BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1133550**
HANSFORD INDUSTRIES, INC. **DBA VIKING STEEL** **8610 ELDER CREEK ROAD** **SACRAMENTO, CA 95828** **Employer**	**DECISION**

Statement of the Case

Hansford Industries, Inc., dba Viking Steel (Employer) fabricates custom metal products such as staircases for commercial building projects. Beginning on March 19, 2016, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Susan Pipes (Pipes) conducted an accident inspection at a workplace maintained by Employer at 8610 Elder Creek Road, Sacramento, California (hereinafter, "the worksite"), following a fatal accident involving Employer's employee Christopher Briggs (Briggs). On June 23, 2016, the Division issued six citations alleging seven violations of safety orders found in California Code of Regulations, title 8.[1] The citations allege that Employer failed to: certify that its forklift operators had been trained and evaluated as required; identify and evaluate hazards in the workplace and establish safe work practices with regard to movement of fabricated steel components via industrial trucks; prevent employees from standing, passing or working under the elevated portion of a forklift; take extreme care when tilting loads on a forklift; provide initial training to forklift operators on all of the required topics; balance, brace or secure loads so as to prevent tipping and falling; and, secure loads against dangerous displacement.

Employer filed timely appeals of all the citations. Employer's appeals contest the existence of the alleged violations, and also pleaded numerous affirmative defenses. (See Exhibit 1.) With respect to Citations 2, 3, 4, 5 and 6, Employer also appealed the classifications and the proposed penalties.

This appeal was heard by J. Kevin Elmendorf, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board in Sacramento, California, on May 17 and 18, 2018; and, May 7 through May 9, and October 30, 2019. Cynthia Perez, Esq., Staff Counsel,

[1] Unless otherwise indicated, all further references are to sections of California Code of Regulations, title 8.

represented the Division. Manuel Melgoza, Esq. attorney with Donnell, Melgoza and Scates LLP, represented Employer. Kyle Tambornini, Esq. and Ilona Manzyuk, Esq., attorneys with Eason and Tambornini, ALC, represented the third party survivors of Briggs. During the hearing, the third parties withdrew from the appeals. The ALJ extended the submission date to February 9, 2020.

Issues

1. Did Employer consent to the Division's inspection?

2. Was the Division required to conduct its inspection in accordance with the Division's Manual of Policies and Procedures?

3. Did Employer fail to certify that its forklift operators had been trained and evaluated?

4. Did Employer fail to identify and evaluate hazards at the worksite pertaining to the movement of fabricated steel components via forklift?

5. Did Employer allow employees to stand, pass, or work under the elevated portion of any industrial truck, loaded or empty, that was not effectively blocked to prevent it from falling?

6. Did Employer allow an employee to tilt an elevated load forward when the load was not being deposited onto a storage rack or equivalent?

7. Did Employer fail to provide initial training to its powered industrial truck operators in all of the required topics?

8. Did Employer fail to ensure that loads were balanced, braced or secured to prevent tipping or falling?

9. Did Employer secure the staircase against dangerous displacement?

10. Did the Division establish a rebuttable presumption that the violations identified in Citations 3, 4, 5 and 6 were Serious?

11. Did Employer rebut the presumptions that the violations cited in Citations 3, 4, 5 and 6 were Serious by demonstrating that it did not, and could not with the exercise of reasonable diligence, know of the existence of the violations?

12. Did the Division establish that Citations 5 and 6 were properly characterized as accident-related?

13. Did Employer establish that any of the Serious violations identified in Citations 3 through 6 were the result of independent employee action?

14. Did the Division propose reasonable penalties for Employer's Citations 3, 4, 5 and 6?

Findings of Fact

1. On March 19, 2016, Employer's employee Briggs suffered a fatal injury while attempting to remove a clamp securing a 37-foot long, over-2,000 pound staircase (hereinafter "the staircase" or "the load") to the forks of a forklift operated by Employer's employee Jamin Boyd Porter (Porter). (This incident shall be referred to as "the accident.")

2. Associate Safety Engineer Pipes arrived at the worksite on March 19, 2016, in response to an accident report, and was greeted by Superintendent Timothy Hieber (Hieber), who granted consent to inspect the worksite.

3. During the inspection, Pipes met with several of Employer's owners and managers. At no time did any of Employer's managers state that they did not consent to the Division's inspection or try to deny Pipes access to the location of the accident.

4. Prior to the accident, Employer certified that its industrial truck operators had been trained and evaluated in the operation of powered industrial trucks.

5. Employer's Injury and Illness Protection Program (IIPP) contains procedures for identifying and evaluating workplace hazards.

6. Employer did not identify and evaluate workplace hazards, including the hazards associated with transporting and depositing a 37-foot long, over 2,000 pound non-linear metal staircase that was held in place on the forks of a forklift by four clamps.

7. The staircase was non-linear, meaning that it was configured in such a way that its center of gravity was not located in its geometric center. Employer did not provide initial training to its employees Porter, Joel King (King), or Briggs on workplace specific topics including composition of loads and load stability,

and load manipulation, including the securing and depositing of loads, with regard to non-linear loads.

8. Porter, with the assistance of King, who acted as his spotter, drove the forklift carrying the staircase from the painting area to the staging area. Briggs followed behind Porter on another forklift to assist in depositing the staircase onto wooden boards (called "dunnage").

9. In the process of removing the clamps, the forklift operator was directed by King to tilt the forks forward. Once the forks were tilted forward, the stairs stopped leaning. The stairs stood back upright, and King continued to attempt to remove the right front clamp. Approximately four to five seconds later, the load began rocking back and forth, and it then fell.

10. Briggs did not stand, pass, or work under the elevated portion of the forklift.

11. No portion of the forklift fell during or immediately preceding the accident.

12. Porter, King and Briggs were unclamping the staircase from the forklift's forks in anticipation of depositing the staircase onto the dunnage, when the accident occurred. The staircase was elevated on the forks approximately four to 12 inches above the dunnage while this was happening.

13. Porter tilted the staircase while it was elevated above the dunnage.

14. The top of the staircase was not secured to the forklift.

15. The staircase became unstable while Briggs and King were attempting to remove the four clamps. Employer did not balance, brace or secure the staircase to prevent it from tipping and falling while the clamps were being removed.

16. Employer did not secure the staircase against dangerous displacement.

17. Employer elected to not use a sling or any other device to secure the top of the staircase.

18. Tilting the forks of the forklift while the staircase was resting on the forks could cause the staircase to fall and crush an employee, causing broken bones and fatal injuries to an employee's head or torso.

19. Employer's failure to provide initial workplace specific training to its powered industrial truck operators created the possibility that poorly trained forklift operators could operate forklifts unsafely if a load were to become unbalanced or displaced, fall, and strike an employee.

20. Employer did not have any supervisors present while the work that led to the accident was being conducted.

21. Employer's failure to ensure that the staircase was balanced, braced, or secured as to prevent tipping and falling, as well as its failure to secure the staircase against dangerous displacement either by proper piling or other securing means, caused Briggs' death.

22. Porter, King and Briggs were conducting work that was not "routine" when the accident occurred.

23. Porter, King and Briggs did not know that what they were doing was contra to Employer's safety requirements.

24. Division's Manual of Policies and Procedures is not binding on the Division.

25. The penalties for Citations 3 and 4 as issued were not reasonable.

26. The penalties for Citations 5 and 6 as issued were reasonable.

Analysis

1. Did Employer consent to the Division's inspection?

California Labor Code section 6313, subdivision (a), provides that, "The [D]ivision shall investigate the causes of any employment accident that is fatal to one or more employees . . . unless it determines that an investigation is unnecessary." Labor Code section 6314, subdivision (a), provides that the Division shall, "upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect…." Labor Code section 6314, subdivision (d), provides that during the inspection "a representative of the employer and a representative authorized by his or her employees shall have an opportunity to accompany" the inspector.

The determination of whether consent was given to the inspection is fact specific and requires examination of the particular circumstances under which the consent was granted. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7,

2016), citing *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651; *Enters v. Marshall* (1978) 578 F.2d 1021, 1024 [in determining whether the employer consented to an OSHA inspection, the court looks to the totality of the circumstances].)

An inspector may rely on consent to search given by someone who, in the inspector's reasoned judgment, has apparent authority to consent. (*Nolte Sheet Metal, Inc., supra,* Cal/OSHA App. 14-2777, citing *People v. Roman* (1991) 227 Cal.App.3d 674, 679; *Terry v. Ohio* (1968) 392 U.S. 1, 21-22; *People v. Superior Court* (Walker), (2006) 143 Cal. App. 4th 1183, 1199.)

Pipes credibly testified that when she arrived at the front gate of the worksite, she was met by Employer's employee Hieber, who identified himself as the shop superintendent. Pipes testified that she introduced herself to Hieber and showed him her credentials, explained the purpose of her visit, and asked for permission to inspect the worksite and investigate the accident. Pipes testified that Hieber granted her permission to inspect the worksite, and directed her to the location of the accident. Finally, Pipes denied that anyone at the worksite attempted to deny her the ability to inspect the worksite and conduct her investigation. Pipes' testimony is consistent with the Opening Conference Checklist (Exhibit A) that she prepared during the course of her inspection.

During the hearing, Hieber denied that he met Pipes when she arrived. Hieber testified that when he arrived at the worksite sometime after 2:00 p.m. on the date of the incident, he met Pipes for the first time when she was already in the yard at the rear of the worksite near the forklift involved in the accident. Hieber denied that Pipes requested permission from him to inspect the property. Hieber did acknowledge during the hearing that, after discussing the incident with Hieber on the yard, Pipes went into the management office and spoke with senior managers and employees about her investigation and the accident. Nothing in the record suggests that Hieber at any time made any attempt to deny Pipes the opportunity to investigate the accident.

Jerad Patterson (Patterson), Employer's co-owner and Chief Financial Officer, testified that when he first observed Pipes on the date of the accident, she was approaching him in the breezeway toward the front of the worksite from the rear of the yard. Patterson testified that Pipes introduced herself, but he denied that Pipes requested permission to inspect the worksite. Patterson testified that Pipes gave her his business card while they were in the office together with Hieber, and that she gave him an overview of her investigation and interviewed several of Employer's employees in Patterson's presence. Nothing in the record suggests that Hieber made any attempt to deny Pipes the opportunity to investigate the accident.

