

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

LABOR READY
P.O. Box 2910
Tacoma, WA 98401

Employer

Docket. 13-R3D2-0164

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration of the Decision of the Administrative Law Judge on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 20, 2012, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a construction site in San Marcos, California maintained by Tiga Construction (Tiga), where Employer had sent several employees to perform construction work. On December 27, 2012, the Division issued a citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged in Citation 1, Item 1 a General violation of section 3203(a) [ineffective Illness and Injury Prevention Program (IIPP)] and in Citation 1, Item 2 a General violation of section 3395(f)(3) [deficient Heat Illness Prevention Program (HIPP)].

Employer filed a timely appeal of the citation.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on October 28, 2013. The Decision denied Employer's appeal, imposing a total civil penalty of \$465.

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

The Board ordered reconsideration of the decision on its own motion. Neither party filed an answer to the petition.

ISSUE

Were Employer's employees exposed to worksite hazards without appropriate IIPP coverage?

Was Employer's HIPP compliant with section 3395(f)?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer timely reported an injury of its employee, Larry Grajiola (Grajiola), who was assigned to clear brush from a site maintained by Tiga Construction on August 8, 9, and 10. Justin Clark (Clark), Employer's branch manager, took the order from Timothy Steeves (Steeves) of Tiga, and during the order process asked Steeves if Tiga had a written IIPP and written HIPP. Steeves stated that Tiga had both. (Ex. B). Clark and Steeves signed a contract for the order for three employees. The contract at paragraph 4 stated under "Safety" that Employer's workers "need to be included in your safety and health program and you are required to comply with safety regulations and provide any necessary site-specific safety training and equipment." (Ex. 7).

The job site safety evaluation cover page completed and approved by branch manager Clark on August 6, 2012 after a site visit included several "yes" or "no" questions: Does the customer have a written safety program, Will the customer include LRW workers in your Safety & Health programs, Will documentation of training be provided to Labor Ready?. "Yes" was circled in response to these questions. (Ex. 6). During the job site visit, Clark again asked Steeves if Tiga had a written IIPP, and again Steeves responded in the affirmative.

Associate Safety Engineer William Moffett (Moffett) performed an inspection at the worksite where Grajiola's injury occurred. Moffett requested various documents from Employer, including the IIPP and HIPP of both Employer and Tiga. Moffett testified that the Division also requested these documents from Tiga, and Steeves was unfamiliar with what constituted either an IIPP or HIPP, and did not provide either document. Citations were subsequently issued to Tiga. (Ex. 8).

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Citation 1, Item 1

Citation 1, Item 1 alleges a violation of section 3203(a), which requires every employer to establish, implement and maintain an effective Injury and Illness Prevention Program. The citation specifically alleges that Employer, as a primary employer, failed to ensure that its employees were covered under an effective IIPP. The parties stipulated that Employer was the primary employer and Tiga was the secondary, and at hearing there was agreement that a dual employment relationship existed between Employer and Tiga. (See, *Sully-Miller Contracting Co.*, Cal/OSHA App. 99-896, Decision After Reconsideration (Oct. 30, 2001), *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486 [existence of special employment relationship]).

As the ALJ found, the Board has held that both the primary and secondary employer have responsibility for the safety of employees, given the Labor Code's command that "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein [and] every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees." (*Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001), Labor Code sections 6400(a) and 6401; see also section 6400(b)). These mandates of the Labor Code are given regulatory life in section 3203(a), which requires "every employer" to establish an effective IIPP.

While Employer had an IIPP, the parties agreed by contract that while Employer's employees were at Employer's worksite, they would be covered by Tiga's safety program.² Employer asked Tiga's CEO if Tiga had an IIPP, but otherwise took no steps to ensure that Tiga's IIPP was sufficient for the construction work that Employer's employees would be doing -- for instance, Employer did not ask to view Tiga's IIPP, did not request a copy, nor did Employer receive verification of training on the IIPP. An employer remains responsible for its employees' exposure to a hazard, even where that hazard is created by a third party, and is responsible for the safety of its employees, even if it does not retain ultimate control at all times. (*Petroleum Maintenance*

² Employer's IIPP at p. 6, section 3.1.1(A) Communication from Labor Ready to Customer (Secondary Employer) states in part: Labor Ready will acquire the following information from secondary employer in order to ensure that health and safety roles and responsibilities are clearly defined: a. Verification of whether the employer has an IIPP in states where these programs are required. The program may be known by other names such as "accident prevention program" or "safety and health program."

Company, Cal/OSHA App. 81-594, Decision After Reconsideration (Aug. 30, 1982) (“PEMCO I”), citing *Cal-Cut Pipe & Supply Co.*, Cal/OSHA App. 76-955, Decision After Reconsideration (Aug. 26, 1980), *Zapata Diversified Builders*, Cal/OSHA App. 80-1059, Decision After Reconsideration (Jun. 29, 1981).) A general violation of section 3203(a) was established.

Citation 1, Item 2

Citation 1, Item 2 alleged a violation of section 3395(f)(3), which states:

(3) The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

Item 2 alleges that Employer’s written procedures required by subsections (f)(1)(B), (G), (H), and (I), were requested on October 3, 2012, were submitted by Employer and reviewed and found to be deficient as the documents did not cover several areas:

1. When shade is required, and how much shade is required for the crew. [3395(d)(1)]
2. High Heat procedures Items 1-4, [3395(e) (1, 2, 3, 4)]
3. Procedures for responding to symptoms of Heat Illness, such as how medical services will be provided in the event they are needed.
4. Procedures for contacting emergency medical services, and if necessary process to transport an employee to a point where they can be reached by an emergency medical provider.

Unlike Citation 1, Item 1, the Citation specifically refers not to Tiga’s failure to have a HIPP, but to deficiencies in Employer’s program. At hearing, Employer conceded that its HIPP was lacking certain elements that had been noted by the Division, but argued that it was not required to comply with the HIPP provision, given its arrangement with Tiga and the nature of its business.³

As discussed above, Employer’s argument fails, as 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. (*Petroleum*

³ The ALJ found Employer’s deficient HIPP was in violation of the safety order, as Clark, one of Labor Ready’s full time office employees, was required to venture out into the field to check on Employer’s temporary workers. The citation and hearing were limited to Employer’s HIPP and the temporary workers at the Tiga construction site, making the discussion of the HIPP’s application to Employer’s office staff irrelevant to the question at issue.

Maintenance Company, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985) (“PEMCO 2”).) For employees assigned to work in industries listed in 3395(a)(2)-- which include construction and landscaping-- this training includes heat illness prevention. While Employer may argue that it had arranged for Tiga to provide the HIPP, 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. (*Manpower*, supra, citing *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) Tiga’s HIPP was not entered into the record and may not have existed at all based on the Division’s conversations with Tiga; even if the employees in question were deemed to be covered by Tiga’s HIPP, the evidence suggests Tiga was not in compliance with section 3395. A violation of section 3395(e) is established.

Therefore, we affirm the result of Decision sustaining the citation but for the different reasons stated above.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUGUST 28, 2014