BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

FEDEX FREIGHT INC
11153 MULBERRY AVENUE
FONTANA, CA 92337-3600

Employer

Inspection No.
1099855

DECISION

Statement of the Case

FedEx Freight Inc. is a heavy-freight hauler. On October 20, 2015, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ramesh Gupta1, conducted an accident investigation at Employer’s facility located at 11153 Mulberry Avenue, Fontana, California. On March 18, 2016, the Division issued three citations to Employer, alleging four violations of California Code of Regulations, title 82. The citations at issue allege the following: failure to establish, implement and maintain in writing an effective Heat Illness Prevention Plan; failure to ensure effective heat illness training to each supervisory and non-supervisory employee; failure to establish, implement and maintain an effective injury and illness prevention program; and, failure to ensure that a large crate was secured inside a trailer against dangerous displacement prior to strapping the crate.

Employer filed timely appeals of all citations and items. Employer contested the existence of the alleged violations, the classification of citations 2 and 3 and asserted numerous affirmative defenses.3 (See Exhibit 1)

This matter was heard by Jacqueline Jones, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Riverside, California on October 25, 2016 and March 1, 2017. Jeffrey Tanenbaum, Esq. and Rachel Conn, Esq., represented Employer. William Cregar, Staff Counsel, represented the Division. The undersigned submitted the matter on August 29, 2017.

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1 At the time of the investigation, Gupta was working for the Division as a Retired Annuitant/Associate Safety Engineer.
2 Unless otherwise specified, all references are to California Code of Regulations, title 8.
3 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 Action Defense.].)
Issues

1. Did Employer maintain an outdoor place of employment?
2. Did Employer fail to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP)?
3. Did Employer fail to ensure that all loads were secured against dangerous displacement either by proper piling or other securing means?
4. Did the Division establish rebuttable presumptions that the violations in Citations 2 and 3 were serious?
5. Did the Employer rebut the presumptions that the violations in Citations 2 and 3 were serious?
6. Did Employer carry its burden of proof on the issue of the Independent Employee Act Defense (IEAD)?
7. Did the Division establish the accident-related characterization in Citation 3?
8. Were the hazards addressed in Citation 3 duplicative of the hazards in Citation 2, and subject to the same abatement?

Findings of Fact

1. On September 29, 2015, forklift operator/dock worker Christopher Bon sustained a serious physical injury when a large and heavy crate weighing 1162 pounds fell on his right femur.
2. The majority of the work site was indoors.
3. Bon was asked to move an approximately 1162 pound irregular load of freight with a 10-12 inch base into a trailer.
4. After a load is moved into a trailer it must be secured.
5. Bon requested the assistance of co-worker Cody Christenson (Christenson) to perform a procedure known as flipping heavy crates/loads to move and secure the heavy object.
6. Employer had no procedures on flipping.
7. Christenson moved the forklift before Bonn could secure the freight.
8. Employer’s failure to ensure that the load was secured against dangerous displacement was the cause of the accident.
9. The Division calculated the proposed penalties in accordance with the applicable title 8 regulations.

Analysis

1. Did Employer maintain an outdoor place of Employment?

The Division cited Employer for a violation of section 3395, subdivision (i) which provides as follows:

4 The parties stipulated to findings of fact 1 and 9 at the hearing.

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The employer shall establish implement and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer’s Illness and Injury Prevention Plan required by section 3203, and shall at a Minimum contain:

(1) Procedures for the provision of water and access to shade.
(2) High heat procedures referred to in subsection (e).
(3) Emergency Response Procedures in accordance with subsection (f).
(4) Acclimatization methods and procedures in accordance with subsection (g).

Section 3395, subdivision (a) provides as follows:

(a) Scope and Application.
   (1) This standard applies to all outdoor places of employment.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, On October 20, 2015 and November 5, 2015, the employer had not established, implemented, and maintained in writing, an effective heat illness prevention plan for the employees.

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 sustain a violation of the safety order the Division has the burden of proving that the employer was engaged in outdoor employment.

