

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

KIMCO STAFFING SERVICES, INC.
17872 Cowan Avenue
Irvine, CA 92612

Employer

DOCKETS 15-R3D3-4594
and 4595

DECISION

Statement of the Case

Kimco Staffing Services, Inc. (Employer) is a staffing agency that places temporary employees at worksites owned and operated by secondary employers. Beginning August 8, 2015, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Mahmood Chaudhry, conducted an accident inspection at a place of employment maintained by Employer at 17820 Slover Ave., Bloomington, California (the site). On October 23, 2015, the Division cited Employer for failure to train employees on heat illness and its symptoms, failure to assess foot injury job hazards, and failure to provide appropriate foot protection.

Employer filed timely appeals contesting the existence of the alleged violations.¹

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Van Nuys, California on April 20, 2016. Fred C. Gillette, Risk Control Consultant, represented Employer. Melissa Peters, Staff Counsel, represented the Division. The matter was submitted on May 11, 2016.

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

Issues

1. Did Employer train its employees on heat illness and its symptoms?
2. Did Employer assess the foot injury hazards at the site?
3. Did Employer provide appropriate foot protection?

Findings of Fact

1. On August 14, 2015, Employer sent its employee, laborer² Martin Portillo (Portillo) to work for a secondary employer³ at the site. His job duties included working inside shipping containers and inside a warehouse. Employer's employee, forklift driver Mark Pena (Pena), also worked inside the warehouse.
2. August 14, 2015, was Portillo's first day doing this job. He felt that it was hot inside the containers and the warehouse.
3. Employer had a written Heat Illness Prevention Program (HIPP) which required training regarding heat illness. The HIPP did not describe the different types of heat illness, the symptoms of heat illness, or a plan to prevent heat illness. The secondary employer posted signs that described ways to prevent heat illness, such as drinking water.
4. Employer did not train Portillo or Pena regarding heat illness prevention or the symptoms of heat illness before either started working at the site.
5. Boxes were transported from inside containers into the warehouse where they were stacked, placed on pallets, and scanned. Portillo and Pena worked in close proximity to forklifts that could contact a foot, causing penetrating or crushing injuries.
6. Employer did not perform an evaluation to determine the type of personal protective equipment that was appropriate. Employees wore closed-toe shoes, but did not wear shoes with enhanced foot protection.
7. Employer did not provide foot protection that addressed the foot injury hazard.

Analysis

1. Did Employer train its employees on heat illness and its symptoms?

Section 3203, subdivision (a) requires every employer to establish an Injury and Illness Prevention Program (IIPP). Section 3203, subdivision (a)(7)(C) requires that an IIPP:

² His job title was "lumper."

³ The secondary employer was Distribution Associates.

- (7) Provide training and instruction: ...
- (C) To all employees given new job assignments for which training has not previously been 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.

Where a primary employer's employees are employed by a secondary employer, the primary employer has a responsibility to ensure that its employees are prepared to recognize and deal with the hazards peculiar to the work they are assigned to. Where there is a hazard of indoor heat, this includes heat illness training. While the primary employer may arrange for the secondary employer to provide training on heat illness prevention and heat illness symptoms, each employer ultimately remains responsible for the completion of its safety and health duties to its employees, and may not contract or otherwise delegate those duties away. (*Labor Ready Cal/OSHA App. 13-0165 Decision After Reconsideration (Aug. 28, 2014) citing Manpower, supra, citing Manpower, Inc., Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).*) Where indoor heat illness is a hazard, both the primary and secondary employer must have a Heat Illness Prevention Program (HIPP) and must provide effective heat illness training to its employees. (*National Distribution Center, L.P., Cal/OSHA App.12-391, Decision After Reconsideration (Oct. 5, 2015).*) The training must be sufficient to make employees proficient and qualified on the subject of the training. (*Siskiyou Forest Products, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).*)

Here, Employer was a primary employer. Portillo and Pena worked inside shipping containers and a warehouse that could be hot. Portillo testified that he felt hot, and Associate Safety Engineer Mahmood Chaudhry (Chaudhry) testified that the temperature inside the warehouse was about 91 degrees Fahrenheit on the day of his inspection⁴, and that it was about three to four degrees hotter inside the containers. Employer did not rebut this testimony.

