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BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD

In the Matter of the Appeal
of:

DOCKETS 10-R3D2-3832
and 3833

OTIS ELEVATOR COMPANY
4619 Viewridge Avenue, Suite B
San Diego, CA 92123-5611¹

DECISION

Employer

Background and Jurisdictional Information

Otis Elevator Company (Employer)² manufactures and installs elevators. Beginning September 1, 2010, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Darcy Murphine conducted an accident inspection at a place of employment maintained by Employer at 9155 Scholars Drive South, La Jolla, California 92093 (the site)³. On November 19, 2010, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations⁴:

<u>Cit/ Item</u>	<u>Alleged Violation</u>	<u>Classification</u>	<u>Penalty</u>
1-1	1509(a) [deficient written Injury and Illness Prevention Program]	General	\$275

¹ This is Employer's office in San Diego, California. (Exhibits 12, 17) On the appeal form, Employer listed the job site address (9155 Scholars Drive South, La Jolla, CA 92093) as its official address instead of listing its office address.

² Employer is wholly owned by United Technologies.

³ The job site had two different street addresses. The site was known as the UCSD Revelle College Apartments with the address of 9155 Scholars Drive South, La Jolla, CA 92093. The address of the general contractor's office trailer on site was 9500 Gillman Drive, La Jolla, California 92037. The job site was sufficiently large that it apparently encompassed both street addresses. (Exhibit 4)

⁴ Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

1-2	1512(i) [deficient written emergency medical plan]	General	\$135
1-3	3395(e)(3) [deficient Heat Illness Prevention Plan]	General	\$135
1-4	3650(l) [unsecured excessively high load]	General	\$410
1-5	3668(d)(2) [no refresher training for forklift operator]	General	\$310
1-6	3203(b)(1) [no written inspection records]	Regulatory	\$275
2	3650(t)(12) [forklift operator did not look in the direction of travel and ensure all persons were in the clear before moving]	Serious	\$14,400

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, the reasonableness of the abatement requirements, and the reasonableness of all proposed penalties. Employer also alleged affirmative defenses.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on January 31, 2012. Paul J. Waters, Attorney, of Waters Law Group, LLC, represented Employer. Darcy Murphine, Compliance Safety and Health Officer, represented the Division. The parties presented oral and documentary evidence. The parties requested, and were granted, leave to file briefs. The ALJ, on her own motion, extended the submission date for decision to July 30, 2012.

Law and Motion

At the hearing, Employer moved, without objection, to withdraw the issue of abatement from all of its appeals. The motion was granted.

At the hearing, the Division stipulated that Employer had a highly effective program for enforcing its safety rules.

At hearing, the Division stipulated that Exhibit BB met all the requirements set for in § 3395 for a written Heat Illness Prevention Plan (HIPP).

On March 12, 2012, along with its post-hearing brief, the Division filed a written motion to correct the penalty adjustment for size from 20% to 0% (zero) for all citations and items, which resulted in the following amended/corrected proposed penalties:

<u>Citation/Item</u>	<u>Original Penalty</u>	<u>Amended Penalty</u>
Citation 1/Item 1	\$275	\$375
Citation 1/Item 2	\$135	\$185
Citation 1/Item 3	\$135	\$185
Citation 1/Item 4	\$410	\$560
Citation 1/Item 5	\$310	\$420
Citation 1/Item 6	\$275	\$375
Citation 2/Item 1	\$14,400	\$18,000

In calculating the penalties, the inspector based the size adjustment upon the number of employees at the site, which was 44. Testimony at hearing⁵ showed that Employer had over 10,000 employees in the United States and that over 1,000,000 man-hours were worked in California. No penalty adjustment is allowable for size where an employer has over 100 employees. (§ 335(b)) Employer filed a reply brief on April 3, 2012. It did not object or otherwise respond to the Division's motion. From this, it is inferred that Employer had over 100 employees in California. The Division's motion is deemed an argument regarding the reasonableness of the proposed penalties. Good cause having been established, the Division's motion is granted.

All Dockets

On September 1, 2010, Compliance Safety and Health Officer Darcy Murphine (Murphine) went to the site to conduct an investigation of an accident that occurred on August 16, 2010 to Employer's employee, Apprentice Elevator Mechanic Nathan Baumgardner⁶ (Baumgardner). The accident occurred when Journeyman Elevator Mechanic Brandon Brigante (Brigante) drove the left front wheel of his forklift over Baumgardner's right foot, resulting in a serious injury⁷. Baumgardner and Brigante reported to New Installation Superintendent Kirk Wasson (Wasson), who had assigned

⁵ Robert Rodriguez, Environmental Health and Safety Manager, West Region.

⁶ At the hearing, Nathan Baumgardner testified without being sworn in. After he had been excused, but before the hearing was adjourned, both parties stipulated that his testimony would be treated as if he had testified under oath.

⁷ Baumgardner was hospitalized for about one week. He suffered a fractured ankle and dislocated bones. His injuries required surgery.

them to perform the task of unloading materials from a truck to a staging area using a forklift.

Employer was a subcontractor of the general contractor at the site, Swinerton Builders (Swinerton). Swinerton Foreman Alejandro Rivera (Rivera), Swinerton Project Engineer Curtis Chism (Chism), and Swinerton Project Superintendent Bobby Badillo (Badillo) were at the site on the day of the accident, but none of them saw the accident occur. Chism testified at hearing that he took a photograph of the forklift immediately after the accident and before any changes had been made to the scene⁸. (Exhibit 3)

Murphine testified in detail regarding her education, training, and experience. She has been employed by the Division since June 1989 and is current in her training. She has been an Associate Safety Engineer for over 10 years. Prior to that, she was an Associate Industrial Hygienist for over 10 years for the Division. Prior to that, she was an Assistant Industrial Hygienist. She was employed by Federal OSHA as a compliance safety officer for two years before working for the Division. While employed by Cal/OSHA, she has conducted over 750 inspections. She has received health and safety training from both Cal/OSHA and Federal OSHA, including accident investigations, work site hazards for construction, and hazard recognition.

Docket 10-R3D2-3832

Citation 1, Item 1, § 1509(a)

Summary of Evidence

The Division cited Employer for failing to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP). The Division cited Employer for missing required elements of an IIPP.

On September 1, 2010, Murphine spoke to Wasson. As part of her inspection, she gave Wasson a document request (Exhibit 9) that included a request for Employer's IIPP. On September 8, 2010 Wasson responded with a letter (Exhibit 10). His letter described documents that were enclosed with the letter. Among the documents was a copy of what he identified as Employer's IIPP (Exhibit 15). Exhibit 15 is a 61-page document titled "Otis North America Area Field Environment, Health & Safety Program Manual."

Murphine closely examined Employer's IIPP. She looked for provisions that identified the person or persons with authority and responsibility for

⁸ The accident occurred directly outside his office in the general contractor's job trailer. In Exhibit 4, the accident location is indicated by a circle surrounding an "x" and the job trailer is indicated by an orange box.

implementing the IIPP. She found vague statements about management, supervision, leadership, and enforcement (pages 4, 6, 7, 44); but she did not find any provision that specifically identified the person or persons (by name or title) with ultimate authority and responsibility to implement the IIPP. Murphine testified that she examined pages 6 (organization), 10 (accountability), and 44 to 61 (Appendix A, Environment, Health, and Safety Rules and Responsibilities) of Employer's IIPP (Exhibit 15). She found a description of job responsibilities by title, but no one was specifically given responsibility and authority to implement the IIPP. Thus, she determined that Employer's IIPP did not satisfy the requirements of § 3203(a)(1).

Murphine testified on direct examination that she looked for provisions that provided a system for employees to communicate with management about health and safety matters without fear of reprisal. She found systems for management to communicate with employees, and provisions for employees to communicate with management (Exhibit 15, p. 19, 20), but no way for employees to communicate with management without fear of reprisal. The IIPP does not explicitly state that employees may communicate without fear of reprisal. Thus, she determined that Employer's IIPP did not satisfy the requirements of § 3203(a)(3).

Murphine looked for procedures to identify and evaluate work place hazards whenever new substances, processes, procedures, or equipment were introduced and whenever Employer was made aware of a new or previously unrecognized hazard. She found provisions for periodic risk assessment and correction of hazards (Exhibit 15, p. 12) and assessment of new products (Exhibit 15, p. 13) only. She did not find procedures to identify and evaluate work place hazards whenever new substances, processes, procedures, or equipment were introduced and whenever Employer was made aware of a new or previously unrecognized hazard.

Employer's IIPP states that job hazard analysis (JHA) and hazard scan are used on site to identify and control hazards on the job. (Exhibits 15 and C) Journeymen are required to perform a JHA at the beginning of each day and each new work task. (Exhibit E, p. 9) A periodic inspection must be conducted at each construction site. (Exhibit C, p. 10) The inspection is the responsibility of the foreman or mechanic/journeyman in charge. A contractor's pre-start checklist (Exhibit G) must be completed before start of installation of an elevator.

However, in her review, Murphine did not find anything that covered new substances, processes, procedures, equipment or hazards that were new or previously unrecognized. Thus, she determined that Employer's IIPP did not satisfy the requirements of § 3203(a)(4)(B) and § 3203(a)(4)(C).

Murphine looked for provisions that required training and instruction to all employees given new job assignments for which training had not previously been received and whenever new substances, processes, procedures or equipment were introduced to the workplace and represented a new hazard or whenever Employer was made aware of a new or previously unrecognized hazard. She did not find any. The provisions on new hire training just required training on all aspects of fatality prevention and training on the Employee Safety Handbook. (Exhibit 15, p. 16)

Thus, she determined that Employer's IIPP did not satisfy the requirements of § 3203(a)(7)(C), § 3203(a)(7)(D), and § 3203(a)(7)(E).