In this matter, Jon Christian Barrett (Barrett), Senior Manager of Safety credibly testified that outside work at this location consists of walking outside from the cab of the truck to the building and inspecting the truck for defects. Barrett testified that outside work was minimal and
that the majority of the work was inside. Ramesh Gupta (Gupta)\(^5\) observed that the majority of the work was done inside on the docks and that outside work was minimal. The Board in *National Distribution Center, LP, Employer Tri-State Staffing, 2015 CA OSHA App. Bd. LEXIS 105*, stated: “First, while we agree that section 3395 [the outdoor heat illness standard does not apply to regulate the conduct of Employers] in this case since the worksite is indoors, we do not view the Division’s instant citations as alleging a violation of section 3395, nor requiring Employers to comply with the requirements of that section.” Here, Employer’s primary work occurs inside. Outside work here, appears to be minimal. Therefore, the Division failed to meet its burden as to Citation 1, items 1 and 2.

**Did Employer fail to establish, implement, and maintain an effective Injury and Illness Prevention Program?**

Section 3 2 03, subdivision (a)(4) states:

(a) Effective July 1, 1991, every employer shall establish, implement and Maintain an effective Injury and Illness Prevention (Program). The Program shall be in writing and, shall, at a minimum:

(4) Include procedures for identifying and evaluating work place hazards Including scheduled periodic inspections to identify unsafe conditions and Work practices. Inspections shall be made to identify and evaluate hazards.

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

Section 3 2 03, subdivision (a)(6) states:

(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 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

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\(^5\) On October 20, 2015, Cal/OSHA Associate Safety Engineer Ramesh Gupta conducted an accident investigation regarding an injury at a place of employment maintained by Employer at 11153 Mulberry Avenue, Fontana, California.
necessary to correct the hazardous condition shall be provided the necessary safeguards

Section 3203, subdivision (a)(7) states:

(7) Provide training and instruction.

(A) When the program is first established;

(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 that:

Prior to and during the course of investigation, including, but not limited to, on October 20, 2015 and November 5, 2015, the employer had not complied with the following essential elements:

**Instance (1)**

The employer had not identified and evaluated the hazard of flipping large, irregular and oversize loads against the wall of a trailer container in an almost vertical manner. The procedures were not developed to prevent tipping and falling as required by section 3203 (a)(4).

In order to prove a violation, the Division has the burden of establishing that Employer had a written IIPP; and (2) failed to effectively implement an essential element of the IIPP by not including procedures for identifying work safe practices and evaluating the hazards of flipping large irregular and oversize loads against the wall of a trailer container in an almost vertical manner.

To establish an 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*
Here, the Division’s citation alleges that employer had not identified and evaluated the hazard of flipping large, irregular and oversize loads against the wall of a trailer container in an almost vertical manner. The Division alleged that procedures were not developed to prevent tipping and falling.

The first element was undisputed, as both parties provided testimonial evidence at the hearing that Employer had a written IIPP. (See Exhibit N) In determining the existence of the second element, the Division must show that Employer failed to implement an essential element, and that such a failure is a deficiency that is essential to the overall IIPP.

According to Board precedent, section 3203, subdivision (a)(4):

Contains no requirement for an employer to have a written procedure for each hazardous operation it undertakes. What is required is for Employer to have Procedures in place for identifying and evaluating workplace hazards, and these Procedures are to include scheduled Periodic inspections. (Brunton Enterprises, Inc., Cal/OSHA App.08-3445, Decision After Reconsideration (October 11, 2013).)

During direct examination by the Division, Gupta credibly testified on the issue of whether Employer had procedures for identifying safe work practices and evaluating work place hazards. Gupta testified that the violation was demonstrated here, in that there was no fixed procedure for holding large irregular sized packages in place when the packages are flipped. Gupta testified that flipping loads occurs when a pallet is placed inside of a trailer and placed vertical on its side by a forklift operator/dock worker.

