

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

KIMCO Staffing Services, Inc.
1430 West River Lane
Santa Ana, CA 92706-1449

Employer

Dockets No. 2015-R3D3-4594
and 4595

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by KIMCO Staffing Services, Inc. (Employer).

JURISDICTION

Commencing on August 20, 2015, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On October 23, 2015, the Division issued two citations to Employer alleging three violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Citation 1 alleged violations of section 3203, subsection (a)(7)(C) (Injury and Illness Prevention Program – failure to train temporary Employees on heat illness) and section 3380, subsection (f)(1) (Personal Protective Devices – failure to assess work place hazards). Citation 2 alleged violation of section 3385, subsection (a) (Foot Protection – failure to provide appropriate foot protection).

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on June 08, 2016, affirming the violations.

Employer subsequently filed a timely petition for reconsideration on July 07, 2016.

The Division answered the Employer's petition for reconsideration.

ISSUES

1. Did Employer comply with the training requirements of section 3203, subsection (a)(7)(C)?
2. Has Employer properly assessed the present or likely to be present workplace hazards as required by section 3380, subsection (f)(1)?
3. Did the ALJ correctly apply section 3385, subsection (a) to the facts of the instant case?
4. Are the violations of section 3380, subsection (f)(1) and section 3385, subsection (a) related to the same hazard sought to be prevented by the safety orders? If so, may the Board set aside the penalty in Citation 1, Item 2?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis of Labor Code section 6617, subsections (c) and (e). Furthermore, Employer's petition challenges each of the alleged violations separately.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a

preponderance of the evidence in the record as a whole and appropriate under the circumstances.

As a Primary Employer, KIMCO Was Responsible for Training Its Employees When They Were Assigned to Their New Job Assignments.

Citation 1, Item 1 alleges a general violation of section 3203, subsection (a)(7)(C):

(a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at minimum:

(7) Provide training and instruction:

(C) To all employees given new job assignments for which training has not been previously received.

The alleged violation description reads as follows:

Prior to and during the course of the inspection, including, but not limited to, on August 20, 2015, the employer failed to train the temp. employees on heat illnesses and symptoms engaged in off-loading boxes of merchandize [sic] from containers parked in the loading dock doors of the warehousing facility that should reasonably be anticipated to result in exposure of the risk of heat illness and temperature exceeded 90 degrees Fahrenheit.

Employer makes two arguments concerning this citation: 1) the citation is erroneous because of Division's reference to section 3395—Heat Illness Prevention—on the citation and 2) it complied with the training requirements of section 3203, subsection (a)(7)(C).

As to the first argument, while it is true that the scope of section 3395 is only applicable to outdoor places of employment, the reference by the Division to section 3395 on the citation is "merely a reference". (*National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (October 05, 2015).) The Employer is not mandated to comply with the requirements of section 3395, nor is the citation viewed as alleging a violation of that section. (*Id.*) Therefore, the Board will analyze Employer's violation solely based on the merits of section 3203, subsection (a)(7)(C).

The purpose of section 3203, subsection (a)(7) is to provide employees with the ability to recognize 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 (March 17, 2003).) Although training is not defined in the regulations, the Board has previously held training, “when used to describe the process of providing employees with that knowledge and ability in this context, is to instruct so as to make proficient or qualified.” (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (March 17, 2003).)

Employer provided its Heat Illness Prevention Program (HIPP) to show it complied with the training requirements of section 3203, subsection (a)(7)(C). While Employer’s HIPP iterates the importance of providing training on heat illness and provides some information on heat illness, it does not demonstrate that any training actually occurred. As the ALJ stated, it “is not the training itself.” (Decision, p. 6.) Despite a document request from the Division, Employer did not provide any record showing employees Martin Portillo (Portillo) or Mark Pena (Pena) were trained with respect to heat illness before starting to work at the site. Although there is evidence indicating some form of training on heat illness was provided to employees, there is not enough to demonstrate Employer provided adequate instruction to employees as required by the safety order. (section 3203, subsection (a)(7)(C); see also, *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (March 17, 2003).)

