BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
WONDERFUL CITRUS PACKING LLC **1901 S. Lexington Street** **Delano, CA 93215** **Employer**	**1462745** **DENIAL OF PETITION FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the Petition for Reconsideration filed in the above-entitled matter by Wonderful Citrus Packing LLC (Employer).

JURISDICTION

Beginning February 14, 2020, the Division of Occupational Safety and Health (Division) through Compliance Officer Daniel Pulido (Pulido), conducted an accident investigation at Employer's worksite located at 1901 South Lexington Street, in Delano, California (the site).

On June 5, 2020, the Division issued two citations. Citation 1, Item 1, asserted a Regulatory violation of section 3668, subdivision (f),[1] alleging Employer failed to provide documentation certifying that a powered industrial truck operator had been trained and evaluated as required. Citation 2, Item 1, asserted a Serious, Accident-Related violation of section 3650, subdivision (t)(9), alleging Employer failed to ensure that powered industrial truck operators maintained a safe distance from other vehicles. Employer filed a timely appeal.

The matter was heard by Howard Chernin, Administrative Law Judge (ALJ), for the Board in Los Angeles, California on May 11, 2022. All participants appeared remotely via the Zoom video platform. District Manager Efren Gomez represented the Division, and Rhonda Steffen, attorney at Roll Law Group, represented Employer. During the hearing, Employer withdrew its appeal of Citation 1, Item 1.

The matter was submitted on August 10, 2022. On September 8, 2022, ALJ Chernin issued a Decision affirming Citation 2, Item 1, and its Serious, Accident-Related classification. This petition follows. Employer's petition addresses the existence of the violation, but not its classification or the calculation of the penalty, waiving the latter points. (Lab. Code, § 6618.)

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

The Board has fully reviewed the record in this case. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

ISSUE

1) Did the ALJ properly find a violation of section 3650, subdivision (t)(9), based on evidence that two vehicles failed to maintain a safe distance from one another (as demonstrated by a collision), notwithstanding the absence of any additional findings pertaining to excessive speed, loss of control, or failure to follow traffic regulations?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

Here, Employer asserts that the ALJ acted without and in excess of his authority (Lab. Code, § 6617, subd. (a)) and the findings of fact do not support the order or decision (Lab. Code, § 6617, subd. (e)).

Employer challenges the ALJ's affirmance of Citation 2. That citation asserts a violation of section, 3650, subdivision (t)(9), which states,

> (t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:
>
> […]
>
> (9) Vehicles shall not exceed the authorized or safe speed, always maintaining a safe distance from other vehicles, keeping the truck under positive control at all times and all established traffic regulations shall be observed. For trucks traveling in the same direction, a safe distance may be considered to be approximately 3 truck lengths or preferably a time lapse -3 seconds -passing the same point.

The dispute turns on what the Division must prove in order to establish a violation of the aforementioned safety order. The ALJ found that a violation may be established based solely on the fact that two operative vehicles failed to maintain a safe distance from one another, as evidenced by a collision. Employer, on the other hand, contends that a violation cannot be sustained merely due to the collision, absent additional evidence establishing excessive speed, loss of control, and/or failure to follow traffic regulations.

We first discuss the material facts, which are addressed in detail in the ALJ's decision. On January 9, 2020, employee Juan Antonio Hernandez Gonzalez (Gonzalez) was operating an electric pallet jack (EPJ) in the palletizer area of Employer's warehouse facility. An EPJ is a vehicle that moves pallets. Simultaneously, employee Rigoberto Mosqueda (Mosqueda) was operating a forklift in the same area of the warehouse. While they were both operating in the same area, Mosqueda stopped his forklift to allow Gonzalez to proceed. Before Gonzalez had completed passing, Mosqueda placed his forklift into motion, striking Gonzalez's ankle with the forks and causing Gonzalez to suffer a serious ankle injury.

Although Employer admits a collision occurred and resulted in injuries to Gonzalez, Employer argues the Division must do more to demonstrate the vehicles failed to maintain a safe distance, arguing that this amounts to strict liability for collisions. (Petition, pp. 5-8.) Employer states that the Division must demonstrate either excessive speed, the loss of positive control, or a failure to comply with traffic regulations. (*Ibid*.) Employer supports its position through reference to two ALJ decisions, which need not be discussed,[2] and one Board decision.