Here, Employer provided evidence through the credible testimony from Senior Manager of Safety Jon Barrett (Barrett), of Employer’s procedures to prevent tipping and falling of loads. Barrett testified that Employer has numerous procedures for training and pre-shift training, mentor training and Quick Safety Messages which are reviewed weekly. Employer also implemented ways to identify, evaluate and correct hazards via its IIPP (See Exhibit N) and Safe Working Guidelines (See Exhibit M). Employer conducts both periodic and scheduled safety inspections. (See Exhibits N & O). Board precedent in Brunton Enterprises, Inc. (Ibid) concludes that there is no requirement for an employer to have a written procedure on each hazardous operation it undertakes. What is required is for Employer to have Procedures in place for identifying and evaluating workplace hazards, and these procedures are to include “scheduled periodic inspections”. Employer has done so. The Division has not established that Instance 1 was a violation of section 3203, subdivision (a)(4).

Barrett has 28 years of experience as an employee of Employer. He is a certified Director of Safety.
Instance 2

The Employer had not utilized methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures as required by section 3203(a) (6). The practice of flipping the loads had been going on at the establishment for a long time.

Section 3203, subdivision (a)(6) “is a performance standard, and creates a goal or requirement while leaving employers to design appropriate means of compliance under various working conditions.” *MCM Construction Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016), citing *Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012). “The issue is generally not that the IIPP is flawed, but that the employer has neglected to implement that IIPP, as it has failed to correct a hazard at the workplace.” (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, *supra*, citing *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) “Employers are given wide latitude in how they choose to correct hazards, and presumably, creation of a new written procedure may not always be necessary.” (Id.) However, it is the employer’s burden to show that it has actually responded to known or reported hazards. (*Bay area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration (Sep. 6, 2012) [reversed on other grounds].)

Senior Manager of Safety Barrett testified that flipping or standing on edge is a common practice for employer. Christopher Bon (Bon) testified that his job as a forklift/dock operator was to load and unload freight using a propane powered forklift. Bon testified that he was never trained on the procedure of flipping loads. Bon testified that he was uncomfortable with flipping the heavy item depicted in Exhibit 2 and that is why he requested assistance from his co-worker (Cody Christenson) with more experience with flipping heavy items.

The Division presented Gupta’s Field Documentation Worksheet as Exhibits 3, 4, and 5 and Gupta provided testimony regarding this document. Employer objected to Gupta’s testimony regarding the statements made by Dock Supervisor John Caserus (Caserus). Gupta asked Todd Titus (Field Safety Advisor for Employer) if Employer had any procedures on flipping loads. Titus told Gupta that Employer did not have procedures on flipping loads. Titus statements to Gupta are not hearsay because he is the Field Safety Advisor and a member of management and therefore authorized to make statements on Employer’s behalf. *Macco Construction OSHAB 600 (Rev. 5/17)*

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7 Exhibits 3, 4, and 5 are the Field Document Worksheet used by Gupta during his inspection of the site on November 5, 2015, to record his findings during the inspection. Because the worksheet contains relevant information about what Gupta discovered during the course of his investigation in his official capacity its probative value far outweighs any prejudice to the Employer. The document is several pages of hand written notes. Although the document is hearsay, the document contains admissions from Caserus, An Employer representative authorized to speak on Employer’s behalf, on which Gupta specifically testified. Admissions adverse to an employer made by a representative of that employer are an exception to the hearsay rule and may support a finding of fact. (See Evidence Code §1222; *Macco Construction*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986).)
84-1106, Decision After Reconsideration (Aug. 20, 1986) Titus statements are authorized admissions under Evidence Code Section 1221.

