BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
GENERAL DYNAMICS NASSCO **P.O. BOX 85278** **SAN DIEGO, CA 92168** **Employer**	**1300984** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

General Dynamics NASSCO (Employer) builds and repairs ships. Beginning March 27, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Victor Reyes (Reyes), conducted an inspection of Employer's shipyard located at 2798 E. Harbor Drive in San Diego, California (the worksite), in response to a report of an injury that occurred on March 7, 2018.

On September 7, 2018, the Division issued two citations to Employer. Citation 1 alleged two Instances of General violations of California Code of Regulations, title 8[1], section 3203. First, section 3203, subdivision (a)(4) [failure to effectively implement and maintain procedures for identifying and evaluating work place hazards]; second, section 3203, subdivision (a)(6) [failure to effectively implement procedures for correcting unsafe or unhealthy conditions]. Citation 2 alleged a Serious, Accident-Related violation of section 5042, subdivision (a)(9) [failure to keep all employees clear of loads about to be lifted and of suspended loads].

Employer timely appealed. This matter was heard by Mario Grimm, Administrative Law Judge (ALJ) for the Board, in West Covina, California, via the Zoom video platform, on June 2, 2021 and October 13 and 14, 2021. Kevin D. Bland, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Kathryn J. Woods, Staff Counsel, represented the Division. Each party submitted a closing brief.

The ALJ's Decision, issued on April 8, 2022, upheld both Citations, the Serious and Accident-Related classifications of Citation 2, and the proposed penalties. Employer timely filed a Petition for Reconsideration (Petition) on May 6, 2022. The Division timely filed an Answer,

[1] Unless otherwise specified, all section references are to California Code of Regulations, title 8.

opposing Employer's Petition, on July 1, 2022.

Employer's Petition argues that, in upholding Citations 1 and 2, the ALJ acted in excess of the Board's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the decision. (Lab. Code, § 6617, subds. (a), (c), (e).) Specifically, Employer argues that the cited safety orders were not violated. Employer further argues that the Independent Employee Action Defense (IEAD) was established. Employer does not contest the Serious, Accident-Related classification of Citation 2. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618.)

In making this decision, the Board has engaged in an independent review of the entire record. The Board has additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the Division establish, by a preponderance of evidence, a violation and/or violations of section 3203, subdivision (a)?

2. Did the Division establish, by a preponderance of evidence, a violation of section 5042, subdivision (a)(9)?

3. Did Employer establish the Independent Employee Action Defense?

FINDINGS OF FACT

1. Peter White (White), the injured employee, was a temporary employee working as a rigger at Employer's shipyard.
2. On March 7, 2018, Mr. White was injured while installing pipe braces onto a stanchion.
3. The pipe braces were rigged, attached to a sling, and suspended by a crane.
4. The pipe braces were each approximately 500 pounds, 10 feet in length, and 12 inches in diameter, with a slot on both ends.
5. To install a pipe brace, these slots were fitted onto brackets attached to the stanchion. Each stanchion was supported by four braces.
6. Mr. White was standing beside a suspended pipe brace, using his hands to control and adjust it into the bracket, when the load unexpectedly shifted upwards, trapping and crushing Mr. White's right hand in a pinch point.
7. The pinch point was between a horizontal pipe, already installed on the stanchion, and the suspended pipe brace.
8. The horizontal pipe created an obstruction in front of the bracket where the pipe brace needed to be fitted into place, resulting in the pinch point between the brace and the horizontal pipe.

9. In order to manually guide the pipe brace into place, Mr. White had placed his hand on top of the pipe brace, inadvertently placing it in the pinch point.

10. This obstruction, and accordingly the pinch point, was not present regarding the previous two pipe braces Mr. White had installed on the same stanchion.

11. Mr. White suffered a broken finger and partial degloving[2] of his right hand, which resulted in permanent injuries.

12. No supervisor was present when Mr. White's injury occurred.

13. Employer's Rigging Safety Procedures contained provisions requiring employees to keep clear of suspended loads and avoid pinch points.

14. Employer's definition of keeping employees clear of suspended loads was limited to keeping employees clear of areas directly underneath overhead loads.

