

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

In the Matter of the Appeal of:

BARRETT BUSINESS SERVICES, INC.
4120 E. Jurupa Street, Suite 220
Ontario, Ca 91761

Employer

**DOCKETS 12-R3D1-1204
through 1206**

DECISION

Statement of the Case

Barrett Business Services Inc. is a staffing company which sends its employees to work for other employers¹. Beginning September 28, 2011, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer Norma Boltz, conducted an accident inspection at 333 North Euclid Way, Anaheim, California (the site). On March 27, 2012, the Division cited Employer for (1) failure to effectively implement the Injury and Illness Prevention Program (IIPP), (2) failure to monitor or cause to have monitored the level of Carbon Monoxide and (3) failure to control Carbon Monoxide levels.

Employer filed a timely appeal as to Citation 1, contending only that the safety order had not been violated. Employer filed timely appeals of Citations 2 and 3 contending that the safety orders were not violated, the classifications were incorrect, and that the proposed penalties were unreasonable. Employer asserts various affirmative defenses².

This matter was regularly set for hearing before Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and

¹ Employer was the “primary” employer. Here the host or “secondary” employer was L&L Foods.

² Employer withdrew abatement as a grounds for appeal. Employer withdrew jurisdiction and consent to inspect as affirmative defenses. Except as otherwise noted in this Decision, Employer failed to present evidence in support of its pleaded affirmative defenses, and said defenses are therefore deemed waived. (see, e.g. *Central Coast Pipeline Construction Co., Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980) [holding that the employer bears the burden of proving all of the elements of the Independent Employee Action Defense.]

Health Appeals Board, at West Covina, California on April 11 and 12, 2013, August 2 and 5, 2013, November 14, 2013, March 5, 2014, January 8, 2015 and July 14, 2015. Ron Medeiros, Esq, Robert D. Peterson Law Corporation, represented Employer. James Clark, Staff Counsel, represented the Division. The ALJ extended the submission date on her own motion to March 16, 2016.³

Issues

1. Did Employer fail to effectively implement its Injury and Illness Prevention Program (IIPP)?
2. Did Employer fail to comply with section 5155, subdivision (e)(1) by failing to monitor the level of carbon monoxide in a building?
3. Did Employer willfully fail to comply with section 5155, subdivision (e)(1)?
4. Was Citation 2 properly classified as general?
5. Was the proposed penalty in Citation 2 reasonable?
6. Were employees exposed to Permissible Exposure Limits (PEL) above the ceiling of 200 Parts Per Million?
7. Did Employer willfully fail to comply with section 5155, subdivision (c)(3)?
8. Was Citation 3 properly classified as a serious violation?
9. Did Employer present sufficient evidence to demonstrate that it did not, and could not with the exercise of reasonable diligence, have known the presence of the Serious violation in Citation 3?
10. Was Citation 3 properly characterized as Serious Accident Related?
11. Was the proposed penalty for Citation 3 reasonable?

Findings of Fact

1. On September 28, 2011, employees became ill due to carbon monoxide emissions from a Propane powered forklift.
2. Employees were exposed to carbon monoxide levels exceeding the ceiling limit of 200 parts per million.
3. 8 employees were transported to the hospital due to the excessive carbon monoxide levels.
4. Victor Garcia, the On-site Manager for the Employer during the Summer of 2011 through October 2011 had authority over safety matters.
5. During the Summer of 2011 up to and including September 28, 2011, employees complained to Barrett Business Services Inc. On-site Manager Victor Garcia about feeling nauseous, having headaches, the heat at the site, the lack of ventilation due to the Employer closing all of the building

³ Unless otherwise specified, all section references are to Sections of California Code of Regulations, title 8.

- openings⁴ and fumes being emitted from the propane powered forklift. Employer had knowledge of the unsafe conditions at the site.
6. Employer's Injury and Illness Prevention Plan was not effectively implemented in that it did not identify and evaluate workplace hazards when harmful changes were made to the facility through the closure of all of the building openings.
 7. Employer's Injury and Illness Prevention Plan was not effectively implemented in that Employer's investigation was deficient. Garcia handed out pain medication and told sick employees to check with their doctor. Employer failed to monitor the level of carbon monoxide at the facility and violated the safety order.
 8. Employer should have reasonably suspected that employees were being exposed to concentrations of carbon monoxide that exceeded the Permissible Exposure Limit (PEL) because employees were complaining about headaches, nausea and the fumes being emitted from the propane powered forklift in the enclosed work site with poor ventilation.
 9. Employees complained during the Summer of 2011 up to and including September 28, 2011 about the hazardous condition of the emissions from the Propane powered forklift and Employer failed to make reasonable efforts to remove the condition in that Employer did not take the forklift out of operation or have the exhaust leak repaired.
 10. Failing to monitor for carbon monoxide when it is reasonable to do so directly relates to employee safety and health in that employees could become sick from carbon monoxide that exceeds 200 parts per million.
 11. The proposed penalty for Citation 2 was not calculated in accordance with the applicable California Code of Regulations, title 8.
 12. Employer failed to control carbon monoxide levels in that employees were exposed to carbon monoxide levels above the ceiling limit.
 13. Employer was aware of the unsafe and hazardous condition and made no reasonable effort to eliminate the condition.
 14. Salgado suffered a serious injury within the meaning of the Labor Code and applicable regulations in that he was hospitalized for purposes other than medical observation.
 15. The proposed penalty as to Citation 3 was not calculated in accordance with the applicable California Code of Regulations, title 8.

