BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1352198**
TRAPAC, LLC **630 W. HARRY BRIDGES BOULEVARD** **WILMINGTON, CA 90744**	**DECISION**
Employer	

Statement of the Case

TraPac, LLC (Employer), operates a shipping container terminal at the Port of Oakland. On October 10, 2018, the Division of Occupational Safety and Health (the Division), through former Associate Safety Engineer, now District Manager, Denis McComb, commenced an accident investigation at a job site located at 2800 7th Street in Oakland, California (job site), after receiving a report of an injury at the site on September 25, 2018. On February 8, 2019, the Division cited Employer for: failure to ensure that employees are properly trained to service single, split, and multi-piece rims and wheels safely; failure to ensure that employees completely deflated a tire by removing the valve core and inserting a wire or equivalent device into the center of the valve stem to ensure there was no obstruction before removal of the wheel from the axle; and failure to ensure that employees did not interchange multi-piece wheel components except as provided in the charts or in the applicable rim manual.

Employer filed timely appeals of the citations on the grounds that the safety orders were not violated, the classification of the violation in Citation 2 is incorrect, and the proposed penalties are unreasonable. Additionally, Employer asserted the affirmative defense of Independent Employee Action.[1] At the commencement of the hearing, Employer withdrew its assertion that Citation 1, Items 1 and 2, were misclassified as General violations.

This matter was heard by Kerry Lewis, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (Appeals Board), in Oakland, California, on October 1, 2019, and February 21, 2020. William Brooks, attorney at Law Offices of William N.

[1]In addition to asserting that an "independent employee action caused the violation," Employer's appeal forms assert that "Employer reserves the right to assert any affirmative defenses that may arise as discovery progresses." Employer did not specifically assert any additional affirmative defenses prior to or at the time of the hearing. As such, the only affirmative defense available to Employer was the Independent Employee Action Defense and all other affirmative defenses are waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Brooks, represented Employer. Denise Cardoso, Staff Counsel, represented the Division. The matter was submitted on April 13, 2020.

Issues

1. Did Employer's training program ensure that each employee understands, demonstrates, and maintains the ability to safely service single, split, and multi-piece rims or wheels?

2. Did Employer fail to ensure that employees completely deflate multi-piece rim tires by removing valve cores and inserting wires or equivalent devices into the center of the valve stems to ensure there were no obstructions before removing wheels from axles?

3. Did Employer fail to ensure that employees only interchange multi-piece wheel components as provided in the charts or in the applicable rim manual?

4. Did Employer establish that it was not responsible for the violations in Citation 1, Item 2, and Citation 2 based on the Independent Employee Action Defense?

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

6. Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

7. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

8. Are the proposed penalties reasonable?

Findings of Fact[2]

1. Employer provided chassis training to its employees multiple times per year regarding safely servicing multi-piece and split rim wheels.

[2] Findings of Fact Nos. 6, 7, and 16 are stipulations by the parties.

2. The chassis training provided to Employer's employees by an outside vendor included demounting and deflation of tires, inspection of rim components, tire mounting, and installation and removal of wheels from a vehicle.

3. As part of the chassis training provided by the outside vendor, all of the employees were required to demonstrate that they could successfully perform several tasks related to wheel servicing.

4. Although Employer's signage and safety procedures contained numerous instructions on what employees were "always" and "never" supposed to do during servicing of multi-piece and split rim wheels, there was no instruction that the employees must always insert a steel wire or other device into the valve stem to completely deflate the tire before removing a wheel from the axle.

5. Employer's employees were not regularly inserting anything in the valve stem to ensure there was no obstruction before removal of the wheel from the axle.

6. Rolando Hernandez (Hernandez) was an employee of Employer on September 25, 2018, when he suffered an injury that required inpatient hospitalization and treatment for a period in excess of 24 hours.

7. Hernandez's injury on September 25, 2018, was caused by an accident that occurred during his employment with Employer.

8. When Hernandez was attempting to install a wheel on an axle, it exploded because the rim and ring components of the wheel were mismatched. The tire struck Hernandez, resulting in broken bones and face lacerations.

9. The wheel involved in the accident was not assembled by Hernandez. It had been assembled by another employee of Employer.

10. Hernandez had been a chassis mechanic for approximately three years prior to the accident and had serviced multi-piece and split rim wheels numerous times prior to the accident.

11. Employer's written Injury and Illness Prevention Program contains all the requirements set forth in the safety orders and there were no citations for deficiencies in the implementation of Employer's written program.