Murphine found that Employer's IIPP complied with all the other requirements of § 3203(a).

Referring to the proposed penalty worksheet (Exhibit 16), Murphine explained calculation of the proposed penalty for Citation 1, Item 1. She rated severity as low because Employer had an IIPP; it was just missing some elements. Hence, the base penalty is \$1,000. She rated extent as medium because about half of the IIPP elements were missing. She rated likelihood as medium because an accident happened and the IIPP had deficiencies. She rated good faith as medium, allowing a 15% penalty adjustment factor. Employer told her that it had 44 employees, so she allowed a 20% penalty adjustment factor for size. Employer did not have a record of serious violations within the last three years, so it was entitled to the maximum penalty adjustment factor of 10% for good history. This yielded an adjusted penalty of \$550. Applying a mandatory 50% abatement credit resulted in a proposed penalty of \$275.

Bob Rodriguez (Rodriguez), Environmental Health and Safety Manager, West Region, testified for Employer. He has held that position for the last 10 years and has been in the business for approximately 23 years. His duties include overseeing Employer's environmental health and safety program and editing Employer's Employee Safety Handbook (Exhibit E). He was the co-author of Employer's IIPP for all of the United States. He is responsible for auditing and inspection operations for the Western United States. His job entails detailed review of Employer's environmental health and safety program. He is responsible for California specifically and has authored documents just for California.

Rodriguez testified in detail regarding his education, certificates, and other training. He earned a bachelor's degree in Mechanical Engineering from the University of Arizona. He is certified as an OSHA trainer, and has other health and safety related certificates.

Rodriguez further testified that Employer is the largest elevator company in the world. It has over 60,000 employees worldwide and about 10,000 employees in the United States. In 2011, over 1,000,000 man-hours were worked in the field in California. Employer has the lowest injury rate among all its major competitors. Its injury rate is comparable with an office environment.

Rodriguez testified that there is more to Employer's IIPP than just Exhibit 15. Rodriguez gave a detailed description of Employer's safety training program and Employer's training requirements. Employer developed a world-wide standard that is modified in accordance with local regulations. Rodriguez helped develop Employer's IIPP (Exhibit 15) for California. Exhibit 15 is not all encompassing. The intent was to address Cal/OSHA requirements. Rodriguez testified that he edited the Employee Safety Handbook (Exhibit E) prior to its final publication. Rodriguez explained the purpose and meaning of the relevant sections.

Rodriguez testified that Exhibit 15 identified the persons with the authority and responsibility for implementing the IIPP. The purpose of pages 4 and 5 of Exhibit 15 were to identify what specific responsibilities each leader had. Appendix A (Exhibit 15, p. 44-61) sets forth in detail the responsibilities of all management personnel and their specific training requirements. Each management member is assigned specific responsibilities by job title for implementing Employer's IIPP. (Exhibit 15, pp. 6-7). Management employees are audited, evaluated and held accountable for meeting their requirements.

Rodriguez testified that Employer's IIPP and the Employee Safety Handbook addressed heat illness. Section 4.19 (page 17 of the Safety Handbook) relating to heat stress is the same as Exhibit 19. Exhibit 18, which includes Exhibit 19, is an excerpt from weekly safety and health readings for employees. Rodriguez then testified regarding Exhibits K, L, N, O, and P, all of which he considered part of Employer's safety program.

Exhibit K is Employer's Environmental Health and Safety Committee for 2011 charter, location, organization and oversight. Wasson was a member of the committee. Exhibit L is a chart titled "EHS Safety Bulletin Board" showing all of Employer's operations regarding health and safety. The purpose is to give all employees access to environmental health and safety information.

Rodriguez testified that Employer wanted employee input on health and safety issues and that employees could communicate with management without fear of reprisal. Employer performed company-wide surveys of field associates on safety issues. The purpose was to ensure that management was aware of field employee concerns. (Exhibit U) The IIPP (Exhibit 15, p. 19,

titled "Communications) contained several ways for employees to communicate with management, but they were not the only ways employees could communicate with management.

Rodriguez testified that Employer also had an Ombudsman/Dialog Program. Employees could communicate anonymously to management through use of Exhibit M, titled "Dialogue Form." Exhibit M is a form which is part of Employer's formal dialog process for employees to communicate health and safety concerns to management. The form goes beyond Employer to their parent company, United Technologies. The form is logged into the system and can be tracked. It may be submitted anonymously.

Rodriguez testified that Employer's IIPP had provisions for identifying new hazards whenever new substances, processes, procedures, or equipment were introduced, and whenever Employer was made aware of a new or previously unrecognized hazard. Employer has an Environmental Health and Safety Committee. (Exhibit K). When a new safety issue is identified, Employer performs a root cause analysis (Exhibit N titled "Relentless Root Cause Analysis") to identify root causes of a problem and to correct it. It is used for safety issues and accident investigations. Exhibit "O" is the "Passport Process, a tool in the ACE Toolkit." Its stated purpose is to "improve organizational decision-making in major strategic activities." Employer uses it to develop new products and to assess the associated risks. A job hazard analysis is performed, among other things, and is integrated elsewhere into Employer's IIPP and more fully detailed elsewhere. (Exhibit C)

Rodriguez testified that Exhibit P contains the processes and forms Employer uses for turnbacks. Employer defines a "turnback" as any undesirable event.

In addition, there are personal boxes, job site talks and publications to inform employees about health and safety issues. One of the publications is called TIP—Technical Information Publication. It is developed, reviewed and distributed among Employer's employees. Any employee may request a TIP. New employees are given safety training which is designed to make them aware of job hazards.

Employer develops construction letters at Employer's headquarters and directly distributes them to the branches. Employer has developed standard work processes that are reviewed for quality and safety, and which employees are required to refer when performing a job. There is a book specific to every elevator installation. Rodriguez testified that new employees would be introduced to material handling and unloading trucks. They would be given corrective instruction to address any deficiencies. The book is designed to identify corrections that need to be implemented in the field.

Employer has a Project Partnering Handbook (Exhibit I) which is required for all new construction projects. It guides everyone through the process and is delivered with the materials to the job site. The handbook involves together the office, field, owner and general contractor and owner to make sure everyone is informed and everyone is on the same page. The book is delivered to the job site.

Rodriguez testified that Employer's Safety Handbook (Exhibit E) had a section on job hazard analysis (JHA) pages 176 to 178. (Exhibit Q). The JHA is the same as described in Exhibit C. The purpose of the JHA training is to ensure all employees know how to do JHA. Exhibit T is an optional form used to complete JHA.

As part of his job duties, Rodriguez reviews training records quarterly. Exhibit R is a matrix that shows the dates that Baumgardner had training. He had JHA training in March 2009 and March 2010. He had forklift safety training in March 2007. The sign-in sheet and the cover sheet for forklift training are part of Exhibit R. Exhibit S is a matrix that shows the dates that Brigante had training. It shows JHA training, but no forklift safety training.

Rodriguez testified that the checklists in Employer's Partnering Handbook (Exhibit I) and the Job Hazard Analysis were required to be completed before any job began. They were designed to assist in inspection for hazards and to encompass all known hazards.

Rodriguez further testified that Employer's IIPP had provisions for training employees whenever new substances, processes, procedures, or equipment were introduced, and whenever Employer was made aware of a new or previously unrecognized hazard. Whenever there is an accident, Employer publishes it and trains all employees about the hazard. There is more than one way this is done. (Exhibits V, W, X, Y, Z)

Exhibit V is Employer's Monthly Safety Summary which is distributed to the branches. Its purpose is to identify issues related to health and safety. It is communicated to the branches and to the field. He prepares the summaries now, but he did not prepare them at the time of the accident.

All field employees are required to review summaries of accidents. Exhibit W is an example of an accident that Employer publicized through their newsletter. These summaries state health and safety policies and procedures.

Employer has a form to complete when there is a near miss accident or close call, called "Close Call". (Exhibit X) Anyone may use it. It is designed for use in the field. The purpose is to communicate hazards in the workplace. Employer has a "Near Miss Report Form" (Exhibit Y) to report situations that

could have resulted in an accident. Employer has an "Improvement Opportunity" form (Exhibit Z) which allows employees to suggest improvements. The form is in the branch offices and on bulletin boards.

Rodriguez further testified that Employer has a new hire program. Supervisors are required to go through an evaluation of each new employee to make sure they understand their job assignment. The purpose is to protect them against any new hazard based on their new duties. Field individuals must be field certified. They are observed to see if their training has been effective, or "sunk in." A new employee who comes from another elevator company must go through the same training as a new hire. When an employee is transferred, an internal safety and training evaluation is performed (Exhibit AA) because employees given new job assignments must be retrained.

Findings and Reasons for Decision

Employer's IIPP lacked provisions essential to its overall safety program. The Division established a violation of § 1509(a) by a preponderance of the evidence.

The violation was properly classified as general.

The amended proposed penalty of \$375 is found reasonable and is assessed.