Analysis

1. Did Employer fail to effectively implement its Injury and Illness Prevention Program?

⁴ Plant Manager, John Pooley testified that the building at the site was altered in June 2011. The alteration included blocking out openings so that insect and vermin would not have access into the building.

The Division cited employer under Section 3203.

Section 3203, subdivision (a) provides as follows:

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:

(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 hazards, labor/management safety and health committees.

(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.

.....

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard;

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

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

(7) Provide training and instruction.

(A) When the program is first established; [Exception omitted]

(B) To all new employees;

(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

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The citation alleges the following:

At and before the time of the inspection conducted at 333 N. Euclid Way in Anaheim, the employer failed to effectively implement its written Injury and Illness Prevention Program, in that:

(a) It did not ensure communication with employees, who were not encouraged to communicate their health and safety concerns to management, but feared reprisal (Cal. Code Regs, tit.8, § 3203, subd. (a)(3));

(b) It did not identify and evaluate workplace hazards when changes were made to the facility that introduced the hazard of harmful exposures to employees, nor when employer was specifically made aware of the hazard (Cal. Code Regs, tit.8, § 3203, subd. (a)(4)(B) & (C));

(c) It did not investigate the illnesses reported by employees who were subjected to harmful exposures (Cal. Code Regs, tit.8, § 3203, subd. (a)(5));

(d) It did not take corrective action when the unhealthy conditions that exposed employees to harmful air contaminants became apparent (Cal. Code Regs, tit.8, § 3203, subd. (a)(5) and

(e) It did not provide health and safety training to the employees working at the facility (Cal. Code Regs, tit.8 § 3203, subd. (a)(7))

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal App. 4th 472, 483, review denied.)

To establish an Injury Illness Prevention Program (IIPP) violation, the Division must prove that flaws in the Employer’s written IIPP amounted to a failure to “establish” or “implement” or “maintain” an “effective” program. The Appeals Board has consistently held that a failure to implement or maintain an IIPP cannot be based on an isolated or single violation. (*GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, DBA Fischer Transport, A Sole Proprietor*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).) The

Board has also held that an IIPP can be proved not effectively maintained on the ground of one deficiency, if the deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Instance 1

Section 3203, subdivision (a)(3) requires every employer to have a readily understandable communication system which informs employees of matters related to occupational safety and health. Here the Division alleged that the Employer did not encourage communication. Here, Employer conducted safety meetings and had training programs as testified to by Manager, Victor Garcia. Therefore, Employer has substantially complied with the safety order.

The Division has not established that Employer failed to comply with any of the methods described in section 3203 subdivision (a)(3), and Employer has shown compliance with at least one of the listed methods.

Instance 2

The Division also alleges Employer has failed to identify and evaluate unsafe work practices as required under section 3203, subdivision (a)(4)(C). In order to prove a violation of section 3203, subdivision, (a)(4)(C), the Division must establish the following: 1) Employer did not have procedures in place for identifying and evaluating workplace hazards and 2) Employer's procedures did not include scheduled periodic inspections *Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (October 11, 2013).

In *Brunton Enterprises, Inc.*, the Appeals Board granted an employer's appeal of a citation for violation of 3203, subdivision (a)(4), where there was evidence of the employer's failure to take steps to eliminate a specific hazard in a specific operation. The Board wrote: "Division's testimony regarding the lack of specific procedures for the operation at hand is not relevant and the evidence in the record does not otherwise disclose that Employer's IIPP lacked procedures to identify and evaluate hazards." Here, the circumstances are different.