⁴ August 20, 2015

Employer recognized that there was an indoor heat illness hazard, and that it had a duty to effectively train its employees regarding heat illness. Although the secondary employer had some signs posted about heat illness, and encouraged employees to drink water, evidence is lacking that employees were fully trained by anyone on how to prevent heat illness, the different types of heat illness and the symptoms of heat illness. Employer's HIPP (Exhibit 4) requires the training, but is not the training itself. Employer presented no written records showing that either Portillo or Pena were trained regarding heat illness before starting work at the site⁵.

Therefore, the Division established a violation of section 3203, subdivision (a)(7)(C), by a preponderance of the evidence.

Employer did not contest the violation's classification as general or the \$935 penalty. They are established by law⁶.

2. Did Employer assess the foot injury hazards at the site?

Section 3380, subdivision (f)(1) reads as follows:

Personal Protective Devices.

(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.

⁵ Chaudhry issued Employer a document request for written records, but did not receive any records.

⁶ An issue not properly raised on appeal is deemed waived. (See § 361.3 ["Issues on Appeal"] and *Western Paper Box Co.*, Cal/OHSA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) In one case, the Appeals Board held that an employer could not raise a violation's existence as an issue where its appeal form, which the employer did not move to amend, did not check off the existence box, and only raised the independent employee action defense, and the hearing only covered the defense's issues. Existence is then presumed and the employer may only try to prove it should not be held responsible for the violation. (*Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000).)

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 (Kimco Staffing Services, Inc.) had not assessed foot injury hazards in that the appropriate type of personal protective equipment (PPE) was not selected to protect the affected temp employees i.e., industrial truck operators and the employees working around or near industrial truck during processing materials at the employer's (Distribution Alternative Inc) warehouse facility.

Where a primary employer assigns its employees to work at another employer's worksite, the primary employer retains a non-delegable duty to inspect and make certain that the secondary worksite is safe for the intended activities of its employees. (*Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

In order to establish a violation, the Division must show the following elements: 1) a foot injury hazard existed at the site, 2) failure to select the type of shoes or PPE that would protect the affected employees from the hazards, 3) failure to communicate the decision to the affected employees, 4) failure to supply properly fitted PPE to the affected employees, and 5) failure to require affected employees to use them.

Merchandise was taken out of shipping containers, stacked on pallets and wrapped. It was then transported by a forklift of some type⁷. Portillo was required to work in close proximity to forklifts. Although Pena drove forklifts, at times he was on foot near the forklift. Pena did not always drive sit-down forklifts. There were other types of forklifts, such as stand-up forklifts and pallet jacks. Pena was required to pick up and stack products, and use a handheld scanner to scan the product he was handling. Pena was in close contact to the forklifts and thereby exposed to the hazard of foot contact with the forklift. Forklift drivers worked alongside non-forklift drivers like Portillo.

Chaudhry testified, based upon his education, training and experience⁸, that forklifts contacting a foot could cause a penetrating foot injury, crushing foot injury, or amputation. Portillo and Pena also testified to the foot injury hazard. Branch Manager Alfonso Gutierrez's (Gutierrez) opined that there

⁷ The most common type of forklift used was a sit-down forklift (Exhibit 2), but there were other types—a stand-up forklift, a cherry picker, and electric pallet jacks.

⁸ Chaudhry was current in his Division-required training, which included forklifts, personal protective equipment, and hazard recognition. He has worked in the safety field for 46 years. As of the date of the inspection, he had worked for the Division for approximately 17 years and performed over 1000 inspections, about 50 of which related to forklifts.

was no hazard that required more than closed toe shoes because there had not been any accidents he knew about where a forklift caused foot injuries. Lack of any past accidents does not prove lack of a hazard or a violation. Occurrence or non-occurrence of an accident does not affect the existence of a hazard; it only affects the likelihood of the hazard causing an accident. (See *National Cement Co.*, Cal/OSHA 91-310, Decision After Reconsideration (Mar. 10, 1993); *Industrial Maintenance Corp.*, Cal/OSHA 87-377, Decision After Reconsideration (Aug. 31, 1982); *Christeve Corporation*, Cal/OSHA App. 79-712, Decision After Reconsideration (Aug. 20, 1984).) Thus, a preponderance of the evidence supports a finding that employees were exposed to the hazard of foot injuries. Thus, the first element was met.