The Division cited Employer for a violation of § 1509(a). Section 1509(a) makes the General Industry Safety Order IIPP applicable to construction employees. (See *CA Transportation*, Cal/OSHA App. 08-2174, Denial of Petition for Reconsideration (Dec. 21, 2011).) Section 1509(a) reads as follows:

§ 1509. Injury and Illness Prevention Program

- (a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

The parties agreed that Employer had an IIPP, part of which was titled *Otis North America Area Field Environment, Health & Safety Program Manual* (Exhibit 15). The Division alleged that Employer's IIPP did not effectively address the following required elements of section 3203(a): (1), (3), (4)(B), (4)(C), (7)(C), (7)(D) and (7)(E). Those sections provide as follows:

- (a) Effective July 1, 1991, every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
- (1) Identify the person or persons with authority and responsibility for implementing the Program.
 - (2) ...
 - (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about the hazards, labor/management safety and health committees, or any other means that ensures communication with employees. (exception omitted)
 - (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) ...
 - (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.
 - (5) ...
 - (6) ...
 - (7) Provide training and instruction:
 - (A) ...
 - (B) ...
 - (C) To all employees given new job assignments for which training has not been previously received;
 - (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
 - (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and

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).) The Division may establish a violation if an IIPP lacks any one of

the minimum elements required. (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)

First, the Division alleged that Employer did not identify the person or persons with the authority and responsibility for implementing its IIPP; but, instead delegated responsibility for implementation to all levels of management and non-management. Employer did not dispute the Division's allegation that no person or persons were identified by name who had authority and responsibility for the program.

However, the Appeals Board has held that an IIPP may satisfy the requirements of § 3203(a)(1) by identifying the person or persons by job title only. Nonetheless, an IIPP must do more than make "all levels of management" responsible for implementing a plan. (*Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration (June 10, 2010).) An IIPP does not have to use the exact language found in § 3203(a) to comply with § 3203(a). (*Id.*)

Rodriguez credibly testified that he helped develop Exhibit 15 and that its purpose was to comply with California's IIPP requirements. Page 3, Exhibit 15 states that it "provides information on how Otis NAA⁹ implements each element..." Element 4 (page 10) is devoted to accountability. It states that IIPP responsibilities are included in job descriptions and are part of annual performance appraisals. All employees have specific roles, which are listed in Appendix A (Exhibit 15, pages 44 to 61).

Exhibit 15, page 4 states that "The NAA president reviews and deploys an annual EH&S [environmental health and safety] policy of commitment, vision and values." This is not just advisory. (See *Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration (June 10, 2010).) This language identifies the NAA president as the person with the authority for implementing the IIPP. All other employees, including senior management, report to the president.

Exhibit 15, page 45, states that "senior management" is responsible to "identify and assign responsibilities of EH&S Staff and Line Organization to carry out EH&S programs in prescribed timeframes" and to "establish a formal system of accountability at all levels of the organization." Exhibit 15, page 46, states that two duties of "line management" are to "Implement and sustain EH&S management system," and "Develop, comply with, and enforce EH&S policies and procedures." Thus, line management is identified as the persons with the responsibility for implementing the details of the IIPP, although that exact language is not used. Senior management is responsible for holding line management responsible for implementing the IIPP provisions.

⁹ NAA stands for "North American Area."

Appendix A names specific job titles that come within the definition of "line management" and "senior management."

Consequently, it is found that Employer's IIPP satisfies the requirements of §3203(a)(1).

Second, the Division conceded that Employer's employees were able to communicate with Employer about safety matters, but alleged that they could not do so without fear of reprisal, in violation of § 3203(a)(3).

Employer had many systems for communicating with employees on health and safety matters. (Exhibit 15, p. 16-21). Employees could file some forms anonymously, notably the Dialog Form (Exhibit M) that was part of Employer's Ombudsman/Dialog Program. Rodriguez credibly testified that the "Dialog process" is a confidential channel for employees to communicate issues and concerns to Employer through use of a form. The Division did not dispute this testimony, but alleged that Employer nowhere expressly stated that employees could communicate about hazards without fear of reprisal. Employer's IIPP does not explicitly state that employees may communicate without fear of reprisal. The presumed purpose of anonymity is to prevent retaliation or reprisal. The Division did not explain or present evidence regarding how an employee who made an anonymous complaint could fear reprisal. The safety order does not require words that explicitly state that an employee may communicate without fear of reprisal.

Accordingly, it is found that employees could communicate to management about health and safety issues without fear of reprisal. Therefore, Employer's IIPP satisfies the requirement of § 3203(a)(3).

Third, the Division alleged that Employer did not include sufficient procedures for identifying and evaluating work place hazards required by § 3203(a)(4)(B)—Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and (a)(4)(C)—Whenever the employer is made aware of a new or previously unrecognized hazard.

The Division recognized that Employer did have some procedures for identifying and evaluating workplace hazards, including job hazard analysis (JHA) (Exhibit C), risk assessment (Exhibit 15, p. 12-19), inspections, audits, and incident investigations (Exhibit 15, pages 27-34.) Employer's IIPP states that JHA and hazard scan are used on site to identify and control hazards on the job. (Exhibits 15 and C) Journeymen are required to perform a JHA at the beginning of each day and for each new work task. (Exhibit E, p. 9) A periodic inspection must be conducted at each construction site. (Exhibit C, p. 10) The inspection is the responsibility of the foreman or

mechanic/journeyman in charge. A contractor's pre-start checklist (Exhibit G) must be completed before start of installation of an elevator.

Employer has a Passport Process (Exhibit 15, p. 13, Exhibit O) that is part of the product development process. The purpose is to ensure that products are in compliance with safety standards. The Passport Process is a tool to review major programs and new products. The EH&S plan for product development does include identification of safety issues and field procedures not previously used, including new hazards assigned to field personnel and use of materials of concern. However, the Passport Process misses new substances, processes, procedures or equipment that enters into the work place when they are not identified through it. The Passport Process does not apply when Employer is made aware of a new or previously unrecognized hazard.

As Rodriguez testified, Employer has a "turnback" process for undesirable events (Exhibit P), Close Call reports (Exhibit X), and Near Miss Reports (Exhibit Y). Their purpose is to ensure that management becomes aware of reports of potential issues from the field or customers. Employer uses them to collect new information. However, the Turnback reports, Close Call reports, and Near Miss Reports do not require evaluating hazards whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent new occupational safety and health hazards, or whenever the employer is made aware of new or previously unrecognized hazards.

A review of all Employer's forms and written procedures shows that, except for new product development, none of them describe performing an inspection whenever new substances, processes, procedures, or equipment are introduced into the workplace or whenever Employer is made aware of a new or previously unrecognized hazard. The procedures for new product development do not encompass all the potential new hazards unrelated to new product development, such as new hazards at a construction site or hazards created by other employers. Rodriguez's testimony that Employer actually performs inspections whenever new substances, processes, procedures, or equipment are introduced into the workplace or whenever Employer is made aware of a new or previously unrecognized hazard is not determinative because the procedures must be in writing.

Accordingly, it is found that the Division met its burden to establish that Employer's IIPP did not comply with the requirements of § 3203(a)(4)(B) or (a)(4)(C).

Fourth, the Division alleged that Employer's IIPP lacked provisions to provide training and instruction to all employees given new job assignments for which training had not previously been given (§ 3203(a)(7)(C)); whenever

new substances, processes, procedures or equipment are introduced into the workplace and represent a new hazard (§ 3203(a)(7)(D)); or whenever the employer is made aware of a new or previously unrecognized hazard. (§ 3203(a)(7)(E).)

The passport process (Exhibit O) does not address employee training as part of the product development process. Employer's training described in Exhibit 15, pages 16, 17, and 19 mandates field safety training meetings to include "new processes." Employer's new hire training program requires transferred employees to receive new training as necessary for their new position. (Exhibit AA) This provision satisfies the § 3203(a)(7)(C) requirement that training and instruction be given to existing employees given new job assignments for which training had not previously been given. However, it does not satisfy the requirement for new hires to be given training for job assignments for which they had not previously received training. New hires are trained on all fatality prevention issues and all aspects covered in the Employee Safety Handbook. (Exhibit 15, page 16). Employer has a two-day new hire program, referred to in Exhibit AA.

Exhibit 15, page 17 states that when new processes or special alerts are released, separate training sessions are created on an as-needed basis to train all associates. This is not the same as requiring training for all employees who are given a new job assignment or for training whenever new substances, processes, procedures or equipment are introduced into the workplace that represent a new hazard.

Rodriguez credibly testified that new employees receive training on job assignments for which they had not previously received training, and that their supervisors evaluated them to specifically identify areas where they would be given new job assignments for which training had not previously been given. Assuming this is true, the requirements must be in writing. Rodriguez did not identify where this provision was in writing. Since he had the motive and opportunity to do so, and he was involved in putting Employer's IIPP in writing, it is inferred that the required provisions were not written anywhere. (Evidence Code 413) The Appeals Board has held that reasonable inferences can be drawn from evidence introduced at hearing. (*ARB, Inc., Cal/OSHA App. 93-2984, Decision After Reconsideration* (Dec. 22, 1997).) "An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or established in the action." (Evidence Code § 600(b).)

Therefore, it is found that Employer's IIPP lacked written provisions for providing training and instruction to new employees given new job assignments for which training had not previously been given, as required by § 3203(a)(7)(C); whenever new substances, processes, procedures or equipment were introduced into the workplace and represented a new hazard

as required by § 3203(a)(7)(D); or whenever the employer was made aware of a new or previously unrecognized hazard as required by § 3203(a)(7)(E).

To establish an IIPP violation, the flaws in a program amount to a failure to “establish,” “implement” or “maintain” an “effective” program. A single, isolated failure to “implement” a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fisher Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).) An IIPP can be proved not effectively maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Here, there is more than one flaw in Employer’s IIPP, and the flaws are sufficient to find that the IIPP is not effectively maintained. The flaws here generally relate to a failure to have procedures for identifying and evaluating new hazards and to training employees regarding new hazards. Training is essential to establishing an effective overall IIPP; and lack of training can be the basis for a serious violation¹⁰. The Board has held the purpose of § 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through training and instruction. (See *Sierra Production Service, Inc.*, Cal/OSHA App. 84-1227, Decision After Reconsideration (Aug. 13, 1987).) The Board has held that failure to train an employee for a new job assignment is sufficient to find a violation of § 1509(a). (*A. Teichert & Son, Inc. dba Teichert Construction*, Cal/OSHA App. 05-2650, Decision After Reconsideration (Aug. 16, 2012), citing *Clark Pacific Precast, LLC, et al.*, Cal/OSHA App. 08-0027, Denial of Petition for Reconsideration (Jul. 26, 2010), *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003), and *Los Angeles Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Jul. 29, 1981).)