12. Employer conducts safety meetings each morning that review numerous safety topics with all the employees.

13. Palomino and Hernandez were not disciplined or counseled for their regular failures to insert something into the valve stem to deflate the tire before removing the wheel from the axle.

14. The rim and ring components have an identification stamp that allows employees to match the components according to a chart, but the identification stamps were regularly obscured by dirt or paint.

15. Using mismatched components in multi-piece or split rim wheels could result in the wheel assembly separating and the tire or rim components striking an employee with explosive force that could cause significant physical injuries or death.

16. The penalties were calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer's training program ensure that each employee understands, demonstrates, and maintains the ability to safely service single, split, and multi-piece rims or wheels?

California Code of Regulations, title 8, section 3326, subdivision (c),[3] provides, in relevant part:

> Employee Training. The employer shall establish a training program which shall include, as a minimum, the following elements:
>
> […]

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

(2) The employer shall assure that each employee understands, demonstrates and maintains the ability to service single, split and multi-piece rims or wheels safely, including performance of the following tasks:

(A) Demounting of tires (including deflation).

(B) Inspection and identification of the rim wheel components.

(C) Mounting of tire (including inflation with a restraining device or other safeguard required by this section).

[…]

(G) Installation and removal of rim wheels from the vehicle.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, on September 25, 2018, the employer failed to establish a training program that assures that each employee understands, demonstrates and maintains the ability to service single, split and multi-piece rims or wheels safely in accordance with the topics outlined in sections (A), (B), (C), and (G).

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. (*Howard J. White. Inc., Howard J. White Construction, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed 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." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied.)

Employer's training program was conducted by an outside vendor multiple times per year. The facilitator, Dwayne Edward Talbot (Talbot), has worked with multi-piece wheels for 34 years and has been training employees to service wheels since approximately 2003. Talbot testified that he was contracted by Employer and personally conducted chassis training, which includes training on the servicing of rims and wheels, during the period prior to the time of the accident and the Division's inspection. Prior to the accident, Talbot had conducted the chassis training for Employer two times per year for approximately ten years. Talbot testified that he

used the same topics and training procedures for each chassis training, which could take multiple days to complete depending on the number of participants. Because his chassis training program is conducted in the same manner each time, Talbot was able to provide specific, detailed testimony about the structure of the chassis training.

Talbot testified that the training involved classroom training followed by hands-on application of the training information. Each of the participants was provided with training documents, including TraPac's procedures, materials prepared by Talbot, and Federal Occupational Safety and Health Administration (Fed/OSHA) informational documents. During the classroom portion of the training, Talbot reviewed all the materials with the participants and answered questions about the information contained therein.

Talbot also provided detailed testimony regarding his methods for the hands-on portion of the training. Each of the participants was required to successfully complete a four-step process under Talbot's observation, which covered everything from removing the wheel from the chassis to demounting the tire from the rim, mounting the replacement tire on the rim assembly, and reinstalling the wheel on the chassis. Talbot testified that, in order to successfully complete the training, each employee needed to complete all four steps with no mistakes and without any intervention from Talbot.

Talbot's testimony established that his training included instructions to insert a steel rod in the valve stem during deflation of the tire, as well as the importance of ensuring that the rim and ring components matched. The Division issued Citation 1, Item 1, based in part on statements from employees during the inspection, which were repeated during the hearing in testimony from Hernandez and Marco Palomino (Palomino). The employees claimed that they had never been trained to use a wire in the valve stem or to match the numbers on the rim and the ring. The employees' assertions that they were not trained to perform these tasks are not credible when weighed against the thorough, detailed, and unbiased testimony of Talbot and the Fed/OSHA materials that Talbot testified were read and discussed at the trainings.

As discussed below, the workers were not inserting a wire into the valve stem to ensure that there were no obstructions and were not matching the numbers on the rim and ring when assembling wheels. However, the preponderance of the evidence supports a finding that Employer did provide extensive training regarding servicing single, multi-piece, and split rim wheels safely. The training included deflation and demounting of tires, inspection and identification of the rim wheel components, mounting of tires, and installation and removal of rim wheels from a vehicle. Additionally, the training required that employees demonstrate that they had the ability to perform all the steps to servicing the wheels safely.

Accordingly, the Division did not establish that the training provided by Employer was insufficient to meet the requirements set forth in section 3326, subdivision (c)(2). Citation 1, Item 1, is dismissed.

