BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: PLANTEL NURSERIES 2860 Telephone Road Santa Maria, CA 93454 Employer	Docket No. 01-R4D5-2346 **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 petition for reconsideration filed in the above entitled matter by Plantel Nurseries (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On April 30, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an inspection under the Agricultural Safety and Health Inspection Program at a place of employment maintained by Employer at Stowell and Rosemary Streets, Santa Maria, California (the site). On June 8, 2001, the Division issued a citation to Employer alleging a serious violation of section[1] 3441(b) [no operator on self-propelled tractor] of the General Industry Safety Orders appearing in Title 8 of the California Code of Regulations, with a proposed civil penalty of $5,400.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, the reasonableness of the proposed civil penalty, and raising the independent employee action defense.

On June 12, 2002, a hearing was held before Dale Raymond, Administrative Law Judge (ALJ) of the Board, in Ventura, California. Richard A. Quandt, Attorney, represented Employer. Andreea Minea, District Manager, represented the Division.

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

On July 1, 2002, the ALJ issued a Decision denying Employer's appeal and assessing a civil penalty of $5,400.

On July 29, 2002, Employer filed a petition for reconsideration. On August 30, 2002, the Division filed an answer. The Board took Employer's petition under submission on September 11, 2002, and stayed the decision of the ALJ pending a decision the ALJ pending a decision on the petition for reconsideration.

EVIDENCE

District Manager Andreea Minea (Minea) testified for the Division that she and Associate Industrial Hygienist Mary Rose Chan (Chan) were driving down East Stowell Road in Santa Maria on April 30, 2001 when they saw a slow moving tractor with no operator at the controls pulling a seedling planter. Minea drove to the end of the field, turned around and came back, which took about a minute. She started taking photographs. One photograph (Exhibit 2) is a picture of the tractor without an operator. As she continued to take photographs, an operator climbed on to the tractor (Exhibit 3). His head and upper torso are visible. According to Minea, Exhibits 2 and 3 were taken 10 to 20 second apart.

Minea and Chan entered the field and asked for the foreman. They were referred to Juan Garisa (Garisa). Garisa said he was in charge, but he wanted his supervisor to be present, so he called Chris Waldron, the Sales and Field Manager. Waldron came to the site. Minea held an opening conference with Waldron, and then interviewed employees. According to what Garisa told Minea, the tractor operator was Jose Rodriguez (Rodriguez). Rodriguez told Garisa that he got off the tractor to fix a pipe in the furrow. Minea checked to see if the tractor had an emergency stop button. Although the tractor had an emergency stop button, it did not work. Garisa then connected the wires to make the button work. Garisa further told Minea that he was present observing the work in process when Rodriguez got off the tractor.

Based upon the above, Minea issued a citation for a violation of section 3441 (b). She classified the violation as serious because the most likely injuries in the event of an accident caused by the violation are broken bones, crushing injuries or death. A back wheel of the tractor can run over an employee.

Juan Garisa testified for Employer. He has worked for Employer for about five or six years. On the date of the inspection, he was the foreman. Ensuring employee's safety was his primary duty. Rodriguez had been in his crew for about four months before the day of the incident. Rodriguez's only duty was to drive the tractor. Employer's policy requires that the driver stay on the tractor with his safety belt on if the tractor is moving. Garisa believed that Rodriguez was aware of this rule because "[we] train[ed] him and told him everything."

Garisa testified he was in back of the seedling planter at the time of the incident checking the quality of the work. When Garisa saw Rodriguez stepping down from the tractor, Garisa ran towards him and yelled and waved "no." It took Rodriguez about one to one and one-half minutes to get back on the tractor. When the incident happened, Garisa stopped the tractor and asked Rodriquez why he got off. Rodriguez said it was for a pipe. Garisa told him there was no excuse for not stopping the tractor before and had no reason to expect Rodriguez to do that. There are two workers who walk alongside the tractor. The tractor driver has the authority to tell them to move any obstacles in the field.