Because training is essential to an overall safety program, it follows that an IIPP which does not provide for training whenever employees are given new job assignments for which training had not previously been given, whenever new substances, processes, procedures or equipment are introduced and

¹⁰ The Board has held that violations of section 3203(a)(7) may be classified as serious where the Division focuses its proof on the probable consequences of an accident related to the violation and establishes that it ‘is so grave that it threatens the employee with death or serious injury as a substantial probability’ and that ‘the employer knew, or with the exercise of reasonable diligence, could have known of the existence of the hazard in the workplace.’ *Sully-Miller Contracting Co.*, Cal/OSHA App. 99-896, Decision After Reconsideration (Oct. 30, 2001).

represent a new hazard, or whenever the employer is made aware of a new or previously unrecognized hazard is not an effective IIPP.

Accordingly, the Division established a violation of § 1509(a) by a preponderance of the evidence.

The Division classified the violation as general. In order to establish a general violation, the Division need only show that the safety order was violated and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998).) Since the violation relates to job hazards and training, it is related to employee safety and health. It was properly classified as general.

The Division proposed a penalty of \$375, as amended, adjusting the factor for Employer's size to zero. Murphine credibly testified that she rated severity as low because Employer had an IIPP. This rating appears consistent with the regulations. Murphine rated extent as medium because about half of the IIPP elements were missing. This rating also appears consistent with the regulations.

This violation does not pertain to employee illness or disease. Section 335(a)(2)ii provides as follows:

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 site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

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 of 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.

Murphine rated likelihood as medium because an accident occurred and the IIPP had other deficiencies.

Likelihood is defined in § 335(a)(3) 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

Since all employees are affected by a defective IIPP, the rating of "medium" for likelihood is consistent with the regulations.

Murphine rated good faith as medium, allowing a 15% penalty adjustment factor, but did not explain why. Under § 336((3)(c), "good faith" is defined as follows:

The 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

The Division cited Employer for a safety program violation, and it has been upheld, as discussed above. This reason makes Murphine's rating of "fair" or "average" consistent with the regulations.

The penalty adjustment factor for size has been corrected to zero, because Employer has over 100 employees. Employer did not have a record of serious violations within the last three years, so it was entitled to the maximum penalty adjustment factor of 10% for good history. Applying a mandatory 50% abatement credit results in a proposed penalty of \$375.

Accordingly, a proposed penalty of \$375 is found reasonable and is assessed.

Citation 1, Item 2, § 1512(i)

Summary of Evidence

The Division cited Employer for failure to have a complete written emergency medical plan.

On September 1, 2010, Murphine asked Wasson for Employer's written emergency action plan for 9500 Gillman Drive, San Diego, California. (Exhibit 9). On September 8, 2010, Wasson supplied Employer's Emergency Response Plan for San Diego (Exhibit 17) dated January 1, 2010.

The plan was specific for Employer's main office at 4619 Viewridge Avenue, San Diego. Upon her review of the plan, she found nothing specific to 9500 Gillman Drive¹¹ or 9155 Scholars Drive South¹². Emergency numbers were listed for fire, police, ambulance, FBI, National Response Center, and Poison Center (Exhibit 17, p. 2). There were no telephone numbers for a specific physician or alternate, hospitals, an ambulance service or fire service, except for the generic 911.

Based on the above, Murphine determined that Employer's plan was not in conformance with § 1512(i) because there was no information relating to the job site. She determined that it was a general violation.

Using Exhibit 16, she explained calculation of the proposed penalty. She rated severity, extent and likelihood as low, resulting in a gravity-based penalty of \$500. As before, good faith was medium, size was medium, and history was good. Applying the 50% abatement credit and rounding down to the nearest five dollars resulted in a proposed penalty of \$135. As discussed, correcting the adjustment for size increased the proposed penalty to \$185.

On cross-examination, Murphine testified that Employer did not indicate that they were using Swinerton's emergency medical plan.

Swinerton's Foreman¹³ Alejandro Rivera (Rivera) testified that Swinerton was the general contractor on the job. Rivera was the DSP, or "Designated Safety Person" for Swinerton. It is Swinerton's policy to obtain a sub-contractor's health and safety program before they start working. Swinerton had a first aid plan and a plan to contact emergency medical services. It applied to all employees on site, but he never discussed Employer's medical plan or Swinerton's medical plan with any Otis employee. Swinerton did not form a combined emergency medical program with Employer.

¹¹ Address which Murphine used in her document request (Exhibit 9).

¹² Address of job site on the citation.

¹³ On the day of the hearing, Rivera had the job title of Assistant Superintendent.

Rivera testified that he helped load Baumgardner onto Swinerton's Project Manager's (Bobby Badillo's) truck. Badillo and Rivera drove Baumgardner to the hospital. No one called 911. Rivera did not know why. At the hospital, Rivera stayed with Baumgardner. After X-rays were taken, Wasson arrived in the emergency room, and Rivera left.

Wasson testified that he was familiar with Employer's written emergency medical plan. The medical plan is "all over" his office and the Human Resources office. The poster with the 911 information (Exhibit F) is at all the job sites. The poster specifies that the number to call in case of an emergency for an ambulance, doctor, fire, rescue, or police, is 911. There is a blank on the poster to enter other telephone numbers. In addition, the poster states it must be posted at the job site. It also has general directions about what to do in case of an emergency, such as keeping the injured person still while help is being summoned, and covering the injured person.

Wasson testified that the poster is delivered together with all the other equipment and materials for a job site. Wasson believed that Brigante and Baumgardner were aware of the poster before the job started. They were required to post the poster. If they did not put up the poster, they could be written up for a disciplinary infraction. Wasson testified that the poster is not unpacked and posted until the employees begin installing the elevator, which process had not started on the day of the accident.

Baumgardner testified that he was familiar with the emergency medical plan poster (Exhibit F) before the accident occurred. The poster is shipped along with all the other materials for the construction site. In this case, the poster had not been put up yet. It was still in the materials being unloaded. The poster might not be posted until a week or two after materials are unloaded. It is not put up until the job starts.

Baumgardner further testified that he knew he was supposed to call 911. He had access to a telephone to make the call. Instead, he chose to ask Swinerton employees to drive him to the hospital because he thought it would be faster than going by ambulance.

Brigante testified that he was familiar with the poster (Exhibit F). He was aware that it was Employer's policy to call 911 in the event of a medical emergency like the one that occurred the day of the accident. Brigante had an Employer cell phone that he could have used to call 911. Brigante knew that there was a hospital close by, just around the corner. He knew that Baumgardner was being driven to the hospital by truck. The reason was that it was faster to go by truck because the hospital was so close to the site¹⁴.

¹⁴ Baumgardner was taken to Scripps La Jolla. (Exhibit 2)

Brigante called his supervisor, Wasson, and continued with his work because he had a job to do.

Findings and Reasons for Decision

Employer did not have a complete written plan to provide emergency medical services.

The violation was properly classified as general.

The amended proposed penalty of \$185 is found reasonable and is assessed.

The Division cited Employer for a violation of § 1512(i), which provides as follows:

§ 1512. Emergency Medical Service

- (i) Written Plan. The employer shall have a written plan to provide emergency medical services. The plan shall specify the means of implementing all applicable requirements in this section. When employers form a combined emergency medical services program with appropriately trained persons, one written plan will be considered acceptable to comply with the intent of this subsection

Section 1512(i) requires that the plan specify the means of meeting all requirements of §1512, which includes § 1512(e). The alleged violation description specifically stated that the requirements of § 1512(e) were not met. Section 1512(e) provides as follows:

- (e) Provision for Obtaining Emergency Medical Services. Proper equipment for the prompt transportation of the injured or ill person to a physician or hospital where emergency care is provided, or an effective communication system for contacting hospitals or other emergency medical facilities, physicians, ambulances and fire services, shall be provided. The telephone numbers of the following emergency medical services in the area shall be posted near the job telephone, telephone switchboard, or otherwise made available to employees where no job site telephone exists:

- (1) A physician and at least one alternate if available.
- (2) Hospitals.
- (3) Ambulance services.
- (4) Fire-protection services.

The Board has held that the Legislature has directed that adequate first aid attention be provided on each construction project before the arrival of a certified or licensed health professional. (*Channel Constructors, Inc.*, Cal/OSHA App. 81-1015, Decision After Reconsideration (Dec. 7, 1984); *Zapata Constructors, Inc.*, Cal/OSHA App. 76-751, Decision After Reconsideration (Sep. 18, 1979).) In order to provide adequate first aid attention, a written emergency medical plan that meets all the requirements of § 1512 is required. The presence of equipment which could be used to execute the plan (e.g., a mobile phone) does not meet the requirements of having the plan. (*Pacific Telephone Co. dba AT&T 4051*, Cal/OSHA App. 06-5052, Decision After Reconsideration (Aug. 11, 2011).)

A close review of Employer's emergency medical plan shows that it does not relate to the job site, but only to Employer's office building on Viewridge Avenue. The construction project was not located at Employer's office. Neither Employer's written emergency medical plan (Exhibit 17) nor Employer's job poster (Exhibit F) had specific telephone numbers other than 911. Although Wasson testified that the poster was posted in his office, he did not testify that there were any specific telephone numbers listed. Even if his poster had specific telephone numbers, Wasson's office was located at Viewridge Avenue in San Diego, not at the site. Thus, it is found that there were no specific telephone numbers at the site for the following: (1) a physician and at least one alternative if available; (2) hospitals; (3) ambulance services; or (4) fire protection services.

