BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	**Inspection Number** 1399613
BMC WEST, LLC **25735 SPRINGBROOK AVE.** **SANTA CLARITA, CA 91350**	**DECISION AFTER RECONSIDERATION**
Employer	

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by BMC West, LLC (Employer) under reconsideration, renders the following decision after reconsideration.

JURISDICTION

Employer sells lumber, hardware and building supplies at a facility located at 2000 Tapo Street in Simi Valley, California. On April 17, 2019, one of Employer's employees was injured when a forklift driven by another employee struck a barbeque grill which the injured employee was cleaning, causing the grill to fall onto and injure him. The California Division of Occupational Safety and Health (Division) investigated the accident. On October 16, 2019, the Division issued two citations to Employer alleging four violations of workplace safety requirements in California Code of Regulations, title 8.[1]

Employer timely appealed. A contested evidentiary hearing was held over six days before an administrative law judge (ALJ) of the Board starting on August 21, 2020, and concluding on April 28, 2023. The matter was submitted on January 18, 2024, and the ALJ issued a decision (Decision) on February 16, 2024. The Decision affirmed the four violations alleged and imposed civil penalties totaling $19,050.

Employer timely petitioned for reconsideration. (Lab. Code § 6614, subd, (a).)

ISSUES

1. Does designating an unfilled position titled "Location Safety Coordinator" to be the person responsible for implementing and maintaining Employer's IIPP satisfy section 3203, subdivision (a)(1)?
2. Do provisions in Employer's IIPP relating to correcting hazards satisfy section 3203, subdivision (a)(4) regarding inspecting for unsafe conditions?

[1] Except as otherwise specified, references are to California Code of Regulations, title 8.

3. Did Employer fail to keep training records as required?
4. Is an HIPP with an out-of-date shade requirement triggering temperature compliant with section 3395?
5. Was there sufficient non-hearsay evidence in the record to support the alleged violation of section 3650, subdivision (t)(11), regarding unsafe operation of a forklift?
6. Did Employer establish the Independent Employee Action Defense (IEAD) and/or the *Newbery* defense with respect to Citation 2?
7. Was the Serious classification established?
8. Was the penalty properly calculated?

FINDINGS OF FACT

1. On April 17, 2019, Employer's employee Justin Bastow (Bastow) was operating a forklift at the worksite with the load being carried that obstructed his view in the direction of travel.
2. The forklift struck a barbeque grill that another BMC employee, Jaime Terrazas (Terrazas) was cleaning, causing the grill to fall on and injure Terrazas.
3. Bastow was an experienced forklift operator and a certified forklift operator at the time of the accident.
4. As a result of the accident Terrazas suffered thoracic and lumbar compression fractures and a nondisplaced fracture of his tibia, as well as associated knee and back pain. Terrazas was hospitalized and treated for more than 24 hours.
5. Employer's Injury and Illness Prevention Program (IIPP) lacked elements required by section 3203 which are critical to its successful implementation.
6. Employer's IIPP did not include procedures for identifying and evaluating hazards when new substances, processes, procedures or equipment are introduced to the workplace, or when Employer becomes aware of a new or previously unrecognized hazard.
7. Employer's IIPP states that the "Location Safety Coordinator" is responsible for implementing the IIPP, but Employer did not employ such a person at the worksite at issue.
8. Employer's training records for January and February 2019 included the month and year but not the date that training events occurred.
9. Employer's training records include monthly "Safety Meeting Sign Up Sheets" for January and February 2019 that are photocopies of the same document which have been altered to indicate different dates, topics, training providers, and an employee signature.
10. Employer's Heat Illness Prevention Plan included a shade requirement triggering temperature of 85 degrees Fahrenheit, which was out-of-date.
11. Employer's employees at the worksite worked both indoors and outdoors.
12. The forklift accident at issue occurred in plain view of the front office.