Here, the record shows that Pipes was greeted at the worksite by Hieber, or someone holding themselves out as Hieber. Hieber (or the person claiming to be Hieber) identified himself as a superintendent, and after learning the purpose of Pipes' visit, directed Pipes to the location of the accident at the worksite. Pipes was justified in her belief that Hieber (or the person claiming to be him) had authority to consent to inspect the worksite. Furthermore, neither Hieber, Patterson, nor any other employee or manager of Employer informed Pipes that she was not permitted to inspect the worksite. Because Pipes obtained consent by someone with authority to act on Employer's behalf (or upon whose apparent authority Pipes reasonably relied), and because Pipes complied with the Labor Code's requirements regarding obtaining access to the worksite for inspection purposes, the only reasonable conclusion that can be drawn is that the Division obtained consent from Employer to inspect the worksite.

2. Was the Division required to conduct its inspection in accordance with the Division's Manual of Policies and Procedures?

Pursuant to Government Code section 11340.5, subdivision (a):

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

During the hearing, Employer cross-examined Pipes on the Division's Manual of Policies and Procedures (MPP) (Exhibits M and N), and whether or not she followed the steps outlined in the MPP when she conducted her investigation at the worksite. Nothing in the record suggests that the MPP has been adopted by the Department of Industrial Relations as a regulation and filed with the Secretary of State. Absent such evidence, the MPP cannot be considered binding on the Division, and therefore Pipes' adherence to the MPP or lack of adherence is not relevant to the issue of whether her inspection of the worksite was lawful.

3. Did Employer fail to certify that its forklift operators had been trained and evaluated?

Section 3668, subdivision (f), provides:

> The employer shall certify that each operator has been trained and evaluated as required by this section. The certification shall include the name of the operator,

the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

Citation 1, Item 1, alleges:

> As a result of an accident investigation initiated March 19, 2016, at a worksite located at 8610 Elder Creek Road in Sacramento, CA, Hansford Industries, Inc., dba Viking Steel was found not to have certified that each operator of industrial trucks, including but not limited to a Caterpillar Model DP70, was trained and evaluated as required by this section, including documentation of the name of the operator, date of training, date of evaluation, and the identity of the person(s) performing the training or evaluation.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013) (Internal citations omitted).)

Pipes testified that, as part of her investigation of the accident, she requested documentation of certified rigger training for employees Porter, King and Briggs, the employees who were involved in the work that gave rise to the accident. (See Exhibit 35.) Pipes further testified that Employer's response included a forklift certification training certification card for Porter, King, and Briggs, but no records of certification of rigger training for these employees. (See Exhibit 36.) Pipes testified that the Division issued Citation 1, Item 1, to Employer because the regulation requires the employer to certify that each forklift operator received instruction in a variety of enumerated topics. She testified that Employer provided certification cards issued from a training vendor, but that Porter's certification card was issued prior to his working for Employer. She stated that Employer's IIPP requires Employer to evaluate each employee after hire, or provide for a workplace specific evaluation. Pipes testified she received no documentation showing that this was done.

During cross-examination, Employer showed Pipes a collection of training and certification records (Exhibit G) pertaining to Porter, King and Briggs. A review of Exhibit G

shows that an outside vendor certified Briggs' training and evaluation on September 22, 2014; King's training and evaluation on May 8, 2014; and, Porter's training and evaluation on January 20, 2015. Although the Division raised objections to the admission of certification documents pertaining to Porter, the documents were authenticated by Employer's witnesses and were admitted over objection.

Pipes testified that she could not recall whether she received all of the documents during her investigation. However, Pipes admitted that, had she seen the records, she would not have issued Citation 1, Item 1, because the records showed that Employer had met its obligation to certify the training and evaluation of its employee forklift operators. Pipes' admission that she would not have found a violation if she had reviewed all of the documents that she was shown during her cross-examination, undercuts the Division's contention that Employer did not certify that its employees received required training and evaluation in the operation of forklifts. In fact, Pipes testified that based on review of Exhibit G, Employer had properly certified training and evaluation of its forklift operators.

In light of Pipes' testimony and the documentary evidence contained in Exhibit G, the Division did not meet its burden of establishing that Employer violated section 3668, subdivision (f). Accordingly, Citation 1, Item 1, is dismissed, and its associated penalty is vacated.

4. Did Employer fail to identify and evaluate hazards at the worksite pertaining to the movement of fabricated steel components via forklift?

Section 3203, subdivision (a), provides, in relevant part:

(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:

. . .

(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;

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(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.

Citation 1, Item 2, alleges:

As a result of an accident investigation initiated March 19, 2016, at a worksite located at 8610 Elder Creek Road in Sacramento, CA, Hansford Industries, Inc. dba Viking Steel was found not to have identified and evaluated work place hazards, and established safe work practices, related to movement of fabricated steel components via industrial truck, including, but not limited to, securing of materials on industrial trucks and offloading materials from trucks.

The Appeals Board explained the requirements of section 3203, subdivision (a)(4), in *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013), as follows:

Section 3203(a)(4) requires that employers include procedures for identifying and evaluating work place hazards in their Injury and Illness Prevention Programs. These procedures must include "scheduled periodic inspections to identify unsafe conditions and work practices." [Citation omitted.]

. . .

3203(a)(4) requires that employers include "*procedures* for identifying and evaluating work place hazards *including scheduled periodic inspections* to identify unsafe conditions and work practices." (Section 3203(a)(4) [emphasis added].)

. . .

Section 3203(a)(4) contains 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." (Section 3203(a)(4).) The Division's testimony regarding the lack of specific procedures for the operation at hand is not relevant….

It is not enough that an employer has procedures in place for identifying and evaluating workplace hazards. Merely having a written IIPP is insufficient to establish implementation because proof of implementation requires evidence of actual responses to known or reported

hazards. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0378, Decision After Reconsideration (Oct. 5, 2015), citing *Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) If an employer fails to implement its procedures, a violation of section 3203, subdivision (a)(4) will be established. (*ABM Facility Services, Inc. dba ABM Building Value*, Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015).)

a. Employer established procedures for identifying and evaluating workplace hazards

A review of Employer's IIPP shows that it states the following with respect to identification and evaluation of workplace hazards:

> 3. System to Identify and Prevent Safety and Health Hazards
> Identification of Hazards:
> This IIPP's system to identify safety and health hazards includes using information from Cal/OSHA standards and other relevant material in this program to discover any potential hazards in the workplace.
> In addition, potential hazards may be identified by reviewing causes of injury and illness (OSHA Log 300 and Workers' Compensation Employer's Report of Occupational Injury or Illness, also known as the "Employer First Report"), periodic scheduled inspections, investigating injuries, illnesses and accidents, and considering information provided by employees.
>
> Prevention of Hazards:
> Compliance with any applicable Cal/OSHA standard will be assured to address hazards covered by such standards. In addition, any unsafe or unhealthy condition or work practice that is discovered will be corrected in a timely manner based on the following:
>
> * If the hazard discovered may cause a serious injury or illness, it shall be corrected immediately or employees removed from the area, source of exposure or unsafe piece of equipment.
> * If the hazard is one that is easily abated, it shall be corrected immediately.
> * Other hazards shall be corrected in a timely manner.
>
> Documentation used in discovering the hazard will be used to confirm abatement.

The IIPP further states:

> 5. Periodic Scheduled Inspection
> Responsibility and Frequency of Inspections:
> Periodic scheduled inspections are conducted by, or under the direction of Senior Corporate Officers or an appointed competent person by him. Because the nature of Viking's work varies in different geographical areas, inspections shall be scheduled in concert with the work being performed. In addition, the main facility shall be inspected once weekly.
>
> Whenever information indicates that a previously unrecognized hazard may be present, the area in which the suspected hazard is present will be inspected promptly.
>
> Documentation of Inspections:
> The designated person responsible for inspection shall document the findings of the inspection, noting the area inspected person or persons conducting the inspection and any deficiencies noted. Corrections shall be made and documented as being completed in a timely manner.

Employers are required to have procedures in place for identifying and evaluating workplace hazards, including conducting periodic inspections. Here, the evidence shows that Employer's IIPP contained such procedures. Pipes testified that Employer did not provide documentation of specific practices for moving and securing steel components. The fact that the procedures did not specifically address every hazardous operation an employer takes is not relevant. On the basis of the documentary evidence presented, it is determined that the procedures for identifying and evaluating workplace hazards that are contained in Employer's IIPP complied with the mandate of section 3203, subdivision (a)(4).

b. Employer did not effectively implement its procedures for identifying and evaluating workplace hazards

Pipes testified that, during her investigation, she reviewed Employer's IIPP (Exhibit 44) and observed that it contained a requirement to perform a Job Hazard Analysis (JHA) prior to beginning work on a project. She further testified that she requested and received no documentation showing that a JHA had been performed prior to the work being conducted when the accident occurred. Pipes also testified that the IIPP required Employer to create safe practices for conducting its work, but she could not find any practices relating to securing or moving loads. Moreover, Pipes testified that Employer's IIPP required it to conduct facility inspections

weekly to identify workplace hazards, and that she asked for documentation of the inspections but received none. However, a review of the document request prepared by Pipes (Exhibit 35), shows that it did not include a request for inspection documentation or JHA's. Thus, the fact that Employer did not provide any such documentation to the Division during the inspection is not indicative of a violation.

A violation can still be found where, as here, an employer fails to identify and evaluate hazards existing in the workplace. There is no dispute that, on the date of the accident, Employer's employees were involved in transporting a 37-foot long, over 2,000 pound metal staircase from the painting area at the back of the worksite and depositing it onto wooden beams at an outdoor staging area in the main yard. There is also no dispute that Employer fabricates custom metal products, such as staircases, for commercial building products, and that the products vary in size, configuration and weight.

