

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

FRANK M BOOTH, INC.
PO Box 5
Marysville, CA 95901

Employer

DOCKET 12-R2D3-0601

DECISION

INTRODUCTION

Frank M. Booth, Inc. (Employer) is a Heating, Ventilation, Air Conditioning (HVAC) and Mechanical Engineering Contractor. Beginning on December 28, 2011, the Division of Occupational Safety and Health (DOSH) through Associate Safety Engineer John Wendland, conducted an accident inspection at 126 B St., Marysville, California 95901 (the site). On February 9, 2012, the Division cited Appellant for a Serious, Accident Related violation of California Code of Regulations, Title 8, section 3212, subdivision (e)¹ for failure to ensure that a load, comprised of a concrete skid weighing 700-800 pounds, was secured when employee Kirby Smith (Smith) attempted to move the load from a hoist (crane) to a forklift. The skid unexpectedly fell causing serious crushing injury to a worker's foot.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the penalty. Employer raised numerous affirmative defenses.

The matter was regularly set for hearing before Neil Robinson, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on June 20, 2013. Manuel Melgoza of Robert D. Peterson Law Corp. represented Employer. John Weiss, District Manager, represented DOSH. The parties presented oral and documentary evidence. The record was left open until July 11, 2013, for the submission of closing briefs. The submission date was later extended to January 15, 2014, by order of the Administrative Law Judge.

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

STIPULATIONS, AND PRE-HEARING DETERMINATIONS

1. Employer concedes a “skid’ being lifted by an overhead crane was released by the crane before being otherwise secured or supported – the result of which was the skid striking an employee as it fell.”²
2. Appellant withdrew its appeal of the abatement requirement.
3. At the hearing, Employer narrowed the number of defenses it was alleging. In its post-hearing brief, Employer appears to have further narrowed the defenses alleged to the independent employee action defense (IEAD) and lack of employer knowledge. Employer also contends that this event was unforeseeable pursuant to *Newbery Electric Corp. v. Occupational Safety and Health Appeals Board*, (1981) 123 Cal.App.3d 641.
4. Assuming that DOSH established a serious accident related violation and rejects the affirmative defense of IEAD and the defense of lack of employer knowledge, then Employer stipulates that the penalties were calculated in accord with DOSH’s policies and procedures.
5. The parties stipulated that specific instruction for transferring loads to a forklift from a hoist is not in Exhibit B.

ISSUES

1. Did Employer carry its burden of proof on the issue of the IEAD affirmative defense pursuant to *Mercury Service Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration, October 16, 1980?

FINDINGS OF FACT OR LAW

1. Employer proved each element of the IEAD affirmative defense resulting in employer’s release of liability for the safety order violation along with any accompanying penalties.

² This concession was made in Appellant’s post-hearing submission filed July 16, 2013. This concession is an admission that there was indeed a violation of section 4999, subdivision (h). Furthermore, it is undisputed that the violation caused an employee to have three toes amputated which is clearly a “serious physical harm” as specified by Labor Code section 6432, subdivision (a). There does not need to be further analysis of the underlying violation, however, the IEAD defense must be considered.

ANALYSIS

1. Employer proved each element of the IEAD affirmative defense.

It is undisputed that a violation of California Code of Regs, Title 8, section 4999, subdivision (h) occurred. A qualified rigger failed to ensure that a load was secured or supported causing the load to fall onto the foot of Smith resulting in the amputation of three of Smith's toes. Employer conceded this and waived its argument that the violation did not occur on page 2 of the closing brief. The focus of this analysis will now shift to the IEAD affirmative defense.

The Independent Employee Action Defense has five elements, which if proven by an employer, excuses the violation and results in employer's appeal being granted. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration, (October 16, 1980)) Employer must prove: (1) that the employee who caused the violation was experienced in the job being performed; (2) that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments; (3) that the employer effectively enforces the safety program; (4) that the employer has a policy of sanctions against employees who violate the safety program; and (5) that the employee caused a safety infraction which he or she knew was contrary to employer's safety requirements.

The first element is whether the injured employee, Smith, was experienced in the job being performed. This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work which resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 11-2801, Decision After Reconsideration (February 4, 2011.)) In *West Coast Communication, ibid*, an employee was found to be experienced in placing cones and the use of fall protection. Previous field audits found that the employee had indeed correctly placed cones and used fall protection.

