

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

In the Matter of the Appeal of:

NATIONAL DISTRIBUTION CENTER, LP  
15835 San Antonio Avenue  
Chino, CA 91708

TRI-STATE STAFFING  
15835 Fern Avenue  
Chino, CA 91710

Employer

Docket Nos.

12-R6D2-0391

12-R6D2-0378

**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 taken the petitions for reconsideration filed by the Division of Occupational Safety and Health (Division) under submission in the above-referenced matters, renders the following consolidated decision after reconsideration.

**JURISDICTION**

Beginning on September 1, 2011, the Division, through Associate Safety Engineer Barry Burgess (Burgess), commenced an accident inspection at 15835 San Antonio Ave., Chino, California (the "site"). Employees of both Tri-State Staffing (TSI) and National Distribution Center, LP (NDC) worked at the site.

On January 24, 2012, the Division issued amended serious accident-related citations to both TSI and NDC. The citations to each Employer were markedly similar in content. Citation 1, Item 1 alleged that Employers violated Cal. Code Regs., tit. 8, § 3203, subdivisions (a)(4), (a)(6) and (a)(7)<sup>1</sup> [failure to implement an effective Injury and Illness Prevention Program]. The citations alleged that an employee of TSI working for NDC suffered a serious heat illness because Employers failed to implement the required elements of an Injury and Illness Prevention Program (IIPP), including failing to: (1) identify and evaluate

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

the hazard of heat exposure and heat illness; (2) correct the hazard of heat exposure and heat illness; and, (3) train on the hazard of heat exposure and heat illness.

Employers filed timely appeals contesting the existence of the alleged violations, their classification, the reasonableness of the proposed penalties, and asserting affirmative defenses.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. The appeals of both NDC and TSI were consolidated by Order of the ALJ.

Ronald Peters of Littler Mendelson, P.C. represented NDC. Eugene McMenamain, of Atkinson, Andelson, Loya, Ruud, and Romo, a Professional Corporation, initially represented TSI; however, Ronald Peters substituted as counsel for TSI after the ALJ's order of consolidation.

Tuyet-Van Tran, Staff Counsel, and Melissa Peters, Staff Counsel, represented the Division. Jora Trang, Managing Attorney, and Nicole Marquez, Staff Attorney, of Worksafe, Inc., and Special Counsel Iustina Mignea of the Legal Aid Society Employment Law Center, represented the third party employee Domingo Blancas (Blancas).

After taking testimony and considering the evidence and arguments of counsel, the ALJ issued Decisions on March 25, 2015 granting the appeals of both TSI and NDC and vacating the Division's citations.

The Division filed Petitions for Reconsideration contending that the ALJ should have affirmed the citations to the extent that they alleged violations of section 3203, subdivisions (a)(6) and (a)(7). The Board took the petitions under submission. Employers and third party filed Answers/Responses to the Petitions.

## **ISSUES**

- 1. Were NDC and TSI each required to establish, implement, and maintain an injury and illness prevention program as to TSI's employees?**
- 2. If the answer to the first issue is in the affirmative, did Employers fail to implement effective IPPs that included methods or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner for employees exposed to the risk of heat illness in the workplace?**

- 3. If the answer to the first issue is in the affirmative, did Employers fail to implement effective IPPs that provide for training and instruction for employees exposed to the risk of heat illness in the workplace?**
- 4. If the record established that Employers, or one of them, failed to implement effective IPPs, did Employers establish any affirmative defenses that relieve the Employers of some or all responsibility for the alleged violation(s)?**
- 5. If the record established that Employers, or one of them, failed to implement an IIPP and that no affirmative defenses apply, did the Division properly classify the citations?**

### **FINDINGS OF FACT**

After an independent review of the evidentiary record, the Board makes the following findings of fact:

1. The site was a warehouse controlled by NDC.<sup>2</sup> Both NDC and TSI employees worked at the site. TSI was the primary employer. NDC was the secondary employer. NDC controlled, directed and directly supervised TSI workers at the site. Both NDC and TSI employees were exposed to the hazard of heat exposure at the indoor site.
2. Employers, through their respective personnel, performed inspections of the site to identify and evaluate job hazards. Employers identified the job hazard of indoor heat exposure at the site and evaluated it.
3. Domingo Blancas (Blancas) was a TSI employee who worked indoors at the site, and was exposed to the hazard of indoor heat exposure. He regularly worked under the direction and control of NDC employees. He first experienced heat illness symptoms on August 29, 2011.
4. On August 30, 2011, Blancas first reported heat illness symptoms to TSI Risk Manager Erica Lepe (Lepe). Lepe suspected Blancas suffered from heat stress. Lepe arranged transportation for Blancas to a medical clinic. She arranged for Blancas to be driven to the clinic by another employee, who had also complained of being ill, and whom she also suspected of suffering from heat stress.

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<sup>2</sup> Within the record there are repeated references to National Freight, Inc. (NFI). Employers' Counsel represented on the record that NFI was merely, for purposes of the hearing, a dba of NDC.

5. On August 30, 2011, Blancas received treatment from Dr. Ted Diaz at a medical clinic. Dr. Diaz did not make a definitive diagnosis, but questioned whether Blancas suffered from dehydration secondary to heat exposure. Dr. Diaz referred Blancas to the Emergency Room (ER) at a different medical facility for further testing. Blancas did not go to the ER that day.
6. On August 31, 2011, Blancas returned to work. Lepe called Blancas into her office and discovered he had not gone to the ER. She asked about his failure to go the ER. However, while her back was turned to handle some other tasks, Blancas disappeared without a word. Lepe then received a telephone call which led her to believe that Blancas' son took him to the ER—her belief was subsequently confirmed.
7. On August 31, 2011, Blancas was treated in the ER of Pomona Valley Hospital, and he was subsequently admitted to the hospital. He was hospitalized due to heat illness, and he received concomitant treatment. He was discharged on September 2, 2011 with a diagnosis of heat stroke and acute myositis.
8. Prior to Blancas' illness TSI and NDC adopted several policies and procedures to address and correct the risk of heat illness at the site, including, but not limited to: providing approximately twenty water coolers, and other sources of plumbed water; providing several fans to assist with ventilation and cooling; providing some air-conditioned areas, such as break/lunch room(s); permitting employees to take breaks upon request; exhausting hot air from the warehouse; monitoring the heat, etc. However, the methods, policies and procedures adopted by Employers were not appropriate<sup>3</sup> or sufficient to correct the hazard of heat illness that existed indoors at the site.
9. TSI and NDC both had heat illness training programs, and they provided heat illness training to their respective employees. However, the heat illness training provided to TSI employees was deficient, constituting a failure to implement training, and both Employers are responsible for this failure.