The referenced Board decision, *Certified Grocers of California*, *LTD*., Cal/OSHA App. 78-607, Decision After Reconsideration (Oct. 27, 1982) (*Certified Grocers*), considered a near identical predecessor to the current regulation. The Board found that employees had been driving two vehicles "bumper-to-bumper," less than one foot apart, but the Board declined to find a violation because the Division "failed to establish that the speed and distance were unsafe." (*Ibid*.) Employer argues that *Certified Grocers*, and the ALJ decisions, "show a failure to drive in a safe manner must be shown by such factors as speed, loss of positive control, or a failure to follow traffic regulations. All three cases held failure to maintain a safe distance is not sufficient to show unsafe driving." (Petition, pp. 6-7.)

When evaluating Employer's argument and the ALJ's Decision, the issue before the Board is ultimately a matter of regulatory construction, requiring that the Board follow well-known rules.[3] The Board first looks to the plain language of the regulation itself. (*Shimmick Construction Company, Inc.,* Cal/OSHA App. 1192534, Decision After Reconsideration (Aug. 26, 2022).) Words are given their ordinary and usual meaning and construed in context. (*Ibid*.) The Board

[2] Employer cites to two ALJ Decisions: *Home Depot USA*, *Inc*., Cal/OSHA App. 15-2298, Decision (Aug. 24, 2016) and *Tri Valley Growers*, Cal/OSHA App. 75-787, Decision (Mar. 22, 1976). "We accord no precedential value to ALJ decisions… the Appeals Board has never considered such decisions as being persuasive unless and until they are reviewed and adopted by the Board after reconsideration." (*General Truss*, *Co*., *Inc*., Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011).)

[3] The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d, 1510, 1517.)

should additionally attempt to give meaning to each word of the safety order. (*McCarthy Building Co*., *Inc*., Cal/OSHA App. 12-3458, Decision After Reconsideration (Feb. 8, 2016).) However, the plain meaning rule does not prohibit the Board from determining whether the literal meaning of the regulation comports with its purpose. (*Shimmick Construction Company*, *Inc*., *supra*, Cal/OSHA App. 1192534.) Furthermore, where a word of common usage has more than one meaning, the one which will best attain the purposes of the regulation should be adopted to avoid absurdity or injustice. (*Ibid*.)

Here, the safety order requires industrial truck operators comply with the following rules: "[v]ehicles shall not exceed the authorized or safe speed, always maintaining a safe distance from other vehicles, keeping the truck under positive control at all times and all established traffic regulations shall be observed." (§ 3650, subd. (t)(9).) Parsing the safety order, applying the plain meaning, and giving effect to each part of the safety order, it is clear that a violation of the cited subdivision will exist if the operator of an industrial truck or tow tractor fails to follow any of the following rules: 1) the vehicle operator shall not exceed the authorized or safe speed; or, 2) the vehicle operator shall maintain a safe distance from other vehicles; or, 3) the operator shall keep the vehicle under positive control at all times; or, 4) the operator shall observe all traffic regulations. When a safety standard includes two or more distinct requirements, a violation of the safety standard occurs if an employer violates any one of the requirements. (*Fedex Freight*, *Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016).)

Employer's analysis, which would not find a violation based solely on the fact that its operators failed to maintain a safe distance, unless coupled with other evidence of excessive speed, loss of positive control, and/or a failure to comply with traffic regulations, does not give meaning to each term of the safety order. Since excessive speed or a violation of traffic regulations would cause a violation even without evidence of a failure to maintain a safe distance, Employer's interpretation would effectively render the safe distance requirement surplusage. The Board avoids interpretations that would render words surplusage. (*McCarthy Building Co*., *Inc*., *supra*, Cal/OSHA App. 12-3458.)

Employer's interpretation also fails because it is less protective of workers. The California Supreme Court has held the relevant Labor Code provisions speak in the "broadest possible terms" and must be construed liberally to achieve a safe working environment. (*Carmona* v. *Division of Industrial Safety* (1975) 13 Cal.3d 303, 311-313; *Department of Industrial Relation v. Occupational Safety and Health Appeals Board* (2018) 26 Cal.App.5th 93, 106-107.) It has likewise held these safety orders must be construed liberally to achieve a safe working environment. (*Ibid*.)

Here, even absent evidence of unsafe speed, loss of positive control, or violation of traffic regulations, there is evidence that the vehicle operators failed to maintain a safe distance from one another due to the serious injury suffered by Gonzalez. Indeed, for this reason, the *Certified Grocers* decision offers little aid to Employer. There, although the operators' vehicles were within one foot of each other, the Board found there was no proof that such conduct was unsafe. Here, on the other hand, the collision and subsequent serious injury demonstrate the conduct was unsafe.

Finally, affirming the violation does not mean that Employer is strictly liable for the violation. Multiple defenses exist to both general and serious violations, including the Independent Employee Action Defense,[4] which Employer did not assert in its petition.

DECISION

For the reasons stated above, the petition for reconsideration is denied. The Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 11/23/2022

[4] *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).