The evidence shows that Smith was employed by Employer for over 20 years and that he had been a supervisor for 10 to 15 years, although he has not acted in a supervisory capacity at the time of the accident. When he worked as a supervisor, Smith was charged with the responsibility to ensure that workers in his charge rigged loads correctly. Smith's uncontested testimony shows that he safely released rigging from loads over 50 times in the past, but before this accident he had never released the rigging from a load without making sure the load was secured.³ One of Smith's supervisors

³ By way of background, on the morning of the accident, Smith was walking by the paint booth on the way to his job assignment when he observed Josh Felkins (Felkins) struggling to move a skid from a hoist to the forklift. The skid was balanced on its four inch edge. Smith

at the time of injury, Heidi Walker (Walker) testified that Smith was proficient at rigging and that there was no reason to closely supervise him. Employer has proven that Smith had the requisite experience to meet the first requirement of the IEAD.

The second requirement for the IEAD is that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments. (*Mercury Service, Inc., supra*) The well devised safety program must contain specific procedures. (*Blue Diamond Growers, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012)*). Further, the Appeals Board in *Glass Pak, Cal/OSHA App. 03-750, Decision After Reconsideration (November 4, 2010)* found that an IIPP that was written and contained provisions for progressive discipline for safety violations constituted a well devised safety program.

Evidence of training respective to rigging loads was produced. Scott Jackson (Jackson), Employer's safety coordinator testified that Smith had attended comprehensive classes that included how to rig and hoist safely. Specifically, Smith attended a class on May 20, 2009, that was sponsored by employer and co-taught by representatives from LiftAll and Buck-Coffing Hoisting (see also, Exhibit B, page 1). This was a hands-on rigging class. Jackson further testified that Smith attended a 30 hour course sponsored by Cal/OSHA that covered material handling as well as cranes and derricks.

Additionally, Walker stated that Employer conducts safety meetings every Wednesday where different safety issues are discussed. Proper rigging has been a topic in the Wednesday meeting in the past. That loads should not be left unsupported has been communicated to employees "a lot", perhaps as many as 50 times, according to Walker. Exhibit B contains 39 weekly meeting logs in the year 2011, covering a wide range of safety topics. To reinforce work safety rules, supervisors walk around the job sites as many as eight times a day checking the job site to ensure, among other things, that employees are working safely.

Instruction on safe rigging practices is included in Exhibit C, beginning on page 9 containing the "Code of Safe Practices." Rigging is covered on page 20 of the IIPP and includes some general safety information such as "Never leave a suspended load unattended without securing it."

Finally, Employer offered proof of a progressive disciplinary system. As further support of a well devised safety program, the IIPP contains specific

stepped in to help Felkins. He released the load from the hoist leaving both he and Felkins to hold the 600 to 700 pound skid by hand. Smith asked Felkins to get on the forklift at which time the load fell to the floor injuring Smith.

written procedures for progressive discipline for when employees violate safety rules, as discussed in further detail below.

DOSH relies on *Dayton Hudson Corporation dba Target Stores*, Cal./OSHA App. 99-0912, Decision After Reconsideration (December 10, 2001) for the proposition that effective training has to be specific, even though in that case, the IEAD defense was not alleged. In *Dayton Hudson Corporation dba Target Stores, supra*, the employee normally worked as a cashier but at the time she was injured she was substituting as a food court worker. The injured worker sustained an eye injury when oven clearing chemicals were splashed in her eye. The injured worker was never given training about working with caustic chemicals and she was not provided required safety equipment but was given training on general safety. This case can be easily distinguished where both Smith and Felkins had been given specific training on the use of hoists and rigging, more for Smith during his twenty-year tenure with Employer, as specifically documented above.

Employer has proven the second element of the IEAD.

The third element of the IEAD defense requires proof that Employer effectively enforces its safety program. What constitutes effective enforcement of a safety program is addressed in *Glass Pak*, Cal./OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal./OSHA App. 94-3355, Decision After Reconsideration (September 15, 1999) which stated that proof that Employer's safety program is effectively enforced requires evidence of meaningful consistent enforcement.