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<sup>3</sup> To be clear, in stating herein that the methods, policies, and procedures were not “appropriate,” the Board is stating that the methods, policies, and procedures utilized by Employer were not appropriate in degree given the conditions that existed at this particular site. In other words, the methods, policies, and procedures adopted by Employers, while perhaps proper in nature, were not of sufficient or appropriate magnitude or scope to deal with the particular hazards that existed at this site under the specific facts of this case.

10. There is a realistic possibility that death or serious physical harm could result from the actual hazard created by Employers failure to adopt appropriate methods and procedures to correct the hazard of heat exposure in the workplace. There is also a realistic possibility that death or serious physical harm could result from the failure to provide sufficient training and instruction on heat exposure in the workplace.
11. Employers' serious violations of sections 3203, subdivision (a)(6) [failure to correct unsafe or unhealthy conditions in the workplace] caused a serious injury/illness to Blancas.

### **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 reviewed and considered both the Petitions for Reconsideration and the Answers/Responses filed by the Parties.

The Division issued citations to both TSI and NDC alleging failure to properly implement an IIPP, thereby violating section 3203, subdivision (a). The Division has the burden to prove the violations by a preponderance of the evidence. (See, *Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983); *Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) The Division must also prove employee exposure to the violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003); *The Purdy Company of Illinois*, Cal/OSHA App. 79-281, Decision After Reconsideration (Dec. 20, 1984).)

#### **A. Were NDC and TSI each required to establish, implement, and maintain an injury and illness prevention program as to the TSI employees?**

The Division's petitions raise issues regarding the extent and scope of TSI and NDC's respective duties to establish, implement, and maintain an IIPP as to the TSI employees, and whether the IIPP implementation efforts of one employer may be credited to another; therefore, we preliminary address this issue:

The Board has long held that an employee, in some instances, may have two employers "[w]ith the 'primary employer' being the employer who loans or leases one or a number of employees to the 'secondary employer' (also referred to as 'general' and 'special' employer)." (*Staffchex*, Cal/OSHA App. 10-2456,

Decision After Reconsideration (Aug. 28, 2014), *citing, Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 693-694; *Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011).) The secondary employer typically controls the work of the loaned employee. (*Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011); *see also, Optical Coating Laboratory Inc.*, Cal/OSHA App. 82-1093 Decision After Reconsideration (Sep. 28, 1984).) Here, the ALJ found that TSI was the primary employer and NDC was the secondary employer. After an independent review of the record, the Board finds that the record fully supports the ALJ's determination of such a joint employer relationship.<sup>4</sup>

As primary and secondary employers, both TSI and NDC had a duty to establish, implement, and maintain an IIPP as to their employees in the joint employer context. (*See, Kelly Global Logistics, Inc.*, Cal/OSHA App. 12-0014, Decision After Reconsideration (Sep. 4, 2014); *Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration, (Aug. 28, 2014); Section 3203; Labor Code section 6401.7.) The Board has repeatedly interpreted this duty broadly consistent with the remedial purposes of the Act. (*See e.g., Kelly Global Logistics, Inc.*, Cal/OSHA App. 12-0014, Decision After Reconsideration (Sep. 4, 2014); *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014); *Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration, (Aug. 28, 2014); *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001); *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) The program must contain the elements enumerated in the regulation, including, inter alia, methods and/or procedures for correcting unsafe or unhealthy conditions, and it must provide for training and instruction. (Section 3203 subd. (a)(6) and (a)(7); *see also, Ibid.*)<sup>5</sup>

But, while both primary and secondary employers are required to establish and maintain an IIPP, we note that section 3203 does not explicitly prohibit primary employers from cooperating with secondary employers, or vice

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<sup>4</sup> Further, within the petitions, the Parties do not dispute the ALJ's factual finding in this respect, and therefore it is affirmed. By failing to timely assert an objection to the findings of fact in a petition for reconsideration, the parties waived any objections to these findings. (Labor Code section 6618; *see also, Sully-Miller Contracting Co. v. California Occupational Safety and Health Appeals Bd.* (2006) 138 Cal.App.4th 684, 691-692 fn. 4.) The parties' stipulations on the record also support this finding.

<sup>5</sup> If a primary employer does not have control over the worksite, the primary employer's implementation of corrective efforts may include, in some instances, removing employees from a hazardous or unhealthy places of employment until correction occurs. Labor Code section 6402: "No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe and healthful." The primary employer must also instruct their employees that they may refuse to do work when they believe a job is dangerous, without sanction. (*See, Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 695-700, *citing, Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985) ("PEMCO II"), PEMCO II was reversed by the Board on other grounds.)

versa, with respect to fulfilling their IIPP duties. (See e.g., *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001)<sup>6</sup>.) There may be certain circumstances where one employer's actual implementation of an IIPP on another employer's behalf may satisfy both employers' duties under section 3203. (*Ibid.*) Notwithstanding such cooperative efforts, each employer remains ultimately responsible to ensure implementation as to all employees subject to the IIPP requirements, and employers cannot escape liability for a violation of their duties, or for a failure of implementation, by arguing that they contracted or delegated away, or otherwise reassigned, their statutory and regulatory responsibilities. (See e.g., *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001); *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014), citing, *Moran Constructors, Inc.*, Cal/OSH App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) In other words, an employer cannot defend against a violation by arguing that it contracted away or otherwise reassigned the responsibilities imposed upon it by a safety order. (*Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

Having established that both TSI and NDC held a duty to establish, implement, and maintain an IIPP as to the TSI employees, and that each Employer is fully responsible for a violation of that duty (regardless of any contract, delegation of responsibility, or other cooperative efforts), we now consider whether either entity violated that duty.

