BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **SIGNAL ENERGY, LLC** **2034 HAMILTON PLACE BOULEVARD,** **4TH FLOOR** **CHATTANOOGA, TN 37421** **Employer**	Inspection No. **1155042** **DECISION AFTER RECONSIDERATION**

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

JURISDICTION

Signal Energy, LLC (Employer, or Signal Energy) is a solar installation general contractor. At all relevant times in this matter, Employer had contracted with Array Technologies, Inc. (ATI) to complete warranty work at a large (approximately 1,800 to 2,000 acres) solar power project at 9810 South Ohio, Cantua Creek, California, 93608, referred to by Employer as the "Tranquility Solar Project" (the worksite, or Tranquility). ATI in turn subcontracted with Hill Country Staffing (HCS) to provide labor to complete the project.

In response to a report of an employee illness, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Joe Zavala (Zavala) and Assistant Safety Engineer Napoli Sams (Sams), conducted an inspection at Employer's worksite beginning on June 13, 2016. On December 1, 2016, the Division issued one citation to Signal Energy for an alleged violation of California Code of Regulations, title 8[1], section 3395, subdivision (f)(2)(C) [failure to implement emergency medical procedures in accordance with written procedures for heat illness].

Employer timely appealed. A hearing was held via Zoom on November 3 and 4, 2020, by Administrative Law Judge (ALJ) Kevin Elmendorf, out of Sacramento, California. Karen F. Tynan, Esq., and Robert Rodriguez, Esq., of the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Signal Energy. Cynthia Perez, Esq., Staff Counsel, represented the Division.

The ALJ's Decision, issued on April 8, 2021, affirmed the violation but reduced the classification from Serious to General, finding Employer established that it did not, and could not through the exercise of reasonable diligence, know of the violation. The penalty was reduced accordingly.

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

Employer timely filed a Petition for Reconsideration (Petition), which the Board took under submission on June 6, 2021. The Division timely filed an Answer to Employer's Petition. Employer's Petition argues solely that Employer, as controlling employer on a multi-employer worksite, exercised due diligence in overseeing the worksite to ensure compliance with health and safety standards and prevent employee exposure to hazardous conditions, and the Citation should be dismissed entirely. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

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

ISSUES

1. Did Employer, as the controlling employer on a multi-employer worksite, exercise due diligence under the circumstances despite failing to address or correct a hazard created by a subcontractor?

FINDINGS OF FACT

1. On June 7, 2016, Teresa Beltran (Beltran), an employee of HCS, while working on Employer's solar array project in a high heat outdoor area, experienced symptoms of severe heat illness, including vomiting.

2. Employer Signal Energy was the general contractor and the controlling employer of the multi-employer solar array project known as the Tranquility Solar Project.

3. Signal Energy contracted with ATI to complete warranty work at the Tranquility Solar Project.

4. In June 2016, HCS was a staffing subcontractor for ATI, and supplied workers for the Tranquility Solar Project.

5. Signal Energy provided safety training, including heat illness prevention, to employees of ATI and HCS at the Tranquility worksite.

6. On June 7, 2016, high temperatures at the outdoor Tranquility worksite ranged between approximately 83 and 100 degrees Fahrenheit.

7. Upon learning of Ms. Beltran's vomiting and other heat illness symptoms, ATI moved Ms. Beltran to a van with air conditioning and provided a bag of ice to cool her down. After 30 to 40 minutes, Ms. Beltran returned to the worksite and worked the rest of the day without incident.

8. Subcontractor ATI did not implement Signal Energy's emergency medical procedures when an employee showed symptoms of severe heat illness, including vomiting. Signal Energy's emergency medical procedures required 911 to be called when an employee

exhibited symptoms of severe heat illness.

9. Signal Energy did not have knowledge that an employee of a subcontractor displayed symptoms of severe heat illness, including vomiting, on June 7, 2016.

10. Four employees of ATI/HCS other than Ms. Beltran experienced symptoms of heat illness at the worksite on June 7, 2016.

11. ATI did not report any of the five incidents of employee heat illness that occurred at the worksite on June 7, 2016, to Signal Energy.

12. Signal Energy was not aware of any of these incidents of employee heat illness, including Ms. Beltran's, until the Division's inspection on June 13, 2016.