Garisa testified that Employer conducts about two safety meetings every week. Safety meeting attendance records and safety committee meeting notes were presented by Employer (Exhibits B and D). Both Garisa and Rodriguez were warned and suspended for one week without pay because of the incident.

Chris Waldron (Waldron) testified that he is Employer's Sales and Field Manager. He has worked for Employer for over five years. He was involved with the transplanting crew. He visits crews every day and visits every crew at least once a week. Waldron stated that Employer's policy is that a tractor driver must stay seated at the controls while the tractor is moving. If something is in the way, the driver is supposed to yell at the workers on the ground to fix it; or, in the alternative, stop the tractor and fix the problem.

Although Waldron conceded that none of the safety rules specifically instructs tractor operators no to dismount a tractor when it is moving, Employer's policy is inferred from two of Employers' rules. The first is that handrails must be used when climbing on or off tractors (Exhibit A, page 13, number 7). The second is that before moving the tractor, one foot must be on the rake and the other foot must be on the clutch and the seat belt must be fastened. (Exhibit A, page 13, number 8.) Pedro Garisa, Rodriguez's supervisor for initial training, and Waldron both verbally told Rodriguez not to get off the tractor when it was moving. Waldron issued a suspension to Garisa as well as to Rodriguez because they were a team.

Scott Nicholson (Nicholson) testified that he had been Employer's President for three and one-half years. About three years ago, Employer made a big change in policy to require tractor drivers to stay on tractors at all times. The stop switches on the tractors were a carry-over from the prior policy. Employer has an extensive safety program that it enforces. Nicholson presented copies of disciplinary actions taken in the year 2000 for safety violations (Exhibit C).

ISSUES

1. Did the Division establish a serious violation of section 3441(b)?
2. Was the penalty correctly calculated?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

Section 3441(b) requires all self-propelled equipment to have an operator stationed at the controls when under its own power and in motion. The evidence was undisputed that Employer's tractor moved forward without an operator at the controls and that Employer's employees were nearby, and thus, the Division established a violation of section 3441(b). Employer addresses and defenses it raised which pertain to the classification of the violation as serious and the reasonableness of the penalty assessed by the ALJ.

In its petition for reconsideration, Employer asserts that the ALJ's decision is erroneous because 1) the evidence does not justify the ALJ's finding that the tractor operator was never told not to dismount or mount a moving tractor and that the foreman did not tell the operator to climb back on the tractor; and 2) the ALJ's findings do not support the decision since the penalty was not reasonably calculated in view of the circumstances and the Division's practices and policies for calculating penalties.

1. The Evidence Establishes a Serious Violation of Section 3441 (b)

The legal standard identified by Employer in its first contention addresses the defense to the classification of the violation as "serious." A serious violation exists if there is a substantial probability that death or serious physical harm could result from a violation. (Labor Code § 6432(a))[2] Pursuant to Labor Code section 6432(b), "a serious violation shall not be deemed to exist *if the employer can demonstrate* that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." (Italics added)

The ALJ found that Employer failed to carry its burden of proof to establish that it could not have known of the violation with the exercise of reasonable diligence. The ALJ's finding was based upon the discredited testimony of Garisa that he saw Rodriguez as he started to climb off the tractor and immediately instructed him to get back on the tractor which he did. The ALJ explained that it was unreasonable to believe that the tractor would have been without an operator for the (short) period of time portrayed by Employer given the time it took the Division inspectors to drive to the end of the field (after having observed the riderless tractor from the street), turn around, travel back to the location of the tractor, and take photographs of a riderless tractor and Rodriguez mounting the tractor.

[2] The test is the probability of a serious injury *assuming* that an accident occurs. Minea's testimony that serious crushing injuries or death were substantially probable in the event of an accident caused by the violation was unrefuted by Employer and credited by the ALJ.

The evidentiary findings contested by Employer pertain to factual findings based upon disputed evidence and credibility determinations made by the ALJ. Generally, the Board gives deference to factual findings of the ALJ unless they are opposed by evidence of considerable weight (*Lamb v. Workmen's Compensation Appeals Board* (1974) 11 Cal.3d 274).