Here the evidence demonstrates that employees such as Bon and Christenson were expected to flip heavy items without adequate training. Bon indicated that there was no training on flipping large irregular sized packages. Christenson indicated that he had no training on flipping in his written statement to Gupta. Christenson’s testimony was that other workers showed him how to flip. Frank Escobar Jr. (Escobar), Operations Manager testified that the type of heavy load that caused the accident was delivered to the site on average twice daily. The record clearly reflects that there was a regular need to flip heavy items. Management was aware that there were no procedures on flipping loads. Here, an adverse inference can be drawn due to the failure of the Employer to call either Titus or Caserus as witnesses. The adverse inference is that Titus and Caserus would testify that Employer had no procedures for correcting unsafe or unhealthy practices of flipping and that the procedure had gone on for years at this site. Employer did not respond appropriately, in that nothing was done to correct the hazard of employees flipping large and irregular sized packages without adequate training in that the practice was allowed to continue. Employer offered no evidence that it took steps to train employees in flipping large and irregular sized packages. The Division has established that Instance 2 was a violation of section 3203, subdivision (a)(6).

**Instance 3**

Specific training and instructions were not provided to the Employee(s) on the assignment of flipping large irregular and oversize loads in the trailer in accordance with 3203 (a) (7).

The regulation requires that employees be provided appropriate training or instruction when a new or unrecognized hazard emerges in the workplace. (See Manpower, Inc., Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) Senior Manager of Safety Barrett, during cross-examination was asked if employer had any written instruction to employees regarding holding heavy packages in place until it is strapped in. Barrett replied that he was not aware of any such instruction. During the course of his investigation, Gupta interviewed the injured worker, Bon, and his co-worker, Christenson. Gupta testified at hearing that both Bon and Christenson reviewed their written statements for accuracy. Christenson’s statement said, “Bon requested him to help flip the crate inside the container. He has flipped the load 200-300 times. On average 5 times a month. Nobody trained him on flipping. No one discussed to keep holding the load until it is properly braced”.

Bon testified the he was never given guidance on how to flip. Bon testified that he never saw any videos on flipping. He watched other people to learn how to flip. It appears that Manager Caserus raised concerns about the lack of training regarding the hazard of flipping objects and that no training regarding this hazard was ever conducted. Caserus told Gupta that
he does not allow flipping on his shift. Bon testified that he had not received instructions or procedures on flipping. Additionally, as stated earlier, Titus, a Manager told Gupta that there were no procedures on flipping loads. Here, it is found that there was no specific training and instruction on flipping large and irregular freight. The Division has established that Instance 3 was a violation of section 3203, subdivision (a)(7)(E). In summary, the Division has established a violation of section 3203 subdivision (a).

2. **Did Employer fail to ensure that all loads were secured against dangerous displacement either by proper piling or other securing means?**

The Division cited Employer for a violation of section 3704 which provides:

> All loads shall be secured against dangerous displacement either by proper piling or other securing means.

In the citation, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on October 20, 2015, and November 5, 2015, the employer had not ensured that a large crate (weighing 1162 lbs) was secured inside a trailer against dangerous displacement prior to strapping the crate.

As a result, on September 29, 2015, at or about 4:45 p.m., an employee sustained serious physical injuries of his right upper leg when the unsecured crate he was strapping inside the trailer fell on him Location: Outbound Dock #59.

In *Preston Pipelines, Inc.* (2013, CA OSHA App. Bd. Lexis 12), the Board held that the safety order does not necessarily require immobilization of the load, but rather requires that the load be limited in the distance it can move so as to avoid “dangerous displacement.” The Board is requiring that the load be secured so that dangerous movement or displacement does not take place. The testimony of Bon and Christenson both affirm that the load fell prior to the load being secured. Here, the Division presented credible testimony the procedure used which is called “flipping the load” could have been done in a similar manner if the forklift stayed in place until the object was secured. This would have fulfilled the safety order’s requirement to secure the load against “dangerous displacement”. The load was not secured and fell onto the injured worker.

The Division, therefore, established a violation of section 3704.

3. **Did the Division establish rebuttable presumptions that the violations in Citations 2 and 3 were serious?**

Labor Code §6432, subdivision (a) states:

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

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

Realistic possibility is not defined in the safety orders. However, the Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (MDB Management Inc., Management Inc., Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016, p. 4 citing Langer Farms, LLC, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing Janco Corporation, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing Oliver Wire & Plating Co., Inc., Cal/OSHA App. 77693, Decision After Reconsideration (April 30, 1980).)