15. Employer's established procedures permitted employees to be in close proximity of, and in direct bodily contact with, suspended loads.

DISCUSSION

1. Did the Division establish, by a preponderance of evidence, a violation and/or violations of section 3203, subdivision (a)?

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White,* Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).)

Citation 1 alleged two instances of violations of section 3203, subdivision (a). Section 3203 requires employers to establish, maintain, and implement an effective written Illness and Injury Program (IIPP) that meets the minimum requirements set forth in subdivision (a) of the regulation. The Division need only prove one alleged instance to establish a violation. (*Shimmick Construction Company, Inc.*, Cal/OHSA App. 1059365, Decision After Reconsideration (Jul. 5, 2019).) Citation 1, Instance 1, alleged a violation of subdivision (a)(4), which requires employers to identify workplace hazards. Citation 1, Instance 2, alleged a violation of subdivision (a)(6), which requires employers to correct workplace hazards.

While an employer may have a comprehensive written IIPP, the Division may still establish a violation by demonstrating the employer failed to effectively implement its IIPP. (*OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016); *Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Proof of implementation requires evidence of actual responses to known or reported

[2] A degloving injury is a traumatic injury that results in the top layers of skin and tissue being torn away from the underlying muscle, connective tissue, or bone.

hazards. (*National Distribution Center, LP / Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) (*NDC/Tri-State*).)

We address each Instance in turn.

Citation 1, Instance 1:

Did the Division establish a violation of section 3203, subdivision (a)(4)?

Citation 1, Instance 1 alleged a violation of section 3203, subdivision (a)(4). Section 3203, subdivision (a)(4), provides that the IIPP must:

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> (A) When the Program is first established; […]
>
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
>
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

In Citation 1, Instance 1, the Division alleged:

> Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the employer did not implement and maintain an effective Injury and Illness Prevention Program as required in the following two instances:
>
> 1. The employer procedures for identifying and evaluating work place hazards is [sic] not adequate because supervisors did not identify hazards associated to hoisting operations including, but not limited to, pinch points after worksite had change [sic].

Section 3203, subdivision (a)(4) requires that employers include procedures for identifying and evaluating work place hazards in the IIPP. These procedures must include "scheduled periodic inspections to identify unsafe conditions and work practices." (*Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) To establish a violation of section 3203, subdivision (a)(4), the Division must demonstrate that the employer failed to effectively implement its duty to inspect, identify, and evaluate workplace hazards when (1) the program was first established, (2) new substances, processes, procedures, or equipment were introduced, or (3) the employer was made aware of a new or previously unrecognized hazard. (§ 3203, subd. (a)(4)(A)-(C); *Hansford Industries, Inc. dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021).)

Here, two hazards are at issue: the pinch point between the suspended pipe brace and the horizontal pipe on the stanchion, and the suspended load itself. These two hazards are interrelated, but not inextricable.

Did Employer fail to identify and evaluate pinch point hazards?

First, the ALJ found, and we agree, that Employer failed to effectively identify hazards associated with the pinch point where Mr. White's hand was injured. Employer's Rigging Safety Procedure Manual, under the section titled "General Crane Operation Rules," directs riggers to keep clear of pinch points. (Exhibit B.) Section 6.8.29 provides: "Hands and feet are kept clear of pinch points. Be alert for 'settling' or rolling of material as it is raised or lowered, or when landing on skids or blocks." (*Id*.) Employer's safety training for riggers, which Mr. White completed, also addressed the importance of avoiding pinch points. (HT 10/13/2021, pp. 379, 398.) Employer argues that such a pinch point was therefore not a "new" hazard that required identification or evaluation.

However, the Board has recognized that workplaces are dynamic environments in which conditions can, and do, change unexpectedly, causing new hazards to arise, which require inspection to identify and evaluate. (See, e.g,, *Hansford Industries, Inc. dba Viking Steel*, *supra*, Cal/OSHA App. 1133550 [new hazard created by metal staircase shifting and tilting on forklift when securing clamps were removed]; *OC Communications*, *supra*, Cal/OSHA App. 14-0120) [new hazard created by inclement weather conditions and employee inexperienced in working in such conditions].)