Boltz testified about the potential hazards of a building where propane powered forklifts are operated and there is inadequate ventilation and employees are complaining about headaches and being nauseous. Boltz testified to her extensive education, experience and training in the health and safety fields. She is current in her training. (See Labor Code § 6432, subd. (g)) Opinions that are sufficiently supported by education, training, or experience are sufficient to support a finding. (See *Home Depot USA, Inc.*, # 6617, *Home Depot*, Cal/SHA App. 10-3284, Decision After Reconsideration ((Dec. 24, 2012); *Davis Brothers Framing Inc.*, Cal/OSHA App. 05-634, Decision After

Reconsideration (Apr. 8, 2010).) Boltz has had training regarding job hazards, accidents, and experience from investigations of accidents and illnesses, including carbon monoxide exposure. Boltz testified that a hazard existed in that changes were made to the building closing the openings to keep vermin out. The changes to the building were made without evaluating the possible hazards of operating the propane powered forklifts in the summer near the production line in a warehouse with limited ventilation. Boltz testified that nine employees told her that they complained to Garcia about headaches, being nauseous and the heat at the site during the Summer of 2011. Here, Garcia conceded that employees complained to him in the Summer of 2011 about headaches and being nauseous and the hot temperatures at the work site. Garcia testified that he told the employees to check with their personal doctor.

The Division alleged that the managers ignored the complaints of the employees. Here, there were procedures in place for identifying hazards but the managers were not capable of evaluating the hazard. The hazard that the managers were unable to recognize was operating a propane powered forklift that was emitting carbon monoxide in an enclosed building. Forklift operators Raoul Navarro and Enrique Alvarez and machine operator Susanna Cardenas all testified about the hazard of the propane powered forklift that was emitting fumes in an enclosed warehouse and made them sick. The operation of the propane powered forklift that was emitting fumes in an enclosed warehouse was an unrecognized hazard in that Garcia the Manager did not eliminate the hazard by replacing the propane powered forklift. Here, the evidence is clear through the testimony of Navarro, Alvarez and Cardenas that Garcia was not capable of evaluating the hazard of operating this defective propane powered forklift. The safety order requires that there be procedures to evaluate hazards. Here, the procedures were deficient. The Division established a violation of section 3203, subdivision (a)(4)(C).

Instance 3

In order to prove a violation of section 3203, subdivision (a)(5), the Division must prove that flaws in an IIPP amount to a failure to “establish”, “implement” or “maintain” an “effective program. Here, the issue is whether Employer failed to implement its IIPP, which is a question of fact. *Ironworks Limited*, Cal/OSHA App 93-024, Decision After Reconsideration (Dec. 20, 1996). The Division must prove that Employer failed to include a procedure to investigate occupational injury or occupational illness. Here, it appears that Employer had a procedure to investigate occupational illnesses. See Exhibit 4, page 4 which states, in pertinent part:

REPORTING SAFETY HAZARDS OR CONCERNS...

“Your employer and/or BBSI representative will investigate all reports of safety concerns or hazardous conditions in the work place and take corrective action whenever it is appropriate to do so”.

Here, On-site Manager Garcia testified that in the Summer of 2011 he received complaints from workers about being nauseous and having headaches. Garcia testified that he told employees to go home and check with their doctors. Three employee witnesses testified that in August 2011 they complained about headaches and smoke being emitted from the propane powered forklifts and that nothing was done.⁵ Enrique Alvarez (forklift operator), Raul Navarro (forklift operator/machine operator) and Susanna Cardenas (packer) testified that they complained to Garcia about having headaches, being sick and nauseous due to the forklift emissions.

The Division met its burden of proving that Employer failed to implement its IIPP by failing to investigate and take corrective actions. Employer did not take corrective action when the unhealthy conditions that exposed employees to harmful air contaminants became apparent with employees complaining about being sick and nauseous in August 2011. Employer did not implement an effective IIPP with respect to the investigation of injuries or illnesses to its employees. As a result, the Division established a violation of section 3203, subdivision (a)(5).

The Division classified the violation as General. Employer did not contest the violation’s classification or the reasonableness of the penalty. An issue not properly raised on appeal is deemed waived. (See §361.3) [“Issues on Appeal”]; *Bougeois, Inc. Cal/OSHA App. 99-1705 Denial of Petition for Reconsideration (Apr. 26, 2000)*; *Western Paper Box Co., Cal/OSHA APP. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).*)

Instance 4

Section 3203, subdivision (a)(7)(E) requires that an employer must provide training and instruction whenever an employer is made aware of a new or previously unrecognized (see Cal. Code Regs., § 3203, subd. (a)(7)(E)) The purpose of section 3203, subdivision (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. (*Siskiyou Forest Products, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).*) Boltz testified that Employees told her that they did not receive health and safety training. Here, Employer’s witness

⁵ Employer conducted a Heat Illness training on September 26, 2011. Nonetheless, Employer did not investigate occupational illnesses when informed and did not take corrective action until September 26, 2011.

Christian Caraballo testified to receiving heat illness training on September 26, 2011. Additionally, Employer records documenting said meeting were provided to Boltz per her testimony. Employees received training to prevent contamination to the food product. (Exhibit J) Here, the Employer has substantially complied in compliance with the safety order. Therefore, the Division has not sustained the burden of proof as to section 3203, subdivision (a)(7)(E).