Here, Gupta testified that he classified the citation as serious because Employer had no procedures on flipping heavy loads and there was no training on flipping heavy loads. The hazard is that there are no procedures or training on flipping large irregular shaped and heavy loads which if they fall can cause serious physical harm or death. Gupta testified that there was a realistic possibility of serious harm or death if employees are not trained and there are no procedures for flipping loads and the load falls onto someone. This type of hazard could cause death or serious physical harm. Here, it is found that Gupta has worked in the safety field for over 28 years. 27 of those years Gupta has worked as an Associate Safety Engineer for the Division. Gupta testified that he was up to date on his mandated training. It is found that Gupta’s opinion was adequately based upon his training and experience.

His testimony, which was based on his experience investigating such injuries and accidents with the Division, was unrebutted, and was credited. Gupta explained that heavy freight weighing over 1000 pounds that is not secured could cause serious injuries. The Board in Forklift Sales of Sacramento Inc. 2011 CA OSHA App. Bd. LEXIS 102, similarly held that, “It is not entirely clear that expert opinion is required to prove that a 1200 + pound pallet jack that became dislodged from a forklift would more likely than not cause serious injury if an accident were to occur as a result of the failure to secure the load, as that result is probably a matter easily understood by a layperson. See Witkin, California Evidence. Opinion Evidence §29 (2008). The actual hazard posed by the violation could result in permanent disfigurement and/or broken bones. These type of injuries could result in hospitalization requiring treatment for 24 hours or more.

While Gupta was at the site he interviewed several people including the injured worker, Bon. Gupta learned through conversations with Bon and Titus that there were no procedures or training on flipping heavy loads. The Division established rebuttable presumptions that the violations in citations 2 and 3 were serious.
4. Did the Employer rebut the presumptions that the violations in Citations 2 and 3 were serious?

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to the employer to rebut the presumption. (International Paper Co., Cal/OSHA App. 14-1189, Decision After Reconsideration (June, 2015).) Labor Code section 6432, subdivision (c) provides that employer may rebut the presumption:

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 and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

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

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

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (Vance Brown, Inc., Cal/OSHA App. 00-3318, Decision After Reconsideration (April 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (Robert Onweller dba Pacific Hauling & Demolition, Cal/OSHA App. 14-1087, Decision After Reconsideration (June 15, 2015); A.A. Portonova & Sons, Inc. Cal/OSHA app. 83-891, Decision After Reconsideration (March 19, 1986).)

The factors set forth in Labor Code section 6432, subdivision (b)(1) may be used to evaluate whether the Employer established that it did not know and could not, with the exercise of reasonable diligence, have known of the severity of the harm and likelihood of harm involved in failing to train specifically regarding the hazards of flipping and failing to correct unsafe conditions and work procedures. (A. Teichert & Son, supra.)

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8 Labor Code section 6432, subdivision (b)(1), mentioned in subdivision (c)(1) above, directs the Division to consider several factors when issuing citations for alleged serious violations, which include:
As to citation 2, the record shows that Employer knew that it was required to train employees on job hazards involving their assignment to move heavy freight, but there was no training on flipping heavy loads. According to Barrett, there were no written procedures on flipping. No procedure for correcting unsafe conditions was introduced. Reasonable diligence requires proof of the employer's conduct vis a vis the employee's work where the violation occurred. (Roof Structures, Cal/OSHA App. 91-316, Decision After Reconsideration (Feb. 25, 2009).) Failure to inspect the employee's work demonstrates a lack of adequate supervision. (Sunrise Windows, Cal/OSHA App. 00-3220, Decision After Reconsideration (Jan 23, 2003).) Here, Employer had knowledge that heavy freight was being transported and that said freight should be secured. Bon testified that heavy freight is flipped on average 20 to 30 times per day without it being fully secured. Employer did not provide procedures or training on flipping heavy loads. Here, after weighing the evidence, it cannot be said that employer did not have knowledge of the hazards.