REASONS FOR DECISION AFTER RECONSIDERATION

As noted above, BMC operates a retail building supply and lumber yard in Simi Valley, California. In April 2019 one of Employer's employees drove a forklift with a raised load blocking the driver's view in the direction of travel (forward), instead of in reverse as required. As a result, the load (a garbage dumpster) stuck a barbeque grill which was being cleaned by another employee, knocking the grill over onto that employee and seriously injuring him. The accident was timely reported to the Division. After the ensuing inspection the Division issued two citations to Employer alleging four violations. Citation 1, Item 1, classified as General, alleged that Employer failed to

establish an effective Injury and Illness Prevention Program (IIPP) containing all required elements. Citation 1, Item 2, classified as Regulatory, alleged that Employer failed to maintain written training records. Citation 1, Item 3, classified as General, alleged that Employer failed to establish an effective Heat Illness Prevention Plan (HIPP). Citation 2, classified as Serious Accident-Related, alleged that Employer failed to ensure that a powered industrial truck (i.e. forklift) was operated in a safe manner in accordance with applicable operating rules.

Our analysis addresses each of the issues listed above in turn.

1. Citation 1, Item 1, Instance 1: Does designating an unfilled position titled "Location Safety Coordinator" to be the person responsible for implementing and maintaining Employer's IIPP satisfy section 3203, subdivision (a)(1)?

Section 3203, subdivision (a)(1) provides that an employer's IIPP "shall, at a minimum: [¶] Identify the person or persons with authority and responsibility for implementing the Program."

Employer's IIPP in evidence provides that the "Location Safety Coordinator" is the person responsible for implementing the IIPP. It does not name any such individual, and no one at the hearing identified such an individual or testified that someone had been appointed to the position. Failure to identify a specific position or individual with the responsibility for ensuring that the IIPP is implemented violates section 3203, subdivision (a)(1). (*West Coast Arborists, Inc*., Cal OSHA App. 1180192, Denial of Petition for Reconsideration (Apr. 26, 2019); *Pouk & Steinle, Inc*., Cal OSHA App 03-1495, Decision After Reconsideration (June 10, 2010).) It follows that identifying such a position but not actually filling it also violates section 3203, subdivision (a)(1), since in such a circumstance there would be no person implementing the IIPP.

Employer contends that its "Location Manager," an actual, identified person, fulfilled the IIPP function. Employer's IIPP states that "Location Managers and supervisors are responsible for implementing and maintaining those elements in their work areas[.]" (Ex. M, Employer's IIPP, § 1.1.1.) The "in their work areas" limitation in the quote above, however, means that, in the absence of a Location Safety Coordinator, there is no one with overall responsibility for implementing the IIPP at the worksite. Therefore, the Decision was correct in finding that Employer violated section 3203, subdivision (a)(1) in this instance.

2. Citation 1, Item 1, Instance 2: Do provisions in Employer's IIPP relating to correcting hazards satisfy section 3203, subdivision (a)(4) regarding inspecting for unsafe conditions?

> Section 3203, subdivision (a)(4) requires that an IIPP shall, at a minimum:
>
> Include procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A) When the Program is first established;
Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

The Division alleged that the IIPP did not state that periodic inspections shall be made as required by subdivision (a)(4). That section "[R]equires that employers include procedures for identifying and evaluating workplace hazards in the IIPP." (*General Dynamics NASSCO*, Cal OSHA App. 1300984, Decision After Reconsideration (Jan. 23, 2023).)

The Decision found that section 1.1.5 of Employer's IIPP does not contain all the elements required by section 3203, subdivision (a)(4). Further, the IIPP's "Hazard Correction" provision, section 1.1.7, does not include instructions for identifying or evaluating hazards. (Ex. M.) While IIPP section 1.1.7 does provide that hazards will be corrected when discovered, the provision does not describe any procedures for identifying and evaluating newly discovered hazards, and the record does not demonstrate that Employer adopted written procedures in its IIPP in compliance with section 3203, subdivision (a)(4).

Employer's Petition recites several examples from the IIPP which purportedly satisfy section 3203, subdivision (a)(4). A review of the IIPP shows, however, that it does not address new hazards, and does not contain a referenced "BMC Monthly Safety Inspection" form. And while IIPP section 1.1.8 refers to new hazards, it does so only in the context of training on such hazards and not correction of the hazards. The Decision correctly held that Employer's IIPP did not satisfy the requirements of section 3203, subdivision (a)(4) regarding inspecting for unsafe conditions.