The Board agrees with the finding of the ALJ regarding the evidence which tends to show that the tractor was riderless for a long enough period time such that Employer could have known of the violation with the exercise of reasonable diligence. Where the violation exists for a duration of time in the presence of a foreman, Employer cannot claim that it did not, and could not, with the exercise of reasonable diligence know of the violation.

Here, the ALJ measured the testimony of Garisa against Minea's testimony regarding her initial observation of the riderless tractor, her drive to the end of the field to turnaround, and her return to take pictures from the road. In discrediting Garisa's testimony of his immediate observance and action taken to correct the violation, the ALJ properly viewed such testimony as unbelievable in view of the other credited facts.

Also, other evidence supports the finding regarding the longer duration of the violation. Garisa also testified that it took Rodriguez 1 to 1½ minutes to get back on the tractor. Minea testified that the tractor was moving slowly, at about walking pace. The Board takes official notice of the facts that a normal walking pace is 2 miles per hour and that there are 5,280 feet in a mile. Applying these facts, the distance traveled by the tractor in one minute was 176 feet.[3] Accordingly, the Board further finds that a moving riderless tractor that travels at least 176 feet at walking speed is significant for purposes of determining that Employer could have known of the violation with the exercise of reasonable diligence under the circumstances.

In view of the ALJ's factual finding regarding the duration of time of the violation, the evidence established that Employer had knowledge of the violative condition rendering the classification of the violation as serious irrespective of Employer's policy, its training of Rodriguez, and Rodriguez' independent conduct.[4] Since the evidence relied upon by Employer does not address the finding made by the ALJ regarding the duration of time of the violation, it does not constitute considerable evidence to the contrary under *Lamb, supra.* Since

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[3] The calculation is based upon the following: 5,280 feet = 1 mile; at 2 miles per hour the distance traveled is 10,560 feet (5,280 x 2); 10,560 feet ÷ 60 minutes (1 hour) = 176 feet.

[4] Employer maintains that the overwhelming evidence establishes that Employer could not with the exercise of reasonable diligence have known of the violative *conduct of the operator*. Employer cites to evidence supporting the existence of Employer's policy and Rodriguez' knowledge of such policy based upon his receipt of formal training, his operation of the tractor for the previous four months with no previous incidents or warnings regarding a failure to comply with Employer's policy requiring that operators remain on moving tractors, documented safety meetings, and the undisputed testimony of Waldron and Garisa stating that Rodriguez had been told not to dismount a moving tractor.

the ALJ's finding is both reasonable and supported by the evidence, the Board will not disturb such finding.[5]

Although the tractor was riderless for a relatively short period of time and the operator re-mounted the tractor after being directed to do so by the foreman, such facts do not render the classification any less serious under the circumstances because the risk of serious injury to exposed employees being struck or run over by a tractor without someone at the controls still existed albeit for a short period of time.[6]

2. The Assessed Penalty Was Incorrectly Calculated

Employer argues that the penalty assessed by the ALJ was not reasonably calculated in view of the circumstances and the Division's practices and policies for calculating penalties.[7] Employer requests that the Board re-calculate the assessed penalty so it is proportionate and reasonable considering the independent act of the employee and the good faith efforts of the company to comply with the safety order.

Consideration of independent acts of an employee in calculating the civil penalty for an established violation is neither contemplated nor provided for under the penalty-setting regulations and the Board declines to consider the acts of an employee to further mitigate a penalty for an *established* violation of a safety order committed by an employer.[8] However, an employer's "good faith" is an established adjustment factor which can be rated by the Division and applied to the circumstances in the particular case in accordance with the Director's regulations. (§§ 335(c), 336(d)(2))

The Board has held that penalties calculated in accordance with the Director's penalty-setting regulations are presumptively reasonable. (*Dye & Wash Technology,* Cal/OSHA App. 00-2327, Denial of Petition for