The workplace conditions in this particular situation changed when Mr. White started to install the third pipe brace. (Exhibit 16 [Rigging Safety Gram].) The pinch point was between a horizontal pipe on the stanchion and the third pipe brace that Mr. White was installing. (Exhibits 10.1 and 10.2 [annotated versions of photo of stanchion with installed pipe braces].) The two pipe braces Mr. White had already installed on the same stanchion did not have a similar section of horizontal pipe above the brackets, and thus the pinch point hazard was not present when those pipe braces were manually guided into place. It was therefore a new hazard which required identification and evaluation.

Further, no supervisor was present at the time Mr. White began to install the third pipe brace. Employer could not delegate identification of that pinch point hazard to Mr. White and the other rigger on his crew, who were both non-supervisory employees. It is established that, while employees are responsible for complying with an employer's safety training and rules, employers may not delegate the ultimate duty and responsibility of identifying and evaluating new or previously unrecognized hazards to non-supervisory employees. (See, e.g., *Papich Construction Co.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) Labor Code section 6400, subdivision (a) provides, "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." This non-delegable responsibility for ensuring safe working conditions lies on employers, not employees. (See Lab. Code, §§ 6400, 6401, 6402, 6403, 6404; *Granite Construction Company, Inc.*, Cal/OSHA App. 1235643, Decision After Reconsideration (March 30, 2021); *NDC/Tri-State, supra*, Cal/OSHA

App. 12-0391; *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

Employer's Safety Manager at the time of Mr. White's injury, Duke Vuong (Vuong), who was involved in planning the installation of the stanchion and pipes, testified that Employer concluded it would be safer to install the horizontal pipe before the pipe braces on the stanchion. (HT 10/13/2021, pp. 389, 393, 395.) However, as the ALJ noted, there was no testimony from Mr. Vuong as to whether the pinch point created by the horizontal pipe was identified and evaluated at that time. (Decision, p. 6.) Rather, Mr. Vuong testified that, in his opinion, "the existence of that horizontal piece doesn't change the fundamental rigging process." (*Id*. at pp. 397, 398.) This implies that Employer felt no additional inspection was required, and therefore no inspection was conducted, which would have identified the pinch point in question.

Although Employer's Safety Procedure Manual titled "Safety Management System Audits and Safety Inspections" (Exhibit L) provides for regular safety inspections at several levels in order to identify unsafe conditions and practices, Employer presented no evidence that such an inspection occurred with regard to this particular pinch point hazard. In fact, Employer's own investigative report of the accident states that Mr. White was not aware of the pinch point, and that appropriate supervision should have recognized and addressed the pinch point hazard. (Exhibit 15 [Employer's Accident Report].)

Employer argues that the ALJ's Decision, finding a violation of section 3203, subdivision (a)(4), is at odds with *Brunton Enterprises*, in which the Board stated that, though a certain procedure "was not the safest method, 'that does not demonstrate that Employer's IIPP lacked a system of hazard identification and evaluation.'" (*Brunton Enterprises, Inc*., *supra*, Cal/OSHA App. 08-3445.) Here, however, the issue regarding the pinch point hazard is not with Employer's written IIPP, but its implementation of the program's inspection procedures.

We find that Employer failed to identify and evaluate the pinch point hazard that the horizontal pipe would create while riggers installed the pipe braces. This in itself is sufficient grounds to affirm Instance 1. A single deficiency can constitute an IIPP violation if that deficiency is shown to be "essential to the overall program." (*Mountain Cascade, Inc*., Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003); *OC Communications, Inc*., *supra*, Cal/OSHA App. 14-0120.) Here, the alleged violations involved rigging and hoisting operations. Rigging is a crucial part of Employer's daily operations; therefore, rigging safety is essential to Employer's overall safety program.

Did Employer fail to identify and evaluate hazards associated with suspended loads?

Second, the ALJ found, and we agree, that Employer failed to identify hazards associated with suspended loads. Ultimately, it was this failure that led to Mr. White's injury. Had Employer effectively identified the hazard of employees being in direct contact with suspended loads, Mr. White's hand would not have been in proximity to the pinch point.