Employer presented evidence of a written plan to enforce its safety rules within its IIPP document in Exhibit C, page 5. This document is Employer's progressive disciplinary process that begins with a verbal warning, then a written warning and finally a suspension without pay. Employer, consistent with its written policy, may immediately terminate an employee in conjunction with a written warning or a suspension without pay depending on Employer's discretion and the severity of the offense. Specified offenses justify immediate termination, such as infractions involving alcohol, drugs, fighting, or endangering others.

Employer presented evidence that it does enforce its well devised safety program. The documents comprising Exhibit G clearly show that employer uses its disciplinary process to enforce safe practices. For example, one employee was given a verbal warning for not wearing safety glasses while operating pipe threading machinery and then the same employee was given a written "Record of Counseling and Notice of Pending Termination" for non-compliance with safety rules. Another employee in the 2010 timeframe was given a warning notice for improper use of equipment and use of a personal cell phone. Employer produced documentation for at least five other

employees and the discipline they received for violating important safety requirements.

Additionally, Jackson stated that there are other methods to enforce safety rules such as site inspections by supervisors and insurance company representatives. Jackson further testified that there are incentives for following the safety program. Foremen who have a safe work record in their department are eligible for monetary bonuses and safe workers are given recognition before groups of co-workers.

DOSH contends that there was inadequate enforcement of safety rules because there was, at the time of the accident, insufficient supervision of workers. DOSH cites *Kenko, Inc.*, Cal/OSHA App. 90-9011, Decision After Reconsideration (January 6, 1992), to support the argument that Employer was ineffective in enforcing its safety program because its managers failed to exercise necessary supervision to ensure safety. In *Kenko, Inc. ibid*, the supervisor had left the work site where the accident occurred leaving the workers to deal with safety issues of an extraordinary nature. *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.*, (1985) 167 Cal.App.1232, 1243 and also *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1985) 141 Cal.App.3d 1041, 1045 were cited by DOSH to show that a lack of proper supervision can defeat element three of the IEAD defense. In *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.*, *ibid*, the worker who committed the safety violation was a supervisor and the IEAD defense is not available to supervisors, an issue not present here. In *Gaehwiler v. Occupational Safety & Health Appeals Bd.*, *ibid*, the employer alleged that the accident was unforeseeable pursuant to *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, 649, a theory that shares some common elements with an IEAD defense. The *Gaehwiler* court found that the supervisor on the job at the time of the accident was not actually supervising and thus was found to be an ineffective employer representative designated to ensure workplace safety.

DOSH's argument that there was inadequate supervision and thus ineffective enforcement of its safety program is mistaken. The cases cited by DOSH are distinguishable from the facts proven at the hearing. Supervisors walk the worksite as many as eight times each day to ensure a safe workplace, among other duties. More than one supervisor conducts these workplace walks. As Walker stated in her testimony, the accident happened in the morning before the first walk of the work site could occur. It is undisputed that the accident happened quickly when Smith disconnected the hoist causing the skid to fall ten seconds later. The violation occurred without the knowledge of Employer who could not reasonably have discovered the violation before it occurred. This evidence does not support a failure of supervision as a causal link to the occurrence of Smith's safety violation and thus does not defeat element three of the IEAD defense.

Employer has proven element three of the IEAD.

Element four of the IEAD requires proof that Employer has a policy of sanctions against employees who violate the safety program. As here, element four was addressed with the same evidence used to determine whether element three was proven in *Glass Pak, supra*. Referring to the evidence of employee discipline analyzed above, Employer has presented an effective and enforced safety program that does result in sanctions and can result in an employee's dismissal.

DOSH, however, alleges that the Employer's enforcement of workplace safety rules is suspect because no evidence documenting the verbal warnings was admitted into evidence. Smith testified that he received a verbal warning. Jackson acknowledged that he gave both Smith and Felkins a verbal warning. The IIPP, Exhibit C, page 5, states, "When a worker is disciplined, it must be documented and brought to the attention of the management." This statement is vague and does not specify how the discipline must be documented. The Accident Investigation Report, Exhibit 5, notes that "Employees will be re-trained in safe rigging procedures." This in combination with the credible testimony of Jackson stating they he administered verbal warnings and Smith's admission that he received the warning constitutes sufficient proof that verbal warnings were indeed given and that Employer's safety program was enforced consistent with Employer's IIPP. Furthermore, in *Glass Pak, supra*, the Appeals Board noted that verbal warnings alone can be effective enforcement and specifically disagreed with the ALJ who had determined otherwise.