2. Did Employer fail to ensure that employees completely deflate multi-piece rim tires by removing valve cores and inserting wires or equivalent devices into the center of the valve stems to ensure there were no obstructions before removing wheels from axles?

Section 3326, subdivision (h)(1), provides:

(h) Demounting Tires.

(1) Split and multi-piece rim tires shall be completely deflated by removing the valve core. A wire or equivalent device shall be inserted into the center of the valve stem to ensure no obstruction exists that would prevent complete deflation, before removal of the wheel from the axle.

In Citation 1, Item 2, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, on September 25, 2018, the employer failed to ensure that employees completely deflate a multi-piece rim tire by removing the valve core. A wire or equivalent device was not inserted into the center of the valve stem to ensure no obstruction exists that would prevent complete deflation, before removal of the wheel from the axle.

Section 3326, subdivision (b), defines "multi-piece rim or wheel" as, "A vehicle rim or wheel consisting of two or more parts, one of which is a side or locking ring designed to hold the tire on the rim or wheel by interlocking components when the tire is inflated." There was no dispute that Employer's employees were servicing multi-piece wheels.

Section 3326, subdivision (b), further defines "demounting" by referencing the definition of "mounting."

Mounting a Tire. The assembly or putting together the wheel and tire components to form a rim wheel, including inflation. Demounting means the opposite of mounting a tire.

The safety order requires that, prior to removing the wheel from the axle to take it apart, or demount it, the wheel must be completely deflated. In order to ensure that it is completely deflated, the safety order requires that employees remove the valve core and insert a wire or other device into the valve stem to ensure that it completely deflates without any obstruction.

Section 3207, which sets forth the definitions to be used in the General Industry Safety Orders, defines "shall" as "[a] mandatory requirement." As such, the insertion of the wire or other device is mandatory: "A wire or other device *shall* be inserted… ." (§3326, subd. (h)(1), emphasis added.)

Employer's written procedures for servicing multi-piece and split rim tires contain "Always" and "Never" instructions for employees. The list of things that employees should "always" do instructs them to remove the valve core, but makes no reference to inserting a wire or other device into the valve stem. Additionally, Division District Manager Denis McComb (McComb) testified that he interviewed a total of four employees as part of his inspection and all of the employees stated that they did not insert a wire or other device into the valve stem during the demounting process. These out-of-court statements are corroborated by the testimony of Hernandez and Palomino, who testified that it was not their regular practice to insert anything into the valve stem to deflate the tire during the demounting process. Hernandez testified that he would only consider inserting a wire into the valve stem if he noticed an obstruction and that he had not had a situation where there was an obstruction to clear.

Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer. (*RNR Construction*, *supra*, Cal/OSHA App. 1092600.) Although Employer established that the written materials provided to the employees during their training with Talbot included instructing them to insert a wire into the valve stem, there was no evidence to refute the employees' testimony that they were not actually doing it. Accordingly, the Division established a violation of section 3326, subdivision (h)(1), and Citation 1, Item 2, is affirmed.

3. Did Employer fail to ensure that employees only interchange multi-piece wheel components as provided in the charts or in the applicable rim manual?

Section 3326, subdivision (i)(3), provides: "Wheel component acceptability. Multi-piece wheel components shall not be interchanged except as provided in the charts or in the applicable rim manual"

In Citation 2, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on September 25, 2018, the employer failed to ensure that employees did not interchange multi-piece wheel components except as provided in the charts or in the applicable rim manual. As a result, an employee sustained a serious injury.

In order to establish a violation of section 3326, subdivision (i)(3), the Division must prove that the components of a multi-piece wheel were mismatched. That is, the stamped identification numbers on the rim and ring components were not compatible based on a matching chart. The chart is a standard chart that was included in the Fed/OSHA wheel servicing materials and was posted on a sign at the job site near where the wheels were assembled.

There was no dispute that the components of the wheel involved in the accident were mismatched. The components themselves were examined and photographed, revealing that the identification stamps did not match in accordance with the charts. Additionally, Talbot testified that he had examined the rim and ring after the accident and confirmed that they did not match. Finally, Employer's representative acknowledged the mismatched components in Employer's response to the Division's Notice of Intent to Classify Citation as Serious. Hernandez testified that he had not assembled the mismatched wheel, but that it had been assembled by another of Employer's employees.