13. One safety manager employed by Signal Energy was present at the 1,800 to 2,000 acre Tranquility worksite on June 7, 2016.

14. The hazard of heat illness is foreseeable for employees working outdoors in high heat conditions.

DISCUSSION

1. Did Employer, as the controlling employer on a multi-employer worksite, exercise due diligence under the circumstances despite failing to address or correct a hazard created by a subcontractor?

Section 3395 governs workplace heat illness prevention. Subdivision (f)(2) provides, in relevant part:

> (f) Emergency Response Procedures. The employer shall implement effective emergency response procedures including: […]
> (2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided. […]
> (B) If the signs or symptoms are indicators of severe heat illness (such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.
> (C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with its written procedures.

Citation 1 alleged:

> Prior to and during the course of the inspection, including, but not limited to, on June 13, 2016, Signal Energy LLC, failed to implement emergency medical services in accordance with its written procedures.
> Instance 1: The employer failed to implement effective emergency response procedures. Employer did not follow its own procedures in Sections "I" 3.1.3 and 3.4.1.1.
> Instance 2: The employer failed to implement or provide emergency medical services in accordance with the employer's procedures. Employers [sic] written procedures [in] Section "I" 3.4.1.1 indicate to call 911 if injured employee's symptoms include vomiting. One of the injured employees experienced vomiting and employer did not call 911.

On June 7, 2016, high temperatures at the outdoor Tranquility worksite ranged between approximately 83 to 100 degrees Fahrenheit. (Exhibit 3.) Five employees of ATI/HCS experienced symptoms of heat illness significant enough to require first aid. (Exhibit G.) One of these ATI/HCS employees, Ms. Beltran, experienced symptoms of severe heat illness, including vomiting. ATI did not implement the emergency medical procedures in Employer's written Heat Illness Prevention Plan (HIPP), which required 911 to be called when an employee exhibited symptoms of severe heat illness, including vomiting. (Exhibit I.) Nor did ATI report any of the five incidents of heat illness, including Ms. Beltran's, to Employer. (Exhibits A, C.)

Regarding the due diligence defense, section 336.10, subdivision (c), defines a "controlling employer" as "The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite; i.e., the employer who had the authority for ensuring that the hazardous condition is corrected[.]" Labor Code section 6400, subdivision (b)(3), also defines a "controlling employer" as "The employer who was responsible, by contract or through actual practice, for safety and health conditions on the worksite, which is the employer who had the authority for ensuring that the hazardous condition is corrected[.]"

There is no dispute that Signal Energy was the controlling employer at the Tranquility worksite. Nor does Employer dispute that the violation occurred. Rather, Employer argues that it exercised due diligence under the circumstances to ensure compliance with health and safety standards and prevent employee exposure to hazardous conditions, despite failing to address or correct the hazard in question.

It should first be noted that the due diligence defense, which Employer asserts regarding the existence of the violation, is distinct from an employer's exercise of reasonable diligence regarding the classification of a violation.[2] The latter is not at issue. In this matter, the Division

[2] Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists 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 satisfactorily rebut the presumption, the employer must demonstrate both: (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

conceded that the Citation should have been classified as General rather than Serious, and thus the ALJ's Decision did not analyze the factors for determination set forth in Labor Code Section 6432, subdivisions (b) and (c). Employer now argues that although "the reduction of the Serious citation to a General is an initial step in the right direction," "its affirmative defense, exercise of reasonable diligence, should insulate it from **any** citation in the present matter." (Petition, p. 2 [emphasis in original].)

The ALJ's Decision does not address the due diligence defense. Where an employer fails to present evidence in support of an affirmative defense, the defense is deemed waived. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) Employer's Petition nonetheless argues, "While the Decision does not discuss Signal's presentation of evidence relating to the due diligence affirmative defense, this evidence was presented at the hearing and the affirmative defense was not waived." (Petition, p. 3.) The Petition goes on to present a table of evidence, presented at hearing and discussed in detail below, in support of this contention.