Employer's Rigging Safety Procedure Manual, under the section titled "General Crane Operation Rules," requires riggers to keep clear of suspended loads. (Exhibit B.) Section 6.8.25

provides: "All people are in the clear before moving any loads." (*Id*.) Section 6.8.28 provides: "Always stand clear of the load so if it swings, slips, or spills, injuries do not occur. Do not stand near material that could be struck by a moving load." (*Id*.)

Employer argues that it did implement the provisions of its IIPP requiring the identification and evaluation of hazards associated with suspended loads, but that these provisions applied only to areas directly underneath loads suspended overhead. We reject this argument, as will be discussed in detail with regard to Citation 2. Accordingly, we must also reject Employer's assertion that it effectively identified and evaluated such hazards.

The plain language of Employer's IIPP provisions for rigging and hoisting loads is not limited to keeping employees clear of the area directly beneath overhead loads. For example, as noted above, Employer's IIPP states, "All people are in the clear before moving any loads." (Exhibit B.) This requirement is not limited in any way to loads that are overhead. Rather, by directing employees to stay clear of loads "before moving," this directive is most logically interpreted to apply to loads from the moment they are rigged. The IIPP further directs employees to "stand clear of the load so if it swings, slips, or spills, injuries do not occur." (*Id*.) The word "swings," in particular, implies a load that, although not overhead, could move laterally and strike an employee. "[S]lips, or spills," as well, could reasonably apply to a load that is not overhead, but still capable of striking an employee by becoming partially or totally loose from its rigging as it is hoisted. Similarly, the directive, "Do not stand near material that could be struck by a moving load[]" (*id*.), implies a hazard of being crushed between the load and the material in question due to unexpected movement of the load, and is not limited to the hazard of material directly over an employee's head. Employer failed to implement these IIPP provisions, by permitting employees to be in close proximity to, and in physical contact with, suspended loads. Employer therefore failed to identify and evaluate hazards associated with suspended loads.

Employer does not dispute that it interpreted "keeping clear" of a load to mean only avoiding the areas directly beneath a load suspended overhead. (HT 10/13/2021, pp. 384-385, 412.) Employer's written IIPP notwithstanding, Mr. Vuong testified that it was not a violation of Employer's safety rules to be in physical contact with a suspended load. (HT 10/13/2021, pp. 385, 414; HT 10/14/2021, pp. 441-442.) It thus cannot be said that Employer "took reasonable measures to identify and mitigate a hazard, although the Division may disagree that sufficient measures were taken." (*Coast Waste Management, Inc*., Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).)

We find that the Division established the violation alleged in Citation 1, Instance 1. Employer violated section 3203, subdivision (a)(4) by failing to identify the hazards created both by the pinch point and by the suspended load. Although this alone would be a sufficient basis to uphold Citation 1, we next discuss Instance 2.

Citation 1, Instance 2:

Did the Division establish a violation of section 3203, subdivision (a)(6)?

Citation 1, Instance 2 alleged a violation of section 3203, subdivision (a)(6). Section 3203, subdivision (a)(6), provides that an employer's IIPP must:

> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
>
> (A) When observed or discovered; and,
>
> (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

In Citation 1, Instance 2, the Division alleged:

> Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the employer did not implement and maintain an effective Injury and Illness Prevention Program as required in the following two instances:
>
> […]
>
> 2. The employer did not implement effective methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner, including, but not limited to, hazards associated to hoisting operations.

"Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards. [Citations.]" (*BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) In a section 3203, subdivision (a)(6) citation, the issue is generally not that the IIPP is flawed, but that the employer has neglected to implement that IIPP, by failing to correct a hazard at the workplace. (*Contra Costa Electric, Inc*., *supra*, Cal/OSHA App. 09-3271.) This is the case here. To establish the violation, the Division must therefore demonstrate that Employer failed to implement its IIPP by failing to correct a hazard. (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016.).)

Again, the two hazards at issue are the pinch point and the suspended load. The ALJ found, and we agree, that Employer failed to correct both hazards.

