did not look at what Ramirez told him he found in the refrigerator, before instructing Ramirez to move it to the waste storage area. Land testified that he instructed Ramirez to place the waste chemicals in the waste storage area as opposed to the waste drum. Even so, Employer still failed to evaluate the chemicals' compatibility prior to storage. The Division, therefore, proved the third element.

The Division met its burden of proving that Employer violated section 5164, subdivision (a). The evidence established that the substances that Employer utilizes, and which it instructed Ramirez to store in the waste storage area, were routinely mixed; that when mixed they had a propensity for reacting violently or becoming hazardous by reasons of oxidizing power, flammability and explosibility; and, that Employer failed to evaluate the compatibility of the waste chemicals before Land ordered Ramirez to store them.¹⁶

7. Did Employer establish that it did not know, and could not have known through the exercise of reasonable diligence, of its failure to perform an evaluation of chemical compatibility prior to Land ordering Ramirez to move waste chemicals from a refrigerator into the waste storage area?

Where an employer demonstrates that "it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation", a serious classification will not stand. (Cal. Code. Regs., tit. 8, § 334, subd. (c)(2); see *Central Coast Pipeline*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).) In order to establish that it could not have known of the violation through the exercise of reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2013).) Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation. (See *Stone Container*

¹⁶ Land testified that the MSDS sheet for Trigonox 101 (Exhibit 12), says to store Trigonox 101 separately from other chemicals and keep it in the original container. He also testified that he did not know what would happen if the Trigonox 101 were not kept in its original container. Land's demonstrated lack of understanding as to why the Trigonox 101 should be kept in its original container is further evidence highly suggestive that Employer did not evaluate compatibility before storing.

Corporation, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).)

Here, Land admitted that he did not supervise Ramirez after instructing him to take the waste chemicals from the refrigerator to the waste storage area. Although Land had worked for many years with Ramirez and had grown to trust him, Ramirez had no education in chemistry apart from the limited training he received from Employer, which focused on accidental exposure. In addition, Ramirez testified that although he had received written materials at past training, he generally through them out right afterward.

Ramirez also testified that this was not the first time he had put Trigonox 101 into the waste drum; in fact, he had done so on at least several occasions, suggesting a detectable pattern of conduct. Although Land testified that he did not instruct Ramirez to put chemicals into the waste drum, and in fact would never do so, neither Land nor Verduzco, Ramirez's direct supervisor, saw fit to supervise the removal. Employer's failure to observe Ramirez's actions on these multiple occasions, and Land's presence while the violation was occurring, undermines Employer's argument that it lacked a reasonable opportunity to detect the violation. Employer could have discovered via reasonable supervision that a) it was storing unevaluated chemicals together; and, b) Ramirez misunderstood Land's instructions and was pouring Trigonox 101 into the waste drum. In addition, Employer could have more closely monitored Ramirez because Employer admitted that this was not a "routine task".

Thus, for the foregoing reasons, Employer did not meet its burden of proof for its affirmative defense alleging lack of employer knowledge.

8. Was the Division's assessment of \$18,000 for Employer's alleged violation of section 5164, subdivision (a) reasonable?

The parties stipulated that Citation 2 was properly classified as Serious Accident-Related. Although the parties did not stipulate that the penalty was correctly calculated, the proposed penalty of \$18,000 is inconsistent with Section 336, subdivision (c)(3), which states that an adjustment for size may be made to a Serious violation that the Division determines has caused death or serious injury. Here, because the parties stipulated that Employer employs 26-

60 employees, a size adjustment of 20 per cent (\$3,600) is warranted¹⁷, resulting in a reduced penalty of \$14,400 for violation of Citation 2, Item 1.

9. Did the Division impose reasonable abatement requirements upon Employer in requiring Employer to evaluate the compatibility of chemicals before storing them together?

Employer also challenged the Division's abatement requirements as part of its appeal. Le testified to the dangers of not evaluating compatibility of chemicals prior to storing them in the same area, specifically, that an undesired reaction can take place, including explosion and fire. Land testified that he believed the chemicals were evaluated because they create acrylic when the correct recipe is followed, but he admitted that he did not understand the chemicals' physical and chemical properties. Land admitted Employer employs staff chemists at a laboratory, and Employer failed to offer evidence that it is unable to abate the violation by having those chemists perform compatibility evaluations prior to storing chemicals together. Accordingly, Employer failed to prove by preponderant evidence that the abatement requested is unreasonable.