The Division established that Employer failed to comply with section 3203 subdivisions (a)(4)(C), and (a)(5).

As discussed above, Employer did not contest neither the violation's classification nor the violation's penalty. As a result, the classification of General is correct. The penalty for Citation 1, Item 1 of \$675 is reasonable and is assessed.

2. Did Employer fail to comply with section 5155, subdivision (e)(1) by failing to monitor the level of carbon monoxide in a building?

Section 5155, subdivision (e)(1) provides:

(e) Workplace Monitoring

(1) Whenever it is reasonable to suspect that employees may be exposed to concentrations of airborne contaminants in excess of levels permitted in section 5155 (c), the employer shall monitor (or cause to have monitored) the work environment so that exposures to employees can be measured or calculated.

Section 5155, subdivision (c) provides in relevant part

(1) Permissible Exposure Limits (PELS)

(A) An employee exposure to an airborne contaminant in a workday, expressed as an 8-hour time weighted average (TWA) concentration shall not exceed the PEL specified for the substance in Table AC-1.⁶

The Division alleged the following:

At and before the time of the inspection conducted at 333 North Euclid Way in Anaheim, the employer failed to monitor

⁶A carbon monoxide level of 200 ppm is the ceiling level for carbon monoxide exposure. This is the point at which a person should leave the environment.

(or caused to have monitored) the level of Carbon Monoxide at the facility, where forklifts powered by internal combustion engines were operated in an enclosed, unventilated space, and when symptoms of exposure to Carbon Monoxide has been exhibited by the exposed employees.

In order to establish the violation, the Division must prove the following: 1) it was reasonable to suspect that employees may have been exposed to concentrations of airborne contaminants in excess of levels permitted in section 5155, subdivision (c); and 2) the employer did not monitor (or cause to have monitored) the work environment so that exposures to employees can be measured or calculated. An employer must consider such things as the nature of the site at which work is being performed, the materials and equipment being used, the nature of the work and information received from those working there to determine if exposure to an airborne contaminant exceeding a permissible exposure limit (PEL) might reasonably be suspected. (See *E. & G. Contractors, Inc.*, Cal/OSHA APP. 81-825, Decision After Reconsideration (Mar. 27, 1987).)

If exposure to airborne contaminants are suspected, the employer must monitor the work environment for contaminants. Employees were working in the warehouse with very little ventilation. Forklifts powered by internal combustion engines were operating. Internal combustion engines are known to emit carbon monoxide. Three employees testified that they complained on or around August 2011⁷, directly to Employer's On-site Manager, Garcia of headaches and nausea, which they attributed to exposure to fumes accumulated in the warehouse and emitted from the forklifts.

Employer should reasonably have suspected that employees were being exposed to concentrations of carbon monoxide exceeding the PEL. Moreover, it was undisputed that Employer did not monitor the workplace during the two weeks before the inspection while these factors were present.

Here, sick employees complained about forklifts powered by internal combustion engines which were operated in an enclosed warehouse with limited ventilation. It was reasonable to suspect that employees were exposed to an airborne contaminant exceeding the PEL. Here, Employer did not

⁷ Employer argues that Citation 2 should be dismissed the alleged violation occurred during the Summer of 2011 and that the citation issued more than six months after the Summer of 2011. This argument is rejected because Labor Code section 6317 provides in relevant part that if, after inspection or investigation, the Division believes an employer is in violation of any standard, rule, order or regulation enacted pursuant to the California Occupational Safety and Health Act of 1973, it shall issue a citation to the employer within six months from the date of the alleged violation. Here, the inspection began on September 28, 2011 and the citations issued on March 27, 2012. The citations were timely.

monitor the work environment. The Division has met its burden of proof, and the violation is established.

3. Did Employer willfully fail to comply with Section 5155, subdivision (e)(1)?

Labor Code section 6429, subdivision (a) provides the authority for assessment of civil penalties for willful violations of not more than \$70,000 and reads in pertinent part, “Any employer who willfully ... violates any occupational safety or health standard, order, or special order ... may be assessed a civil penalty of not more than seventy thousand dollars (\$70,000) ... for each willful violation.” Pursuant to authority provided by Labor Code section 55, the Director has promulgated regulations that define willful. A willful violation is defined in section 334, subdivision (e) as:

[A] violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law, or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

The Division has two alternate means of proving the willfulness of an employer’s conduct under section 334, subdivision (e). It could prove either (1) that the employer knew the provisions of the cited safety order and intentionally violated them (“intentionally violated a safety law”), or, (2) that the employer knew “that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.” (See *Rick’s Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal. App. 4th 1023, 1034, and *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668 through 1670, Decision After Reconsideration (Oct. 14, 1987).)

There were no witnesses or evidence that proved that the employer knew the provisions of the cited safety order. There were no witnesses or evidence that proved that the employer knew the provisions of the cited safety order and intentionally violated a safety law. Here, the Division was not able to meet its burden of proof regarding the first way of proving the willfulness of Employer’s conduct. .