**B. Did Employers fail to implement an effective IIPP that included methods or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner for employees exposed to the risk of heat illness in the workplace?**

The Division asserts that Employers both violated section 3203, subdivision (a)(6), which states:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

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<sup>6</sup>*In Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001), the Board previously stated: "Section 3203(a) does not explicitly prohibit primary employers from cooperating with secondary employers in fulfilling the duty to inspect the work place, although both retain ultimate responsibility to ensure the inspections are executed. There may, then, be circumstances under which the secondary employer's inspection, on both employer's behalf, may satisfy the duty outlined in section 3203, as long as both employers document compliance, and keep the records as required by section 3203(b)(1)."

...

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

(A) When observed or discovered; and,

(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The Division's citations assert the following<sup>7</sup>:

On or about August 30, 2011, an employee of Tristate Staffing Inc. working for National Distribution Centers, LP suffered a serious heat illness because [Employers] failed to implement and/or failed to ensure implementation of the required elements of an Injury and Illness Prevention Program including but not limited to:

....

2. [Employers] failed to establish and implement procedures for correcting the hazard of occupational heat exposure and heat illness including but not limited to failure to respond to symptoms of possible heat illness, failure to contact emergency medical services when necessary, and failure to have a designated person available to ensure that emergency procedures are invoked when appropriate. Reference § 3203(a)(6) and § 3395(f).

The Division asserts that Employers failed to implement their IIPP as required by failing to adequately correct the hazard of heat exposure and heat illness at the site. The Division alleges that Employers violated section 3203, subdivision (a)(6) by failing to implement an IIPP that included appropriate means or methods for correcting unhealthy conditions, work practices, and work procedures at the worksite. An Employer's IIPP may be satisfactory as written, but still result in a violation of section 3203 subdivision (a)(6) if the IIPP is not implemented, or through failure correct known hazards. (*Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014).)

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<sup>7</sup> The Division's citations to TSI and NDC are virtually identical to one another with only a few minor differences, *e.g.* the name of the cited Employer differs in a few areas, and there are some other minor non-substantive differences.



The site at issue here is a large warehouse, with numerous truck bays on its sides where trucks can load and unload items. The site has an un-insulated roof and lacks air-conditioning except in a few specified locations, including break rooms and offices. The site also suffers from poor air circulation in many areas. During the summer months, temperatures inside the site can range as high as ninety degrees (90°F) to a hundred degrees (100°F)—and temperatures can be higher inside shipping containers, which employees must load and unload. Employees working at the site were exposed to the hazard of heat illness.

Employers were aware that the site posed the hazard of heat illness. Employers took some steps to address that hazard during the relevant time periods. Employers engaged in the following efforts: they provided approximately twenty water coolers<sup>8</sup> throughout the site, and provided several other sources of plumbed water; they provided several fans to assist with ventilation; they provided air-conditioned lunch room(s), an air-conditioned application room, and other air-conditioned areas (although there was some credible testimony suggesting that the air-conditioning did not work in some instances); they permitted employees to take cooling breaks; and Employers also established heat illness training programs (discussed in greater detail in the next section).

Mark Winsborrow (Winsborrow), Director of Risk and Safety for NDC, testified to other additional measures taken by NDC to address, and ameliorate, the hazard of heat illness in the workplace (some of which commenced during the month of August 2011) including: monitoring the temperature, and adopting certain programs at different temperature levels such as stationing supervisors on the docks to monitor employees at 95 degrees; attempting to exhaust heat from the warehouse at night or early morning hours; requiring heavy labor to be done at earlier times in the day; and, rotating employees to lessen exposure to hotter areas. NDC also adopted an Emergency First Aid Procedure for Heat Stress.

During the relevant time period, TSI employed Blancas to work for NDC at the site. Blancas performed manual labor at the site, including sweeping the floors. On August 29, 2011, Blancas first felt ill, with symptoms including, poor appetite, feeling hot (or feverish), sweating, pallid complexion, shakiness, and ill temper. Blancas did not report any of his concerns to Employers on that day.

On August 30, 2011, Blancas continued to feel ill. His illness was reported to Rudy Thomas (Thomas), an NDC manager. Thomas merely directed Blancas to report to TSI. Thereafter, Blancas reported feeling ill to Erica Lepe

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<sup>8</sup> The water coolers were, with few exceptions, in working condition and were replenished.

(Lepe), TSI Risk Manager. Blancas reported experiencing dizziness, stomach cramps, and other symptoms. Lepe suspected that Blancas possibly suffered from heat stress. Lepe acknowledged that it was hot at the site that day and the temperature may have exceeded a hundred degrees (100°F).

Lepe asked Blancas several questions to evaluate his condition. In response, Blancas seemed lucid and responsive. Lepe testified that she did not observe in Blancas (based on her knowledge) any objective signs or symptoms of heat illness. Lepe concluded that Blancas was not experiencing an emergency. Lepe asked Blancas whether he wanted to see a doctor, to which Blancas responded affirmatively. Lepe did not take Blancas to the clinic herself. Rather, she arranged for another employee, who had also complained of heat illness symptoms such as fatigue, headache, and dizziness, to drive both himself and Blancas to the clinic. Lepe suspected that the employee that drove Blancas also possibly suffered from heat stress.

At the clinic, Blancas received treatment from Dr. Ted Diaz. Blancas reported experiencing headache, dizziness, total body pain, and nausea. Blancas stated his symptoms had commenced on August 29, 2011.<sup>9</sup> Blancas advised the doctor that workplace exposure to heat may have precipitated his illness. Dr. Diaz provided Blancas cold water and applied an ice hydrocolator to Blancas' head and neck. The medical records demonstrate that Dr. Diaz, while perhaps not making a definitive diagnosis, questioned whether Blancas suffered from symptoms of dehydration secondary to heat exposure. Dr. Diaz referred Blancas to the hospital ER for further testing and evaluation. But, Blancas did not go to the ER that day.