As will be discussed further in this Decision, Pipes credibly testified that the work involved several hazards, including the risk of dangerous displacement of the staircase, and the realistic possibility that, should something go wrong during the operation, Employer's employees who were involved could be seriously injured or killed. In fact, one of Employer's employees (Briggs) was killed when the staircase fell onto him while he, King and Porter were attempting to unclamp the staircase from Porter's forklift. Employer's Superintendent Hieber testified that he instructed Porter on Friday, March 18, 2016, to move the staircase from the painting area to the staging area the next day, on Saturday, March 19, 2016. Despite the inherent risk involved, Hieber and co-owner Patterson acknowledged in their testimony during hearing that Employer had no specific rules pertaining to this type of operation, and instead left it up to the crew moving the staircase to determine how best to accomplish the work, including where to place clamps and the sequencing for their removal. The above-summarized evidence demonstrates that Employer made no effort to identify and evaluate the hazards presented by moving a 37-foot long, over 2,000 pound metal staircase, despite the fact that Employer was aware of the work that was going to occur at least one day in advance. Based on the evidence of Employer's failure to identify and evaluate any hazards associated with this work, the Division established by a preponderance of the evidence that Employer did not implement procedures for identifying and evaluating workplace hazards.

Accordingly, the Division established a violation of section 3203, subdivision (a)(4), by a preponderance of the evidence, and Citation 1, Item 2, is affirmed.

5. Did Employer allow employees to stand, pass, or work under the elevated portion of any industrial truck, loaded or empty, that was not effectively blocked to prevent it from falling?

Section 3650, subdivision (t)(6), provides:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

. . .

(6) Employees shall not be allowed to stand, pass, or work under the elevated portion of any industrial truck, loaded or empty, unless it is effectively blocked to prevent it from falling.

Citation 2 alleges:

On March 19, 2016, employees of Hansford Industries, Inc. dba Viking Steel, loaded a steel staircase onto an industrial truck and moved it to a staging area within the materials yard at a worksite located at 8610 Elder Creek Road in Sacramento. An employee assisting with the offloading process, worked from under the elevated portion of the loaded industrial truck, as clamps used to secure the load were removed. The industrial truck and staircase were not effectively blocked, resulting in the employee sustaining a fatal accident-related injury, when the staircase became displaced and fell onto him.

The Division bears the burden of proving a violation of the safety order, including its applicability, by a preponderance of the evidence. Here, there is no dispute that, on the date of the accident, Employer's employees were operating and working alongside powered industrial trucks, in this case a forklift. Therefore, the safety order applies to the work that was being performed.

To prove a violation, the Division bears the burden of establishing that: a) an employee was standing, passing, or working under the elevated portion of any industrial truck, whether or not that truck was loaded or empty; and, b) the employer did not effectively block the elevated portion of the industrial truck to prevent it from falling.

a. Did an employee stand, pass, or work under the elevated portion of an industrial truck?

During the hearing and in their post-hearing briefs, the parties contested whether or not, for a violation to be found, an employee must stand, pass, or work beneath the elevated portion of the industrial truck itself, or whether a violation may be found where the employee is not physically under the elevated portion of the industrial truck, but is within an area where he could

be serious physically harmed or killed by the load were it to shift or fall. The parties' dispute is one of regulatory construction and interpretation.

The Appeals Board has previously held that rules of statutory construction also apply to interpreting regulations. (*The Home Depot*, Cal/OSHA App. 98-2236, Decision After Reconsideration (Dec. 20, 2001), citing *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1517.) Initially, courts and agencies apply the plain meaning of the words of the regulations. If the plain, commonsense meaning of the words is unambiguous, the plain meaning controls. (*Borikas v. Alameda Unified School Dist*. (2013) 214 Cal. App. 4th 135, 146; *Neville v. County of Sonoma* (2012) 206 Cal. App. 4th 61, 70.) Where a term in a regulation "is not defined, it can be assumed that the Legislature was referring to the conventional definition of that term." (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal. App. 4th 75, 82.)

Here, applying a plain meaning interpretation, the safety order as written applies to situations where employees stand, pass or work beneath a portion of the industrial truck itself. A "portion" is widely defined as "a part of any whole, either separated from or integrated with it." (http://www.dictionary.com/ browse/portion?s=t, retrieved January 24, 2020.) Thus, any portion of an industrial truck is any part, separated from or integrated with it, that is required to make the truck whole. Thus, assuming that one were to remove the forks from a forklift truck, the forks would still constitute a portion of the forklift truck, because even when separated from the rest of the truck, they are a part of what makes a whole forklift truck. A load is not a part of a forklift truck in the same way that the forks, mast, or operator's controls are, because a forklift truck can operate as intended without the latter, but cannot operate as intended without the former. This interpretation is supported by the regulation's inclusion of the qualifying language "loaded or empty." Thus, the plain meaning of the regulation would support finding a violation where the employee stands, passes or works beneath an elevated portion of the truck, irrespective of whether the truck is carrying a load.

The parties dispute whether Briggs was standing, passing or working under the elevated portion of the forklift when the accident occurred. None of the witnesses who testified observed any portion of Briggs' body beneath the forks. Pipes testified that Porter told her he could see Briggs kneeling alongside the fork. Porter told Pipes that, at the time of the accident, the forks were raised 12 to 16 inches off the ground. Pipes further testified that Porter and King informed her that Briggs had been attempting to remove a clamp on the inner side of the right fork when the accident occurred. According to Pipes, Porter told her that he could tell that the clamp Briggs was attempting to remove was placed in the downward position, because of markings left by the clamp that he observed after the accident. Porter, however, did not recall the exact placement of

the clamps, and did not directly observe any of the clamps in place with the arm in the downward position. This is also reflected in Pipes' notes from her interview of Porter. (Exhibit B.)

Pipes testified that, based on her observations, in order to loosen the clamp when it was in a downward position, one would need to reach or crawl under the fork to reach an adjustable screw that, when turned, tightens or loosens the clamp. However, none of the eyewitnesses who were interviewed by Pipes or who testified at hearing mentioned seeing any portion of Briggs' body beneath the forks of the forklift.

Exhibit 22 shows the four clamps that were used by Employer to secure the load to the forks. It is noted that the adjustable screw portion of the clamps is operated via a metal rod that sticks out horizontally from the end of the screw opposite the material that the clamp is placed around. Pipes acknowledged in her testimony that she did not ask whether Employer had extension tools available to employees for use in unscrewing clamps.

King testified during the hearing that he attached the clamps securing the load to the forks when the load was initially placed on the forks in the painting area. King credibly testified that he placed all of the clamps with the arms in the upward position.

King's direct, credible testimony is entitled to more weight than the hearsay evidence produced by the Division regarding the placement and orientation of the four clamps. Here, the only evidence that any of the clamps were in the downward position came from hearsay statements made to Pipes. The Division maintained at hearing that Briggs would have necessarily had to reach under the fork of the forklift to unscrew the clamp he was attempting to remove at the time of the accident, based on the Division's belief that the clamp was attached with the arm facing downward. The Division's evidence, however, did not establish that the clamp was installed in such a way, and none of the eyewitnesses to the accident saw any portion of Briggs' body go beneath the forks of the forklift. Therefore, the evidence does not establish that any portion of Briggs' body was beneath any elevated portion of the forklift.

b. Did Employer effectively block the elevated portion of the forklift to prevent it from falling?

The Division's evidence focused principally on establishing that a) Briggs passed, stood or worked beneath a portion of the forklift truck while removing a clamp that was used to attach the load to the right fork; and/or b) Briggs' location in relation to the load satisfied the first element (relating to employee exposure) of section 3650, subdivision (t)(6). The Division, however, offered no evidence or argument that the forks were not properly blocked to prevent them from falling, and nothing in the record suggests that the forks did fall. The Division bears

the burden of proving each element of a violation by a preponderance of the evidence. Here, the Division did not meet its burden, because it did not produce any evidence that Employer failed to block the forks to prevent them from falling.[2] The only testimony relevant to this element came during cross-examination, when Pipes testified she had no problem with the locking pins of the forklift. The Division offered no further evidence with regard to whether the forks were blocked.

For the foregoing reasons, the Division did not meet its burden of establishing that Employer violated section 3650, subdivision (t)(6). Citation 2 is dismissed, and its associated penalty is vacated.

6. Did Employer allow an employee to tilt an elevated load forward when the load was not being deposited onto a storage rack or equivalent?

Section 3650, subdivision (t)(28), provides:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

. . .

(28) Extreme care shall be taken when tilting loads. Tilting forward with the load engaging means elevated shall be prohibited except when picking up a load. Elevated loads shall not be tilted forward except when the load is being deposited onto a storage rack or equivalent. When stacking or tiering, backward tilt shall be limited to that necessary to stabilize the load.

Citation 3 alleges:

On March 19, 2016, employees of Hansford Industries, Inc. dba Viking Steel, loaded a steel staircase onto an industrial truck and moved it to a staging area within the materials yard at a worksite located at 8610 Elder Creek Road in Sacramento. The load was tilted to facilitate removal of clamps securing the load to the forks of the lift, resulting in the load shifting and falling as the clamps were removed, and an employee sustaining a fatal injury.

[2] The Division cited several Decisions After Reconsideration in its closing brief to advance its argument made during the hearing that the regulation "does not mean an employee must be directly under an elevated portion of the industrial truck for the regulation to apply," and that "the Division need not prove that an employee was directly underneath a load in order to sustain a violation of a regulation." (Division's Closing Brief, p. 9.) While the Division's argument is not without merit, even adopting the Division's position would not change the outcome in this particular case, because the Division did not establish the second element needed to prove a violation: that Employer failed to block the forks to prevent them from falling.

To prove a violation, the Division must show that Employer failed to take extreme care when tilting a load. Specifically, the Division may establish a violation by showing that Employer did any of the following: 1) allowed an industrial truck to be tilted forward with the load-engaging means elevated, except when the truck is picking up a load; 2) allowed an elevated load to be tilted forward, unless the load was being deposited onto a storage rack or equivalent; or, 3) allowed backward tilt while stacking or tiering, beyond that which was necessary to stabilize the load.