The burden is on employers to raise affirmative defenses "in a timely manner and without prejudice to the Division." (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998.) Here, Employer did raise, or at least plead, the defense in a timely manner, in its amended appeal. More significantly, the Division's Answer to the Petition does not allege prejudice or assert that Employer has waived the defense. Rather, the Answer (somewhat confusingly) argues that, although "Employer never provided evidence of the affirmative defense of due diligence," (Answer, p. 5), the ALJ nevertheless properly concluded that Employer did not establish the defense (*Id*. at p. 4), and goes on to address the evidence presented by Employer. As the defense was timely pleaded, Employer has demonstrated that it presented at least some evidence in support of the defense, and the Division does not allege prejudice, we find that the due diligence defense was not waived, and will consider Employer's Petition based upon the evidentiary record as it exists.

In *United Association Local Union 246, AFL-CIO v. California Occupational Safety and Health Appeals Bd.* (2011) 199 Cal.App.4th 273, the Court of Appeal required the Board to recognize a due diligence defense for controlling employers. "A controlling employer must be granted the opportunity to prove it acted with due diligence under the circumstances in failing to correct a hazard created by a subcontractor on a multi-employer worksite." (*Harris Construction Company, Inc.*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) (*Harris*).)

A number of factors are considered in evaluating this defense, including: (a) whether the controlling employer exercised adequate supervision and oversight, and conducted periodic inspections of appropriate frequency; (b) whether the controlling employer implemented an

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include, but are not limited to, those listed in subdivision (b), and […] (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.
Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (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; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

effective system for promptly correcting hazards; (c) whether the controlling employer enforced the subcontractor's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; (d) whether the controlling employer engaged in ongoing efforts to provide safety training to employees; (e) whether the hazard was latent and unforeseeable; and (f) whether the controlling employer researched the safety history of the subcontractor.[3] (*McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (*McCarthy*); *Harris*, *supra*, Cal/OSHA App. 03-3914.) These factors "cannot be applied mechanically;" rather, the "totality of the circumstances" must be considered when weighing each respective factor. (*Ibid*.) "In determining whether a controlling employer established the due diligence defense the dispositive circumstances and factors can be expected to vary from case to case." (*Ibid*.) Overall, a "controlling employer must exercise reasonable care to prevent and detect violations on the site [] but the extent of measures required [] is less than what is required of an employer with respect to protecting its own employees." (*Ibid*.)

Of these factors, Employer argues that it exercised adequate supervision over the worksite, that it implemented an effective system for promptly correcting hazards, that it enforced ATI's compliance with Employer's safety rules, that it engaged in ongoing efforts to provide safety training to employees, and that the hazard was latent and unforeseeable.

We therefore address each element of the due diligence defense in turn.

(a) Did the controlling employer exercise adequate supervision and oversight, and conduct periodic inspections of appropriate frequency?

The first factor for consideration is whether the controlling employer exercised adequate supervision and oversight of the worksite, including conducting periodic inspections of appropriate frequency. What constitutes adequate supervision and inspection includes consideration of "the scale of the project, the number of subcontractors, and the nature of the work." (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired. (*Harris*, *supra*, Cal/OSHA App. 03-3914.)

McCarthy involved the construction of a high school. In that matter, the controlling employer "utilized a full-time Safety Coordinator at the site" who "spent over 70% of each day in the field--often as much as six hours per day." The controlling employer also utilized

[3] In *McCarthy*, the Board also recognized other factors derived from the Department of Labor and Industries of the State of Washington program, entitled WISHA Regional Directive 27.00, as a valuable persuasive resource. These listed responsibilities include: contractually requiring the subcontractor to provide all safety equipment required to do the job, or providing the safety equipment itself; establishing work rules designed to prevent safety violations, such as developing an accident prevention program that is reasonably specific and tailored to the safety and health requirements of particular job sites and/or operations, and that includes training and corrective action; engaging in efforts to ensure that subcontractors have appropriate and reasonably specific accident prevention programs; engaging in appropriate efforts to communicate work rules to its subcontractors; establishing an overall process to discover and control recognized hazards, with the degree of oversight dependent on a number of factors such as the subcontractor's activity, experience, and level of specialized expertise; and, the general contractor must effectively enforce its accident prevention and safety plans via contractual language, appropriate disciplinary action, and documentation. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) These various factors may be used, where appropriate, to evaluate whether a controlling employer has acted with due diligence. (*Id*.)