There was also no dispute that employees working with mismatched wheel assemblies are exposed to the hazard of the tire exploding off of the rim, as was the case with the Hernandez accident at issue. This hazard was set forth in the Fed/OSHA materials and Employer's multi-piece wheel servicing safety procedures.

Accordingly, the Division met its burden of proving that multi-piece wheel components were not interchanged except as provided in the applicable charts or rim manual, thereby establishing a violation of section 3326, subdivision (i)(3).

4. Did Employer establish that it was not responsible for the violations in Citation 1, Item 2, and Citation 2 based on the Independent Employee Action Defense?

Employer asserted that it is not responsible for the violations alleged in Citation 1, Item 2, and Citation 2 based on the Independent Employee Action Defense (IEAD). In order to successfully assert the affirmative defense of IEAD, an employer must establish each of the following elements:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program which includes 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 policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

a. Was Hernandez experienced in the job being performed?

This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).)

Hernandez was a union worker who had been working as a mechanic for at least three years prior to the accident. He was hired as a "steady" worker for Employer approximately one year prior to the accident and testified that he had worked as a mechanic for Ports America for two years before coming to work for Employer. Hernandez regularly serviced multi-piece wheels during his work for Ports America and for Employer.

There was no evidence that servicing multi-piece wheels, including deflating tires for demounting and assembling the rim components, was a new task or one for which Hernandez did not have extensive experience. As such, Employer satisfied the first element of the IEAD.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments. (See *Mercury Service, Inc*., *supra*, Cal/OSHA App. 77-1133.)

Employer's written Injury and Illness Prevention Program (IIPP) was produced to the Division during the inspection as part of Employer's responses to a document request. The written IIPP includes all the topics required by section 3203, subdivision (a). The Division did not cite Employer for any deficiencies in the written program or implementation thereof.

Employer presented evidence that it regularly provides its employees with comprehensive training on how to safely service various types of wheels. Additionally, Employer conducts safety meetings each morning that review numerous safety topics with all the employees.

Accordingly, Employer established that it has a well-devised safety program that includes providing its employees with safety training, satisfying the second element of the IEAD.

c. Did Employer effectively enforce its safety program?

"While an employer may have a well-defined safety program on paper, an employer must also demonstrate that it effectively enforces that safety program to meet the IEAD. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*FedEx Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

Although Employer trained its employees to properly service multi-piece and split rim wheels as part of its safety program, the employees were not following various aspects of the safety program. Hernandez and Palomino testified that they had not been disciplined or otherwise corrected when they did not insert a wire into the valve stem or did not deflate tires prior to removing them from the axle. Additionally, Palomino testified that the identification stamps on the rim and ring components were not visible because of paint or dirt, making it less likely that the employees were actually following the safety program with regard to ensuring that the components were matched properly. There was no evidence that Employer took steps to ensure that the identification stamps were visible in order to ensure that the employees could confirm that they were properly matched, as required by Employer's safety program.

Accordingly, Employer did not satisfy element three of the IEAD because it did not establish that it effectively enforced its safety program.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

"Element four requires a demonstration that the employer has a policy of sanctions which it enforces against employees who violate the safety program." (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) The Appeals Board has determined that employers may show compliance with this element through producing records of disciplinary actions related to safety. (*Paramount Farms, King Facility*, Cal/OSHA App. 2009-864, Decision After Reconsideration Mar. 27, 2014).) Additionally, an employer may show that it implements other means of promoting safety other than discipline, such as

retraining, verbal coaching, and positive recognition of employees who follow the safety program. (*Synergy Tree Trimming, Inc., supra,* Cal/OSHA App. 317253953.)

Employer's labor workforce consists primarily of union members. Cameron testified that if a member of Employer's management observed a safety violation, he could instruct the employee to stop the unsafe activity, but then he was required to speak to the lead person in order to have that person more thoroughly address the situation with the employee. Cameron testified that he has filed complaints with the union multiple times over the years when a union worker violated a safety policy.

Although Employer has some measures in place to sanction employees for safety violations, there was insufficient evidence that the particular violations involved in the Division's inspection were addressed through any disciplinary actions or coaching. The employees were not able to ensure that the rim and ring components were matched due to the obscured identification stamps, and there was no evidence that the employees were sanctioned for not taking steps to clean the dirt or scrape the paint off to see the stamps. Additionally, as set forth above, Hernandez and Palomino testified that they were not regularly inserting a wire into the valve stem during deflation of the tire and were not fully deflating tires prior to removing them from the axle. Neither employee had been counseled or disciplined for these failures to comply with Employer's safety policy.