The parties do not dispute that, at the time of the accident, Employer had been using a powered industrial truck to transport a load at the worksite. Therefore, the safety order applies to the work that was being performed.

a. Did Employer allow an elevated load to be tilted forward?

The Division took the position at hearing and in its post-hearing brief, that Employer violated the safety order by permitting its employees to tilt an elevated load forward at a time when it was not being deposited onto a storage rack or equivalent. Pipes testified that she learned during her investigation that Porter, King and Briggs were in the process of removing four clamps attached to the load and forks when the accident occurred. King told Pipes during his interview, and testified during the hearing, that as he was removing the right front clamp, he noticed a gap forming between the load and the forks, indicating that the load was leaning. At the time, King said that the load was resting on the forks, which were raised above the dunnage. King admitted during the hearing that he went around to the side of the load and the forks, and signaled for Porter to tilt the forks forward. According to King, the stairs stopped leaning once Porter tilted the forks. According to King, the stairs stood back upright, and he continued to attempt to remove the right front clamp. Approximately four to five seconds later, King observed the load begin rocking back and forth, and it then fell. King's testimony is consistent with Pipes' notes from her interview with Porter. (Exhibit B.) Pipes wrote that Porter told her that he tilted the forks forward to assist King as he was trying to loosen the right front clamp, and shortly thereafter saw the load tilt forward and backward, and then saw it fall as the bottom of the load slid forward.

Although Employer had the opportunity to present evidence that the forks were not tilted forward while elevated and supporting a load, Employer did not present such evidence. Based on the above evidence, the Division met its burden of establishing by a preponderance of the evidence that Employer allowed an elevated load to be tilted forward.

b. Was the load being deposited onto a storage rack or equivalent while it was being tilted forward?

The safety order does not define "deposit", but it is generally understood to mean "to put, place, or set down, especially carefully or exactly."(https://www.dictionary.com/browse/deposit?s=t, retrieved on January 27, 2020.) King testified that the forks of the forklift were lowered "as close as possible" to the dunnage when the accident occurred. Various witness estimates placed the forks approximately four inches to 12 inches above the dunnage at the time of the accident. As discussed, it is undisputed that Employer's employees were in the process of removing clamps holding the load in place on the forks when the accident occurred. King testified he intended to remove the front clamps first, and that the first clamp he tried to remove was the right front clamp. King testified that he "got a couple of turns" and noticed a gap forming, which is why he walked around to the side and signaled for Porter to tilt the forks forward. At this point, the load was still attached to the forks by one or more clamps.

Pipes testified that during the investigation, Porter explained that he and his fellow employees customarily unclamp the clamps before setting down the load onto the dunnage. Porter's statements to Pipes are consistent with King's testimony at the hearing.

Based on the above-summarized evidence, it is found that the load was being prepared to be deposited, and was not actually being deposited, on the dunnage when the incident occurred.

c. Was removal of the clamps preparatory of, and integrally related to, the act of depositing the load on the dunnage?

Employer argues that no violation exists because removal of the clamps was an act preparatory of depositing the load, and therefore encompassed in the act of depositing the load. In its post-hearing brief, Employer cites to several Decisions After Reconsideration for the proposition that "measures preparatory to a regulated activity are deemed to be encompassed and included in the regulated activity." (Employer's Post-Hearing Brief, p. 17.) In *Caldwell-Roland Roofing, Inc.*, Cal/OSHA App. 03-2905, Decision After Reconsideration (June 9, 2010), the Appeals Board observed that acts that "are preparatory of *and integrally related to* a regulated activity…have been found to be covered as part of that activity under appropriate circumstances." (Emphasis added.) The word "integral," although undefined in the regulation, is commonly understood to mean "necessary to the completeness of the whole." (https://www.dictionary.com/browse/integral?s=t, retrieved on January 23, 2020.)

There is no dispute that Employer's employees were preparing to deposit the load at the time of the accident, as confirmed by Employer's witnesses who testified during hearing. However, removal of the clamps was not integral to depositing the load. In fact, King testified that, were the dunnage higher, it would have been possible to remove the clamps *after* the load

was deposited on the dunnage. Thus, removal of the clamps prior to depositing the load was not integral to the activity; rather, it was a result of Employer's own choices.

The Division established by a preponderance of the evidence that Employer allowed an elevated load to be tilted forward. Moreover, the Division established by a preponderance of the evidence that Employer was not depositing the load when the load was tilted, right before the accident. The act of removing the clamps that affixed the load to the forks of the forklift was preparatory of, but not integral to, depositing the load; therefore, it is a discrete act separate from the act of depositing. Because the Division established by a preponderance of the evidence that Employer tilted a load forward at a time when it was not being deposited, the Division established a violation of section 3650, subdivision (t)(28). Citation 3 is affirmed.

7. Did Employer fail to provide initial training to its powered industrial truck operators in all of the required topics?

Section 3668, subdivision (c), provides:

(c) Powered industrial truck operators shall receive initial training in the following topics, except in topics which the employer can demonstrate are not applicable to the safe operation of the truck in the employer's workplace.

(1) Truck-related topics:

(A) Operating instructions, warnings, and precautions for the types of truck the operator will be authorized to operate;
(B) Differences between the truck and the automobile;
(C) Truck controls and instrumentation: where they are located, what they do, and how they work;
(D) Engine or motor operation;
(E) Steering and maneuvering;
(F) Visibility (including restrictions due to loading);
(G) Fork and attachment adaptation, operation, and use limitations;
(H) Vehicle capacity;
(I) Vehicle stability;
(J) Any vehicle inspection and maintenance that the operator will be required to perform;
(K) Refueling and/or charging and recharging of batteries;
(L) Operating limitations;
(M) Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate.

(2) Workplace-related topics:

(A) Surface conditions where the vehicle will be operated;

(B) Composition of loads to be carried and load stability;

(C) Load manipulation, stacking, and unstacking;

(D) Pedestrian traffic in areas where the vehicle will be operated;

(E) Narrow aisles and other restricted places where the vehicle will be operated;

(F) Hazardous (classified) locations where the vehicle will be operated;

(G) Ramps and other sloped surfaces that could affect the vehicle's stability;

(H) Closed environments and other areas where insufficient ventilation or poor vehicle maintenance could cause a build-up of carbon monoxide or diesel exhaust;

(I) Other unique or potentially hazardous conditions in the workplace that could affect safe operation.

Citation 4 alleges:

> As a result of an accident investigation initiated March 19, 2016, at a worksite located at 8610 Elder Creek Road in Sacramento, CA, Hansford Industries, Inc. dba Viking Steel was found not to have provided specific training for powered industrial truck operators covering both truck-related and workplace-related topics required by the standard, including, but not limited to, composition of loads to be carried and load stability, load manipulation, including safe procedures for securing and depositing loads, and manufacturer operating instructions, warnings, and precautions for a Caterpillar Lift Truck, Model DP70.

In order to establish a violation, the Division has the burden of demonstrating that Employer failed to ensure that its employees tasked with operating powered industrial trucks received initial training in any of the enumerated topics, except for topics that Employer can show are not relevant to the worksite.

The Division focused at hearing on whether Employer ensured its employees received training with regard to composition of loads and load stability, and load manipulation, including the securing and depositing of loads. Pipes testified that she requested copies of "documentation of training on safe operating procedures relating to forklift operation, [and] loading and

offloading of materials using [a] forklift," pertaining to Porter, King and Briggs. (Exhibit 35.) Pipes testified that Employer's response to her request included the following statement:

> All new employees undergo an initial safety orientation training at the time of hire. Employees review the general safety policies of Viking Steel, the contents of the IIPP and Code of Safe Practices, as well as specific safety procedures relevant to their job. The signed Code of Safe Practices acknowledges their receipt of this training (see Attachment G). All Shop Employees (i.e. Jamin Porter, Joel King and Chris Briggs) must possess certification of completion of a forklift operator safety training program (see Attachment G). Viking Steel offers this training if the employee does not possess this certification at the time of hire. Additionally, the Shop Superintendent reviews and assesses the forklift operation and material handling skills of each shop employee at the time of hire and throughout their employment. Employees are only allowed to operate forklifts and move material after receipt of all qualifications and approval from the Shop Superintendent. Ongoing forklift, material movement and loading training is provided through pre-shift safety meetings and pre-task safety planning discussions. Safety Meeting sign-in sheets are included in Attachment G as examples. All three employees involved were qualified and had extensive training and experience in forklift operation and material handling.

(Exhibit 36.)

During the hearing, Employer introduced the training and certification-related documentation referenced in Exhibit 36. Exhibit G included "Certificate of Completion" cards for Employer's forklift operators which show that the employees completed a training program in the safe operation of warehouse forklifts in May 2014, with the exception of Porter, who completed training in January 2015. Employer also provided a "Training Checklist" completed for Briggs, King and Porter. Each checklist indicates that the employees were trained in the classroom on the following topics: formal training, including video, discussion, and tests; operating instructions, warnings, precautions; differences between forklift and automobile; forklift controls; engine operation; steering and maneuvering; visibility; fork operation and limitation; vehicle capacity; vehicle stability; inspection and maintenance; refueling and/or battery charging; and, operating limitations. It also indicates that the employees were trained on the forklift with regard to the following topics: pre-operation inspection; entering equipment using three-point method; fastening seatbelts; setting parking brakes, controls in neutral before starting; familiarizing with controls before moving; checking surroundings for hazards, obstacles, and personnel before moving; maneuvering the forklift around obstacles; correctly picking up a load using the boom, inserting forks all the way, and securing the load; depositing

loads smoothly, backing out the forklift; proper shut down method, including lowering forks, setting the parking brake and shutting off the engine; and, exiting the lift with the three-point method.

Pipes testified that the Division issued Citation 4 to Employer because Employer did not provide documentation that employees were assessed regarding the operation of forklifts. She also testified that Employer did not give workplace-specific training regarding its conditions, traffic flow, configuration of specific loads such as the staircase involved in the accident, and how to load, transport, and unload such loads. Pipes testified that she requested documentation from Employer showing that it provided the training but received none. She also testified that she requested safe operating procedures from Employer for loading, securing, transporting and offloading the fabricated metal components that Employer manufactures and similarly received none.