On August 31, 2011, Blancas returned to work. Lepe called him into her office and questioned whether he had gone to the ER. Blancas advised her that he had not gone to the ER. Lepe questioned his failure to go the ER, and then proceeded to turn away from Blancas to handle some tasks. Lepe stated she would have ensured Blancas' transportation to the ER but while she was turned away Blancas left the office. Lepe then received a telephone call which

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<sup>9</sup> The Division's Exhibits 8 and 22, and Employer's Exhibit B, contain copies of Blancas' medical records, including physician reports. The physician reports, and related medical records, are admitted under Evidence Code section 1271, which is the business record exception to the hearsay rule. The witnesses testified adequately to the identity of the records, and their sources. The testimony regarding the records was such as to indicate their trustworthiness. From the foundational evidence, it can reasonably be determined and inferred that the medical records were made in the regular course of business, at or near the time of the event, and kept as part of the patient records for Blancas. Alternatively, the medical records are also admissible under section 376.2 to supplement and explain the testimony of other witnesses to the hearing, including the testimony of Erica Lepe, Barry Burgess, Santos Castaneda, and Josue Blancas. Finally, Employers may be construed to have effectively waived any objection to the records through the expert's reliance on the records.

led her to believe that Blancas' son had taken him to the ER—this understanding was subsequently confirmed.<sup>10</sup>

Blancas was treated in the ER of Pomona Valley Hospital, and he was admitted to the hospital. The evidence, including the medical records, supports a finding that Blancas suffered from, and was hospitalized for several days due to, heat illness. He was discharged on September 2, 2011 with a diagnosis of heat stroke and acute myositis.

On this record, the Division argues that Employers failed to implement an IIPP that included appropriate methods and procedures for correcting unhealthy conditions, work practices, and work procedures, requiring the Board affirm the section 3203, subdivision (a)(6) violation.

Implementation of an IIPP is a question fact. (*Ironworks Unlimited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration (Sep. 6, 2012) [reversed in part by Superior Court on other grounds], *citing*, *Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) “Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, *as well [as] to respond appropriately to correct the hazards.*” (*Emphasis added.*) (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014) (citations omitted.) “The safety order requires employers to have procedures in place both to identify hazards as they arise, *and to take appropriate corrective action to abate the hazards.*” (*Ibid.*, *emphasis added.*)

After review of the entire evidentiary record in the proceeding, the Board finds that the Division established that Employers violated section 3203, subdivision (a)(6) by failing to implement appropriate methods and/or procedures for correcting unsafe or unhealthy conditions in the workplace.

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<sup>10</sup> Some disputes exist between the testimony of Lepe and the testimony/declaration of Josue Blancas and Domingo Blancas regarding the events that took place on August 30 and 31, 2011. In resolving these disputes, the ALJ gave greater credence to the testimony of Lepe over the evidence offered by Josue Blancas and Domingo Blancas—finding that Josue Blancas and Domingo Blancas had made inconsistent statements and were less credible than Lepe, and also noting that Domingo Blancas was not available for cross-examination. The Board will typically not disturb an ALJ's credibility determination, and consistent with that practice affords Lepe's testimony more credence here. But, that is not to say that the Board will disregard all the testimony and evidence of Josue and Domingo Blancas, particularly where it is not disputed or where it is corroborated by other credible evidence. The Board additionally notes that the declaration of Blancas was properly admitted. Although hearsay, it is admissible under section 376.2 to supplement and explain other evidence.

The Board makes this finding for the following reasons, any of which would be sufficient to affirm the violation under the specific facts of this case<sup>11</sup>:

First, both NDC and TSI failed to implement an IIPP that included appropriate methods and/or procedures to correct or minimize the risk of heat exposure and illness that existed in the warehouse. Employees at this site were exposed to a significant hazard of heat illness. The temperatures inside the warehouse reached ninety (90°F) to a hundred (100°F) degrees, or more. The risk of heat illness was aggravated due to the following, without limitation: the absence of air-conditioning (other than in a few areas), the relatively small number of fans given the size of the warehouse, the lack of insulation in the roof, the extreme heat in the storage containers, the physical nature of the employees' work, the poor circulation inside the warehouse, the indoor use of mechanical equipment such as forklifts adding to the heat burden, and the decision to keep truck bay doors shut when not loading and unloading. Lepe acknowledged that circulation issues existed in the warehouse. Lepe also acknowledged that the heat in the warehouse, at times, was greater than the temperature outside. Given the conditions in the warehouse and the physical nature of the work, Employers should have engaged in additional corrective efforts to ameliorate the risk of heat illness beyond those employed. The corrective measures utilized by Employers at the time of Blancas' injury, while a good start, were simply not commensurate to the hazard posed by the conditions in the warehouse. Both Employers' are equally liable for the absence of sufficient corrective efforts.<sup>12</sup>

While we find in this case that Employers failed to implement appropriate corrective methods and measures to address heat exposure and illness at the site, we note that an employer has some latitude in fashioning corrective procedures and methods to address workplace hazards. "Section 3203(a)(6) is a 'performance standard,' which establishes a goal or requirement for employers to meet, while leaving the employer latitude in designing an appropriate means of compliance." (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014), *citing*, *Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012).) Employers have the latitude under a performance standard to fashion additional appropriate means to address the hazard. (*Ibid.*)<sup>13</sup> Regardless of which additional corrective means Employers

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<sup>11</sup> In order to prove a violation, the Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*Petersen Builders Inc.* Cal/OSHA App. 91-057, Decision After Reconsideration, (Jan. 24, 1992), fn. 4.)

<sup>12</sup> Even if TSI as the primary employer does not control the worksite, it always has the option, and the duty, to remove its employees from an unsafe environment until appropriate corrective measures are implemented.