Additionally, in order for a plan to provide for the prompt transportation of the injured or ill person to a physician or hospital where emergency care is provided, the plan must include the location of the relevant hospitals, clinics, physicians or other appropriate medical facility. Employer's plan did not have this information.

When the accident occurred, neither Brigante nor Baumgardner called 911, even though they knew it was Employer's policy. Instead, Baumgardner asked Swinerton employees to take him to a hospital. While this evidence is not conclusive, it supports the inference that Employer did not have an medical emergency plan that met the requirements of §1512(i).

Employer speculated that the relevant emergency numbers were posted in Swinerton's job trailer. Even if they were, there was no evidence that Wasson, Brigante or Baumgardner knew about it. Even assuming Employer's

employees knew about the telephone numbers and the location was readily accessible, the number for the physician and alternate was not valid for them since Swinerton did not have a combined emergency medical plan with Employer.

Employer argued that only the number "911" was needed because all emergency services could be contacted in that manner. Employer argued supplying other numbers was therefore redundant and useless. This argument is flawed because specific doctors and hospitals cannot be reached by calling 911. Additionally, the Board has consistently rejected this type of argument. (See *Triad Geotechnical Consultants, Inc.*, Cal/OSHA App. 95-2232 Decision After Reconsideration (Nov. 10, 1999); *Oltman's Construction Co.*, Cal/OSHA App. 84-715, Decision After Reconsideration (Jan. 17, 1986).) The Legislature and the Standards Board have established the requirements set forth in the safety order in question. Employers are bound to comply. If Employer believes a safety order is unreasonable or that its own practice provides greater protection for its employees, Employer's remedy is to petition the Standards Board for a permanent variance pursuant to Labor Code § 143(a) or to have the safety order repealed or amended. (*City of Sacramento Fire Department*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989).)

Therefore, the Division established a violation of § 1512(i) by a preponderance of the evidenced.

The Division classified the violation as general. Since provision of emergency medical services relates to employee health, the violation was properly classified as general.

A review of the proposed penalty, revised to \$185 to correct for Employer's size, indicates that it was calculated in accordance with the Division's policies and procedures. The ratings for severity, extent, and likelihood were as low as possible. The medium rating for good faith is appropriate. The best rating for history was given, as well as an abatement credit. The proper penalty adjustment for size is zero.

Therefore, a penalty of \$185 is found reasonable and is assessed.

Citation 1, Item 3, General, § 3395(e)(3)

Summary of Evidence

The Division cited Employer for failure to have a complete written Heat Illness Prevention Plan (HIPP).

The parties agreed that Brigante and Baumgardner were working outdoors. (Exhibits 2, 3, 4, 7, A, B) Because Employer's employees were working outdoors, Murphine asked Wasson for Employer's written HIPP in her Document Request Sheet. (Exhibit 9) Wasson, in response, (Exhibit 10) gave her Employer's Heat Stress Plan. It was section 4.19, titled "Heat Stress" (Exhibits 18, 19¹⁵) of Employer's Safety Handbook (Exhibit E). Murphine reviewed it. There were details about signs, symptoms, prevention and treatment of heat illness. There were no procedures on how and when to provide water, shade and a place to cool down or what to do in high heat conditions, which were required HIPP elements. Hence, she determined that employer's HIPP was out of in compliance with § 3395(e)(3).

Based upon the above, Murphine issued Citation 1, Item 3 for a general violation of § 3395(e)(3). Using Exhibit 16, she explained calculation of the proposed penalty. It was calculated in the same way as for Item 2. She rated severity as low because most of the time, employees did not work outdoors. She rated extent as low because only two employees were exposed. She rated likelihood as low because the site was near the coast, where high heat was not an issue.

Rodriguez testified that he was aware that California had special requirements regarding heat illness. He was the author of Exhibit BB, Employer's HIPP. Exhibit BB has a revision date of December 2010. He wrote the HIPP almost verbatim from the standard when the heat illness standard was passed, in about 2007. The only changes he made since then reflect amendments to the heat illness safety order, which took place in approximately November of 2010. Otherwise, Exhibit BB is identical to the HIPP effect on the day of the accident.

The Division stipulated that Exhibit BB met all the requirements of § 3395(e). Murphine testified that she did not see Exhibit BB until after she issued Citation 1, Item 3.

Wasson testified that he knew Employer had an HIPP tailored for California and intended to give it to Murphine. Failure to give it to Murphine was an oversight. Wasson has about 40 to 50 pdf files. When Murphine asked for a copy of the HIPP, Wasson inadvertently grabbed the wrong document.

¹⁵ Exhibit 18 and 19 are different versions of the same information. Exhibits 18 and 19 each contains some additional information not found in the other exhibit.

Findings and Reasons for Decision

The Division did not establish a violation of § 3395(e)(3).

Citation 1, Item 3 is dismissed and the penalty is set aside.

The Division cited Employer for a violation of § 3395(e)(3), which provides as follows¹⁶:

§ 3395. Heat Illness Prevention in Outdoor Places of Employment

(e)(3) The employer's procedures required by subsections (e)(1)(B), (G), (H), and (I) shall be in writing and shall be made available to employees and to representatives of the Division on request.

Section 3395(e)(1) (B), (G), (H), and (I) read as follows:

(B) The employer's procedures for complying with the requirements of this standard;

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary;

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider;

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

The one-page heat stress plan (Exhibits 18 and 19) that Wasson gave Murphine in response to her document request does not meet the minimum requirements of § 3395(e). Wasson testified that he mistakenly grabbed the wrong document. This testimony is credible and is credited.

¹⁶ Section 3395(e)(3) was amended effective November 4, 2010. The quoted safety order is the safety order in effect on the day of the accident, August 16, 2010 and on the initial day of the inspection, September 1, 2010. Neither party argued that the safety order effective beginning November 4, 2010 applied.

Rodriguez testified that he wrote original Employer's HIPP when the heat illness standard was first passed. The April 2007 date of the original HIPP corroborates his testimony. Rodriguez testified that he made amendments to the HIPP after the standard was changed in November 2010. This testimony explains the December 2010 date of Exhibit BB. Rodriguez credibly testified that Employer's HIPP was otherwise identical, although he did not identify each amendment made. Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact. (Evidence Code § 411) The Division did not refute or dispute his testimony, although they had the motive and opportunity. In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him. (Evidence Code § 413) This raises the inference that Rodriguez's testimony is true.

For the above reasons, Rodriguez's testimony is credited. On that basis, it is found that Employer had an HIPP on September 1, 2010 that met the requirements of § 3395(e) as in effect at the time of the inspection. A violation of § 3395(e)(3) is not found.

Accordingly, Citation 1, Item 3 is dismissed and the penalty is set aside.

Citation 1, Item 4, General, § 3650(l)

Summary of Evidence

The Division cited Employer for failure to secure an excessively high load on a forklift.

Murphine interviewed Baumgardner and Brigante on September 8, 2010.

Brigante told Murphine and also testified at hearing that that they unloaded the materials from a truck in a paved parking lot onto the forklift that he was driving. (Exhibit 3) They had been unloading for about three hours that day before the accident occurred at a little after 11:00 a.m. To unload materials from the truck, Brigante drove from the parking lot, went through a gate, over a metal grate¹⁷, and then made a left turn onto smooth, hard-packed dirt. There was a slight rise of 1" or so when they got to the dirt. They crossed the dirt, turned left, and dropped the material of onto the staging area. The accident occurred when he turned left onto the dirt. After the accident, Brigante continued to operate the forklift for the rest of the day.

¹⁷ The purpose of the grate was to remove dirt from the wheels.

Brigante and Baumgardner told Murphine, and both testified at hearing, that when the accident occurred, two boxes were stacked on top of each other, as photographed in Exhibit 3. Each box was held by one metal strap to a pallet. The boxes were not secured to each other or secured to the forklift. The bottom box was held rigidly by the mast and the forks went through the bottom pallet. The top edge of the mast supported the pallet to which the top box was secured. Gravity held the top box on. The forks were tilted back, so the load rested on the mast. Brigante estimated the weight of each box at 360 pounds¹⁸. He estimated that the boxes were about 30" to three feet square.

They had straps to secure the boxes, but did not use them because this load was one of the lightest for the day. The pallets extended beyond the edge of the boxes. Brigante was able to see over the top of the boxes and to the side of the boxes.

On September 1, 2010, Murphine took measurements of the boxes (Exhibit 8) and then drew the diagram that was admitted as Exhibit 14. She testified that the diagram incorrectly did not show that the mast extended slightly above the second pallet.

Brigante told Murphine and testified at hearing that he was driving slowly, about the speed of a walk. When he drove the load over the grate, it jostled the forklift and the load became unsteady. It vibrated or shook from side to side. The load was not excessively heavy, or wide, but it was tall, and the mast was short. Brigante told Murphine that he asked Baumgardner to put his hand on the load to steady it, and Baumgardner complied.

Wasson performed an incident investigation. (Exhibit 11). He identified the direct cause of the accident as "Improper Loading/Placement Incident - Proximity to Forklift" in his Investigation Report. (Exhibit 11)

Based on her interviews of Brigante and Baumgardner, the incident report review, and her measurements, Murphine determined that the load was excessively high and was not balanced, secured, or strapped to prevent tipping or falling. The Division stipulated that the bottom box was properly secured by the forks going through the pallet. It was the top box that was not secured. Thus, she issued Citation 1, Item 4 for a violation of § 3650(l).