Mr. White's injury ultimately occurred because he was in physical contact with a suspended load. His hand would not otherwise have been in proximity to the pinch point. Employer argues that it corrected the hazard by implementing enhanced safety training on pinch points after Mr. White was injured. (Petition, p. 6; HT 10/13/2021, p. 407.) To wit, Employer's Rigging Safety Gram (Exhibit 16), created after and in response to Mr. White's injury, cautions employees to be "aware" and "watchful" of the positions of their hands and bodies in relation to equipment and

suspended loads during rigging operations. Yet, it explicitly permits employees to place their hands on suspended loads. Employer therefore failed to correct the pinch point hazard, because it still allowed employees to place their hands on suspended loads, which could inadvertently bring employees in proximity to a pinch point, not to mention the myriad other hazards that suspended loads present.

Employer's own policies created the hazard that led to Mr. White's injury, by allowing employees to be in direct contact with suspended loads. Employer knew, or should have known, of the suspended load hazard, and the associated pinch point hazard, prior to Mr. White's injury, yet Employer failed to correct it. Even after Mr. White's injury, Employer's updated safety training failed to instruct workers to stay clear of suspended loads and not to use their hands to guide suspended loads into position. In upholding the alleged violation of section 3203, section (a)(6), the ALJ correctly noted that it is insufficient to simply tell employees to avoid the hazards posed by both pinch points and contact with suspended loads, without actually correcting either hazard. (See, e.g., *Home Depot USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec 24, 2012).)

The Division established the violation of 3203, subdivision (a)(6), alleged in Citation 1, Instance 2. Employer routinely allowed employees to be in direct contact with suspended loads, which in turn placed employees within proximity of pinch point hazards. Employer failed to correct these hazards.

As will be discussed in detail with regard to Citation 2, it was Employer's standard practice to allow riggers to be in physical contact with suspended loads. Because Employer knew or should have known that this practice was in violation of a safety order, yet allowed it to continue, it cannot have effectively identified and corrected that hazard. In turn, the practice of allowing employees to physically contact suspended loads directly resulted in employee exposure to pinch point hazards; again, Employer knew or should have known of this hazard, yet failed to identify or correct it. We find that the Division established the violations alleged in both Instances 1 and 2 of Citation 1. Citation 1 is affirmed.

2. Did the Division establish, by a preponderance of evidence, a violation of section 5042, subdivision (a)(9)?

In Citation 2, the Division cited Employer for an alleged violation of Section 5042, subdivision (a)(9), which provides:

> (a) Whenever any sling is used, the following practices shall be enforced:
>
> […]
>
> (9) All employees shall be kept clear of loads about to be lifted and of suspended loads. (See Section 5002).

Section 5002, in turn, provides:

> Operations shall be conducted and the job controlled in a manner that will avoid exposure of employees to the hazard of overhead loads. Wherever loads must be passed directly over workers, occupied work spaces or occupied passageways, safety type hooks or equivalent means of preventing the loads from becoming disengaged shall be used.

The Division alleged:

> Prior to and during the course of the investigation, the employer did not keep all employees clear of loads about to be lifted and of suspended loads. As a result, on or about 3/7/2018, an employee working under a suspended load was seriously injured when the load being lifted injured the employees [sic] hand.

To prove a violation of section 5042, subdivision (a)(9), the Division must establish by a preponderance of the evidence that a sling was in use, and employees were not kept clear of a suspended load, or a load about to be lifted. (*MCM Construction, Inc*., Cal/OSHA App. 94-246, Decision After Reconsideration (March 30, 2000).)) Here, there is no dispute that a load was lifted by a sling. There is also no dispute that Mr. White was in direct physical contact with the suspended load.

Employer, however, disputes the Board's interpretation of the safety order. As noted above, Employer asserts that section 5042, subdivision (a)(9) requires employees to be kept clear only of the areas directly underneath loads suspended overhead. Under Employer's proffered interpretation, the safety order was not violated, because Mr. White was beside the suspended pipe brace, not underneath it. Employer's argument, which relies upon a non-precedential ALJ decision[3], is flawed for several reasons, and must be rejected.