As to citation 3, the record shows that Employer knew that heavy freight was received at least 2 times every day. Employer is in the business of heavy freight hauling. It cannot be said that Employer did not have knowledge of the hazards. Employer did not rebut the presumption.

5. Did Employer carry its burden of proof on the issue of the IEAD affirmative defense?

Employer alleges that it should not be held responsible for the violation of the safety order because the evidence established that the violation was the result of the independent employee action of either Bon or Christenson. Here, there are two versions of what happened on the date of the accident. Bon alleges that Christenson removed the forklift before the large irregular load was secured. Christenson alleges that Bon told him to pull out and that Bon said he had the item secured and did not need any additional help. Employer alleges that either way, the accident resulted from employee independent action.

The Independent Employer Act Defense (IEAD) is a Board-created affirmative defense that requires an employer to establish five different elements. (1) the employee was experienced in the job being performed; (2) the employer has a well–devised safety program that includes

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
(C) Supervision of employees exposed or potentially exposed to the hazard.
(D) Procedures for communicating to employees about the employer's health and safety rules and programs.
(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:
   (i)The employer's explanation of the circumstances surrounding the alleged violative events.
   (ii)Why the employer believes a serious violation does not exist.
   (iii)Why the employer believes its actions related to the alleged violative event were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).
   (iv)Any other information that the employer wishes to provide.
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 sanctions policy which it enforces against employees who violate the safety program, and (5) the employee caused a safety infraction which s/he knew was against employers safety requirement. (See C.E. Buggy, Inc. v. Occupational Safety and Health Appeals Board (1989) 213 Cal. App. 3d 1150, 1155).

This Board-created affirmative defense requires the employer asserting the defense to demonstrate by a preponderance of evidence all five of the elements. (Chicken of the Sea Int’l, (Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 28, 2003).)

The defense is premised upon an employer’s compliance with non-delegable statutory and regulatory duties. (Pierce Enterprises, Cal/OSHA App. 00-1951, Decision After Reconsideration. (March 20, 2002).) An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee’s actions serve to circumvent or frustrate the employer’s best efforts. (Paramount Farms, King Facility, Cal/OSHA App. 09-864, Decision After Reconsideration (March 27, 2014); Lights of America, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

The first element requires that the employee be experienced in the job performed. 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).)

Both Bon and Christenson were certified fork lift operators. Bon had 4 years of experience as a Fork lift operator/Dock worker and Christenson had 8 years of experience as a Fork lift operator. Both Bon and Christenson testified that Bon wanted help with the heavy freight and asked Christenson to assist him. Both Bon and Christenson testified that they were experienced in moving lots of freight. Bon’s testimony was that he had handled other pieces of heavy freight but not as heavy as this one. Bon’s experience does not fulfill the requirements of the IEAD defense. Christenson testified that his experience included flipping thousands of pieces of freight. The record does not reveal whether Christenson had experience with freight this heavy. Here, it is found that there is insufficient evidence to conclude that either Bon or Christenson had experience in the specific task of flipping heavy freight enough times in the past to become reasonably proficient. The first element was not established.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (Mercwy Service, Inc. Cal/OSHA App. 77-1133, supra.) The well devised safety program must contain specific procedures. (Blue Diamond Growers, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012).) Although the testimony of Barrett was credible regarding Employer’s safety program which included videos, reading assignments, pre-shift meetings and mentoring (See Exhibits D-M), the testimony and statements of Bon and Christenson clearly
indicate a lack of specific training regarding flipping large irregular sized loads. The second element was not established.

The third element of the IEAD defense requires proof that Employer effectively enforces its safety program. Proof that Employer’s safety program is effectively enforced requires evidence of meaningful, consistent enforcement. (Glass Pak, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting Tri-Valley Growers the Board stated that “systematic inspections for hazardous conditions and practices and a sufficient measure of competent supervision must also be demonstrated to meet the third element” citing Atchison, Topeka and Santa Fe Railway Company, Cal/OSHA App. 86, 1700 Decision After Reconsideration (Mar. 17, 1988). Here, Gupta learned in his investigation that Supervisor Caserus was opposed to the flipping procedure, yet the procedure was still allowed by this Employer. The third element was not established.