Employer next argues the secondary employer was responsible for the training, not it. It is a well-established principle that both primary and secondary employers must meet and implement the training requirements of section 3203, subsection (a)(7). (*National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (October 05, 2015); *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001); *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).) While such a principle does not preclude the primary and secondary employers from cooperating with one another in fulfilling their duties, they are both responsible for assuring compliance with the training requirements and may be held liable for any training deficiencies. (*Id.*)

According to KIMCO’s petition, its responsibilities included the following: performing on-site survey of the secondary employer’s work area, performing an inspection of the client’s location, following-up with safety concerns of employees, making routine visits, and being available to the “client to provide any specialty training, but the user company is responsible for the training of personnel on the specifics of the task responsibilities.” (Petition, p. 2.) KIMCO relied on secondary Employer to provide training. As mentioned above, notwithstanding any delegating agreement, each employer ultimately remains

responsible for the completion of its safety and health duties to its employees, and may not delegate those duties away. (*Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration (Aug. 28, 2014), citing *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).)

Assuming for the sake of argument that KIMO was attempting to cooperate with the secondary employer with regard to the fulfillment of both of their IIPP duties, there is no evidence in the record to demonstrate that the secondary employer provided the necessary heat illness training. The Board defers to the ALJ's conclusion that "secondary employer had some signs posted about heat illness and encouraged employees to drink water[.]" (Decision, p. 6.) However, Employer has not provided the Board with a copy of the signs; the Board has no way of knowing what information the signs contained. Moreover, KIMCO is ultimately responsible when there is a failure of IIPP duties regardless of any contract, delegation of responsibility, or other cooperative efforts with the secondary employer. (*National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (October 05, 2015).)

Thus, Employer's arguments regarding Citation 1, Item 1 fail.

Employer's Argument Regarding Section 3380, Subsection (f)(1) Lacks Merit Because Non-Occurrence of an Accident Does Not Equate To Non-Existence of a Regulated Hazard.

Citation 1, Item 2 alleges a general violation of section 3380, subsection (f)(1):

(f) Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

(B) Communicate selection decisions to each affected employee; and,

(C) Select PPE that properly fits each affected employee.

Employer argues it performed an assessment of its work hazards; therefore, it should not have been cited under section 3380, subsection (f)(1). Employer has provided its 'Risk Management Evaluation' form which states under the PPE section that eye, face and hand protection are required. Employer further claims Alfonso Gutierrez (Gutierrez), the Branch Manager, had not heard of a crushing injury from a forklift running over a foot. Also, the professionals who assessed the work environment did not deem it necessary to wear steel-toed safety shoes. The issue with this reasoning is it confuses unawareness of a particular hazard with its non-existence, i.e. just because Gutierrez and Employer's professionals had not heard of a foot injury in this context, it does not mean that the hazard of foot injury does not exist. Employer admits in its petition that the compliance officer had investigated two or three foot-crushing incidents involving forklifts, which proves the foot hazard existed.

As mentioned, Gutierrez's testimony was refuted in the hearing by the Division Compliance Officer, Mahmood Chaudhry (Chaudhry), who has worked in the safety field for 46 years and at the Division for 17, and by Employer's employees Portillo and Pena, who both worked at the warehouse. The Board may rely on the testimony of the Division's inspectors, and here we credit the testimony of Chaudhry, Portillo, and Pena. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003); *HHS Construction*, Cal/OSHA App. 12-0492 through 0497, Decision After Reconsideration (February 26, 2015).) Therefore, based on the provided testimony, the hazard existed and employees were exposed to the foot injury hazard.