DOSH also argues that there was no documentation showing that workers, in the past, were disciplined for failing to correctly rig loads or support loads during the transfer of the load from a hoist to a forklift. The legal standard requires that Employer have a well devised and implemented safety program that is enforced and does not require proof that someone has previously been disciplined for conduct similar to the circumstances giving rise to the current alleged violation. If the violation conduct was a first occurrence, Employer would have had no reason to discipline an employee for the same lapse in safety order compliance.

Thus, the use of verbal warnings is consistent with Employer's disciplinary system. Element four has been proven.

Finally, element five requires proof that the employee caused a safety infraction which he or she knew was contrary to employer's safety requirements. In this record, element five is non-controversial. Smith testified that he knew that unhooking the rigging from the skid without it being secured from falling was against the safety rules. Specifically Smith

stated on cross-examination that in the moments before the accident he knew that company rules were being broken. This is consistent with Smith's other unrebutted testimony that the accident was the first time he ever left a load unsecured.

DOSH, in its post-hearing brief, argues that because Felkins and Smith were working as a team, they are both subject to the requirements of the IEAD defense. However, one need look no farther than *Mercury Service Inc., supra*, to refute DOSH's theory. In *Mercury Service Inc., supra*, the employer's safety program and whether the person causing the violation knew at the time of the violation that he or she was violating a safety standard was the focus. Smith, by his admission during hearing, concedes that he caused the violation by disconnecting the rigging from the crane leaving the skid unsupported and balanced on its four inch edge. At the time of the violation Felkins was helping to steady the skid while Smith released the rigging. Felkins had mounted the forklift truck when the skid fell. Only Smith released the rigging causing the accident and the subsequent citation and penalty, not Felkins. The IEAD defense must be analyzed based on the conduct of Smith.

Because the IEAD defense is an affirmative defense, and all elements of the defense have been proven, for Citation 1, Item 1. Employer has proven the IEAD defense and thus, *Mercury Service, Inc.* it is unnecessary to consider the remaining issues and defenses.

CONCLUSION

Employer successfully proved the IEAD defense. Employer has no liability for penalties associated with Citation 1, Item 1.

Dated: March 13, 2014
NR:kav

NEIL ROBINSON
Administrative Law Judge

**APPENDIX A
Summary of the Record**

Documentary Evidence – DOSH

<u>Exhibit Number</u>	<u>Exhibit Description</u>	<u>Admitted</u>
1.	Jurisdiction documents	Yes
2.	Proposed Penalty Worksheet	Yes
3.	DOSH training unit document	Yes
4.	Photograph of hoist	Yes
5.	Accident Investigation Report	Yes
6.	DOSH discovery request form	No

Documentary Evidence - Employer

<u>Exhibit Letter</u>	<u>Exhibit Description</u>	<u>Admitted</u>
A.	DOSH document date 12/28/2011	Yes
B.	Safety Meeting Documents	Yes
C.	Injury and Illness Prevention Program	Yes
D.	Sign-in sheet for OSHA training	Yes
E.	New Hire Documents	Yes
F.	New Hire Forms	Yes
G.	Employer discipline records	Yes

Witnesses Testifying at the Hearing

Kirby A. Smith
Heidi Walker
Scott Jackson

I, Neil Robinson, The California Occupational Safety and Health Appeals Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was periodically monitored during the hearing and constitutes the official record of the proceedings, along with the documentary evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
FRANK M. BOOTH, INC.
Docket 12-R2D3-0601

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

IMIS No. 119919496

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R2D3-0601	1	1	4999(h)	S	[Failure to secure a load before releasing rigging from hoist] After hearing, the citation is subject to the IEAD defense proven by employer.		X	\$18,000	\$0	\$0
Sub-Total								\$18,000	\$0	\$0
Total Amount Due*										\$0

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: *Please do not send payments to the Appeals Board.*
All Penalty payments must 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.

ALJ: NR
POS: 3/13/14