Overall, the preponderance of the evidence supports a finding that Employer's efforts at sanctioning its employees for violating the various provisions of its safety program were ineffective and insufficient to satisfy the fourth element of the IEAD.

e. Did Hernandez commit a safety infraction that he knew was contra to Employer's safety requirements?

"The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc., supra,* Cal/OSHA App. 317253953.) When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc.*, Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009). [Appeals Board found that the injured employee did not know he was taking an action in violation of the safety program, given his testimony that he had taken that same action on numerous occasions.])

Evidence an employee received the safe practices manual, and was present for general safety discussions at tailgate meetings, is by itself insufficient to show a specific employee was actually aware of a specific safety rule in order to satisfy element five of the IEAD. (*UPS*

(United Parcel Service), Cal/OSHA App. 07-3322, Decision After Reconsideration (Mar. 27, 2012); *Pacific Coast Roofing Corp*., Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).)

Because Employer asserted the IEAD for two different safety order violations, the employee's knowledge of the safety requirements must be analyzed separately for each.

(1) Failure to completely deflate a multi-piece rim tire by removing the valve core and inserting a wire or equivalent device into the center of the valve stem to ensure there was no obstruction before removing the wheel from the axle

The Division's issuance of Citation 1, Item 2, was not directly related to Hernandez's accident. Citation 1, Item 2, was issued based on the failure of Employer to require its employees to insert a wire or other device into the valve stem. Because this was not a violation specific to Hernandez, it does not lend itself to the IEAD, as the violation alleges a widespread problem rather than a knowing violation by Hernandez at the time of the accident.

Nonetheless, Employer did not satisfy the fifth element of the IEAD with regard to Hernandez because Employer did not establish that Hernandez knew of this safety requirement and chose to violate it. Hernandez testified that he was not aware of the requirement to insert something into the valve stem every time before a wheel is removed from the axle. Hernandez testified that he had never inserted a wire or other device into the valve stem and did not believe that he needed to do so unless there was an obstruction to clear.

Employer did not include the requirement in its written safety program. The only procedures that reference use of a device inserted into the valve stem are lengthy Fed/OSHA documents. There was testimony that these documents were provided to the employees as part of their training. However, Hernandez testified under oath that he does not read English proficiently. None of the materials that were provided to the employees during trainings were translated into Spanish.[4]

Even if the violation alleged in Citation 1, Item 2, related directly to the actions of Hernandez, rather than practices as a whole, Employer did not sufficiently establish that Hernandez was aware of a safety policy regarding insertion of a wire or other device into the valve stem prior to deflating a tire to remove it from the axle. Indeed, Employer did not

[4] Employer offered testimony that Hernandez participated in the chassis training by speaking English, conversed in English with Cameron on occasion, and capably interviewed in English to obtain steady employment with Employer. While this testimony is not disregarded, it does not persuasively refute Hernandez's testimony regarding his English-reading proficiency, as there may be a comfort level with verbal communication that is not directly correlated with his reading abilities.

sufficiently establish that it had implemented this procedure into its practices, and there was testimony from both Hernandez and Palomino that neither of them was aware of the practice. As such, the IEAD was not established for Citation 1, Item 2.

(2) Failure to ensure that multi-piece wheel components were only interchanged as provided in the charts or in the applicable rim manual

In its argument that Hernandez knowingly violated the safety policy regarding matching the wheel components, Employer asserts that Hernandez knew that he was required to match the rim and ring components and chose not to comply with the requirement. However, the violation of this safety order and Employer's safety policy occurred at the time that the wheel was assembled. Hernandez testified that he did not assemble the wheel that was involved in the accident. As such, Hernandez's knowledge, or lack thereof, of the safety policy is not pertinent to the fifth element of the IEAD.

The witnesses for both parties testified that the numbers were no longer visible when a wheel was assembled, which placed responsibility for matching the rim and ring components on the employee that assembled the wheel. There was no testimony regarding which employee assembled the wheel; therefore, that employee's knowledge and intentions are unknown.

As set forth above, establishing that an employee received training on a particular safety policy is insufficient to satisfy the fifth element of the IEAD. (*UPS (United Parcel Service), supra*, Cal/OSHA App. 07-3322.) Thus, even if all of Employer's employees were trained about the importance of matching the rim and ring components, there was no evidence regarding the knowledge of the employee that assembled the wheel involved in the accident.