First, the Board has explicitly stated that the purpose of section 5042, subdivision (a)(9), is to protect employees from all the hazards of a suspended load, not just the danger of being immediately underneath a suspended load. (*MCM Construction, Inc*., *supra*, Cal/OSHA App. 94-246.) In *MCM Construction, Inc.,* an employee was in direct contact with a suspended concrete K-rail during crane operations using a sling, guiding the load with his hands. The load swung toward the employee as it was being lowered, crushing his foot. The Board upheld a violation of section 5042, subdivision (a)(9), because the employee was not "kept clear" of the suspended load. The Board noted that the injured employee "was in direct bodily contact with the suspended load, and thus was exposed to all the hazards arising from a suspended load, including the possibility that it could land on his foot." (*Id*.)

Similarly, in *Clark Pacific Precast, LLC, Donald G. Clark Corp. & Robert E. Clark Corp. dba Clark Pacific*, Cal/OSHA App. 09-0283, Decision After Reconsideration (October 25, 2012) (*Clark Pacific*)), an employee was in direct contact with a concrete panel being lifted onto a truck

[3] A decision issued by an ALJ is neither citable authority, nor binding on the Board, under long-held Board authority. (See, e.g*., Teichert Aggregates,* Cal/OSHA App. 04-2982, Decision After Reconsideration (Jan. 21, 2011); *Home Depot, USA Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).)

bed. The panel fell onto the employee and injured him. In affirming a violation of section 5042, subdivision (a)(9), the Board stated, "Both suspended loads and overhead loads present hazards to workers. […] [A] load need not be so high as to be overhead to present a risk of serious injury." (*Id*.)

Second, the plain language of section 5049, subdivision (a)(9) requires employees to be "kept clear of all loads about to be lifted and of suspended loads." Section 5042, subdivision (a)(9) also refers to section 5002, which refers to "overhead loads." Employer urges the Board to disregard the phrase "loads about to be lifted and of suspended loads." Employer would have us interpret the regulation to apply only to "overhead loads." The Board, however, cannot rewrite the safety order. (*Armour Steel Co., Inc*., Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).) In construing a regulation, the Board "give[s] meaning to each word if possible and avoid[s] a construction that would render a term surplusage." (*Webcor Builders, Inc.,* 06-3030, Denial of Petition for Reconsideration (Jan. 11, 2010), citing *Sully-Miller Contracting Co., Inc. v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 695.)

We have previously concluded that, in the instant safety order, the Standards Board intended to address both "suspended loads" and "overhead loads" by incorporating both of those two different terms. Because "[b]oth suspended loads and overhead loads present hazards to workers," the Appeals Board reasoned, "it would be an absurd reading of section 5042(a)(9) to say that it does not apply unless loads are high enough to be over an employee's head when a load suspended inches high can present significant hazards to workers. [Citations.]" (*Clark Pacific*, *supra*, Cal/OSHA App. 09-0283, citing *National Steel and Shipbuilding Company (NASSCO)*, Cal/OSHA App. 10-5728, Denial of Petition for Reconsideration (Sep. 20, 2012) [interpretations leading to absurd results are to be avoided].)

Furthermore, Employer's interpretation would remove protections for workers exposed to suspended loads which are not directly overhead. This interpretation directly conflicts with the longstanding rule that safety orders "are to be given a liberal interpretation for the purpose of achieving a safe working environment." (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 312-313; *Dept. of Industrial Relations v. Occupational Safety and Health Appeals Board* (2018) 26 Cal. App.5th 93, 106.)

Finally, Employer argues that industry practice should be the guiding factor in determining what constitutes safe working conditions for rigging and hoisting operations. Employer asserts that it is sometimes necessary for riggers to place their hands on a suspended load to control and guide the load into place as it is lowered, and that this was the situation here. Mr. White was using his hands to guide a suspended pipe brace and adjust it into position on a bracket when his injury occurred. Mr. White and Mr. Vuong both testified that it is standard industry practice to sometimes manually guide loads into place rather than by using a tether or other equipment. (HT 6/2/2021, pp. 119, 121, 173, 174-175; HT 10/13/2021, pp. 395-397.) In fact, Employer's Petition asserts that it is safer to guide suspended structures into place by hand than by any other means. (Petition, pp. 8-9.)