The fourth element requires Employer to establish that it has a sanctions policy which it enforces against employees who violate the safety program. Bon testified that he had been disciplined in the past for corrective action for rule violations. Additionally, Operations Manager Frank Escobar testified that employees who violate safety rules receive Corrective Action. (See Exhibit S). The Fourth element was established.

The fifth element requires Employer to prove that either Bon or Christenson caused a safety infraction which he knew was against Employer’s safety requirement. Both Bon and Christenson testified that the rule is that a load must be secured and braced before the fork lift pulls out. Here, there was no training and no fixed policy on heavy loads which required flipping and then securing. It is clear that Employer did not have a safety requirement in securing loads of this magnitude. The Fifth element was not established.

Employer failed to prove the first, second, third and fifth element of the IEAD. Therefore, the Division established a violation of section 3704.

8. Did the Division establish the accident-related characterization in Citation 3?

To prove the accident-related characterization, the Division must show a causal nexus between the Employer’s violation of a safety standard and an employee’s serious injury. (MCM Construction, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016); HHS Construction, Cal/OSHA APP. 12-0492, Decision After Reconsideration (Feb. 26, 2015.) The Division must make a showing that the violation is more likely than not was a cause of the injury.” (Ibid).

The Division met its burden to demonstrate a causal nexus between the violation of section 3704 and the serious injury sustained by Bon. The evidence established that the load, a 1162 pound crate was displaced because it was not secured. Therefore, the Division established that the worker’s serious injury was caused by Employer’s failure to ensure that all loads were
secured against dangerous displacement, and as a result, the citation was properly characterized as accident-related.

9. **Were the hazards addressed in Citation 3 duplicative of the hazards in Citation 2, and subject to the same abatement?**

The Appeals Board may set aside a penalty if 1) the hazards are substantially identical to duplicative of another violation and 2) abatement of one will serve to abate the other. *(A & C Landscaping, Inc. aka A & C Construction, Inc., supra, citing Strong Ties Structures, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1978); Western Pacific Roofing Corp., Cal/OSHA App. 96-529, Decision After Reconsideration (Oct. 18, 2000).)*

Here, different but interrelated safety orders were cited. The employer’s duty to train, implement and maintain an effective IIPP involve implementation of procedures to detect unsafe conditions. The employer’s duty to ensure that all loads were secured against displacement involve implementation of procedures to detect unsafe conditions. The hazards in section 3203, subdivisions (a)(6) and (a)(7) are substantially identical or duplicative of section 3704. A single abatement, effective training on flipping and securing heavy loads would have eliminated the hazards in both citations.

Employer’s appeal of Citation 2, Item 1 is denied. It is determined that the violation in Citation 2 is similar to Citation 3 pursuant to section 336, subdivision (k). Therefore, pursuant to section 336, subdivision (k) the penalty will be reduced to $844.

**Conclusions**

The evidence was insufficient to show that Employer maintains a work site where the outdoor heat illness standard applies. As a result, there is no violation of section 3395, subdivision (i).

The evidence was insufficient to show that Employer maintains a work site where the outdoor heat illness standard applies. As a result, there is no violation of section 3395, subdivision (h)(1).

The evidence supports a finding that Employer violated section 3203, subdivision (a)(6) and (a)(7) because employer failed to provide specific training and instructions on flipping large irregular size loads and failed to correct unsafe or unhealthy conditions regarding flipping loads. There was a realistic possibility of a serious injury in the event of an accident caused by the violation. The classification is serious. The penalty assessed for Citation 2 will be reduced to $884 pursuant to section 336, subdivision (k).

The evidence supports a finding that Employer violated section 3407 because Employer failed to ensure that all loads were secured against dangerous displacement by proper piling or other securing means. There was a realistic possibility of a serious injury in the event of an
accident caused by the violation. The classification is serious accident related. Employer did not establish the independent employee action defense.