Pipes testified that she asked King whether there was any "sequence" for installation and removal of clamps, as well as where to place the clamps vis-à-vis a load on the forks of a forklift. Pipes further testified that King told her that it could be done "any way" and stated that he was not aware of any procedures for that. Pipes also testified that Porter told her "it doesn't really matter," and that he was not aware of any procedures for how to place clamps on a load that is being affixed to the forks of a forklift. Pipes testified that Hieber also told her that clamps could be used in any configuration, that there was no set procedure for the sequence of putting them on or taking them off, and that the procedure was left up to the crew doing the work because they were experienced, so they would "make the call." Pipes' notes from her interviews of King, Porter and Hieber are consistent with her testimony.

Hieber testified that he does not allow employees to operate a forklift until he has evaluated them, regardless of whether they are already certified. Hieber testified that he evaluates "how they work in general," and next evaluates them on the forklift doing "minor stuff," although he did not elaborate on what that "minor stuff" is. Hieber also testified that forklift operating rules are posted in the shop (Exhibit J). A review of Exhibit J shows that it is a copy of the Division's "Operating Rules for Industrial Trucks" pamphlet. Exhibit J does not contain rules specific to Employer's worksite or its operations.

Hieber further testified that there is not just one way to apply clamps to a load on a forklift. According to Hieber, "everything's different. I can't have one way of clamping something down." Hieber also testified that the sequence of installing clamps is decided by the crew members when planning to move a component such as the staircase involved in the accident. Moreover, although Hieber testified that employees are trained to operate the forklift with an elevated load so that the forks are as low as safely possible and to be aware of their

surroundings, Hieber pointed to no specific guidance or rules from Employer on how employees are to determine how low is appropriate, and merely stated "it will depend on the situation around you." Although Hieber stated that employees are trained to look around to ensure the zone of danger is clear before unloading a load, Hieber also acknowledged that he does not give specific instructions to employees for loading, moving and unloading Employer's fabricated components. Instead, he testified that "it is a team effort" and that the employees are supposed to form a "verbal plan" amongst themselves. Hieber justified Employer's procedures and lack of specific training by stating "these are all grown men."

Finally, Patterson, Employer's co-owner, testified that he has overall administrative responsibility for Employer's operations and that he oversees Employer's safety program. Patterson testified that he and Hieber provide initial safety training to new employees, but did not elaborate on any workplace specific training provided to new employees. Patterson testified that most JHAs conducted by employer are conducted verbally via a "huddle" amongst the involved employees, because most of the work Employer does is "routine." However, Patterson acknowledged that Hieber assigned "different things on a weekend" than what would be done on a typical work day.

A review of Employer's Code of Safe Practices (Exhibit I), which Patterson testified is provided to each new employee, shows that it does not discuss composition of loads and load stability, or load manipulation, stacking and unstacking.

It is found, based on the above-summarized evidence, that Employer did not provide initial training to its employee forklift operators with respect to all of the relevant items enumerated in the safety order. Specifically, it is found that Employer did not provide workplace-specific training regarding composition of loads to be carried and load stability; and, load manipulation, stacking, and unstacking. This finding is based on the testimony of Hieber, who testified that because "everything's different," employees are not provided training on how to install or remove clamps regarding to sequencing or position. It is further based on the testimony of Patterson, who testified that employees do different work on weekends compared to the "routine" work that is done on weekdays, and who had the opportunity to elaborate on what new employee training is provided with regard to performing non-routine work, but did not. Finally, it is based on Pipes' testimony that Employer's employees informed her that it is up to the employees involved in the work to determine the best way to secure loads to the forks to ensure their stability. Pipes' testimony is consistent with the testimony of Hieber, Employer's superintendent, and Patterson, Employer's co-owner.

Based on the above findings, it is determined that the Division established a violation of section 3668, subdivision (c), by a preponderance of the evidence. Employer did not provide

initial training to its forklift employees in all of the relevant topics enumerated by the safety order. Citation 4 is affirmed.

8. Did Employer fail to ensure that loads were balanced, braced or secured to prevent tipping or falling?

Section 3650, subdivision (l), provides:

> Loads shall be so balanced, braced, or secured as to prevent tipping and falling. Only stable or safely arranged loads shall be handled.

Citation 5 alleges:

> On March 19, 2016, employees of Hansford Industries, Inc. dba Viking Steel, loaded a steel staircase onto an industrial truck and moved it to a staging area within the materials yard at a worksite located at 8610 Elder Creek Road in Sacramento. The load was not balanced, braced, or secured to prevent tipping and falling, resulting in an employee sustaining a fatal accident-related injury when the load tipped and fell onto the employee during offloading of the staircase.

Pipes testified that Employer did not use a sling or other device to secure the top portion of the staircase to the forklift, and that, by tipping the forks while Briggs and King were attempting to remove the four clamps that were securing the bottom of the staircase to the forks, the staircase became unstable. She further testified that in tilting the forks while simultaneously removing the clamps, Employer changed the center of gravity and weight distribution of the load, resulting in the weight distribution tilting outward. Pipes based this opinion on her interviews of employees Porter and King as well as her observations at the scene, and her training and experience as an Associate Safety Engineer with the Division. Pipes testified that the center of gravity of a load with a non-linear configuration, such as the staircase involved here, could be different from the geometric center of the load, as described in the operator's manual for the forklift. (Exhibit 43.) Pipes' testimony, which is based on her observations and supported by what she learned during her interviews of Porter and King (see Exhibit B), is afforded great weight and supports a finding that Employer allowed the load to become unstable.

Employer focused at hearing and in its post-hearing brief on whether the staircase was balanced, braced, or secured so as to prevent tipping or falling during the process of loading and transporting the staircase from the painting area to the staging area at the worksite. King testified that he and Porter made an "eyeball estimation" of where the center of gravity of the staircase would be when loaded on the forks. He stated that such a determination was made based on

experience where, as here, the staircase was configured in such a way that one end would be heavier than the other. He also testified that Porter brought over the forklift while the staircase was still clamped to sawhorses in the painting area, and conducted several test lifts (picks). King then testified that he installed the four clamps to the staircase and the forks. Evidence produced at hearing showed that the clamps were designed to be capable of supporting a load the weight of the staircase at issue here. (See, e.g., Exhibit F.)

Regardless of whether the staircase was stable before the accident, the evidence shows that the staircase became unstable while Employer was preparing to deposit it onto the dunnage at the staging area. As discussed previously, the accident occurred while Employer's employees were removing clamps securing the staircase to the forks of the forklift. King testified that he signaled Porter to tilt the forks of the forklift forward while King was in the process of removing the clamps, because as he was removing the right front clamp, he noticed a gap forming between the load and the forks, indicating that the load was leaning. At the time, King said that the staircase was resting on the forks, which were raised above the dunnage. King admitted during the hearing that he then went around to the side of the staircase and the forks, and signaled for Porter to tilt the forks forward. According to King, the staircase stopped leaning once Porter tilted the forks. According to King, the staircase stood back upright, and he continued to attempt to remove the right front clamp. Approximately four to five seconds later, King observed the staircase begin rocking back and forth, and it then fell.

The evidence supports a finding that the staircase became unstable during handling. This finding is based on the testimony of King that the staircase began tilting as he was attempting to remove the clamps. While Employer may be correct that, prior to King beginning to remove the clamps, the staircase was stable, nonetheless the evidence shows that the staircase became unstable during handling while King was attempting to remove the four clamps securing the load to the forks. The staircase continued to demonstrate instability while Porter tilted the forks, as the staircase tilted back in the other direction. The staircase ultimately rocked backward, hitting the mast of the forklift, became unbalanced, and fell, striking and killing Briggs.

It is further found that Employer did not balance, brace or secure the staircase to prevent it from tipping and falling while the clamps were being removed. The witnesses testified that Employer did not utilize a sling to secure the top portion of the load, and no further actions were taken or equipment used to balance, brace or secure the load while the clamps were being removed. As a result, the load fell.

Based on these findings, it is determined that the Division met its burden of establishing a violation of section 3650, subdivision (l), by a preponderance of the evidence. Employer allowed its employees to handle an unstable load, and Employer did not take measures to balance, brace

or secure the load to prevent it from tipping and falling while the clamps were being removed. Therefore, Citation 5 is affirmed.

9. Did Employer secure the staircase against dangerous displacement?

Section 3704 states that “All loads shall be secured against dangerous displacement either by proper piling or other securing means.”

Citation 6 alleges:

> On March 19, 2016, employees of Hansford Industries, Inc. dba Viking Steel, loaded a steel staircase onto an industrial truck and moved it to a staging area within the materials yard at a worksite located at 8610 Elder Creek Road in Sacramento. The load was not secured against dangerous displacement, resulting in an employee sustaining a fatal accident-related injury when the load tipped and fell onto the employee during offloading of the staircase.

As noted, evidence produced at hearing by the Division supports a finding that the staircase was not secured against tipping and falling while the clamps were being removed.

The words "secured against displacement" require that "the load be safe from the type of movement that may have occurred..." at any time. (*Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001), construing § 1593, subd. (f) ["Unstable Loads"].) The load was not secured against displacement because King removed one of the four clamps that had secured the staircase in its vertical position on the forks, and then walked away and signaled Porter to tilt the forks, when the load fell. Neither Porter nor King took any action to secure the staircase against displacement between the time that King began removing the clamps and when the staircase fell. As a result of the failure to secure the staircase, it became unstable and fell on Briggs.

Employer had the opportunity to provide evidence that it took any means to secure the load against dangerous displacement while it was being unclamped from the forklift, but Employer offered no such evidence at hearing.

The above-summarized evidence is sufficient to support a determination that Employer violated section 3704 by not securing the staircase against dangerous displacement while it was loaded on the forks of the forklift. Thus, Citation 6 is affirmed.

10. Did the Division establish a rebuttable presumption that the violations identified in Citations 3, 4, 5 and 6 were Serious?

Labor Code section 6432, subdivision (a) and subdivision (e), state:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:

[...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

[...]