Under the second prong of the willful test, DOSH must prove an employer commits a willful violation when the following occurs: 1) Employer is aware of a hazardous condition 2) and Employer fails to make reasonable efforts to remove the condition. (*Owens-Brockway Plastic Containers*, OSHAB 93-1629, Decision After Reconsideration (Sept. 25, 1997).)

Boltz testified that she cited Employer for a willful general violation because Employer willingly and knowingly failed to address the safety hazard of not monitoring for Carbon Monoxide when employees exhibited symptoms of Carbon Monoxide exposure. Employer's Safety Hand Book (Exhibit 4), states as follows: Your Employer and/or BBSI representative will investigate all reports of safety concerns or hazardous conditions in the work place and take corrective action whenever it is appropriate to do so. The first issue is whether the Employer was aware of a hazardous condition. Forklift Operator Raoul Navarro testified credibly that he complained to Garcia, and L&L Foods Operation Manager Joe Biginsky (Biginsky) about the lack of ventilation in the warehouse, the heat in the warehouse and the smoke that was emitted when he pressed the gas pedal on the forklift. Forklift Operator Enrique Alvarez testified that he complained to Garcia about breathing problems while working in the warehouse. Garcia testified that in the Summer of 2011 he received complaints from employees about feeling nauseous and having headaches. Employer was aware of the hazard.

The second issue is whether the Employer failed to make reasonable efforts to remove the hazard. Employer makes six arguments: 1)the forklifts were covered by a service contract and had been inspected and maintained every three months; 2)L & L Foods General Manager John Pooley (Pooley) spoke to Forklift Operator Caraballo frequently and he did not complain about symptoms or emissions; 3)the management team at L & L Foods worked in the facility and did not personally experience any symptoms related to Carbon Monoxide exposure; 4) if the management team at the facility had reason to believe a forklift was not functioning, abatement of the problem was simple; 5)management was aware of employees being sick and thought it was heat illness and conducted heat illness training on September 26, 2011 and 6) employee complaints allegedly communicated to management were inconsistent with exposure to Carbon Monoxide.

Employer argues that the forklifts were covered by a service contract and they had been inspected and maintained every three months. Employer's own witness, L&L Foods General Manager John Pooley, testified that it was difficult to find a reliable maintenance company and that the last servicing of the forklift was two months before the date of illness. Employer argues that Caraballo did not notice any problems with the forklift. This is not entirely accurate, in that Caraballo testified that he was told by a supervisor to not operate the propane powered forklift around the female employees because the fumes made them sick. Here, Employer was aware of complaints about the forklift and did not investigate. Employer was aware of complaints about the forklift, yet they did not investigate the apparent problem with the forklift.

Employer further argues that the management team worked at the facility and they did not experience symptoms. The Division's witness Dr. Paul Papanek credibly testified that duration of exposure to the carbon monoxide is important. Employer fails to mention whether Employer's management team was exposed to the carbon monoxide for any extended periods. The weight of the evidence propounds that Employer was told about the forklift's emission. Dr. Papanek testified credibly that proximity to propane powered forklifts could create exposure to carbon monoxide and that an internal combustion engine including a propane powered forklift would be a typical source of carbon monoxide. Here, Employees complained about headaches, nausea, weakness and fumes from the forklift. It does not appear that Employer investigated the source of the hazardous condition. Employer failed to make reasonable efforts to remove the hazard instead Employer assumed that the heat was the source of the employee illness.

Thus, the Division has proved the violation was willful under section 334's second test.

4. Was Citation 2 properly classified as general?

The Division classified Citation 2 as a general violation. A violation which is general is defined as "a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." (Cal Code Regs., tit. 8, § 334, subd. (b).) Employer failed to address the safety hazard of not monitoring for carbon monoxide and this directly relates to its employees safety and health. Citation 2 was properly classified as a general.

5. Was the proposed penalty in Citation 2 reasonable?

Penalties calculated in accordance with the penalty setting regulations are presumptively reasonable and will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. *Stockton Tri Industries, Inc.* Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. *Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2009) citing *Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan 8, 2004). Boltz testified with the assistance of the C-10 penalty worksheet (Exhibit 5). Boltz determined the base penalty of the violation by evaluating severity as provided in section 335 subdivision (a)(1)(A). Boltz evaluated the degree of discomfort, temporary disability and time loss from normal activity an employee was likely to suffer as a result of

occupational injury, illness or disease. She rated severity as medium. The base penalty was therefore, \$1,500. The base penalty is then subjected to an adjustment for extent as provided in section 335(a)(2). Boltz determined that the number of employees exposed was 100. She rated extent as high based on the number of employees exposed. As a result, 25 per cent of the base penalty was added and the penalty is increase by \$375. The base penalty is further adjusted for likelihood per section 335(a)(3). Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Boltz gave likelihood medium but she did not give 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 the experience, available statistics or records.