Using Exhibit 16, Murphine explained the proposed penalty calculation. The violation had an effect on health and safety, so she classified it as general. She rated severity as moderate because an employee would require

¹⁸ The boxes contained coated steel belts in coils. Each box had five spools. The spools are 2 feet in circumference and stacked on top of each other. Each belt is 60 to 70 pounds.

medical attention beyond first aid if hurt as a result of the load falling or the forklift being upset from an unstable load. The boxes each weighed about 360 pounds each, according to Brigante. She rated extent as moderate because it existed the entire time that they moved the load. Likelihood was medium because if the load were going to fall, it would fall when the load was being moved. This yielded a gravity-based penalty of \$1,500.

The same penalty adjustment factors for good faith, size, and history applied for Item 1, resulting in an adjusted penalty of \$825. After application of the 50% abatement credit and rounding down to the nearest five dollars, the proposed penalty was \$410. Murphine allowed a size adjustment of 20% when she proposed a \$410 penalty. With the correct size adjustment of 0%, the proposed penalty is \$560.

Baumgardner testified that he knew Employer's rule requiring loads to be strapped if they were big or awkward, but nothing made him think that this load needed to be secured. It was a small load and one of the lightest loads of the day. He estimated the weight of each box at approximately 300 pounds. At hearing, Baumgardner denied that the boxes moved at all during transit or that Brigante asked him to steady the load. He stepped in front of the forklift to put his hand on the load because he was "just keeping busy."

Wasson testified that he had worked for Employer for 14 years and had been a superintendent for 5 years. Prior to that, he had worked in the field. Before working for Employer, he had worked for approximately 17 years in construction, working with metal studs, drywall and large crews. He was involved in safety during this time.

Wasson testified that he was a certified forklift operator. He was certified on the type of forklift used on the day of the accident. He believed that he had significant experience with this type of forklift. He was also familiar with the belt boxes that the forklift was moving, as photographed in Exhibits 3 and 8. He considered it to be a typical load. It was not excessively high, or excessively wide, or excessively long by elevator standards. It was one of the smallest and lightest loads. Wasson further testified that, judging by the photograph (Exhibit 3), the load did not appear unstable. The reasons were that the load was small and light, both boxes were banded, and both were seated against the mast. Even though the top part of the load did not lean against the mast, the box was strapped to the pallet, and the pallet was seated against the mast. The forks were slightly tilted back, which kept the load against the mast by gravity.

Rivera testified that his duties included investigation accidents and preparation of accident reports. The day after the accident, August 17, 2010, he prepared a report (Exhibit 2). In his report, he stated that the load started

to shift, but this was based upon his interviews of others. He did not witness the accident.

Findings and Reasons for Decision

The Division did not establish a violation of § 3650(l).

Citation 1, Item 4 is vacated and the penalty is set aside.

The Division cited Employer for a violation of § 3650(l), which provides as follows:

§ 3650. Industrial Trucks. General

(l) Loads of excessive width, length or height shall be so balanced, braced, and secured as to prevent tipping and falling.

The forklift load consisted of two equally-sized boxes, one on top of the other. Both boxes were individually strapped to wooden pallets. (Exhibits 3, 8) The top and bottom boxes were not strapped together. Neither box was strapped to the forklift. The boxes weighed about 360 pounds each and contained steel coated belts in coils. The boxes were not as wide as the forklift (Exhibit 3) The height of the stacked boxes did not block the forklift driver's vision. (Exhibit 3) Murphine testified that the forklift mast reached to the top of the pallet on the upper box, as seen in Exhibit 3, and that her diagram (Exhibit 14) was inaccurate in that one respect. The upper box was not supported by the forklift mast. The Division stipulated that the lower box was properly secured with the forks of the lift through the bottom pallet.

The Division alleged that the height of the overall load was excessive because it exceeded the height of the mast. There was no allegation that the driver's vision was obstructed. The top box should have been secured to prevent tipping and falling because the full weight of the upper box was not supported. Employer's Incident Investigation Report (Exhibit 11) identified the direct cause of the accident as "Improper Loading/Placement." Brigante described the load as shaky when they made the turn onto the dirt, although Baumgardner denied that the load ever moved. The Swinerton Incident Report stated that the load started to shift, based upon Rivera's interviews of the people involved. (Exhibit 2, p. 1, Incident Narrative)

To establish a violation of § 3650(l), the height of the load must be excessive. The Board held that in section 3650(l) [formerly 3650(m)], "the predicate phrase 'Loads of excessive width, length or height,' is an operative requirement." (*National Steel & Shipbuilding Co.*, Cal/OSHA App. 00-2743,

Decision After Reconsideration (Oct. 17, 2002).) The fact that a load falls does not establish that the load was of excessive width, length, or height. (*Id.*) It follows that the fact that a load shifts or shakes does not establish that the load was of excessive width, length, or height. Any size load could shift or shake. An extension of a load beyond the forks does not automatically establish that a load's width is excessive. (*Id.*) It follows that extension of a load beyond the top of the mast does not automatically establish that a load's height is excessive. The fact that the height of the load did not obstruct the driver's vision tends to support a contrary conclusion.

The word "excessive" is not defined in the safety orders. (*Id.*) In the context of § 3650(l), the Board adopted the following meaning of "excessive" from *The American Heritage Dictionary of the English Language* (1980):

Exceeding a reasonable degree of propriety, necessity, or the like; extreme; inordinate ... beyond a normal or proper limit ... excessive ... describes a quantity, amount, or degree that is beyond what is specified, required, reasonable, or just. (*Id.*; *McDonald's*, Cal/OSHA App. 03-4116, Decision After Reconsideration (May 31, 2007).)

The Board held "that 'excessive' is a relative term that requires a foundational comparison." (*Id.* at 3) The Division has the burden of providing proof of the meaning of "excessive" in terms of what was standard or normal for the type of load. (*Id.* at 3) There must be evidence of some standard or norm to which a comparison may be made to show that the subject load is of excessive width, length, or height, and the basis for why such comparison amounts to excessive. (*Id.* at 4)

The Division did not present evidence regarding the standard or norm to which a comparison could be made. There was no expert testimony regarding the type of intended loads for the forklift in question. To the contrary, Wasson testified that he was familiar with forklifts and, in his opinion, the load was a normal load. Similarly, Brigante and Baumgardner perceived the load in question as one of the smallest and lightest loads. They did not believe that the load was excessively high, or that their failure to further secure the entire load violated Employer's rules.

For the above reasons, the Division did not meet its burden to establish a violation of § 3650(l). Therefore, Citation 1, Item 4 is dismissed and the penalty is vacated.

Citation 1, Item 5, General, § 3668(d)(2)

Summary of Evidence

The Division cited Employer for failure to give refresher training, including an evaluation of the effectiveness of that training, to its forklift operator.

Murphine asked for a copy of the forklift rental agreement as part of her document request. (Exhibit 9). Wasson gave her a copy. (Exhibit 12). The rental agreement described the forklift specifically. On November 10, 2010, she visited the forklift lessor and photographed a forklift that was the same type as the one used on the day of the accident¹⁹. (Exhibit 13) She did not know if it was the actual forklift involved in the accident.

Murphine asked Wasson for forklift operator certification for Brigante²⁰. (Exhibit 9) Wasson responded by giving her a copy (Exhibits 5, 10). The certification was dated February 11, 2005. There were no other subsequent forklift refresher training records. Murphine testified that power industrial truck (forklift) refresher training must be conducted every three years. Since Brigante was last trained in 2005, his refresher training was overdue.

Based upon the above, she issued Citation 1, Item 5 for a general violation of § 3668(d)(2).

Using Exhibit 16, she testified regarding calculation of the proposed penalty. Severity was medium because in the event of an accident caused by failure to retrain and evaluate, the resulting injury would probably require medical attention beyond first aid, like setting broken bones. Medium severity called for a base of \$1,500. Extent was low. Only one employee was operating the forklift. Likelihood was medium because the forklift was being operated all day long. Work started at about 8:00 a.m. and the accident occurred at about 11:10 a.m. (Exhibit 2). Brigante continued operating the forklift for the rest of the day until all the materials were unloaded. This yielded a gravity-based penalty of \$1,125. Application of the penalty adjustment factors resulted in an adjusted penalty of \$619. After applying the abatement credit and rounding down, the proposed penalty became \$310.

Wasson testified that the crew he assigned was experienced in unloading the product. Wasson further testified that Brigante was very

¹⁹ It was a JCB model #520, a 4400 pound, 16-foot shooting arm forklift.

²⁰ Murphine did not request certification records for Baumgardner and the alleged violation description did not name Baumgardner. Baumgardner did not drive a forklift on the day of the accident. He was working as a spotter. Baumgardner testified that he was an experienced forklift operator and had been certified as a forklift operator before he came to work for Employer, but he did not know if his training was current. Proof that Baumgardner had forklift training in March 2007 was presented at hearing. It is not decided here whether the training qualified under § 3668(d).

experienced in unloading operations, having done it countless times. He was Wasson's "best guy" for the job because he specialized in operating the forklift that was being used. Wasson had observed Brigante on the job and done written evaluations. (Exhibit DD) None of the written evaluations covered forklift operation.

Wasson further testified that Employer had a rule in place before the accident that spotters were required to stay at least 10 feet away from the forklift. This rule did not change after the accident.

Murphine testified that Brigante told her that it was common practice to walk close to the forklift while materials were being moved. Murphine testified that both Brigante and Baumgardner told her that they were not aware of Employer's rule requiring spotters to stay 10 feet away until after the accident.