3. Citation 1, Item 2: Did Employer fail to keep training records as required?

Section 3203, subdivision (b), mandates that employers keep records "of the steps taken to implement and maintain" their IIPPs. Subdivision (b)(2) provides:

> Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

The Division alleged that Employer failed to document training which occurred in April 2019, that the records for January and February 2019 did not include exact dates of training, and that the records for January, February, and March 2019 were forged. The Decision noted the distinction between subdivision (a)(7)'s requirement that training occur and subdivision (b)(2)'s requirement that the training be documented. (Decision, p. 10.) Since Employer was cited for not properly documenting the training, the ALJ assumed it had occurred. (*Ibid*.) The Decision then

determined, based on documentary evidence in the record, that the training records were deficient because they omitted required information, and that at a minimum the January and February records were forged. (Decision, pp. 10-11.)

Employer correctly argued that section 3203, subdivision (b) requires it to keep records of safety training. Employer's argument fails to address its failure to record all the required information in its records. And it misleadingly contended that the Division relied almost entirely on the testimony of a former (supposedly "disgruntled") employee. As stated above, the Decision relied primarily on the documentary evidence in the record. That evidence showed that Employer's records did not contain all the information required by subdivision (b)(2), and further that some of the records were forged.

4. Citation 1, Item 3: Is an HIPP with an out-of-date shade requirement triggering temperature compliant with section 3395?

Employer's Heat Illness Prevention Plan states that employees must have access to shade when temperatures reach 85 degrees. (Ex. K.) While 85 degrees was previously the "trigger temperature" for the shade requirement, at the time of the accident giving rise to the inspection section 3395 had a stated trigger temperature of 80 degrees. The Division cited Employer accordingly.

While it does not dispute using the out-of-date temperature in its HIPP, Employer argues that there was adequate shade and air-conditioned spaces at its facility, and that employees were allowed to access shade as needed. As the Decision points out, however, that argument conflates the written HIPP with conditions at the site. (Decision, p. 12.) Employer's written HIPP was out of compliance with section 3395, subdivision (d).

Employer further argues that the violation should have been classified as Regulatory, not General, and contends the Item should be dismissed due to that alleged misclassification. However, having the wrong temperature at which shade is required in the HIPP is related to employee safety, contrary to Employer's contention. Relying on the out-of-date temperature could result in one or more employee's being denied access to shade when by law, they should have it.

5. Citation 2: Was there sufficient non-hearsay evidence in the record to support the alleged violation of section 3650, subdivision (t)(11), regarding unsafe operation of a forklift?

Section 3650, subdivision (t)(11) states:

> Industrial trucks [i.e. forklifts] and tow tractors shall be operated in a safe manner in accordance with the following operating rules: [¶] (11) The driver shall slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing. [Comment in brackets above added.]

The evidence shows that an employee was using a forklift to move a trash dumpster. He was driving forward with the dumpster on the forks and thus blocking his forward view. The safety order requires that the forklift operator be driving in reverse, "with the load trailing," so he would have an unobstructed view in the direction of travel. As noted earlier, the dumpster struck a barbeque grill which was being cleaned by another employee. The impact knocked the grill onto that employee, causing serious injuries. The ALJ sustained the violation.

Employer challenges that result, arguing, "The Decision's findings are based almost entirely upon *hearsay accounts* of individuals who did not witness the actual incident, and did not testify at the hearing." (Petition, p. 14. Italics in original.) Employer's challenge is not well taken.

The Division's inspector "credibly testified" that four employees, including the forklift driver, all told her the driver was moving forward with the dumpster obstructing his forward view when the accident occurred. (Decision p. 13.) One of those individuals was an assistant manager at the worksite. His statements are attributed to Employer as an authorized admission. (Evid. Code § 1222; *Environmental Construction Group*, Cal/OSHA App. 1129260, Decision After Reconsideration (May 16, 2019).) And Employer's own accident investigation report (Ex. AD) includes statements from two employees, including the driver, that the driver was moving forward with the view obstructed. As the ALJ stated, the hearsay evidence corroborates the statements and photographs in Employer's accident report, which report is itself an admission and thus not hearsay. Lastly, Board regulation § 376.2 provides that hearsay evidence may be used to supplement or explain other evidence in the record.