As stated above, where evidence is lacking, Employer must be given the benefit of the doubt. Therefore, the rating for likelihood must be lowered and 25 per cent of the base penalty is subtracted. This results in a base penalty of \$1,500. Boltz testified that willful violations are multiplied by a factor of five. Recalculating the penalty with the lower rating for likelihood results in \$7,500. That amount is found reasonable and is assessed.

6. Were Employees exposed to Permissible Exposure Limits (PEL) above the ceiling of 200 Parts Per Million?

The Division cited employer under Section 5155, subdivision (c)(3) which states:

Employee exposures shall be controlled such that the applicable ceiling Limit specified in Table AC-1 for any airborne contaminant is not Exceeded at any time. (Table AC-1 specifies a Ceiling Limit for Carbon Monoxide of 200 parts per million (ppm))

The citation alleges the following:

On and before September 28, 2011, at the facility located at 333 N. Euclid Way in Anaheim, the employer failed to control Carbon Monoxide levels in the work environment such that employee exposures did not Exceed the Ceiling Limit at any time. As a result, on September 28, 2011, several employees suffered adverse health effects, one of whom suffered a serious illness.

In order for the Division to prevail it must show that employee exposure to carbon monoxide exceeded 200 ppm⁸. Employer argues that there was no credible or reliable evidence establishing exposure to any level of carbon

⁸ Boltz testified that Parts Per Million is ppm which is used as a measure of small levels of pollutants in air, water etc.

monoxide exceeding 200 ppm. The evidence was undisputed that high levels of carbon monoxide existed throughout the work site on the date of the incident. (See Exhibit 2) Firefighter Thomas Hogan credibly testified that he used a calibrated RKI Eagle Gas monitor which detected readings of 250 ppm in the Raisin Packing Area and 350 ppm in the pallet area. Boltz testified that she arrived at that scene and received various readings on an annually calibrated Q track instrument.⁹ (See Exhibit A) Boltz instrument measured at 252 ppm when she opened the warehouse door between 1 and 2 p.m. on the date of the inspection. Boltz called for an immediate evacuation as the carbon monoxide levels exceeded the ceiling level of 200 ppm. The Division has established a violation of section 5155, subdivision (c) (3).

7. Did Employer willfully fail to comply with Section 5155, subdivision (c)(3)?

See the earlier statement regarding Labor Code section 6429, subdivision (a). A willful violation is defined in section 334, subdivision (e) as:

[A] violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law, or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

The Appeals Board has interpreted this standard to establish two tests for finding a willful violation. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal. App. 4th, 1023, 1034.) Under the first test, the Division must demonstrate that the employer has committed an intentional and knowing violation, and is conscious that the action is a violation of the law. (*Id.*) Whether an act was intentional and knowing rather than inadvertent depends on whether the employer committed a voluntary and volitional, as opposed to inadvertent, act, "or in other words, that the act itself was the desired consequence of the actor's intent, and that the employer was conscious that its act violated a safety order." (*A. Teichert & Son Inc., dba Teichert Construction*, Cal/OSHA App. 09-0459, Decision After Reconsideration (November 9, 2012); *Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (*Ibid.*)). The alternative test requires the Division to show that the employer, even though not consciously violating a safety law, was aware of the unsafe or hazardous condition and made no reasonable effort to eliminate the condition.

⁹⁹ The Q-track is an air monitoring instrument that measures Carbon Monoxide, Oxygen and Carbon Dioxide.

Boltz testified that she cited the Employer for a willful serious violation because Employer willingly and knowingly failed to address the safety hazard of failing to control carbon monoxide levels in the work environment. Boltz learned during her investigation that during the Summer of 2011 changes were made to the building in that all of the openings in the building were sealed to prevent vermin from entering the building. Boltz also learned that employees had complained to Garcia about the forklifts emitting fumes and employees having headaches. Here, it can be said that Employer was aware of the unsafe or hazardous condition.

Applying the first test, it cannot be said that Employer was conscious of violating a safety law based on the failure of the Division to prove that Employer intentionally violated the safety order. Thus, Employer did not willfully fail to comply with the safety order under the first test. As to the second test, it requires the Division to show that the employer, even though not consciously violating a safety law, was aware of the unsafe or hazardous condition and made no reasonable effort to eliminate the condition. The Board has consistently held that knowledge of a supervisor, such as Garcia will be imputed to the Employer. (*Tri-Valley Growers, Inc.*, Cal-OSHA App. 81-1547 Decision After Reconsideration (Jul. 25, 1985), citing *Greene & Hemly, Inc.*, Cal/OSHA App. 76-435 Decision After Reconsideration (Apr. 7, 1987) Here, employees complained about the heat, being nauseous, headaches and emissions from the forklift. Employer argues that it conducted heat illness training . It was not reasonable to ignore the complaints about the emissions from the Propane powered forklift. Here, the employer's witness Christian Caraballo testified that he was told to avoid operating the forklift around the females in the production area as it was making them sick. Under these circumstances Employer had a reasonable opportunity to detect the hazard of a Propane powered forklift emitting carbon monoxide. Employer willfully failed to comply with the safety order as to the second test. Employer was aware of the unsafe or hazardous condition and made no reasonable effort to eliminate the condition. The violation was properly classified as willful.