Exhibit DD, page 7, shows that Brigante was scheduled to have forklift training the week ending October 21, 2010. Exhibit C²¹ lists training Brigante completed in 2010 up to the week ending September 9, 2010, but does not show that he received training on forklifts. Rodriguez testified that Exhibit S is a record of Brigante's training for all of 2009 and 2010. Exhibit S did not show that he had forklift training²². Rodriguez testified that Wasson performed evaluations of Brigante's and Baumgardner's on-the-job skills at construction sites, called safety audits. Exhibit DD contains Wasson's evaluations of Brigante. Exhibit EE contains Wasson's evaluations of Baumgardner.

Rodriguez testified that the purpose of the audits is to ensure that employees know Employer's health and safety rules.

Brigante testified that he and Baumgardner were both experienced forklift operators. Brigante had worked for Employer for about eight years as of August 2010. (Exhibit H, p. 2) Brigante had unloaded material from trucks to a jobsite many times over his years of employment with Employer at nearly every construction site that he worked. Brigante further testified that, to his knowledge, he had never been formally audited or evaluated by Wasson or other management during the unloading tasks. Employer's supervisors audit him at least once a quarter. He did not know if anyone had ever done inspections of loading and unloading operations.

Brigante testified that the training he received in February 2005 (Exhibit 5) included hands-on training and a competency test in addition to

²¹ The relevant page is an unnumbered page between pages 9 and 10.

²² Exhibit R shows that Baumgardner had forklift training in 2007. A cover page from the training and the attendance sheet were included in Exhibit R.

reading written materials on forklift safety. There was no expiration date on his certification. No one ever told him he needed to retake the forklift training.

Brigante testified he did not recall whether his training in 2005 included the topic of spotter. Employer's IIPP, (Exhibit 19, p. 2), section 41.1, titled "Forklifts" sets forth rules. One rule states "Watch for pedestrians," and other states, "Keep a clear view of the path of travel." Brigante was aware of these rules before the accident. Before the accident, Brigante was not aware of Employer's rule that spotters were required to stay 10 feet away from the forklift.

Brigante testified that he saw Baumgardner fall down. He stopped, and then put the forklift into reverse to get the front left forklift wheel off of Baumgardner's right foot. Brigante testified that he did not realize how close Baumgardner was to the forklift.

Brigante testified that he understood it was in violation of Employer's rules to ask Baumgardner to put his hand on top of the load to steady it. This was a short cut. Brigante took short cuts every now and then, and this was a short cut he had taken before. Employer's management, including Wasson, did not know that he took short cuts. Previous to this accident, Brigante had not received any discipline for safety infractions or for taking short cuts. He took short cuts because of the pressure to get jobs done quickly. On September 8, 2010, Wasson issued him written discipline for not performing a JHA prior to starting this job. (Exhibit H)

Findings and Reasons for Decision

Employer did not provide periodic refresher training and evaluation of its forklift operator's performance. The Division established a violation of § 3668(d)(2).

The violation was properly classified as general.

The amended proposed penalty of \$420 is found reasonable and is assessed.

The Division cited Employer for a violation of § 3668(d)(2), which provides as follows:

§ 3368. Powered Industrial Truck Operator Training
(d) Refresher training and evaluation. Refresher training, including an evaluation of the effectiveness of that training, shall be conducted as required by

subsection (d)(1) to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely.

(1) ...

(2) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

Training topics are listed in § 3668(c), and include steering and maneuvering, § 3668(c)(1)(D) and visibility (including restrictions due to loading) § 3668(c)(1)(E).

Brigante was driving the forklift²³ when the accident occurred. Brigante's forklift certification (Exhibit 5) is dated February 11, 2005. Following that date, no other documentation was provided for refresher training and evaluation, and there was no testimony that he received such training. None of Brigante's jobsite evaluations (Exhibit DD) include an evaluation of his forklift performance skills and knowledge. When questioned at hearing if he had ever been audited or evaluated by Employer during the unloading tasks, Brigante answered that he had not, even though he had performed this task on nearly every construction site that he had worked.

Wasson testified that he was familiar with Brigante's work, and that, in his opinion, Brigante was the "best guy" for the job. Opinions are admissible, but it is not enough to state a conclusion. Wasson did not go into detail on how he reached his opinion of Brigante. Wasson had not observed Brigante during unloading. Wasson's conclusion may have been from observation of how the materials were stored after Brigante was done unloading, rather than from personal observation of Brigante while driving. His opinion may have been based on the speed with which Brigante unloaded materials, never realizing that Brigante was taking shortcuts that compromised safety. He never tested Brigante on his forklift skills or recorded a written performance evaluation of them. The Board has long held that opinions must be based on a valid evidentiary foundation, such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); *R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

²³ The parties did not dispute that the forklift was a powered industrial truck. The safety orders define "industrial truck" in § 3649 as "A mobile power-driven truck used for hauling, pushing, lifting, or tiering materials where normal work is normally confined within the boundaries of place of employment.

Employer argued that Wasson's familiarity with Brigante's performance satisfies the requirement for refresher training and evaluation of Brigante's performance. The word "evaluation" is not defined in the safety orders. The same rules that govern the construction and interpretation of legislation apply to construction and interpretation of administrative regulations. (*Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d, 1510, 1517); *MCI Worldcom, Inc.*, Cal/OSHA App. 00-440, Decision After Reconsideration (Feb. 13, 2008) fn. 11.) Under rules of statutory and regulatory interpretation, terms are to be given their ordinary meaning if not specifically defined. (*Lungren v. Deukmejian (Roberti)*(1988) 45 Cal.3d 727, 735.) The dictionary is often used to define terms.

The dictionary defines "evaluation" as the act or result of evaluating, and "evaluate" as "to examine and judge concerning the worth, quality, significance, amount, degree, or condition of;" as, for example, to evaluate a student's ability. (*Webster's Third New International Dictionary of the English Language Unabridged* (1986) p. 786) Evaluation involves some type of test and comparison to a standard, and then subsequent analysis of how well the standard was met. An evaluation involves observation, but requires more than observation.

Employer's position that observation is the same as evaluation would lessen safety protection for employees. It also could lead to deficient or meaningless evaluations; e.g., an employer could certify a cursory glance as a "performance evaluation." Observation only may not reveal weaknesses in handling a specific forklift or lack of knowledge about the forklift. Where a statute is susceptible of two constructions, one leading to mischief and absurdity, and the other leading to sound sense and wise policy, the latter construction is adopted. (*Tiechert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002), citing *Lockheed Missiles & Space Co.*, Cal/OSHA App. 79-492, Decision After Reconsideration (Apr. 14, 1982).)

Adopting an expanded definition of evaluation is consistent with *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303. In that case, the California Supreme Court held that the state's work place safety and health law should be given a "liberal interpretation for the purpose of achieving a safe working environment." (*Id.* at 313). The Appeals Board has applied that instruction to mean that the law requires any safety order interpretation "to be done in a light most favorable to employee safety." *Baldwin Contraction Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001). The Board adopts an approach that safety orders must be interpreted in a manner that affords maximum protection to workers. (*Beutler Heating and Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001).)

Here, Brigante ran over Baumgardner's foot because Brigante was not fully aware of where the forklift wheels were when he turned left and also because Brigante was not aware of Employer's rule requiring spotters to stay 10 feet away from forklifts. Refresher training and performance evaluation as contemplated by the safety order could have revealed such lack of awareness and would have apprised him of the rules. Steering, maneuvering, and visibility were among the required training and proficiency performance issues. Had Brigante had been more aware of the location of the wheels, the accident possibly may not have occurred. Similarly, if Brigante had required Baumgardner to stay 10 feet away from the forklift, the accident would not have occurred.

Therefore, the Division established a violation of § 3668(d)(2). The violation was properly classified as general as it affects employee safety.

A review of the amended penalty calculation indicates that it was calculated in accordance with the regulations, when no penalty adjustment for size is allowed.

Thus, the amended proposed penalty of \$420 is found reasonable and is assessed.

Citation 1, Item 6, Regulatory, § 3203(b)(1)

Summary of Evidence

The Division cited Employer for failure to have job site inspection records.

As part of her inspection, Murphine asked Wasson for copies of Employer's records for scheduled and periodic inspections of the job site. (Exhibit 9) Wasson responded on September 8, 2010 by stating that inspection forms (Exhibit G - Contractor's Pre-Start Checklist) are completed at the start of the installation of an elevator. Since the crew had been assigned to unload material but installation had not started, there were no completed forms. (Exhibit 10). Wasson attached inspection forms that Employer requires to be completed at the start of the job.

Murphine testified that Brigante told her that he did a walk through inspection that morning before they began work, but he did not make a record of it.

Employer's safety handbook (Exhibit E, p. 9), requires the mechanic/journeyman to perform a written job hazard analysis (JHA) at the beginning of each day and each new work task. Employer requires that a

periodic inspection be conducted at each construction site by the foreman or mechanic/journeyman in charge, but does not state when the periodic inspection should be performed. (Exhibit E, p. 10) Daily inspections are required once a job starts. (Exhibit E, p. 10) In this case, Brigante was the mechanic/journeyman, and he did not record his walk through inspection that he did before he began work.

Wasson told Murphine that he had visited the job site about a week prior to the day of the accident and performed a safety inspection, among other things. He did not create a written record of his inspection.

Based upon the above, Murphine issued Citation 1, Item 6 for a violation of § 3203(b)(1). She classified it as regulatory because it related to recordkeeping requirements.

Using Exhibit 16, Murphine testified to calculation of the proposed penalty. Regulatory violations begin with a base of \$500. No reductions are allowable for severity, extent, likelihood, or abatement. The penalty adjustment factors for good faith, size and history are applicable. As before, she rated good faith at medium, allowed an adjustment for size, and allowed the highest rating for good history, resulting in a proposed penalty of \$275. With the corrected adjustment for size, the amended proposed penalty becomes \$375.