<sup>13</sup> The Board also acknowledges the testimony of Winsborrow to the effect that NDC has taken, and continues to take, further efforts to ameliorate the risk of heat illness in the warehouse after Blancas'

ultimately select to further address the situation at the warehouse, the Board finds that the Division met its burden of proof in establishing a 3203 subdivision (a)(6) violation under the specific facts of this case as to both NDC and TSI. However, in so holding, we do not mean to suggest that the hazard of indoor heat had to be completely corrected, eliminated or abated, which could prove to be an impossible obstacle for these Employers at this site. We merely find that the efforts taken to ameliorate the hazard of heat illness, under the specific facts of this case, were not sufficient or appropriate in degree or scope to address the actual hazard presented here.

Second, TSI's initial response to Blancas' complaints of illness further demonstrated a failure to implement appropriate procedures to correct an unsafe and unhealthy condition in the workplace. Blancas complained to Lepe that he was experiencing dizziness, stomach cramps, and other symptoms of heat illness. Lepe suspected that Blancas might be suffering from heat stress. Based on Blancas' presentation of symptoms, Lepe should have arranged appropriate and reliable transportation for Blancas to medical treatment. Section 3206, subdivision (a) requires an employer to "respond appropriately to correct the hazards." (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014).) Lepe failed to implement appropriate corrective procedures or methods when she arranged for another ill employee, who was also complaining of fatigue and dizziness (and whom she suspected of suffering from heat stress), to drive both employees to the clinic. While it is fortunate that Blancas arrived at the clinic without incident, the actions of TSI do not demonstrate appropriate methods or procedures to respond and correct the hazard of heat illness at the site.<sup>14</sup>

Third, NDC's response to Blancas' complaints of illness also demonstrated a failure to implement appropriate procedures to correct an unsafe and unhealthy condition in the workplace. When Thomas, the NDC warehouse manager, was first apprised of Blancas' illness, he merely directed Blancas to TSI. Neither Thomas, nor anyone else at NDC, rendered aid to Blancas. NDC also failed to ensure that TSI responded appropriately to Blancas' illness. NDC's actions in merely referring Blancas to TSI, without engaging in any efforts to assure that Blancas received appropriate transportation or medical care (or even follow-up), do not demonstrate the implementation of appropriate procedures to correct an unsafe and unhealthy

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injury. However, the Board does not (and need not) rule on the efficacy or sufficiency of these additional efforts, since it is not before the Board.

<sup>14</sup> We note, without holding, that it would have been prudent under these circumstances for Lepe to contact emergency services, based on symptoms presented by Blancas, her suspicion of heat illness, and based on the high heat in the warehouse that day. Separately, we also note, without holding, that it would have been prudent for Lepe to assure Blancas' transportation to the ER once she learned that the clinic doctor referred him for further evaluation.

condition in the workplace.<sup>15</sup> And in any event, even if TSI and NDC had agreed (expressly or impliedly) that TSI was delegated the responsibility to respond and address the injuries and illnesses of temporary employees at the site and for implementing the corrective efforts required within the IIPP, NDC is still liable if TSI fails to perform its duties appropriately, as happened here. Employers cannot contract or delegate away their ultimate responsibility for a violation of a safety order or statute. (*See, Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

**C. Did TSI and NDC fail to implement an effective IIPP by failing to provide sufficient training on indoor heat illness?**

The Division additionally asserts that Employers violated section 3203, subdivision (a)(7). That section states:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

...

(7) Provide training and instruction:

(A) When the program is first established;

Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The Division's citations assert the following:

On or about August 30, 2011, an employee of Tristate Staffing Inc. working for National Distribution Centers, LP suffered a serious heat illness because [Employers] failed to implement and/or failed

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<sup>15</sup> Thomas' inaction appeared to be consistent with NDC policy. Winsborrow testified that NDC's policy, for events deemed to be non-emergencies, was merely to direct temporary employees to the temporary agency.

to ensure implementation of the required elements of an Injury and Illness Prevention Program including but not limited to:

....

3. [Employers] failed to provide effective training on the hazard of occupational heat exposure and heat illness before employees were exposed to the risk of heat illness. Reference § 3203(a)(7) and § 3395(f).

Training is the touchstone of any effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002), citing section 3203(a)(7).) The Division may prove a violation of section 3203, subdivision (a)(7) by showing that the implementation of the training required by this section is inadequate. (See *e.g.*, *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), *citing*, *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).)

The evidence is that both NDC and TSI had heat illness training programs. Lepe testified that TSI provided heat illness training to TSI employees on a regular basis. Lepe provided ninety percent (90%) of the heat illness training for TSI. Sandra Moreno, another TSI employee, performed the remainder of the training. They would read the training materials, provide handouts, and ask questions of TSI employees to ensure comprehension. They also provided quizzes to employees, which she graded. The training was provided in both English and Spanish. Employees were also provided tailgate training on heat illness.

Winsborrow testified that NDC provided heat illness training to NDC employees. He testified that NDC provided employees a “foundational” heat illness training program, which included a power-point presentation. NDC also provided handouts and a quiz. The training materials included a discussion regarding the signs and symptoms of heat illness, the types of heat illness, and various methods to address heat illness. NDC also provided additional heat illness handouts. NDC employees were also provided tailgate meetings covering heat illness.

We conclude, consistent with the ALJ’s finding, that the weight of the evidence demonstrates that most, if not all, TSI employees received some form of heat illness training. Castaneda admitted he received some heat illness training, although he disputed its quality. Blancas also signed a document acknowledging receiving heat illness training and advised Burgess, the Division Inspector, he received heat illness training.

Notwithstanding the foregoing, under the specific facts of this case, the evidence preponderates to a finding that Employers violated section 3203, subdivision (a)(7). It is indisputable that Employers were required to provide heat illness training to their employees. Section 3203, subdivision (a)(7)(E) requires Employers to provide employees training whenever the employer is made aware of a new or previously unrecognized hazard. Employers acknowledged that they were aware that heat exposure and heat illness constituted a hazard in the workplace. This awareness triggered the requirement that Employers provide training to employees regarding that hazard, including during the relevant time period. Additionally, section 3203, subdivisions (a)(7)(B) and (a)(7)(C) required Employers to provide training to all new employees, and to all employees given new job assignments for which training has not previously been received, which also demonstrate that such training was required.