Employer did not perform any assessment to determine what type of foot protection was appropriate to protect employees from the foot injury hazard. Employees were required to wear close-toed shoes. However, Employer did not produce any analysis or other evidence to show that this type of shoe would protect affected employees from the hazard. The secondary employer produced a risk management evaluation (Exhibit 6), but it did not address the foot hazard. Thus, the second element was met.

Consequently, the three remaining elements were met. As Employer failed to select the type of shoes or PPE that would protect the affected employees from the foot injury hazard⁹, it necessarily follows that Employer failed to communicate the decision to the affected employees¹⁰, 4) failed to supply properly fitted PPE to the affected employees¹¹, and 5) failed to require affected employees to use them¹².

Therefore, the Division established a violation of section 3380, subdivision (f)(1) by a preponderance of the evidence.

Employer did not contest the violation's classification as general or the \$935 penalty. They are established by law.

3. Did Employer provide appropriate foot protection?

Section 3385, subdivision (a) reads as follows:

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

⁹ Element 2

¹⁰ Element 3

¹¹ Element 4

¹² Element 5

actions, which may cause injuries or who are required to work in abnormally wet locations.

The alleged violation description reads as follows:

Prior to and during the course of the inspection, including, but not limited to, August 20, 2015, the employer did not 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 and whose work environment exposed them to, but not limited to, penetrating foot injuries sustained from crushing actions of industrial trucks.

As discussed above, Portillo and Pena were both exposed to the hazard of penetrating foot injuries sustained from crushing actions of industrial trucks and the hazard of falling objects. Employer did not provide appropriate foot protection for them. Therefore, the Division established a violation of section 3385, subdivision (a).

Employer did not contest the violation's classification as serious or the \$16,875 penalty. They are established by law.

Conclusions

Employer did not train its employees on heat illness and its symptoms. Employer did not assess the foot injury hazard at the site and did not provide appropriate foot protection.

Order

Citation 1, Items 1 and 2, are affirmed.

Citation 2 is affirmed.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: June 8, 2016

DAR:ao

DALE A. RAYMOND
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**KIMCO STAFFING SERVICES, INC.
Dockets 15-R3D3-4594 and 4595**

Date of Hearing: April 20, 2016

Division's Exhibits

| Number | Description | Admitted |
|---------------|--|-----------------|
| 1 | Jurisdictional Documents | Yes |
| 2 | Photograph of forklift | Yes |
| 3 | Mark Pena training documents | Yes |
| 4 | Heat Illness Prevention Program | Yes |
| 5 | Document request sheet | Yes |
| 6 | Risk Management Evaluation | Yes |
| 7 | Notice of Intent to Classify Citation as Serious | Yes |
| 8 | Photograph of loaded pallet and worker | Yes |
| 9 | Photograph of footwear | Yes |

Employer's Exhibits

NONE

Witnesses Testifying at Hearing

Mark Pena

Martin Portillo

Mahmood Chaudhry

Alfonso Gutierrez

CERTIFICATION OF RECORDING

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

_____ Date: _____
DALE A. RAYMOND

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

KIMCO STAFFING SERVICES, INC.
Dockets 15-R3D3-4594 and 4595

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

IMIS No. 1086295

| DOCKET | C I T A T I O N | I T E M | SECTION | T Y P E | MODIFICATION OR WITHDRAWAL | A F F I R M E D | V A C A T E D | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT HEARING | FINAL PENALTY ASSESSED BY BOARD |
|------------------|--------------------------------------|------------------|---------------|------------------|----------------------------|--------------------------------------|---------------------------------|--|---|--|
| 15-R3D3-4594 | 1 | 1 | 3203(a)(7)(C) | G | ALJ affirmed violation | X | | \$935 | \$935 | \$935 |
| | | 2 | 3380(f)(1) | G | ALJ affirmed violation | X | | \$935 | \$935 | \$935 |
| 15-R3D3-4595 | 2 | | 3385(a) | S | ALJ affirmed violation | X | | \$16,875 | \$16,875 | \$16,875 |
| Sub-Total | | | | | | | | \$18,745 | \$18,745 | \$18,745 |

Total Amount Due*

\$18,745

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*

All penalty payments should be made to:

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

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: DR/ao
POS: 06/08/2016