(d) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body.
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Shimmick Construction Co.*, Cal/OSHA App. 1059365, Decision After Reconsideration (July 5, 2019), citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Pipes testified she had been an Associate Safety Engineer with the Division for six years at the time of the hearing. She further testified that she holds certifications in risk management and health and safety, and has received training in a variety of safety topics including basic safety training, general industry training, accident investigation training, and construction safety training. She testified that she was current in her mandated Division training at the time of the inspection. Pipes was qualified, therefore, to testify as to the Serious classifications of Citations 2 through 6. (See Lab. Code section 6432, subd. (g).)

In this case, Briggs suffered a fatal injury and died at the accident scene. As such, hospitalization did not apply. Briggs' head was crushed, constituting a loss of a member of his body and permanent disfigurement. Further, Briggs suffered destruction of his brain and body sufficient to end his life. It is undeniable that Chris Briggs suffered serious physical harm as a result of this accident.

Citation 3

Citation 3 alleges that Employer failed to take extreme care while tilting a load. Pipes testified that tilting the staircase changed its center of gravity and weight distribution. She further testified that tilting the staircase created a realistic possibility that the 37-foot long staircase, which weighed in excess of 2,000 pounds, could fall and crush an employee, causing serious physical harm or death. Pipes testified that, as a result of the staircase falling, an employee suffered fatal injuries. Briggs' fatal injuries demonstrate that not only was there a realistic possibility of serious physical harm, but the violation resulted in actual physical harm that caused an employee's death.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 3 was properly classified as Serious.

Citation 4

Citation 4 alleges that Employer failed to ensure that its employees tasked with operating powered industrial trucks received initial training in any of the enumerated topics, except for topics that Employer can show are not relevant to the worksite. Pipes testified that by not ensuring that operators received the required initial training, it created a realistic possibility that employees who were not properly trained in the operation of the forklift would operate the forklift, load, move and offload large steel components unsafely in a manner that could result in serious physical harm or death. For instance, she testified that employees not being trained in how to properly load and secure loads such as the staircase could result in dangerous displacement of the load, leading to the load tipping and falling and striking employees, causing serious physical harm or death. She also testified that, in addition to risk to nearby employees, the operator could be injured if the displacement of the load results in the forklift tipping. Here, the evidence of Briggs' fatal injury resulting from the violation demonstrates that not only was there a realistic possibility of serious physical harm, but the violation resulted in actual physical harm that caused an employee's death.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 4 was properly classified as Serious.[3]

Citation 5

Citation 5 alleges that Employer failed to ensure that the staircase was balanced, braced, or secured as to prevent tipping and falling, such that it was not stable while being handled by Employer's employees. Pipes testified that by tilting the forks of the forklift while removing the clamps securing the staircase to the forks, Employer changed the center of gravity and weight distribution of the staircase, making it unstable. Pipes testified that the violation created the realistic possibility that the staircase, once it became unstable, could strike an employee, causing serious physical harm or death. Here, the evidence of Briggs' fatal injury resulting from the violation demonstrates that not only was there a realistic possibility of serious physical harm, but the violation resulted in actual physical harm that caused an employee's death.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 5 was properly classified as Serious.

Citation 6

Citation 6 alleges that Employer did not secure the staircase against dangerous displacement either by proper piling or other securing means. Pipes testified that the staircase became displaced as King and Briggs were removing the securing clamps, and noted that nothing was used to secure the top of the staircase to the forklift. Pipes testified that she learned from Hieber that Employer's practice was to use a sling to secure the top of a load like the staircase, while moving it from a vertical to a horizontal position in the staging area. Pipes testified that by not securing the staircase against dangerous displacement, the violation created a realistic possibility that employees could be struck by a displaced load, resulting in serious physical injury or death.

[3] Division's closing brief refers to Citation 4 as being classified Serious-Accident Related. (Division's brief, page 4, line 14-15). However, Citation 4 states its classification as "Serious" at the header but nowhere in the rest of the text of Citation 4 does it allege that the alleged violation is "Accident Related." Whereas, in Citation 5 and Citation 6, the body of each citation alleges that the Accident Related characterization applies. Further, the topic was not the subject of witness examination or argued in the hearing. Moreover, Division's brief at page 17, line 16, states that Citation 4 is classified as Serious – not Serious-Accident Related. It is established that the classification of Citation 4 is Serious, not Serious-Accident Related.

Here, the evidence of Briggs' fatal injury resulting from the violation demonstrates that not only was there a realistic possibility of serious physical harm, but the violation resulted in actual physical harm that caused an employee's death.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 6 was properly classified as Serious.

11. Did Employer rebut the presumption that the violations cited in Citations 3, 4, 5 and 6 were Serious by demonstrating that it did not, and could not with the exercise of reasonable diligence, know of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

A supervisor's knowledge of a hazard is imputed to the employer. (*Levy Premium Foodservice Limited Partnership dba Levy Restaurants*, Cal/OSHA App. 12-2714, Denial of Petition for Reconsideration (Aug. 25, 2014).) Whether foremen/supervisors know the condition is unlawful is immaterial, since ignorance of the specific safety order's mandates is no defense. (*McKee Electric Company*, Cal/OSHA App. 81-0001, Decision After Reconsideration (May 29,

1981); and *Southwest Metals Company*, Cal/OSHA App. 80-068, Decision After Reconsideration (May 22, 1985).)

"[T]he Appeals Board has long held that hazardous conditions in plain view constitute serious violations since the employer could detect them by exercising reasonable diligence. (*Shimmick Construction Company Inc., supra*, Cal/OSHA App. 1059365; also *Home Depot USA, Inc*., Cal/OSHA App. 15-2298, Decision After Reconsideration (May 16, 2017) citing *Fibreboard Box & Millwork Corp*., Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).)

Failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (*Gateway Pacific Contractors, Inc*., Cal/OSHA App. 10-1502, Decision After Reconsideration (Oct. 4, 2016).)

a. Was Porter a supervisor?

The Division argues that Porter, who was operating the forklift at the time of the accident, was a supervisor. Although Patterson testified that Porter was a "lead guy" and denied that Porter had authority over hiring or firing or discipline of employees, his testimony is at odds with that of King, who testified he received his assignment to assist with the loading, movement and depositing of the staircase directly from Porter. Giving an employee an assignment is consistent with being a supervisor. In addition, King testified that Porter was a foreman, and Porter told Pipes when she interviewed him that he is a foreman. (See Exhibit B.) Weighing Porter's statement to Pipes and King's testimony against Patterson's testimony, it is found that the evidence weighs heavily toward a finding that Porter was a foreman and a supervisor at the time of the accident. Thus, Porter's knowledge of his involvement in activities that violated various safety orders found in title 8, is imputed on Employer. Accordingly, Employer cannot rebut the presumption that the citations were properly classified as Serious based on a claim that it lacked knowledge of the violations.

b. Even if Porter was not a supervisor, Employer's failure to properly supervise the activities of its employees at the time the accident shows that Employer did not exercise reasonable diligence.

Hieber was not at the worksite when the accident occurred, and testified that he only showed up after he received a phone call about the accident. Patterson testified that he and co-owner Scott Duncan manage the day-to-day operations at the worksite, but neither he nor Duncan was present when the accident occurred. Pipes testified that Hieber was the highest-

ranking supervisor she encountered when she arrived at the worksite. Thus, assuming for the sake of argument that Porter was not a supervisor, the testimony of Pipes, Hieber and Patterson would support a finding that no supervisor was present and overseeing the operations at the worksite at the time of the accident. The violations that occurred in the outdoors yard of the worksite would have been in plain view of a supervisor had one been present at the worksite. A supervisor exercising reasonable diligence, therefore, would have had the opportunity to detect the hazards identified by the Division in Citations 2 through 6 and take corrective action prior to Briggs being killed.

For all of the foregoing reasons, Employer cannot rebut the presumption that Citations 3 through 6 were properly classified as Serious based on a claim that it lacked knowledge of the violations.

12. Did the Division establish that Citations 5 and 6 were properly characterized as accident-related?

In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id*., citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer. (*Paramount Scaffold, Inc*., Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).) Pipes testified that violations identified in Citations 5 and 6 were the cause of Briggs' fatal injuries. Employer had the opportunity to, but did not present any evidence which would refute Pipes' testimony.

Accordingly, the Division established by a preponderance of the evidence that Citations 5 and 6 were properly characterized as accident-related.

13. Did Employer establish that any of the serious violations identified in Citations 3 through 6 were the result of independent employee action[4]?

[4] Although Employer pleaded numerous affirmative defenses, Employer did not specifically litigate or discuss any of them in its post hearing brief. To the extent that the evidence presented at hearing goes to any of Employer's pleaded defenses, the applicable defense(s) has been discussed herein. All other defenses raised are deemed waived. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

The "Independent Employee Action Defense" (IEAD) is an affirmative defense established by the Appeals Board and consists of five elements. If an employer proves all five elements of the IEAD, the violation is excused and the appeal is granted. Employer must demonstrate: (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 (October 16, 1980).)

The five elements of the defense are designed to assure the employer has taken all reasonable steps to avoid employee exposure to the hazard, but the employee's own action have circumvented or frustrated that effort. (*Marine Terminals Corporation*, Cal/OSHA App. 95-896, Decision After Reconsideration (Sep. 28, 1999).) An employer bears the burden of proof for affirmative defenses. (*Gal Concrete,* Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990).)

a. Were the employees experienced in the job being performed?

This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 11-2801, Decision After Reconsideration (February 4, 2011).) This requires proof that the worker had done the specific task "enough times in the past to become reasonably proficient." (*Solar Turbines, Inc*. Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).) The amount of experience that an employer must demonstrate is relative to the complexity of the task performed. (*Land O' Lakes Purina Feed, LLC*, Cal/OSHA App. 08-1843, Decision After Reconsideration (Jan. 31, 2014).)