additional personnel to supervise the worksite, including "several superintendents at the site, who … were required to check specific areas and ensure the safety and quality of work." (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The Board determined, based on this evidence, "that Employer engaged in multiple efforts to provide appropriate supervision and oversight at the site," and, "Employer's inspections were of appropriate frequency." (*Id.*)

Similarly, in *Hanover RS Construction LLC*, Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2021) (*Hanover*), the controlling employer on the construction of a multi-level parking garage maintained "three full time employees at the project that spent approximately sixty to seventy percent of their time in the field … overseeing the work for multiple hours each work day." These efforts were documented in a site specific safety plan. The Board concluded that the controlling employer "demonstrated it engaged in multiple efforts to provide appropriate supervision and oversight at the site." (*Id.*)

By contrast, in *Savant Construction, Inc.*, Cal/OSHA App. 14-3018, Denial of Petition for Reconsideration (Oct. 19, 2015), the Board determined that the controlling employer at a large construction site did not demonstrate adequate supervision and oversight. There, the controlling employer argued, "in effect, it cannot be everywhere all the time to check the work it and/or its various subcontractors are doing." (*Id.*) The Board concluded that this did not constitute sufficient supervision and oversight, noting, "the controlling employer must keep abreast of the work being done on the job; it would not be sufficient to hire an even excellent subcontractor only to then totally ignore its work on the project." (*Id.*)

Here, Employer estimated the size of the worksite as between 1,800 acres and 2,000 acres. (Petition, p. 4). This is approximately three square miles. The nature of the work involved manually re-installing 200,000 defective mechanical module clamps on solar panels. (*Id.*) Employer assigned two on-site safety managers to the Tranquility worksite in addition to one on-site construction manager. Employer argues that these safety managers "interacted with subcontractors repeatedly to gain compliance with safety requirements." (Petition, p. 7.) One of Employer's on-site safety managers, Brian Wallace (Wallace), testified that he performed "routine inspections" and "safety audits," but provided no further details about the amount of time he spent in the field, the frequency of inspections, or what the inspections involved. (HT, p. 132.)

This lack of evidence alone places Employer on shaky ground with regard to satisfying this factor. Due diligence is an affirmative defense to which the employer has the burden of proof. Vague allegations of supervision, bereft of relevant detail, do not meet that burden.

Further, Mr. Wallace testified that he was on vacation on June 7, 2016, the day of Ms. Beltran's illness. (HT, p. 134.) The second on-site safety manager, Greg Thomas, did not testify at the hearing, and the record is silent as to whether he was present at the worksite that day. There was, at most, one Signal Energy safety manager present at Employer's three square mile outdoor worksite on the day in question.

Ultimately, Employer argues, "on an 1800 acre project, it would not be reasonable or practical to expect Signal to have a supervisor present with each subcontractor employee." (Petition, p. 8.) While it may be true that one to one supervision is neither practical nor required, Employer's argument misses the point of proving "adequate supervision." Simply

assigning two safety managers to monitor an 1,800 to 2,000 acre project does not prove that Employer has satisfied this factor, particularly in light of the record, showing that one of the two safety managers was not present on the day of the violation, and devoid of evidence as to how much time the safety managers actually spent in the field and the frequency of their inspections.

It is not disputed that *five* ATI/HCS employees, including Ms. Beltran, suffered from heat illness at Employer's worksite on the day in question, with Ms. Beltran's symptoms being the most severe. (Exhibit G.) It is also undisputed that Employer was unaware of *any* of these five incidents, let alone ATI's responses to the incidents, until the date of the Division's inspection, on June 16, 2016. (Exhibits A, C.) This fact alone demonstrates a lack of supervision. Rather than demonstrating effective supervision and oversight, Employer's evidence focuses on shifting the responsibility to ATI, not only for the cited violation of section 3395, subdivision (f)(2)(C), related to Ms. Beltran's illness, but for ATI's failure to report any of these multiple incidents of heat illness to Employer, in violation of Employer's IIPP. (Petition, p. 7; Exhibits A, C.) Employer does not assert that ATI willfully concealed these incidents, however, only that ATI failed to follow Employer's training by not reporting them.