While Employers did make efforts to conduct such training (as discussed above), the training was insufficient and incomplete. The evidence demonstrates that Lepe, the person that conducted the bulk of the training for TSI employees, did not have sufficient knowledge regarding heat illness to make her eligible to train others. “[T]he Board has noted that an employee who is assigned to train coworkers must [herself] have been provided instruction to make [her] eligible to teach others.” (*Kelly Global Logistics, Inc.*, Cal/OSHA App. 12-0014, Decision After Reconsideration (Sep. 4, 2014), *citing*, *Hypower, Inc. dba Hypower Electric Services, Inc.*, Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sep. 11, 2013).) Lepe demonstrated severe deficiencies in her knowledge and familiarity regarding heat illness when she failed to appropriately respond to Blancas’ reported medical concerns. In arranging for another employee complaining of dizziness, and whom she believed might be also suffering from heat stress, to transport Blancas to the medical clinic, Lepe showed that she did not fully comprehend the danger and seriousness of heat illness, nor how to properly respond to such illnesses. Lepe also demonstrated deficiencies in her knowledge regarding heat illness during the hearing when she was unable to identify many of the different types of heat illness. The record also demonstrated deficiencies in Lepe’s (and other trainers) ability to effectively instruct others.<sup>16</sup> (*See e.g.*, *Kelly Global Logistics, Inc.*, Cal/OSHA App. 12-0014, Decision After Reconsideration (Sep. 4, 2014), *citing* *Hypower, Inc. dba Hypower Electric Services, Inc.*, Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sep. 11, 2013).) The foregoing evidence supports a strong inference, and finding, that Lepe could not have provided, and did not provide, satisfactory training to TSI employees regarding

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<sup>16</sup> Supporting the finding that Lepe and others failed to provide sufficient training regarding heat illness was Blancas’ failure to report his symptoms of heat illness when they first arose on August 29, 2011. Additionally, although not dispositive by itself, supporting the finding that TSI failed to provide sufficient training were Burgess’ employee interviews regarding the heat illness training.



heat illness.<sup>17</sup> It is not enough for employers to simply provide employees training, the training must also be of sufficient quality to make employees “proficient or qualified” on the subject of the training. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003)—discussing the definition the word training.<sup>18</sup>) Here, the evidence supports a finding that Lepe did not have sufficient knowledge to provide training of required quality.

In addition, while there is some conflicting evidence on this point, the evidence supports a finding that NDC did not train all TSI employees on NDC’s heat illness program, and certainly did not provide TSI employees adequate or appropriate training. Winsborrow made multiple statements and admissions supportive of this finding, including without limitation: (1) Winsborrow testified that it was not NDC’s responsibility or role to train TSI employees on NDC’s program; (2) he stated that NDC was responsible for training NDC employees and TSI was responsible for training TSI employees, but NDC was not responsible for training TSI employee, and, (3) he also separately identified TSI training documents for heat illness, which differed from NDC’s program and materials. This further demonstrates that the heat illness training provided to TSI employees was insufficient.<sup>19</sup>

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<sup>17</sup> Lepe’s conduct and actions also demonstrate TSI’s violation of section 3203, subdivision (a)(7)(F). That section requires training “For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.” Lepe’s conduct, actions, and testimony, as discussed herein, also demonstrated that she was not provided sufficient training by TSI to familiarize herself with the hazard of heat illness and heat exposure.

<sup>18</sup>In *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003), the Board previously held:

The word "training" is not defined in the safety orders. Under those circumstances, it is to be construed "...according to the context and the approved usage of the language...." (See Civil Code section 13, *California Drive-In Restaurant Ass'n. v. Clark* (1943) 22 Cal.2d 287, and *Sierra Production Service, Inc.*, Cal/OSHA App. 84-1227, Decision After Reconsideration (Aug. 13, 1987).) The purpose of section 3203(a)(7) is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through "training and instruction." The generally accepted and approved meaning of the word "training", when used to describe the process of providing employees with that knowledge and ability in this context is "to instruct so as to make proficient or qualified." (Webster's New World Dictionary, Third College Edition (1989), p.1418.)

<sup>19</sup> The Board is additionally troubled by the evidence concerning the lack of training documentation showing that all employees had been trained. While not dispositive, the absence of documentation does support the Division's claim that the training either did not occur, or was cursory in nature. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).)

Both TSI and NDC may properly be cited for failing to implement an IIPP that provides for required training for the TSI employees. Both TSI, the primary employer, and NDC, the secondary employer, must meet and implement the training requirements of section 3203, subdivision (a)(7) in the joint employer context. (*Kelly Global Logistics, Inc.*, Cal/OSHA App. 12-0014, Decision After Reconsideration (Sep. 4, 2014), *citing*, *Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) And while NDC and TSI may, in some instances, reach an agreement whereby TSI performs the required heat illness training—primary and secondary employers may cooperate with each other in fulfilling their duties—both Employers retain ultimate responsibility to ensure compliance with the training requirements, and both may be held liable for any deficiencies in implementation. (See *e.g.*, *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001); *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).)

#### **D. Did the Employers Establish Any Affirmative Defenses?**

Employers assert multiple affirmative defenses. Three of the respective defenses asserted by the Employers are: 1) the citation is unconstitutionally vague, constituting a due process violation; 2) the Independent Employee Action Defense (IEAD); and, 3) the Division failed to comply with requirements of Labor Code section 6432, subdivision (b)(2).