8. Was Citation 3 properly classified as a serious violation?

To sustain a serious violation of Labor Code section 6432, subdivision (a) provides:

There shall be a rebuttable presumption that a "serious" violation exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

If all of the elements of a serious violation are proven per Labor Code section 6432 then a rebuttable presumption that the citation was correctly classified is established. The employer has the statutory right to contradict or rebut the evidence that a serious violation was established.

“Realistic possibility” is not defined in the safety orders. The Board has interpreted the phrase “a realistic possibility” to mean a prediction that is within the bounds of human reason, and not pure speculation. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) In *HHS Construction*, supra, the Board found that there was a realistic possibility of death or serious physical harm created by the actual hazard of an All-Terrain Vehicle (ATV) crash due to the failure to provide training and instruction to employees under section 3203(a)(7) (Id.)

Here, Salgado testified that he was hospitalized for more than mere observation. Boltz testified that serious¹⁰ physical harm was possible and likely. Boltz testified that death was a possibility from failure to control carbon monoxide levels. Boltz is current in her Cal/ OSHA mandated training and is deemed competent to render an opinion of whether a violation is serious. An inspector’s opinion that is sufficiently supported by education, training, or experience, support a finding. (Home Depot USA, Inc., #6617, Cal/OSHA App. 10-3284, Decision After Reconsideration (Apr. 8, 2010).) The witness is qualified to issue an opinion and was found creditable in doing so. Boltz stated that there was employee-exposure to an actual hazard of working in a warehouse where a propane powered forklift was emitting carbon monoxide and Employer failed to control carbon monoxide levels in that they exceeded the ceiling limit and caused serious physical harm to employee Salgado.

The fact that serious harm occurred as a result of the violation is proof that serious harm from the actual hazard is within the bounds of human reason, and not pure speculation. Serious physical harm is therefore a realistic possibility in the event of an accident caused by the actual hazard.

¹⁰ Labor Code section 6432, subdivision (e) provides as follows:

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

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

Therefore, the Division met its burden to establish a rebuttable presumption that a serious violation exists.

9. Did Employer present sufficient evidence to demonstrate that it did not, and could not with the exercise of reasonable diligence have known of the serious violation in Citation 3?

Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to establish that it could not have known of the violation through the exercise of reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could provide the employer with a reasonable opportunity to have detected it. (Vance Brown, Inc., Cal/OSHA App. 00-3318, Decision After Reconsideration (Apr. 1, 2013).)

Employer asserted an affirmative defense of lack of employer knowledge. Employer had knowledge of the violation since Manager Victor Garcia had knowledge of the sick employees who were complaining regarding the emissions from the propane powered forklift. Failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation. (See Stone Container Corporation, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) Knowledge of a supervisor, such as Garcia will be imputed to the employer. (Tri-Valley Growers, Inc., Cal/OSHA App. 81-1547, Decision After Reconsideration (July 25, 1985), citing Greene & Hemly Inc., Cal/OSHA App. 76-435, Decision After Reconsideration (Apr. 7, 1978).) Thus, the Employer did not establish the affirmative defense of lack of employer knowledge.

10. Was Citation 3 properly characterized as Serious Accident Related?

The Division also characterized the violation as accident-related. A violation is “accident-related” when there is a causal nexus between the violation and the serious injury. In order for a citation to be classified as accident related, there must be a showing by the Division of a “causal nexus between the violation and the serious injury”. The violation need not be the only cause of the accident, but the Division must make a “showing [that] the violation more likely than not was a cause of the injury. (MCM Construction, Inc. Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016),

citing Mascon, Inc., Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011.)

To find that a violation is accident-related, the violation does not have to be the only cause of the accident, but only a contributing cause, as long as causal nexus exists between the violation and the serious injury. (Id.) Here, Boltz testified that there was a relationship between the violation and the serious injury in that Employer failed to control the carbon monoxide levels in work environment which caused a Serious injury to Forklift operator Salgado. Therefore, the violation is found to be accident-related.