At hearing, Brigante testified that he had been to the site one or two times before August 16, 2010. He went over the plans for unloading and placing the materials with Wasson. The day of the accident, he did a visual walk-through inspection before they started unloading to check out the job site conditions. He did not notice anything that had changed since he was there with Wasson previously. He did not make a written record of his inspection.

Brigante knew that Employer required him to do a written JHA before beginning work that day (Exhibits C, Q). He did a JHA that morning, but he did not put it in writing. That is why Wasson issued discipline to him, (Exhibit H) which he accepted.

Employer's rules also required Baumgardner to perform a written JHA. Wasson issued discipline to him for the same reason as Brigante, failure to do a written JHA. (Exhibit D)

Wasson testified that his duties included managing Employer's safety program and getting jobs ready for new construction. Wasson testified that he had been to the job site on several occasions before the day of the accident. The last time was within a week of the day of the accident. He met with the general contractor and discussed the path of travel and the lay down area.

Wasson looked for safety issues. He made sure there was a clear pathway for the forklift and that there was stable soil. There was about 100 feet of dirt to cross. It was smooth and hard packed. He determined that it was safe for a forklift to cross carrying the expected loads. He did not make a written record of his inspection. Employer uses a pre-start checklist (Exhibits G, I), but they are not completed until installation begins.

Findings and Reasons for Decision

Employer's employees performed scheduled and periodic inspections, but did not make written records of the inspections. The Division established a violation of § 3203(b)(1).

The violation was properly classified as general.

The amended proposed penalty of \$375 is found reasonable and is assessed.

The Division cited Employer for a violation of § 3203(b)(1), which provides as follows:

- (b) Records of the steps taken to implement and maintain the Program shall include:
 - (1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year.

Section 3203(a)(4) requires, among other things, "scheduled periodic inspections to identify unsafe conditions and work practices" as an element of an IIPP.

Here, Employer required safety inspections before a job started and daily thereafter. (Exhibit E, p. 9, 10). These are a type of scheduled periodic inspection. Brigante testified that he performed the required walk-through on the day of the accident before they began any work. No written record of his inspection exists or was completed.

Wasson testified that he went to the job site within a week before the unloading. He checked for safety issues, such as the laydown area location

and the quality of the path from the truck to the laydown area, and concluded that it was ideal for the job. Wasson's actions constituted a periodic inspection described in Exhibit E, page 10. Wasson did not make a record of this inspection.

Employer's arguments that these inspections are not periodic inspections within the meaning of § 3203(b)(1) and that requiring written records for them would expand the scope of § 3203(a)(4) are rejected. Employer's allegations that this recordkeeping would impose "an incredible paperwork burden" and "actually discourage employers from establishing frequent jobsite inspections" are speculative and are not a defense.

Therefore, the Division established a violation of § 3203(b)(1).

The Division classified the violation as regulatory. A regulatory violation is defined by § 334(a) as follows:

Regulatory Violation—is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc."

Here, the violation pertained to recordkeeping. Therefore, classification as regulatory was correct.

A review of the calculation of the amended proposed penalty, with a 0% adjustment for size indicates that it was calculated consistently with the regulations. A regulatory violation begins with a base of \$500. (§ 336(a)(1)) Regulatory violations may be adjusted for good faith, history and size. As discussed, a 15% (medium) rating for good faith is appropriate; the adjustment for size is 0%; and the adjustment for history is the maximum allowed of 10% for having a good history. This yields a penalty of \$375. No abatement credit is allowable for regulatory violations.

Accordingly, a penalty of \$375 is found reasonable and is assessed.

Docket 10-R3D2-3833

Citation 2, Serious, § 3650(t)(12)

Summary of Evidence

The Division cited Employer for a failure of a forklift operator to look in the direction of travel and failure to be certain all persons were in the clear before moving the forklift.

When Murphine interviewed Brigante, he said that when the forklift load started shaking, Brigante told Baumgardner to put his hand on the load to steady it. Baumgardner had his hand on the load as Brigante made a left hand turn. Brigante told Murphine that he could see Baumgardner, but Brigante was not aware of how close Baumgardner was to the forklift wheel until it was too late. Wasson was not on site at the time. Brigante told Murphine that he was in charge at the site because he was a mechanic and Baumgardner was an apprentice.

Based on these facts, Murphine issued a citation for violation of § 3650(t)(12) because Brigante did not ensure all persons were in the clear before moving the forklift.

Murphine classified the violation as serious. Based upon her education, training, and experience, her opinion is that the most likely injury in the event of an accident caused by a violation is serious. Here, Baumgardner suffered broken bones and was hospitalized for six days. Murphine testified that she had conducted at least four other investigations involving forklift accidents. In all her other forklift accident investigations, the resulting injuries have been serious. This is true even when forklifts are moving slowly. Overall vehicle weight is more important than speed. All the forklift accidents she has investigated involved broken bones and crushing injuries when an employee was hit by a forklift.

Murphine further determined that the violation was accident-related because Baumgardner would not have been injured if Brigante he had made sure that Baumgardner was in the clear before moving the forklift. She determined that Brigante was the foreman and he did not exercise reasonable diligence by performing a job site inspection. She determined that he was the foreman because he was the one giving instructions.

Murphine testified about how she calculated the proposed penalty. (Exhibit 16) Serious violations begin with a base of \$18,000. Where a serious violation results in a serious injury, as here, the only allowable deduction is for size. Because Employer had 44 employees, she allowed a size adjustment, which resulted in a proposed penalty of \$14,400. Since Employer actually has well over 100 employees, no adjustment is allowable for size, making the corrected proposed penalty \$18,000.

Brigante testified that his vision was not obstructed in any way. Baumgardner was walking in front and to the left of the forklift, with his back

towards Brigante. As he drove, he saw Baumgardner with his hand on the boxes²⁴ for five to ten seconds, and then he saw Baumgardner go down.

Brigante further testified that he was not a foreman or supervisor on the day of the accident. He did not have the title "Mechanic in Charge" when there was only one crew, as on the day on the accident. To be a "Mechanic in Charge," there had to be more than one crew. Brigante testified that he did not have the power to assign employees to a job or crew, to change an employee's job duties, to force any employee to follow his orders, or to discipline anyone for safety violations unless he was a mechanic in charge. Brigante testified that he did not have the power to discipline. He could refer safety violations to his supervisor, Wasson, for possible discipline and that he could send an employee off site to report to Wasson at the office for safety violations.

Both Baumgardner and Brigante were members in good standing of the International Union of Elevator Constructors (IUEC). Brigante testified that the title of "foreman" meant an increase in pay and also meant that the person was part of management. Management employees could not belong to the union.

Wasson testified that on the day of the accident, Brigante was not considered a management employee. He was considered an hourly field employee. He was not considered a lead mechanic or a foreman. Brigante could not assign anyone to a crew or to another job site. Brigante did not have any authority to hire or fire anyone. If a helper would not listen, Brigante would have to call Wasson, and Wasson would have to handle it. Brigante's responsibility for safety on the day of the accident was not any different from Baumgardner's responsibility for safety.

Findings and Reasons for Decision

The Division did not establish a violation of § 3650(t)(12).

Citation 2 is dismissed and the penalty is set aside.

The Division cited Employer for a violation of § 3650(t)(12), which provides as follows:

§ 3650. Industrial Trucks. General

²⁴ Brigante testified that he asked Baumgardner to put his hand on the boxes to steady them and Baumgardner complied. Baumgardner testified that Brigante gave him no such instruction. Baumgardner put his hand on the boxes "to keep busy." No finding is made resolving this conflict in the evidence.

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

...
(12) Operators shall look in the direction of travel and shall not move a vehicle until certain that all persons are in the clear.

In *Gayle Manufacturing Company, Inc.*, Cal/OSHA App. 07-3104, Denial of Petition for Reconsideration (May 6, 2010), the Appeals Board held that § 3650(t)(12) has two elements, both of which the Division must prove in order to establish a violation. First, operators must look in the direction of travel; and, second, the operator may not move a forklift until all persons are in the clear. (*Id.*)

The evidence shows that Brigante did not move the forklift until all persons were in the clear. Before he started moving the forklift, Baumgardner was not in Brigante's intended path of travel. He was forward and to the side, and, thus, in the clear. There is no evidence that any other persons were near the forklift when Brigante started moving it.

The evidence also shows that Brigante was looking in the direction of travel. Nothing obstructed his view. He saw Baumgardner in front of him while he was driving the forklift. Initially, Baumgardner walked to the front and left of the forklift. Baumgardner was clear of the forklift's path until he stepped in front of the forklift. The forklift did not stop moving while Baumgardner stepped in close to put his hand on the load. Brigante saw Baumgardner's hand on the boxes.

Brigante testified that he did not realize how close Baumgardner was to the forklift wheel. This testimony is credited. The fact that Brigante actually saw Baumgardner's hand on the boxes and then saw Baumgardner go down is persuasive evidence that Brigante was looking in the direction of travel and certain that Baumgardner was in the clear. It is not reasonable to believe that Brigante would knowingly run Baumgardner over.

The parties did not agree about whether Brigante was Baumgardner's supervisor for purposes of Title 8. This issue is not decided here. Supervisory status is irrelevant to whether § 3650(e)(12) was violated. It is relevant to Employer knowledge, but Employer knowledge is not an element of the violation, and no violation is found.

Therefore, the evidence is insufficient to establish a violation of § 3650(t)(12). Accordingly, Citation 2 is dismissed and the penalty is set aside.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dale A. Raymond

DALE A. RAYMOND

Administrative Law Judge

Dated: August 29, 2012

DAR: ml