##### **1. Unconstitutional Vagueness.**

Although the Division’s citations primarily allege violations of section 3203, [failure to implement an IIPP], Employers argue that the Division is actually attempting to force Employers to comply with section 3395 [the outdoor heat illness standard], which is inapplicable to indoor workplaces such as the site. Employers argue that the Division’s citations “asserts, rather explicitly, that employer failed to properly institute procedures consistent with the requirements of 3395. No amount of legerdemain can change that fundamental truth.” (Appellant’s Joint Reply to Division and Domingo Blancas’s Post Hearing Brief, p. 8-10.) Employers argue that it would be extraordinarily unfair, and unconstitutionally vague, “to require any employer to follow strictly delineated carefully drawn requirements contained in a regulation when that same regulation specifically states that it does not apply to the employer in question.” (*Id.*) However, we do not find Employers’ arguments persuasive for several reasons:

First, while we agree that section 3395 [the outdoor heat illness standard] does not apply to regulate the conduct of Employers in this case since the worksite is indoors, we do not view the Division’s instant citations as

alleging a violation of section 3395, nor requiring Employers to comply with the requirements of that section. It is merely a reference. During the hearing, Burgess testified that he did not contend that section 3395 applied, and stated that it was just a reference. We view the Division's citations as solely asserting a violation of section 3203, subdivision (a). And, in affirming the Division's citations, the Board neither considered nor relied upon section 3395.

Second, Employers' unconstitutional vagueness challenge fails because section 3203 subdivision (a) can reasonably be interpreted to require Employers to address the hazard of indoor heat and heat illness, independent of consideration of section 3395 [the outdoor heat illness standard], particularly when the regulation is viewed in light of the specific facts of the case. In *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890-891, the Appellate Court stated:

In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather, we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case. [citations.] If it can be given a reasonable and practical construction that is consistent with probable legislative intent and encompasses the conduct of the complaining party, the regulation must be upheld. [citations.]

Under the principles espoused in *Teichert Construction, supra*, we decline to find that section 3203, subdivision (a) is unconstitutionally vague as applied to the hazard of indoor heat as applied and considered under the specific facts of this case. Section 3203, subdivision (a)(6), requires employers to establish and implement procedures for "correcting unsafe or unhealthy conditions, work practices and work procedures..." The evidence in this matter demonstrates that hot work sites and environments, including indoor workplaces, may properly be construed to be an unsafe and unhealthy condition potentially leading to heat illness, thereby triggering Employers' obligation to correct the hazard, to the extent possible.

Likewise, Employers are required, pursuant to section 3203 subdivision (a)(7), to provide training whenever they recognize a new hazard, and they are required to provide training to all new employees and to all employees given new job assignments. Here, Employers recognition of indoor heat at the site as a hazard triggered the training requirements under section 3203 subdivision (a)(7).

That section 3203 does not specifically discuss indoor heat illness does not mean that the hazard may be ignored, or that the hazard is not regulated by the section. As discussed in *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014), when discussing section 3203, subdivision (a):

The lack of specificity in the standard is not a flaw, but is intentional, as the standard is a "performance standard," which establishes a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions. [citation.] Having addressed the issue of performance standards in the past, the Appeals Court has explained, "it would not be feasible to draft detailed plans and specifications of all acts or conduct to be performed or prohibited, and it is not necessary to do so." (*Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 891).<sup>20</sup>

Thus, Employers' unconstitutional vagueness challenge fails. We now turn to consideration of Employers' other affirmative defenses.

## **2. Independent Employee Action Defense (IEAD).**

Employers assert that they established the Independent Employee Act Defense (IEAD), which operates as a complete defense to the citation. The elements of IEAD defense are:

- 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.

(See, *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980); see also, *Davey Tree Surgery Co.*

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<sup>20</sup> To the extent that Employers may argue that there is vagueness in the citation, the argument is not persuasive. Employer has been given adequate notice of the substance of the charge, and opportunity to mount a defense. The citations in this instance provided Employer notice referencing 3203, subdivisions (a)(6) and (a)(7). The facts alleged by the Division sufficiently put Employers on notice of the nature and substance of the charge, and provided Employers with the ability to formulate a defense. (See e.g., *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).)

*v. Occupational Safety & Health Appeals Bd.*, (1985) 167 Cal.App.3d 1232, 1239.)

However, again, we do not find Employers' argument persuasive. 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.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) This element should be analyzed by taking a realistic view of the written program and policies, as well as the actual practices at the workplace. (*See, Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).) Here, while Employers had multiple aspects of a well-devised safety program, which included some training, the Division presented sufficient evidence (as discussed herein) to demonstrate that Employers' safety program and training had numerous deficiencies, particularly as applied to TSI employees on the subject of heat and heat illness. As a result, Employers failed to establish the second element of the IEAD defense, and the defense therefore fails. We also note that Employers would be unable to establish the third element of the defense.<sup>21</sup>

### **3. Labor Code section 6432, subdivision (b)(2).**

TSI additionally asserts that the Division failed to properly issue a 1BY form that complied with the requirements of Labor Code section 6432, subdivision (b). TSI specifically alleges that:

The Division failed to comply with the requirements under Labor Code section 6432(a)(2) [sic] "not less than 15 days prior to issuing a citation for serious violation, the Division delivers to the Employer a standardized form containing the Alleged Violation Description ("AVD")...." The form 1BY issued by the Division failed to comply with the requirements of Labor Code section 6432(a)(2).<sup>22</sup>

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<sup>21</sup> Employers would also be unable to establish the third element of the IEAD defense, which requires an employer to show that it effectively enforces its safety program. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) An essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices. (*City of Los Angeles, Department of Water & Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 4, 1988).) Here, the conduct of NDC and TSI in responding to Blancas' complaints of illness demonstrated a failure to effectively enforce their safety program. Additionally, Employers' failure to appropriately correct and minimize the hazards in the workplace, as discussed herein, also demonstrated a failure to effectively enforce their safety program.

<sup>22</sup> Employer's affirmative defense incorrectly asserts the wrong code section citing, Labor Code section 6432, subdivision (a)(2). From the context, it appears that Employer is actually asserting a violation of Labor Code section 6432(b)(2), and therefore we address that issue.