11. Was the penalty for Citation 3 reasonable?

Where the Division does not provide evidence to support its proposed penalty, it is appropriate that Employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the established violation is assessed. *RII Plastering, Inc. dba Quality Plastering Company*, Cal/OSHA App. 00-4250, Decision After Reconsideration [Oct. 21, 2003].] The Division's C-10 penalty worksheet (Exhibit 5) indicates that Boltz rated severity as high. Dr. Papenek stated that the type of treatment required for carbon monoxide exposure would be removal of the person from exposure and giving the person Oxygen. Dr. Papenek testified that exposure to carbon monoxide can in some cases cause permanent irreversible brain damage. Per §335(a)(1)(A)(i) severity shall be based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. The rating of severity as high is correct and the initial base penalty of \$18,000 shall be assessed.

As discussed previously, extent is based upon the number of employees. Here, extent was rated as high per the C-10 penalty worksheet based on the number of employees exposed which was 100. As a result, \$4,500 was reasonably added to the penalty. Here Boltz nor Dr. Papenek gave an explanation as to likelihood. As discussed above, where evidence is lacking the Employer must be given the benefit of the doubt and maximum credits given. Therefore, the rating for likelihood must be lowered and 25 per cent of the base penalty is subtracted, bringing the penalty back to \$18,000. Employer's actions were willful and therefore the penalty is multiplied by five. Boltz did not give credit for history, good faith, or abatement because it was a willful violation and not subject to credit. Employer has more than 100 employees. No size adjustment is allowed. The cap of the penalty is \$70,000. As a result the proposed penalty was \$70,000. The proposed penalty of \$70,000 is found reasonable and is assessed.

CONCLUSIONS

In Citation 1, the evidence supports a finding that Employer failed to effectively implement its IIPP in that its Managers were not capable of evaluating hazards and it failed to investigate occupational hazards. This general violation is sustained.

In Citation 2, the evidence supports a finding that Employer willfully failed to monitor the level of carbon monoxide in a building. This general willful violation is stained.

In Citation 3, the evidence supports a finding that Employer willfully failed to control the ceiling limit for carbon monoxide such that employee exposure exceeded the ceiling limit.

ORDER

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

Dated: April 13, 2016

JJ:lgf

JACQUELINE JONES
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

BARRETT BUSINESS SERVICES, INC.
Dockets 12-R3D1-1204 through 1206

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

IMIS No. 315526582

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R3D1-1204	1	1	3203(a)	G	ALJ affirms citation	X		\$675	\$675	\$675
12-R3D1-1205	2	1	5155(e)	G W	ALJ affirms citation	X		\$12,500	\$9,375	\$9,375
12-R3D1-1206	3	1	5155(c)(3)	S W	ALJ affirms citation	X		\$70,000	\$70,000	\$70,000
Sub-Total								\$83,175	\$80,050	\$80,050

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$80,050

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

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

ALJ: JJ/lgf
 POS: 04/13/2016

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

**BARRETT BUSINESS SERVICES INC.
Dockets 12-R3D1-1204 through 1206**

**DATES OF HEARING: April 11 and 12, 2013, August 2 and 5, 2013,
November 14, 2013, March 5, 2014, January 8, 2015 and July 14, 2015**

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1.	Jurisdictional documents
2.	Team Incident Report
3.	Drawing of L&L Foods
4.	Employee Safety Handbook
5.	C-10 Proposed Penalty Worksheet
6.	Medical Records Maria Perez, 12 pages
7.	Dr. Papenek Curriculum vitae
8.	Medical Records Jimmy Salgado
9.	Medical Records Susanna Cardenas
10.	1 BY form
11.	Employer's response to 1 BY form
12.	Oct. 28, 2011 8 page document

EMPLOYER’S EXHIBITS -Admitted

- A. Certificate of Calibration & Testing
- B. Photo of Entrance
- C. 1. Photo of 169 reading 2. Photo of Production Area
- D. 1. Photocopy of 252 reading 2. Photocopy of parking lot
- E. 1. Photocopy of employee entrance 2. Photo close-up of entrance
- F. Direct reading report
- G. 1. Photo 2. Photo Internal Combustion Propane Forklifts
- H. 1. Photo of Shipping/Receiving 2. Photo close-up Shipping/Receiving
- I. Field Documentation, 6 pages
- J. Employer’s Response to 1 BY form

Witnesses Testifying at Hearing

- 1. David Reid
- 2. Thomas Hogan
- 3. Victor Garcia
- 4. Raoul Navarro
- 5. Enrique Alvarez
- 6. Susanna Cardenas

7. Jimmy Salgado
8. Norma Boltz
9. William Stark
10. Maria Perez
11. Rosa Sevilla
12. Dr. Papenek
13. Christian Caraballo
14. Matt Maxwell
15. John Pooley
16. Joe Biginsky
17. Macarrio Tenorio

CERTIFICATION OF RECORDING

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Dated: April 13, 2016

JACQUELINE JONES
Administrative Law Judge