Employer did not provide sufficient evidence regarding King's, Porter's, and Briggs' experience transporting and depositing loads with non-linear configurations to satisfy the first element of the defense. As noted, Hieber testified that because "everything's different," employees are not provided training on how to install or remove clamps with regarding to sequencing or positioning on the load. Hieber further testified that although he instructed Porter to move the load, he did not give specific instructions for how to move it, and that it was a "team effort" for those employees involved to come up with a "verbal plan" for how to move the load. Hieber justified this by stating that "these are all grown men." In addition, as noted, Patterson testified that most of the work Employer does is "routine." However, Patterson acknowledged that Hieber would assign "different things on a weekend" than what would be done on a typical

work day. The accident occurred on a Saturday. It is found, based on Patterson's and Hieber's testimony, that the work that was being performed when the accident occurred was not the "routine" work that Employer's employees were accustomed to performing. Because the work was not routine, and because Employer did not provide more specific evidence with regard to how many times the three involved Employees had moved and deposited non-linear, over 2,000 pound loads such as the staircase involved in the accident, Employer did not meet its burden of establishing the first element of the IEAD by a preponderance of the evidence.

b. Did Employer have a well-devised safety program that includes training in matters of safety respective to the employees' particular job assignments?

The second requirement for the IEAD is that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments. (*Mercury Service, Inc*., *supra*, Cal/OSHA App. 77-1133) The well devised safety program must contain specific procedures. (*Blue Diamond Growers*, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012).) As discussed previously, the evidence at hearing established that Employer did not give workplace-specific training to its employees as required by section 3668, subdivision (c). Hieber specifically acknowledged that he did not train employees in how to install or remove clamps, and did not give specific instructions to employees involved in moving non-linear loads such as the staircase involved in the accident. Based on the evidence, it is determined that Employer did not meet its burden of establishing the second element of the IEAD.

c. Does Employer effectively enforce its safety program?

The third element of the IEAD requires proof that Employer effectively enforces its safety program. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement. The Appeals Board has previously stated that where there is lax enforcement of safety polices an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010).) Employer has the burden to show that it enforces the safety policies and procedures promulgated in its IIPP and training programs, and promotes a safe working environment. "Enforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Synergy Tree Trimming*, Inc., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), quoting *Martinez Steel Corp*., Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).)

Patterson and Hieber testified that employees receive regular safety trainings when they start employment, as well as on a weekly and monthly basis, and ad-hoc as issues are identified. However, as discussed, Employer's IIPP calls for Employer to conduct and document weekly

inspections of the worksite. Employer offered no written documentation that it conducted inspections required by Employer's IIPP. Moreover, as discussed, Employer violated several safety orders on the date of the accident. Permitting these violations to occur demonstrates that Employer did not effectively enforce its safety program, because it did not identify, evaluate and correct the hazards identified in the citations.

Therefore, Employer did not meet its burden of establishing the third element of the IEAD.

d. Does Employer have a policy of sanctions that it enforces against employees who commit safety infractions?

The fourth element of the IEAD requires a demonstration that the employer has a policy of sanctions that it enforces against employees who violate the safety program. An employer may be able to provide other information that demonstrates the use of verbal coaching, retraining efforts, or positive recognition of employees who follow safe and healthful work practices to ensure compliance, rather than simple written discipline or other punitive measures. (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953) The Appeals Board found that the employer in *Synergy Tree Trimming, Inc*. did not satisfy the fourth element of the IEAD because there was no evidence regarding "sanctions, the progressive disciplinary policy itself, or any other [safety] program features."

Employer's IIPP (Exhibit 44) states under the section entitled "Employee Compliance:"

> Employees are required to comply with safe work practices. If non-compliance is observed, the following disciplinary measures will be used as appropriate to assure future compliance. The method should be selected based on the gravity of the violation and the frequency of such violation and be administered according to progressive discipline employee relations policies:
>
> - Provide counseling by Senior Corporate Officers or the employee's supervisor;
> - Loss of incentives, negative effect on performance evaluation and similar personnel actions;
> - A written warning or warnings; and
> - Suspension or termination.
> - Note that if the violation committed by the employee is done with his/her knowledge and has the potential to be life threatening or create a serious disabling effect, the employee shall be terminated from their position immediately. Examples of such offenses are but not limited to:

(a) Defeating a safety device for other than repair purposes and only after stored energy is locked out;
(b) Fighting or other acts of violence;
(c) Asking another employee to work in a manner that is unsafe;
(d) Insubordination;
(e) Being under the influence of alcohol, illegal substances or misuse of prescribed medication.

In addition, under the section entitled "Documentation of Safety Communications and Enforcement," Employer's IIPP states:

> Each instance of employee communication is documented. Documentation shall include the following:
>
> - Safety tailgate meetings are documented through a sign-in sheet.
> - Written employee safety suggestions or questions are maintained on file along with the response, including information on how the response was provided to employees.
> - Actions taken to enforce compliance with safe work practices in cases that exceeds verbal counseling will be documented in the employee's personnel record by Senior Corporate Officers or an appointed person.

In addition, Hieber testified that he conducted regular safety meetings with the employees, and Employer provided evidence of employee safety meetings held at the worksite, which were attended by the employees involved in the accident. (See Exhibit G.) The Division offered no evidence to refute that the meetings took place. The evidence, when weighed against the lack of evidence from the Division, supports a finding that Employer has a policy of sanctions in its IIPP, which it enforces through delivery of safety training meetings.

Based on the evidence of the quoted sections of Employer's IIPP and Hieber's testimony, Employer met its burden of establishing the fourth element of the IEAD by a preponderance of the evidence.

e. Did the employees who caused the safety infractions know their actions were contra to Employer's safety requirements?

The fifth element of the IEAD requires the employer to demonstrate that the employee causing the infraction knew it was acting contra to the employer's safety requirements. (*Mercury Service, Inc., supra,* Cal/OSHA App. 77-1133)

In *Synergy Tree Trimming, Inc*., the Appeals Board found that the employer had not satisfied the fifth element of the IEAD because the employer was "unable to demonstrate that [the employee's] actions were anything less than an unfortunate one-time error. Put another way, the employer has not shown that [the employee's] actions were intentional and knowing, as opposed to inadvertent, or that [the employee] was conscious of the fact that his actions constituted a violation of a safety regulation or rule at the time of the accident." (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.)

Here, as already discussed, Employer did not have specific procedures for the work that was being performed at the time of the accident, and left it up to the involved employees to figure out how to safely a forklift to move and deposit a non-linear steel staircase weighing more than 2,000 pounds. Because Employer had adopted no rules prohibiting its employees from engaging in the violative conduct discussed in this Decision, it follows that none of Employer's employees could have known that their actions were contra to Employer's safety requirements, because no requirements for safely performing this task existed. Therefore, Employer did not meet its burden of establishing the fifth element of the IEAD.

Employer must meet its burden with respect to all five elements of the IEAD in order to prevail under the defense. Here, Employer only met its burden with respect to the fourth element. Because Employer did not establish the first, second, third, and fifth elements, Employer may not prevail under the IEAD.

14. Did the Division propose reasonable penalties for Employer's Citations 3, 4, 5 and 6?

Penalties calculated in accordance with the penalty-setting regulations are presumptively reasonable will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Pipes credibly testified that she considered and applied the penalty setting regulations (sections 333 through 336) in proposing the penalties for Employer's alleged violations.

The Appeals Board has held that if the Division fails to establish all of the facts supporting the implementation of the penalty calculation, the employer is to be given maximum credit. (*C.A. Rasmussen, Inc*., Cal/OSHA App. 08-0219, Decision After Reconsideration (July 19, 2012).)

Exhibit 2 is the Division's "Proposed Penalty Worksheet (C-10)." Pipes provided testimony explaining how she calculated the penalties from this C-10 worksheet.

a. Citation 3:

i. Severity

Section 335, subdivision (a)(1)(A)(ii), provides that:

> When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:
>
> LOW-- Requiring first-aid only.
> MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.
> HIGH-- Requiring more than 24-hour hospitalization.

Section 335, subdivision (a)(1)(B), states that "The Severity of a Serious violation is considered to be HIGH." (Emphasis in the original.) At the time of the accident, section 336, subdivision (c)(1) stated:

> (1) In General--Any employer who violates any occupational safety and health standard, order, or special order, and such violation is determined to be a Serious violation (as provided in section 334(c)(1) of this article) shall be assessed a civil penalty of up to $ 25,000 for each such violation. Because of the extreme gravity of a Serious violation an initial base penalty of $18,000 shall be assessed.

Although Pipes testified that she did not know why the base amount for a serious citation was $18,000, the Division nonetheless correctly applied the penalty-setting regulations in rating Severity as High, because the Division correctly classified the violation as Serious.

ii. Extent

Section 335, subdivision (a)(2)(ii), in relevant part, provides:

ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or worksite. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as follows:

LOW --When an isolated violation of the standard occurs, or less than 15% of the units are in violation.
MEDIUM --When occasional violation of the standard occurs or 15-50% of the units are in violation.
HIGH--When numerous violations of the standard occur, or more than 50% of the units are in violation.

Section 336, subdivision (b), provides that for a rating of Low, 25 percent of the Base Penalty shall be subtracted; for a rating of Medium, no adjustment to the Base Penalty shall be made; and for a rating of High, 25 percent of the Base Penalty shall be added.

Citation 3 rated Extent as Medium. The Division did not offer any evidence of other times when Employer had tilted a load forward when it was not being deposited, and nothing in the record suggests that Employer had violated section 3650, subdivision (t)(28), on other occasions. Thus, the Division did not establish how widespread this violation was, and Employer is entitled to the maximum adjustment for Extent.

Accordingly, the Extent rating is modified to Low, and Employer is entitled to a 25 percent reduction to the Base Penalty.

iii. Likelihood

Section 335, subdivision (a) (3), provides as follows:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH.

Section 336, subdivision (b), provides that for a rating of Low, 25 percent of the base penalty shall be subtracted; for a rating of Medium, no adjustment to the base penalty shall be made; and for a rating of High, 25 percent of the base penalty shall be added.