However, the evidence does not support the Employer's assertions. The evidence demonstrates that the Division did issue 1BY forms to the Employers in a timely fashion. Although the 1BY form did contain an error(s) regarding the inspection site address, on balance we find that this error was not material, nor did it mislead or prejudice employer. The form sufficiently advised Employers that the Division intended to issue serious accident-related citations for IIPP violations pertaining to an employee who allegedly suffered a serious heat illness on August 30, 2011. The information provided on the form, including the August 30, 2011 date and the reference to a serious heat illness, sufficiently apprised Employers that a citation would issue pertaining to Blancas due to Employers failure to implement their IIPP, including the corrective and training requirements of the IIPP. On balance, we find that the 1BY form complied with the requirements of Labor Code section 6432(b)(2) notwithstanding the immaterial clerical error(s). Employer presented no credible evidence suggesting that it was misled or prejudiced by any clerical errors on the forms.<sup>23</sup>

We also find that Employers failed to establish any of the other asserted affirmative defenses.

#### **E. Classification of the Citation.**

The Division classified the section 3203, subdivision (a)(6) and (a)(7) citations [failure to implement an effective Injury and Illness Prevention Program] as serious and accident-related, and Employers appealed this classification.

A rebuttable presumption of a serious violation exists when the Division establishes that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Labor Code section 6432(a).) The term "realistic possibility" means that that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

The Division established a realistic possibility that serious physical harm or death may occur when an employer fails to implement appropriate methods or procedures to correct and ameliorate the hazard of heat illness and fails to provide appropriate training. Credible testimony demonstrated that heat is a hazard<sup>24</sup> and that exposure to heat, absent appropriate corrective efforts and

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<sup>23</sup> This defense also fails as to NDC if NDC had asserted it, since the 1BY forms were largely identical.

<sup>24</sup> The evidence, including the testimony of Barry Burgess, Dr. Marvin Pietruszka, and Mary Kochie, R.N., demonstrated that there are multiple stages of heat illness, which range in severity from mild to serious, including, without limitation: sunburn, heat edema, heat exhaustion, heat cramps, and heat stroke. The symptoms of heat illness vary depending on the stage and can include: swelling, thirst, cramps, weakness, headache, dizziness, irritability, and vomiting.

absent appropriate training, can realistically lead to severe heat illness, and even death. Employees working in a hot environment, absent implementation of appropriate corrective procedures and efforts, can develop heat illness that may progress to more serious stages, particularly if not properly addressed or treated. In addition, without adequate training an employee may not know how to identify heat illness in themselves or others, or not know how to respond to it, allowing the illness to progress to more serious levels.

In an attempt to rebut the presumption of a serious violation, Employers argue that they “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” (See, Labor Code section 6432(c).) Employers may establish this by demonstrating both of the following:

- (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...
- (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(c).)

However, Employers did not establish that that they did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation, nor did they establish that they took all appropriate actions to eliminate (or reduce) the hazard. As already discussed herein, Employers were aware of the hazard of heat illness, yet Employers did not take all reasonable, responsible, and appropriate steps to anticipate and prevent the violation. Employers did not sufficiently minimize the hazard of heat illness in the workplace, nor did they provide appropriate training, taking into consideration the severity of the harm that could be expected to occur. The efforts taken by Employers were not appropriate in degree or scope to deal with the hazards that existed at this worksite.

Additionally, Employers had knowledge, or should have had knowledge, that the corrective efforts undertaken, and the training it provided, were not adequate. Lepe acknowledged that multiple people complained of heat illness during the hot season, with two people reporting such illnesses on August 30, 2011 alone.

The Division also classified the citations as accident-related. Section 336, subsections (c)(3) and (d)(7) provide that when a serious violation of a safety order causes a serious injury or illness to a person (*i.e.* the injury was accident-related), the Division is precluded from reducing the size of the penalty except for considerations of the businesses' size. (*See also*, Labor Code section 6319, subdivision (d).) Here, the preponderance of evidence in the record demonstrates that the Division properly classified the citation as accident-related. The evidence demonstrates that Blancas performed manual labor at the site in a hot environment. Employers permitted Blancas to work in this environment without providing or implementing appropriate ameliorative and corrective procedures to address the risk of heat. As a result of Employers' conduct, including the lack of appropriate procedures to correct indoor heat, Blancas developed a heat illness, which was allowed to continue, and progress, leading to his hospitalization on August 31, 2011. Blancas suffered from a serious heat illness, requiring hospitalization for several days.

### **DECISION**

In sum, the Board reverses the ALJ and affirms the 3203, subdivision (a)(6) and (a)(7) citations [failure to implement an effective Injury and Illness Prevention Program] as against each Employer. The Board also affirms the serious and accident-related classifications, and finds that the penalty proposed by the Division was appropriately calculated as to each Employer and it so ordered.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: OCT 05, 2015



## SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

**NATIONAL DISTRIBUTION CENTER, LP**  
**Docket No. 2012-R6D2-0391**

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

IMIS No. 314757618

Site: 15835 San Antonio Ave., Chino, CA 91708  
Date of Inspection: 09-01-2011

Date of Citation: 01/13/2012

DOCKET	CITATION	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD	
12-R6D2-0391	1	1	3203(a)	S	Failure to implement an effective IIPP. ALJ vacated violation. Board reversed the ALJ's decision.	x		\$18,000	\$0	<b>\$18,000</b>
<b>Sub-Total</b>								\$18,000	\$0	<b>\$18,000</b>

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$18,000**

NOTE: Payment of final penalty amount 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.

POS: 10/5/2015

## SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

**TRI-STATE STAFFING**  
**Docket No. 2012-R6D2-0378**

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

IMIS No. 314757600

Site: 15835 San Antonio Ave., Chino, CA 91708

Date of Inspection: 09-01-2011 ~ 01/13/2012

Date of Citation: 01/24/2012

DOCKET	CITATION	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD	
12-R6D2-0378	1	1	3203(a)	S	Failure to implement an effective IIPP. ALJ vacated violation. Board reversed the ALJ's decision.	x		\$18,000	\$0	<b>\$18,000</b>
<b>Sub-Total</b>								\$18,000	\$0	<b>\$18,000</b>

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$18,000**

NOTE: Payment of final penalty amount 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.

POS: 10/5/2015