Given the size of the worksite and the outdoor nature of the work, Employer's evidence is insufficient to show that it exercised appropriate supervision and oversight under the circumstances. Accordingly, this factor does not weigh in Employer's favor in demonstrating that Employer acted with due diligence despite failing to correct or address the hazard.

(b) Did the controlling employer implement an effective system for promptly correcting hazards?

Under this factor, the Board considers evidence that the controlling employer had an effective system in place to identify, evaluate, and promptly correct hazards. (*Beazer Homes Holding Corp.*, Cal/OSHA App. 1077503, Decision After Reconsideration (Jan. 18, 2018). (*Beazer Homes*).)

The Board has found that satisfactory examples of such a system include utilization of a Job Safety Analysis (JSA), filled out prior to starting work each day, to identify and address job site safety issues and deficiencies when discovered, which were then reviewed by a Safety Coordinator, who checked for discrepancies and ensured that hazards were addressed. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The Board has also found that this factor may be satisfied by evidence that the controlling employer engaged in ongoing observations and inspections of work in progress, immediately flagged and corrected unsafe conditions, halted work until the hazard was corrected, and documented such incidents. (*Beazer Homes*, *supra*, Cal/OSHA App. 1077503.)

Here, Employer argues that Signal Energy monitored the weather on a daily basis, "conducted daily meetings with supervisors, conducted weekly meetings, conducted safety audits, conducted heat illness training," and, once it became aware of the cited violation, "took immediate steps to correct these hazards," although the corrective measures are not specified. (Petition, pp. 7-8.) Employer also argues that it employed a "site-specific safety plan." (Petition, p. 6.) Chad Dueker, the senior project manager, testified that there were "weekly safety walks between the construction manager and the various subcontractors." (HT, p. 110.)

However, Employer's evidence focuses exclusively on its efforts to identify hazards. The record is silent as to Employer's system for correcting hazards in the field, once identified. For example, if a safety audit revealed a hazard, how was that hazard addressed? Although it appears that Employer did have a system in place for identifying hazards, the record does not provide evidence in support of the most vital aspect of this factor, which asks for evidence of the employer's system for correcting hazards. The burden of proof is upon Employer to establish an affirmative defense, and Employer has not met that burden with regard to this factor.

Further, although the cited violation involved only Employer's failure to implement emergency medical procedures in response to Ms. Beltran's vomiting, five ATI/HCS employees suffered from heat illness at Employer's worksite on June 7, 2016. (Exhibit G.) These multiple illnesses occurred at various times throughout the day, not at the same time. This suggests that Employer did not have an effective plan in place to promptly correct hazards. This factor therefore does not weigh in Employer's favor.

(c) Did the controlling employer enforce the subcontractor's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections?

Evidence of a controlling employer's system for enforcing subcontractors' compliance with safety rules is another factor for determining whether the controlling employer exercised due diligence despite failing to correct or address a hazard. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) In *McCarthy*, for example, the controlling employer presented evidence of its system of sanctions for safety violations, including disciplinary action up to suspension and/or termination of employees who violated safety rules. (*Id.*) In *Hanover*, similarly, the controlling employer demonstrated that it had a system for promptly correcting safety violations and for follow-up inspections, as well as a system of progressive discipline for safety violations. (*Hanover*, *supra*, Cal/OSHA App. 1205077) The Board concluded in both cases that evidence of enforcement including discipline for employees who violated safety rules, and follow-up inspections to prevent future violations, satisfied this factor.

Here, Employer argues that it did have a system of enforcement in place. Employer's Petition refers to "routine audits" conducted by Mr. Wallace to ensure safety compliance. (Petition, p. 8.) Mr. Wallace testified that his duties included "maintaining compliance" with Employer's Injury and Illness Prevention Plan (IIPP) and Heat Illness Prevention Plan (HIPP), and that this included, primarily, "routine inspections and interactions with the employees on site," as well as daily supervisor meetings and weekly "all-hands meetings" on various safety topics. (HT, pp. 132- 133.)