Because the foot injury hazard was not considered by the Employer, it naturally follows that the Employer did not select the appropriate shoes to protect the affected employees, failed to communicate the decision to them, failed to supply the PPE to the affected employees and failed to require employees to use proper foot protection. Although employees wore closed-toe shoes, they did not wear shoes with enhanced foot protection since Employer did not assess the foot injury hazard at the site. Therefore, the ALJ correctly upheld the general violation of section 3380, subsection (f)(1).

The ALJ correctly applied section 3385, subsection (a) to the facts of the instant case.

Citation 2, Item 1 alleges a serious violation of section 3385, subsection (a):

- (a) Appropriate foot protection shall be required for employees who are exposed to foot injuries from electrical hazards, hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions, which may cause injuries or who are required to work in abnormally wet locations.

Employer's arguments regarding the inapplicability of section 3385, subsection (a) to the instant case lack merit. Employer claims one of its experienced employees, Pena, never felt exposed to the hazard of the forklift running over his foot. However, the purpose of the safety orders is to prevent injuries from taking place; therefore, it is irrelevant whether employee felt that he was exposed to the hazard the safety order is designed to protect against. (Labor Code section 6300; *Miller/Thompson J.D Steel, Harris Rebar, a Joint Venture*, Cal./OSHA App. 99-3121, Decision After Reconsideration (Sept. 26, 2001).) Furthermore, Employer has already admitted in its petition to the existence of the foot hazard by stating Chaudhry "indicated that in his experience of the past 17 years in compliance he has investigated 2 or 3 crushing injuries from forklift incidents." (Petition, p. 3.) Employer's arguments lack merit and section 3385, subsection (a) applies to the facts of this case.

The violations of section 3380, subsection (f)(1) and section 3385, subsection (a) are related to the same hazard; therefore, the Board may set aside the penalty of the general violation.

The Board has decided to address the following duplicative penalty issue on its own authority. The Board engaged in the duplicative penalty analysis in *Syar Industries Inc.*, Cal/OSHA App. 13-1876 through 1880, Denial of Petition for Reconsideration (October 15, 2015). In that case, one citation related to not having a specific written procedure requiring employees to turn the saw off and the other concerned with not training employees to do so. (*Id.*) Both citations addressed a hazard that could be eliminated by a single means of abatement, turning the band saw off before cleaning it. (*Id.*) Therefore, the Board eliminated the penalty of one of the citations as duplicative of the other.

In the instant case, the general violation of section 3380, subsection (f)(1) was issued because of Employer's failure to assess "foot injury hazard in that the appropriate type of personal protective equipment (PPE) was not selected to protect the affected temp[orary] employees[.]" (Ex. 1 [Division Citation 1, Item 2].) Whereas the serious citation of section 3385, subsection (a) was issued due to Employer's failure to "ensure and provide appropriate foot protection, including but not limited to steel toed safety shoes to two affected temporary employees who work in the danger zone[.]" (Ex. 1 [Division Citation 2, Item 1].) Both Citation 1, Item 2 and Citation 2, Item 1 address the same hazard—foot injury— eliminated by the same means of abatement—wearing proper foot

protection. Where two citations address a hazard which can be eliminated by a single means of abatement, the Board may eliminate one penalty. (*Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2217 through 2219, Denial of Petition for Reconsideration (October 15, 2015); *Syar Industries Inc.*, Cal/OSHA App. 13-1876 through 1880, Denial of Petition for Reconsideration (October 15, 2015).)

Because Citation 1, Item 2 is a general violation and Citation 2, Item 1 is a serious one, the Board will sustain penalty for the serious violation, which the Board earlier found to have been proved. Therefore, the Board will eliminate the penalty of the general violation of section 3380, subsection (f)(1) as duplicative of the penalty imposed by the serious violation of section 3385, subsection (a).

DECISION

For the reasons stated above, the petition for reconsideration is denied, but the penalty of section 3380, subsection (f)(1), which was assessed to be \$935, will be eliminated as duplicative of the penalty imposed by violating section 3385, subsection (a), which was assessed to be \$16,875.

ART R. CARTER, Chairman
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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