A single missing element defeats the IEAD. (*Home Depot USA, Inc. # 6617, Home Depot, supra*, Cal/OSHA App. 10-3284.) Accordingly, because elements three, four, and five were not established, Employer has not met its burden of proof with regard to the affirmative defense of IEAD for Citation 2.

5. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

(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.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

McComb testified that there is a realistic possibility that an employee could suffer serious physical harm or death as a result of using mismatched components in multi-piece wheels. Additionally, throughout the Fed/OSHA documents provided to the employees during their chassis training, the risk of using mismatched components is identified as serious injury or death if the wheel separates and strikes an employee with explosive force.

The parties stipulated that Hernandez suffered an injury on September 25, 2018, that required inpatient hospitalization and treatment for a period in excess of 24 hours. This establishes that there was actual serious physical harm suffered by Hernandez. Additionally, the parties stipulated that the injury suffered by Hernandez was caused by the accident on September 25, 2018. As such, there is not only a realistic possibility that the violation in Citation 2 could result in serious physical harm, but it was an actuality in this case.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

6. Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

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 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.

The violation at issue in Citation 2 is the mismatching of wheel components which could result in the assembly separating and the tire or rim components striking an employee with explosive force. Although the Fed/OSHA documentation that Employer provided to its employees in training identified the hazard, Employer did not take steps to ensure that its employees were actually matching the components to reduce the hazard. As set forth above, Palomino testified that the identification stamps were obscured by paint or dirt.

While inadmissible to prove liability for an accident,[5] subsequent remedial measures are admissible to demonstrate the feasibility, ease, and lack of expense in eliminating the hazard. (*Baldwin Contracting Co. v. Winston Steel Works* (1965) 236 Cal.App.2d 565.) Palomino testified that, after Hernandez's accident, there have been changes such as ensuring that the identification stamps are visible and ensuring that the employees look for them to match the

[5] Evidence Code section 1151 provides: "When, after occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event."

wheel components. The fact that this is now being done demonstrates that it was a feasible step that Employer could have taken to anticipate and prevent the violation.

Accordingly, Employer failed to take "all the steps a reasonable and responsible employer in like circumstances should be expected to take" to prevent the violation of mismatching the wheel components and cannot rebut the presumption that Citation 2 was properly classified as Serious.

7. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In order for a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction,* Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Labor Code section 6302, subdivision (h), provides that a "serious injury" includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation. The parties stipulated that Hernandez's injuries met the definition of "serious injury" based on the fact that he was hospitalized for more than 24 hours for treatment.

The violation in Citation 2 was the use of mismatched components in a multi-piece wheel assembly. Because the components were mismatched, the tire struck Hernandez when it was blown off the rim and ring assembly as he put it on the axle. The parties stipulated that his injuries were caused by the accident. As such, there is a direct nexus that the violation caused the injury. Accordingly, Citation 2 was properly characterized as Accident-Related.

8. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The parties stipulated that the penalties were calculated in accordance with the Division's policies and procedures.

Accordingly, the penalties for Citation 1, Item 2, and Citation 2 are reasonable.

Conclusion

For Citation 1, Item 1, the Division did not establish by a preponderance of the evidence that Employer's training program failed to ensure that each employee understands, demonstrates, and maintains the ability to service single, split, and multi-piece rims or wheels safely.

For Citation 1, Item 2, the Division established that Employer did not ensure that its employees completely deflate a multi-piece rim tire by removing valve cores and inserting wires or equivalent devices into the center of the valve stems to ensure there were no obstructions before removal of the wheels from the axles. The citation was properly classified as General and the penalty is reasonable.

In Citation 2, the Division established that Employer violated section 3326, subdivision (i)(3), by failing to ensure that its employees interchanged multi-piece wheel components only as provided in the charts or in the applicable rim manual. The Division established the Serious classification and the citation was properly characterized as Accident-Related. The penalty is reasonable.

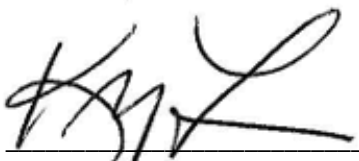
Order

It is hereby ordered that Citation 1, Item 1, is dismissed.

It is further ordered that Citation 1, Item 2, is affirmed and the penalty of $1,275 is sustained.

It is further ordered that Citation 2 is affirmed and the penalty of $25,000 is sustained.

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



Dated: 05/06/2020

Kerry Lewis
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.**