Citation 3, rated Likelihood as Medium. Three employees (Porter, King and Briggs) were exposed to the hazard created by the violation. Briggs was struck and killed by the staircase when it destabilized and fell as a result of being tipped forward while clamps were being removed. King testified he had to jump out of the way to avoid being hit by the falling staircase. Porter was in the forklift operator's cab when the accident occurred, and Pipes testified that the violation could have resulted in injury to the forklift operator as well. Pipes also credibly testified that this type of violation could realistically result in serious physical injury or death, as occurred here. Thus, the Division established that it correctly applied the penalty-setting regulations in rating Likelihood as Moderate.

The Base Penalty for a Serious violation at the time of the accident was $18,000. With the reduction of 25 percent for Extent and no adjustment for Likelihood, Employer is entitled to a 25 percent reduction to the Base Penalty. The adjusted Gravity-Based Penalty is $13,500.

iv. Good Faith

Section 335, subdivision (c), provides:

> Good Faith of the Employer is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD--Effective safety program; FAIR--Average safety program; POOR—No effective safety program.

Section 336, subdivision (d)(2), provides that the Gravity-Based Penalty shall be reduced by 30 percent for a rating of Good, 15 percent for a rating of Fair, and zero percent for a rating of Poor.

In determining the rating for Good Faith, the Appeals Board considers the employer's attitude toward safety of its employees, as well as peculiar circumstances affecting the application of safety orders, and the employer's experience. A determination that the employer did not intend to disregard its employees' safety may be taken into consideration for potential reduction of penalties. (*Watkins Contracting, Inc.*, Cal/OSHA App. 93-1021, Decision After

Reconsideration (Sep. 24, 1997), citing *Wunschel and Small, Inc.*, Cal/OSHA App. 78-1203, Decision After Reconsideration (Feb. 29, 1984).)

The Division rated Employer's Good Faith as Fair on the Proposed Penalty Worksheet. As discussed above, Employer was determined to have not implemented its IIPP with respect to the identification and evaluation of workplace hazards. Employer acknowledged that it left it up to employees to determine how to move and deposit loads, thereby abandoning its role in identifying and evaluating workplace hazards attendant to such work. Because identification and evaluation of hazards is a central component of any employer's safety program, the Division was correct to not rate Employer's Good Faith as Good. Therefore, the Division correctly rated Employer's Good Faith as Fair, and Employer is entitled to a 15 percent downward adjustment of the Gravity-Based Penalty.

v. Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that adjustment may be made for Size when an employer has 100 employees or less. Although the record is silent as to the number of employees working for Employer at the time of the accident, the Division indicated on the Proposed Penalty Worksheet that it gave a 10 percent adjustment for Size, which Employer did not controvert with its own evidence, despite having the opportunity to do so. It is therefore determined that Employer is entitled to a 10 percent adjustment for Size.

vi. History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a history of violations in the past three years, the employer is entitled to a 10 percent History credit.

The Division provided a 10 percent History credit, and there is no evidence Employer has committed a violation in the past. Accordingly, Employer is entitled to the maximum History credit of 10 percent.

In sum, Employer is entitled to a 15 percent Good Faith credit, 10 percent Size credit, and 10 percent History credit. Application of these adjustment factors results in a reduction of the Gravity-Based penalty by 35 percent, or $4,725. Accordingly, the adjusted penalty is $8,775.

vii. Abatement Credit

Section 336, subdivision (e), provides that the penalty for Serious violations shall be reduced by 50 percent where the violation is abated prior to when the citation issues, subject to

exceptions not relevant here. Application of the 50 percent abatement credit is not discretionary. It must be applied wherever it is not prohibited. (*Luis E. Avila dba E & L Avila Labor Contractors*, Cal/OSHA App. 00-4067, Decision After Reconsideration (Aug. 26, 2003).) Citation 3, indicates the violation was abated. There was no evidence at hearing to the contrary. Thus, Employer is entitled to a 50 percent abatement credit.

Accordingly, the assessed penalty is $4,385 after rounding down pursuant to section 336, subdivision (j).

b. Citation 4

i. Severity

Citation 4 was classified as Serious by the Division. As discussed above, Severity is rated as High for all Serious citations. Thus, the Division correctly calculated the base penalty as $18,000.

ii. Extent

Citation 4 rated Extent as Medium. Pipes did not testify as to why she rated Extent as Medium, but the record shows that Employer did not provide the required initial training to any of the three employees doing the work that resulted in the accident, and the testimony of Hieber and Patterson supports a finding that none of Employer's employees who are tasked with operating powered industrial trucks, in particular forklifts such as the one being operated during the accident, received all of the initial training required by the regulation. Based on the record developed at hearing, then, the Division correctly rated Extent as Medium, and Employer is accordingly entitled to no adjustment.

iii. Likelihood

Citation 4 rated Likelihood as Medium. Pipes did not testify as to why she rated Extent as Medium, but the record supports a finding that none of Employer's powered industrial truck operators received the initial workplace-specific training required by the safety order. By not ensuring that its operators received the required training, Employer placed all of its operator employees, and the employees who work alongside them, at risk of serious physical harm or death. Pipes testified that the violation could result in serious physical harm or death. For instance, she testified that employees not being trained in how to properly load and secure loads such as the staircase could result in dangerous displacement of the load, leading to the load tipping and falling and striking employees, causing serious physical harm or death. She also testified that the operator could be injured if the displacement of the load results in the forklift

tipping. Pipes based her testimony on her training and experience, as well as her investigation of the accident that resulted in one employee jumping out of the way to avoid being struck, and another being struck and killed by a falling staircase weighing more than 2,000 pounds. Employer offered no evidence that contradicts Pipes' testimony. Based on the record developed at hearing, the Division correctly rated Likelihood as Medium, and Employer is accordingly entitled to no adjustment.

As discussed, the Base Penalty for a Serious violation at the time of the accident was $18,000. With no allowable reduction for Extent and no adjustment for Likelihood, Employer is entitled to no reduction to the Base Penalty. The adjusted Gravity-Based Penalty is $18,000.

iv. Good Faith, Size and History

Nothing in the record suggests that the adjustments made by the Division for Employer's Good Faith, Size and History should not be made to Citation 4. Accordingly, Employer is entitled to a 15 percent adjustment for Good Faith, a 10 percent adjustment for Size, and a 10 percent adjustment for History. Application of these adjustment factors results in a reduction of the Gravity-Based penalty by 35 percent or $6,300. Accordingly, the adjusted penalty is $11,700.

v. Abatement Credit

Citation 4 indicates that the violation was not abated at the time the citation was issued. Accordingly, Pipes testified that Employer was not eligible to receive an abatement credit. Nothing in the record suggests that Employer submitted abatement to the Division, or a signed statement of abatement, at any time prior to when the deadline for abatement identified in the citation expired. Accordingly, Employer is not entitled to an abatement credit.

Accordingly, a penalty of $11,700 is assessed for Citation 4.

c. Citation 5

i. Severity, Extent and Likelihood

The Division classified Citation 5 as Serious-Accident Related. The base penalty for a Serious violation, as discussed above, is $18,000, and no adjustment for Extent or Likelihood is permitted pursuant to section 336, subdivision (d)(7), for a Serious violation causing death or serious injury. Therefore, the Gravity-Based penalty is $18,000.

ii. Good Faith, Size and History

Section 336, subdivision (d)(7), only allows for an adjustment based on Size for Serious violations causing death or serious injury. Employer is entitled to a 10 percent adjustment for Size. Accordingly, the adjusted penalty is $16,200.

iii. Abatement Credit

Citation 5 indicates that the violation was abated before the citation was issued. However, section 336, subdivision (e)(3)(D), states that serious violations causing a death are not eligible for the abatement credit. As discussed, the violation identified in Citation 5 caused the death of Employer's employee Briggs. Accordingly, Employer is not entitled to an abatement credit.

Accordingly, a penalty of $16,200 is assessed for Citation 5.

d. Citation 6

i. Severity, Extent and Likelihood

The Division classified Citation 6 as Serious-Accident Related. The base penalty for a Serious violation, as discussed above, is $18,000, and no adjustment for Extent or Likelihood is permitted pursuant to section 336, subdivision (d)(7), for a Serious violation causing death or serious injury. Therefore, the Gravity-Based penalty is $18,000.

ii. Good Faith, Size and History

Section 336, subdivision (d)(7), only allows for an adjustment to based on Size for Serious violations causing death or serious injury. Employer is entitled to a 10 percent adjustment for Size. Accordingly, the adjusted penalty is $16,200.

iii. Abatement Credit

Citation 5 indicates that the violation was abated before the citation was issued. However, section 336, subdivision (e)(3)(D), states that serious violations causing a death are not eligible for the abatement credit. As discussed, the violation identified in Citation 5 caused the death of Employer's employee Briggs. Accordingly, Employer is not entitled to an abatement credit.

Accordingly, a penalty of $16,200 is assessed for Citation 6.

Conclusions

Employer consented to the Division's inspection, which was not rendered invalid by the Division's alleged failure to conduct the inspection in accordance with its Manual of Policies and Procedures. Employer certified that its forklift operators had been trained and evaluated as required by title 8 regulations. Employer also ensured that its employees did not stand, pass or work under the elevated portion of an industrial truck. Employer failed to identify and evaluate workplace hazards; failed to ensure that elevated loads were not tilted forward at times when they were not being deposited onto a storage rack or equivalent; failed to provide initial training to its powered industrial truck operators on workplace-related topics; failed to ensure that loads were balanced, braced or secured to prevent tipping or falling; and failed to secure a load against dangerous displacement. The Division established rebuttable presumptions that the violations identified in Citations 3, 4, 5 and 6 were Serious, and Employer failed to rebut the presumptions. The Division established that Citations 5 and 6 were properly characterized as accident-related. Employer did not establish its Independent Employee Action Defense with respect to any of the violations.

The Division did not propose reasonable penalties for Citations 3 or 4. The Division did propose reasonable penalties for Citations 5 and 6.

Orders

Citation 1, Item 1, and Citation 2 are dismissed, and their associated penalties are vacated. Citation 1, Item 2, and Citations 3, 4, 5 and 6 are affirmed as set forth in this Decision. Total penalties of $49,460 are affirmed as set forth in the attached Summary Table.

Dated: 02/21/2020

J. Kevin Elmendorf
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**