**Order**

The appeals of Citation 1, items 1 and 2 are granted, and the penalties are vacated. A violation of Citation 2, item 1 is upheld. The classification is serious. The penalty is $844. A violation of Citation 3, is upheld. The classification is serious. The penalty is $18,000.

Dated: 9-27-2017

[Signature]

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 sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**
APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

Inspection No.: 1099855
Employer: FEDEX FREIGHT INC
Date of hearing(s): March 1, 2017, August 4, 2016, October 25, 2016

DIVISION'S EXHIBITS

<table>
<thead>
<tr>
<th>Exhibit Number</th>
<th>Exhibit Description</th>
<th>Status</th>
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<tbody>
<tr>
<td>1</td>
<td>Jurisdictional documents</td>
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</tr>
<tr>
<td>2</td>
<td>Photocopy of photo of package that fell.</td>
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</tr>
<tr>
<td>3</td>
<td>Safety Engineer Ramesh Gupta's Field notes, pages 2-6.</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>4</td>
<td>Safety Engineer Ramesh Gupta's field notes pages 7-8.</td>
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<tr>
<td>5</td>
<td>Safety Engineer Ramesh Gupta's field notes page 9</td>
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<td>6</td>
<td>1 BY form</td>
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<tr>
<td>7</td>
<td>Safety Topics-Heat Related Illness</td>
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EMPLOYER'S EXHIBITS

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<td>B</td>
<td>Cal/OSHA 170A</td>
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<td>C</td>
<td>Statement of Cody Christenson</td>
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<td>D</td>
<td>Transcripts for Christopher Bon</td>
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<td>E</td>
<td>Dock Employee Education Requirements</td>
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<td>F</td>
<td>Dock Employee Expectations</td>
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<td>G</td>
<td>Proper Loading and Unloading-Final Master 2008</td>
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<td>H</td>
<td>Proper Loading &amp; Unloading Video Discussion Points Exercise</td>
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<td>Freight Handling Course Expectations</td>
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<td>J</td>
<td>Freight Handling Education Course Freight Handling Activity Lesson Plan</td>
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<td>Freight Handling Practices</td>
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<td>Dockworker/Dockworker Part-Time Education Assignment Sheet</td>
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<td>Safety Committee Meeting Agenda and Minutes</td>
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### THIRD-PARTY/INTERVENOR EXHIBITS

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Witnesses testifying at hearing:

- Christopher Michael Bon  
  Forklift operator/Loader/Dock worker
- Ramesh Gupta  
  Cal/OSHA Engineer
- Jon Christian Barrett  
  Senior Manager of Safety
- Frank Escobar Jr.  
  Operations Manager
Cody Christenson
Forklift operator/Loader/Dock worker
APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: 1099855
Employer: FEDEX FREIGHT INC

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

[Signature]
Jacqueline Jones
Administrative Law Judge

[Date]
9-27-2017
### SUMMARY TABLE

**OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD**

In the Matter of the Appeal of:

**FEDEX FREIGHT INC**

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<th>TYPE</th>
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<th>VACATED</th>
<th>PENALTY PROPOSED BY DOSH IN CITATION</th>
<th>FINAL PENALTY ASSESSED</th>
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**Sub-Total** $27,370.00 $18,884.00

**Total Amount Due** $18,884.00

*You may 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.*

### PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:
   **Department of Industrial Relations**

2. Write the **Inspection No.** on your payment

3. Mail payment to:
   Department of Industrial Relations (Accounting)
   Cashier Accounting Office
   P.O. Box 420603
   San Francisco CA 94142-0603

   **Online Payments can also be made by logging on to** http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

   **-DO NOT send payments to the California Occupational Safety and Health Appeals Board-**

**Abbreviation Key:**
- G=General
- S=Serious
- RG=Repeat General
- R=Regulatory
- W=Willful
- E=Employee
- A/R=Accident Related
- RS=Repeat Serious

OSHAB 201 SUMMARY TABLE
Rev. 06/16