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[5] Employer also raised at the hearing the independent employee action defense (IEAD) which is a separate affirmative defense to the violation itself. The ALJ determined that Employer failed to meet the second, third, and fifth elements of the IEAD set forth in *Mercury Service, Inc.* Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). Employer did not state its objection to the ALJ's determination of the IEAD in its petition nor discuss the specific elements of the IEAD determined adversely against Employer. A petition for reconsideration must "set forth specifically and in full detail the grounds upon which the petitioner considers the order or decision to be unjust or unlawful, and every issue to be considered by the Appeals Board on reconsideration. Any objection or issue not raised in the petition for reconsideration is deemed waived…" (§ 391)

[6] The Act does not contemplate nor provide for different levels or degrees for a serious violation. The Director's penalty-setting regulations provide for adjustments to a penalty considering factors such as likelihood, extent, good faith, etc., based upon the circumstances of the violation which is discussed *infra.*

[7] By statute, the penalty-setting regulations are established by the Director of Industrial Relations--not the Division. (Labor Code § 6319(c)).

[8] This is, of course, distinguished from the long-established independent employee act defense which is an affirmative defense to the violation of the safety order which bars liability for the violation and related penalty if the elements under *Mercury Service, Inc. supra*, are met. As noted above, the ALJ determined that Employer did not satisfy all the IEAD elements.

Reconsideration (Jul. 11, 2001).) However, the Board recently noted that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board…" (*DPS Plastering, Inc.,* Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003) p. 4.) Nor does the presumptive reasonableness of the penalty calculated in accordance with the penalty-setting regulations relieve the Division of its duty to offer evidence in support of its determination of the penalty since the Board has historically require proof that a proposed penalty is, *in fact*, calculated in accordance with the penalty-setting regulations. (See, *RII Plastering, Inc,* Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).)

Upon the Board's review of the record, the Division did not present any evidence to support its determination of the penalty as indicated on the penalty-calculation worksheet (Exhibit 4) which indicates how it arrived at the adjustment factors and rating criteria in view of the Director's penalty-setting regulations (§§ 335-336).[9] The penalty-calculation worksheet merely indicates the Division's conclusions and does not provide any description of what facts it relied upon to rate the violation for extent and likelihood as well as assign adjustments for good faith, size, and history as set forth in section 335.

Where the Division does not provide evidence to support its proposed penalty, it is appropriate that Employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc., supra.*)

The initial base penalty for a serious violation is $18,000. (§336(c)) Exhibit 4 indicates that Employer was assigned the maximum adjustment for extent (rated as low) which reduced the base penalty by the maximum 25%. Employer shall also receive a further adjustment of the maximum 25% for likelihood, leaving a gravity-based penalty of $9,000.

The Division assigned adjustment factors of 15% for good faith, 0% for size, and 5% for history which would provide a total adjustment factor of 20%. However, since there is no evidence to support the adjustment factors determined by the Division, Employer shall receive maximum adjustments (reductions) as follows: 30% for good faith, 40% for size, and 10% for history. Thus, a total adjustment factor of 80% is applied to the $9,000 gravity-based penalty resulting in an adjusted penalty of $1,800.

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[9] The only adjustment factor alluded to by the Division was the severity rating for the violation. In its closing statement the Division argued that the severity was high because of the type of injury a worker would suffer if it caught under a wheel of a moving tractor-not *de minimus* based upon the short period of exposure as suggested by Employer. However, the severity of a serious violation is considered to be high as a matter of law pursuant to section 355(a)(1)(B).

Under section 336(e), an abatement credit of 50% applies unless at least one of the listed exceptions in the regulation is established. Since the Division did not establish any of the exceptions listed in section 336(e) or otherwise establish the applicability of section 336(f), a 50% abatement credit is allowed, for a total penalty of $900 which we deem appropriate in this case.

DECISION AFTER RECONSIDERATION

Employer's appeal is denied and the citation is affirmed with an adjusted civil penalty assessed in the amount of $900.

/s/ MARCY V. SAUNDERS, Member
/s/ GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: 01/08/2004