

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

In the Matter of the Appeal of:

EVERGREEN NURSERY
P.O. Box 503130
San Diego, CA 92150

Employer

Dockets. 15-R3D2-0083 and 0084

**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 the California Division of Occupational Safety and Health (Division).

JURISDICTION

Commencing on August 28, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer, Evergreen Nursery.

On December 5, 2014, the Division issued citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing. At the hearing the Division withdrew one of the two citations, leaving one at issue.

On April 8, 2016, the ALJ issued a Decision (Decision) granting Employer's appeal.

The Division timely filed a petition for reconsideration.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

Employer did not answer the petition.

ISSUE

Was the Decision granting Employer's appeal correct?

FINDINGS OF FACT

The Decision made the following finds of fact, which we find are supported by the record.

1. On September 4, 2014, Employer's employees were working in the elevated basket of a JLG 400S aerial device.
2. The employees were not secured to the boom or basket through the use of a safety belt, or body harness equipped with a safety strap or lanyard.
3. The JLG 400S was manufactured after September 1, 1991.
4. The JLG 400S complied with all requirements for an orchard man-lift manufactured after September 1, 1991.
5. The basket had guardrails that were 42½ inches above the platform floor.
6. Employer's JLG 400S was used for pruning fruit and nut trees, which is one of the uses for which it was designed.
7. Employer's JLG 400S qualifies as an orchard man-lift.²

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.

The Division's petition asserts that the Decision was issued in excess of the ALJ's powers and that the findings of fact do not support the Decision.

² Finding of Fact number 7 may be viewed as a combined finding of fact and conclusion of law.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. 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.

Employer operates a tree orchard or nursery. Employer was cited for allegedly violating section 3648, subdivision (o), after a Division inspector observed two of its employees working in an elevated aerial device, also called a man-lift, without being secured against falls. Employer contended that an exception in section 3648, subdivision (o), to the usual fall protection requirement applied. The Division argued at hearing and in its petition that the exception does not apply.

Section 3648, is titled "Operating Instructions (Aerial Devices). Subdivision (o) provides:

An employee, while in an elevated aerial device, shall be secured to the boom, basket or tub of the aerial device through the use of a safety belt, body belt or body harness equipped with safety strap or lanyard.

Exception: Orchard man-lifts manufacture after September 1, 1991, with guardrails 42 inches or higher above the platform floor.

The Decision considered the text of both section 3648 and other safety orders relevant to the questions of whether the JLG 400S qualifies as an orchard man-lift and whether those regulations limit orchard man-lifts to devices which can accommodate only one occupant.

Section 3637 defines several terms used in Article 24 of the General Industry Safety Orders, which addresses "elevating work platforms and aerial devices." (§§ 3636 – 3648.) Among those definitions is: "Orchard Man-Lift (Pruning Tower). An aerial device designed to elevate and position personnel for the purpose of harvesting and/or pruning fruit and nut trees." The definition is not limited to devices which can hold only one person. The word "personnel" in the quoted definition is not limited to one person.³ Had the Standards Board's intent been to limit the definition to devices designed for one person only, it could have so stated.

Section 3641 is specific to orchard man-lifts, and nowhere in its detailed provisions applicable to lifts manufactured after September 1, 1991, does it limit its applicability to one person devices. (See § 3641, subds. (a) through (b)(7).) In addition, section 3648, subdivision (a) addresses situations in which

³ Webster's New World Dictionary, Third College Ed., (1991) for example defines *personnel* as "persons employed in any work, enterprise, service, establishment, etc.[.]" (Webster's, p. 1008.)

“*workers* are on the platform or in the basket while in an elevated position.” (Emphasis added.) From its beginning the safety order contemplates aerial devices in which more than one person may be present. Contrary to the Division’s contention that orchard man-lifts are devices which are designed to hold only one person, the better reading of the safety order is that the exception applies to qualifying orchard man-lifts even if sized to hold more than one person.

The Division argues that the following statement in the Standards Board’s “Informative Digest of Proposed Action” in December 2001 regarding either promulgation or amendment of section 3648, indicates the intent to limit the exception to one-person lifts:

During a September 1990 advisory committee meeting, however, which resulted in the rulemaking which incorporated regulations specific to orchard man-lifts, it was the consensus of opinion that the combination of the tight or restrictive platform area (designed for one person) and a 42-inch high or greater guardrail height would provide adequate fall protection. Thus the Board proposes to clarify that those orchard man-lifts manufactured after September 1, 1991 with guardrails 42 inches or higher are excluded from the fall protection requirements contained in Section 3648(o).

The Division’s petition omits the following statement from the same rulemaking proposal:

A revision is proposed to add an “Exception” to Section 3648(o) to exclude orchard man-lifts manufactured after September 1, 1991 with guardrails 42 inches or higher from the fall protection requirements contained in this subsection. The proposed revision is necessary to address fall protection requirements for those orchard man-lifts not covered by Section 3641(b)(4), which only address orchard man-lifts manufactured after September 1, 1991 with guardrails less than 42 inches.

The portion of the rulemaking notice quoted by the Division (first block quote above) deals with the factual and regulatory situation in 1990. The revision of subdivision (o) under discussion in 2001 addressed changes in circumstances and design of aerial devices in the intervening dozen years, including the changes made in post-September 1, 1991 lifts, and the regulatory gap that had resulted.

The proposed amendment to section 3648, subdivision (o) does not limit the change to lifts which are intended to hold only one person, and the final regulatory text omits any such language. In view of the omission of any

reference or restriction in the Exception to one-person lifts, it cannot be assumed the Standards Board intended such restriction to apply. Doing so would be to read language into the safety order, which the Appeals Board may not do. ("An administrative agency cannot alter or enlarge the legislation[.]" (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal. App. 4th 499, 526; *Webcor Construction LP*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sep. 2, 2010).)

And, although photographs in evidence of various items of equipment (Exhibits 4 through 10, presumably examples of other types of orchard man-lifts) show baskets apparently suitable for only one occupant, the JLG 400S is larger and may readily hold at least two persons. In contrast, the JLG 400S specifications state that its basket is 36 inches by 96 inches, and capable of being loaded to 750 pounds without restriction as to extension distance and angle. (Exhibit 11.) Further, the basket not only has a top rail at more than 42 inches above the platform, it has a mid-rail and vertical bars connecting the rails to the platform at intervals around the perimeter of the platform as well. (Exhibits 9 and 10.) In view of the language of section 3648, subdivision (o) and the included exception, our lack of authority to amend the safety order by reading a term into it, and the apparent security of the JLG 400S itself, we must deny the Division's petition.

DECISION

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: July 1, 2016