6. Did Employer establish the Independent Employee Action Defense (IEAD) and/or the Newbery defense with respect to Citation 2?

The employer asserting the IEAD has the burden of establishing all of its five elements, which are listed here: (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 contrary to the employer's safety requirements. (*Fedex Freight, Inc.*, Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016).)

The evidence established that the forklift driver was experienced and certified to operate a forklift at the time of the accident. The IEAD first element is satisfied.

As noted above, Employer's IIPP and HIPP were deficient. Its IIPP lacked required elements, and the HIPP used an out-of-date trigger temperature. Employer failed to satisfy the second element, and thus cannot satisfy the IEAD.

In the Decision the ALJ also addressed elements 3, 4, and 5. He held that Employer did not satisfy element 3, and, therefore, even assuming it satisfied elements 4 and 5, the defense fails. (Decision, pp. 16, 17.) After our review of the record, we agree that elements 2 and 3 were not satisfied and the IEAD does not apply.

Employer also contends that it satisfied another affirmative defense, the *Newbery* defense, claiming the violation was not foreseeable and therefore it should be relieved of liability for the violation. The Newbery defense was articulated by the Court of Appeal in *Newbery Electric Corp. v. Occupational Safety and Health Appeals Board* (1983) 123 Cal. App. 3d 641. To qualify for the defense the cited employer must prove that none of the following criteria exist: (1) that the employer knew or should have known of the potential danger to employees; (2) that the employer failed to exercise adequate safety supervision; (3) that the employer failed to ensure employee compliance with its safety rules; and (4) that the violation was foreseeable. (*Gaewhiler v. Occupational Safety and Health Appeals Board* (1983) 141 Cal. App. 3d 1041.) The Board has stated that the key factor in the Newbery context is unforeseeability due to the independent action by an employee in contravention of the employer's well-designed safety program. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

As discussed earlier, Employer did not have a well-designed safety program, which precludes application of the *Newbery* defense. In addition, the evidence showed that the accident occurred in plain view in front of the retail office at the worksite, such that there was ample opportunity to observe the driver's improper operation of the forklift. Employer's management witness testified that near-miss forklift events were not uncommon and considered unavoidable given the nature of the operations at the worksite. That combination of knowledge and passivity does not comport with the *Newbery* elements.

7. Was the Serious classification established?

Labor Code section 6432, subdivision (a) provides that a rebuttable presumption that a violation was serious if the Division demonstrates that the hazard created by the violation could, with realistic probability, result in death or serious physical harm. The Division inspector testified that the hazard involved in the accident here could result in death or serious physical harm. The injured employee's medical records show that he was hospitalized for observation and pain management for a period longer than 24 hours. That evidence was more than enough to establish the rebuttable presumption.

Labor Code 6432, subdivision (c) provides that a cited employer may rebut the presumption if it shows both that it took all reasonable steps before the violation occurred to anticipate and prevent the violation, and that it took effective action to eliminate employee exposure to the hazard as soon as the violation was discovered.

The Board has held that a hazard in plain view can constitute a Serious violation and an employer's failure to detect such a hazard negates the argument that the employer acted reasonably and responsibly. (*RNR Construction, Inc*., Cal OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017); *National Steel and Shipbuilding Company*, Cal OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).) The accident giving rise to Citation 2 occurred in the early afternoon in the parking lot of Employer's facility, in front of its retail office. Further, one of its employees caused the forklift driver to stop briefly before the accident occurred but failed to ask about or otherwise comment on the driver's unsafe operation of the forklift, despite Employer's witness's testimony that Employer's "Behavioral Based Safety" program tasked all employees to observe other employees and discuss observed violations. The Decision correctly affirmed the Serious classification of the violation.

8. Was the penalty properly calculated?

Employer argues that Citation 2 was not proved and therefore the associated penalties should be vacated.

As discussed above, we find that the evidence does show that the alleged violation of forklift operating rules was established and that the Serious classification was correct. And, we affirm the Decision's holding that the penalty was properly calculated and supported by the evidence. (Decision, pp. 22-23; *RNR Construction, Inc*., *supra,* Cal OSHA App. 1092600.) We affirm the penalty imposed by the ALJ.

DECISION AFTER RECONSIDERATION

We affirm the ALJ's Decision.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 12/19/2024