This argument also fails. It is well-established that industry standards or practices do not supersede regulatory requirements. (*C.C. Meyers,* Cal/OSHA App. 95-4063, Decision After

Reconsideration (Jun. 7, 2000).) The Board has stated that industry practice is not a defense against a violation of a safety order. (*Webcor Construction, LP*, Cal/OSHA App. 07-5150, Denial of Petition for Reconsideration (Jun. 24, 2009).)

Moreover, an employer may not substitute its own judgment for the mandate of safety orders. (*Giumarra Vineyards Corporation*, Cal/OSHA App. 1256643, Denial of Petition for Reconsideration (May 26, 2020); *City of Sacramento Fire Department*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985).) The Board has explained that "[i]f an Employer feels a safety order is unreasonable it should apply to the Standards Board for a variance or to have the safety order repealed or amended. [Citations.]" (*City of Sacramento Fire Dept*., Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989); *McElroy Metal Mill Inc*., Cal/OSHA App. 1405439, Denial of Petition for Reconsideration (May 28, 2021).)

Employer failed to keep employees clear of suspended loads. We therefore find that the violation of section 5042, subdivision (a)(9) is established. Citation 2 is affirmed.

3. Did Employer establish the Independent Employee Action Defense?

In order to successfully assert the affirmative defense of IEAD, an employer must establish all five of the following elements:

> (1) The employee was experienced in the job being performed;
>
> (2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
>
> (3) The employer effectively enforces the safety program;
>
> (4) The employer has a policy of sanctions against employees who violate the safety program; and
>
> (5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

"As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The defense is premised upon the employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).) The IEAD "recognizes that where the employer has done its best to comply with OSHA, the purposes of the act would not be furthered by punishing it for the violation" (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeal Bd.* (1985) 167 Cal.App.3d 1232, 1242; *Marine Terminals Corp. dba Evergreen Terminals* Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).)

The ALJ concluded that Employer failed to establish the second and fifth elements of the defense. We agree, but conclude that Employer also failed to establish the third and fourth elements.

a. Was the employee experienced in the job being performed?

The first element is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 11-2801, Decision After Reconsideration (Feb. 4, 2011).) This requires proof that the worker had done the specific task "enough times in the past to become reasonably proficient." (*Solar Turbines, Inc.* Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).)

Mr. White was an experienced rigger. He had performed this work in the U.S. Navy for over 20 years. (HT 6/2/2021, p. 32.) He had also completed Employer's rigging training. Despite the fact that he was injured on his third day of work as a rigger with Employer (*Id*. at p. 66), Mr. White was experienced in the job being performed.

The ALJ's finding that Mr. White was an experienced rigger is supported by the record. The first element is satisfied.

b. Does Employer have a well-devised safety program that includes training in matters of safety respective to the employee's particular job assignment?

The second element of the IEAD requires the employer to demonstrate it has a well-devised safety program, which includes training employees in matters of safety respective to their particular job assignments. (*FedEx Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016).) This element is analyzed "by taking a realistic view of the written program and policies, as well as the actual practices at the workplace." (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).) Here, as discussed, Employer's policies and practices allowed employees to be in physical contact with suspended loads. Employer therefore did not have a well-devised safety program.

First, the Board has held that a safety program in direct violation of a safety order cannot be well-devised. (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932.) Second, it stands to reason that an employee cannot be effectively trained in matters of safety if that training involves violation of a safety order. (See, e.g., *National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014) [second IEAD element not established where Employer's training failed to address previous repeated violations of the same safety order].) Mr. White was not trained to stay clear of suspended loads. Mr. White testified that Employer's training permitted him to use his hands to guide the suspended pipe braces into position. (HT 6/2/2021, pp. 164, 171-172, 173-174.) The second IEAD element therefore fails.

c. Does Employer effectively enforce its safety program?