However, Employer has provided no evidence of its system of enforcement; for example, a system of sanctions or disciplinary action for employees who violated safety rules, or follow-up inspections to prevent repeat infractions. The record is devoid even of the specific measures taken after this particular violation to enforce ATI's future compliance with the emergency medical procedures in Employer's IIPP/HIPP. In an email to the Division, Employer's director of safety, Ed Pontis (Pontis), stated merely, "This issue was addressed with ATI's site personnel on the day of your visit, and at a corporate level via conference call on

6/15/16." (Exhibit C.) In his hearing testimony, Mr. Pontis stated that "we monitor and enforce" ATI's compliance with Employer's IIPP/HIPP, without further elaboration. (HT, p. 147.) More evidence is required to satisfy this factor.

Employer's evidence is insufficient to demonstrate that it had an effective system in place for enforcement of ATI's safety compliance. Accordingly, this factor weighs against Employer's affirmative defense.

(d) Did the controlling employer engage in ongoing efforts to provide safety training to employees?

The Board also considers evidence that the controlling employer engaged in ongoing efforts to provide safety training to employees. (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) The Board has found that this factor is satisfied by evidence of, for example, safety orientation for new hires, regular ongoing safety meetings, and a site-specific IIPP. (*Id*.; *Hanover*, *supra*, Cal/OSHA App. 1205077; *Beazer Homes*, *supra*, Cal/OSHA App. 1077503.)

Employer's Petition emphasizes its ongoing efforts at safety training, and the record evidence makes clear that Employer has satisfied this factor. Employer utilized a site-specific IIPP and HIPP. (HT, p. 146; Petition, pp. 6, 8-9; Exhibits H, I.) Employer provided a three to four hour safety orientation to all new hires, including supervisors and subcontractors. (HT, p. 135; Petition, p. 5; Exhibit K.) In addition, Employer held daily safety meetings with all supervisors, including ATI, and weekly "all-hands" safety meetings. (HT, p. 132.) Specifically regarding heat illness, Mr. Pontis testified that "heat illness prevention was discussed in nine out of twelve plan of the day meetings, and five out of the previous six all-hands safety meetings prior to the [Division's] inspection." (HT, pp. 150-151; Petition, p. 6.)

Despite these ongoing training efforts, ATI not only failed to implement the emergency medical procedures in Employer's IIPP/HIPP, the cited violation, but additionally failed to notify Employer of any of the five incidents of employee heat illness, which in itself was a violation of Employer's IIPP. (HT, p. 113; Exhibit C.)

Nonetheless, although ATI's implementation of Employer's training proved ineffective on this occasion, the record demonstrates that Employer engaged in ongoing efforts to provide safety training to employees. This factor therefore weighs in Employer's favor.

(e) Was the hazard latent and unforeseeable?

This element of the due diligence defense considers whether a hazard was latent or unforeseeable, rather than "readily observable." (*McCarthy*, *supra*, Cal/OSHA App. 11-1706.) An example of a latent hazard is one that is "unknown to all due to its inadvertent creation by the subcontractor's employee." (*Harris*, *supra*, Cal/OSHA App. 03-3914.)

Here, Employer argues that heat illness "meets the definition of a latent issue." (Petition, p. 8.) To the contrary, the hazard of heat illness was readily foreseeable for employees working outdoors on a day where temperatures reached between 83 and 100

degrees. (Exhibit 3.) In addition, Ms. Beltran was the fifth of five employees who experienced heat illness on that day. (Exhibit G.) The hazard was therefore foreseeable, rather than latent.

(f) Did the controlling employer research the safety history of the subcontractor?

The steps a controlling employer takes in deciding which subcontractor(s) to retain is an element in determining whether the controlling employer acted with due diligence. (*Harris*, *supra*, Cal/OSHA App. 03-3914.) A subcontractor's safety record and experience may affect how much effort a controlling employer should devote to overseeing the subcontractor's work. (*Savant Construction, Inc.*, *supra*, Cal/OSHA App. 14-3018.)

Employer here offered no evidence of whether or how it had vetted ATI before hiring it; whether it had previous experience working with ATI; and, if so, what that experience was.

On balance, Employer's Petition presents an *ex post facto* attempt to establish a defense that it did not actively pursue at hearing. Employer had the opportunity to directly address, and present evidence in support of, this defense. Sufficient evidence to establish the due diligence defense upon reconsideration is not present in the record.

DECISION

For the reasons discussed, Citation 1, the General classification, and assessed penalty, are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 08/19/2022