CONCLUSIONS

Citation 1, Item 1, a violation of §342(a), is affirmed as set forth in this Decision and in the attached Summary Table. Citation 1, Item 2, a violation of §3203(a)(5), is affirmed as set forth in this Decision and in the attached Summary Table. Citation 2, Item 1, a violation of §5164(a), is affirmed as set forth in this Decision and in the attached Summary Table.

ORDER

Citation 1, Item 1 is sustained, and a penalty of \$2,000 is assessed for the violation. Citation 1, Item 2, is sustained, and a penalty of \$1,125 is assessed for the violation. Citation 2, Item 1, is sustained, and a penalty of \$14,400 is assessed for the violation.

Dated: May 29, 2015

URSULA L. CLEMONS

Presiding Administrative Law Judge

ULC:ml

¹⁷ Although the parties' stipulation addressed Citation 1, Item 1, no contrary evidence regarding Employer's size was presented at hearing.

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
PLASKOLITE WEST INC.

DOCKETS 14-R3D5-1407 and 1408

Date of Hearing: Sept. 30, 2014 – Feb. 6, 2015

Division's Exhibits

Exh. No.	Exhibit Description	
1	Jurisdictional documents	ADMITTED
2	Division's Proposed Penalty Worksheet	ADMITTED
3	Photo of waste drums	ADMITTED
4	Safety Attendance Report dated May 7, 2013	ADMITTED
5	Plaskolite, Inc. General Chemical Appendix	ADMITTED
6	Material Inventory Map dated October 2013	ADMITTED
7	Plaskolite West, Inc. IIPP	ADMITTED
8	Plaskolite Accident Investigation report dated September 25, 2013	ADMITTED
9	Employer's Report of Occupational Injury or Illness, dated September 24, 2013	ADMITTED
10	Plaskolite, Inc. Chemical Management Policy, Revised 10/30/2013	ADMITTED
11	Plaskolite, Inc. Hazard Communication Program Procedures	NOT RECEIVED
12	Trogonox 101 Safety Data Sheet	ADMITTED
13	Loss Investigation Report dated February 17, 2014	NOT RECEIVED

14	DOSH Accident Report dated September 24, 2013	ADMITTED
15	Photograph of drain inlet	ADMITTED
16	Field Documentation Worksheet dated September 24, 2013	ADMITTED
17A	Document Request, dated September 24, 2013	ADMITTED
17B	Document Request, dated March 14, 2014	ADMITTED
18	Field Documentation Worksheet, dated February 10, 2014	ADMITTED
19	Cal/OSHA 1BY dated February 20, 2014	ADMITTED

	<u>Employer's Exhibits</u>	
A	Documentation Worksheet re Citation 1, Item 2, dated September 24, 2013	NOT RECEIVED
B	Investigation Summary, dated March 21, 2014	NOT RECEIVED
C	Documentation Worksheet Re Citation 2, dated September 24, 2013	NOT RECEIVED

Witnesses Testifying at Hearing

Antonio Ramirez
Raul Ruiz
Christopher Land
Hien Le

CERTIFICATION OF RECORDING

*I, **Ursula L. Clemons**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.*

Signature

Date

SUMMARY TABLE

DECISION

In the Matter of the Appeal of:

PLASKOLITE WEST, INC.

Dockets 14-R3D5-1407 and 1408

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

IMIS No. 125875636

DOCKET	CITATION	ITEM	SECTION	TYP	MODIFICATION OR WITHDRAWAL	AFFIRMED	VOID	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R3D5-1407	1	1	342(a)	G	ALJ affirmed violation. Penalty reduced pursuant to applicable DARs.	X		\$5,000	\$5,000	\$2,000
		2	3203(a)(5)	G	ALJ affirmed violation.	X		1,125	1,125	1,125
14-R3D5-1408	2	1	3943(c)	S	ALJ affirmed violation. Penalty reduced with size credit.	X		\$18,000	\$18,000	\$14,400
Sub-Total								\$24,125	\$24,125	\$17,525
Total Amount Due*										\$17,525

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board.
All penalty payments should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*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: ULC/ml

POS: 05/29/15

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 100 North Barranca Street, Suite 410, West Covina, California, 91791.

On May 29, 2015, I served the attached **DECISION** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at West Covina, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Fred Walter, Esq.
THE WALTER LAW FIRM
1270 Healdsburg Avenue, Ste. 201
Healdsburg, CA 95448

District Manager
DOSHS – Torrance
680 Knox Street, Suite 100
Torrance, CA 90502

DOSH - Legal Unit
1515 Clay Street, 19th Floor
Oakland, CA 94612

Melissa Peters, Staff Counsel
Los Angeles Legal Unit
320 West Fourth Street, Suite 400
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 2015, at West Covina, California.

Declarant