Although ultimately unnecessary, we also consider the third and fourth elements of the IEAD. (*FedEx Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016).) The third element is enforcement of the safety program. Proof that Employer's safety

program is effectively enforced requires evidence of meaningful, consistent enforcement. (*Glass Pak*, *supra*, Cal/OSHA App. 03-0750; *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (Sept. 15, 1999).)

"[E]nforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Martinez Steel Corp*., Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) Where there is lax enforcement of safety polices, an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak*, *supra*, Cal/OSHA App. 03-0750.) Employer has the burden to show that it enforces the safety policies and procedures promulgated in its IIPP and training programs, and promotes a safe working environment. (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

Here, compliance with section 5042, subdivision (a)(9) was not enforced, by Employer's admission. Employer did not enforce the provisions in its IIPP which required workers to stay clear of suspended loads. To the contrary, Employer's acknowledged, longstanding procedures permitted employees to be in physical contact with suspended loads. The third element therefore fails.

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

The fourth element of the IEAD requires a demonstration that the employer has a policy of sanctions – for example, progressive discipline or other punishment – that apply to employees who violate the safety program. An employer may also satisfy this element by presenting "other information that demonstrates the use of verbal coaching, retraining efforts, or positive recognition of employees who follow safe and healthful work practices to ensure compliance, rather than simple written discipline or other punitive measures." (*Synergy Tree Trimming, Inc., supra*, Cal/OSHA App. 317253953)

Here, Mr. Vuong testified that Mr. White violated Employer's safety rules by failing to avoid a pinch point. No sanctions were applied, because Mr. White did not return to the workplace after his injury. (HT 10/13/2021, p. 383-384.)

Employer presented evidence that it retrained employees regarding avoidance of pinch points following Mr. White's injury, as discussed above. The ALJ's Decision noted, without elaboration, that Employer "presented evidence that it enforced its safety program and sanctioned employees who violated its safety program." (Decision, p. 10.)

Upon review, however, the record is devoid of evidence as to Employer's actual policies or practices regarding sanctions or other means to enforce compliance with safety rules. Further, and more significantly, an employer cannot be said to have a policy of sanctioning employees who violate safety rules, when that employer routinely permits such violations to occur. Here, Employer's IIPP required employees to stay clear of suspended loads, yet Employer's actual practices, far from sanctioning employees who violated this rule, permitted employees to be in physical contact with suspended loads. The fourth element therefore fails.

e. Did the employee who caused the safety infraction know his actions were contra to Employer's safety requirements?

The fifth element "requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) The Board has held that inadvertence, as opposed to "conscious disregard of a safety rule," does not establish the fifth element of the IEAD. (*Id*.)

Here, Employer's safety rules directed riggers to keep their hands clear of pinch points. (Exhibit B.) Mr. Vuong testified that Mr. White's injury was caused by failing to avoid the pinch point, rather than from being in contact with a suspended load. (HT 10/13/2021, p. 383.) Mr. Vuong stated that it was the placement of Mr. White's hand on the pipe brace that violated safety rules, not the fact that Mr. White was in contact with the suspended pipe brace. (HT 10/13/2021, p. 385; HT 10/14/2021, p. 441-442.)

However, Employer's own accident investigation determined that, although Mr. White failed to keep his hand clear of a pinch point, he was unaware of the pinch point when the accident occurred. (Exhibit D, Exhibit 15.) Mr. White testified that, as an experienced rigger, he knew to avoid pinch points, and did not believe he was violating any safety rule at the time of his injury. (HT 6/2/2021, pp. 101, 116, 119.) He described the incident as an accident.

As discussed above, Mr. White's hand would not have been in proximity to the pinch point if his hand had not been on the suspended pipe brace. Because Employer's safety rules did not prohibit contact with suspended loads, Mr. White could not violate those safety rules, knowingly or otherwise, by placing his hand on the suspended pipe brace. There is also no evidence that he deliberately placed his hand in a pinch point. Employer therefore failed to demonstrate that Mr. White's actions were "intentional and knowing, as opposed to inadvertent." (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.) The fifth element therefore fails.

The Board finds that Employer failed to establish all five elements of the IEAD. The defense thus fails.

DECISION

For the foregoing reasons, Citations 1 and 2 are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member
Marvin Kropke, Board Member

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