

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BLUE DIAMOND GROWERS
1701 C Street
Sacramento, CA 95814

Employer

DOCKETS 15-R2D1-1196
and 1197

DECISION

Statement of the Case

Blue Diamond Growers (Employer) operates an almond processing facility. Beginning October 29, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Anthony Galvez, conducted an accident investigation at a place of employment maintained by Employer at 1701 C Street, Sacramento, California (the site). On February 23, 2015, the Division cited Employer for two violations of California Code of Regulations, title 8, one of which remains at issue.¹ The citation at issue alleges that Employer failed to ensure that an industrial truck operator travel with the load trailing when his forward view was obstructed.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, and the reasonableness of the proposed penalty. Employer also asserted a series of affirmative defenses.

This matter was heard by Kevin J. Reedy, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California, on February 25 and 26, and April 8, 2016. Ron Medeiros, Attorney, of the Robert D. Peterson Law Corporation, represented Employer. Staff Counsel Willie Nguyen represented the Division. The parties submitted post-hearing briefs. The ALJ, on his own motion, extended the submission date to June 20, 2016.

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

Issues

1. Is the cited safety order unconstitutionally vague and therefore unenforceable?
2. Did Employer fail to ensure that an industrial truck travel with the load trailing when the operator's view was obstructed?
3. Did the Division establish the serious classification of the violation?
4. Did the Division establish the accident-related characterization of the violation?
5. Was the proposed penalty reasonable?

Findings of Fact

1. Cal/OSHA Associate Safety Engineer Anthony Galvez (Galvez) opened an accident investigation at 1701 C Street, Sacramento, California, on October 29, 2014.
2. The cited safety order can be given a reasonable and practical construction, in light of the specific facts as set forth in the instant matter.
3. Throughout Employer's entire facility there is mixed pedestrian and forklift travel.
4. Industrial truck driver Carlos Moyo Noe (Moyo) was not traveling with the load, a roaster bin,² trailing when he struck worker Saeeda Nasim (Nasim).
5. Nasim is five feet tall. Moyo did not see Nasim in front of the industrial truck immediately prior to striking her. Moyo's forward view was obstructed by the roaster bin at the time of the accident. The roaster bins measures 46 inches long by 46 inches wide. The leading edge of the roaster bin stands at a height of at least 60 inches from the floor when lifted on a forklift.

² Also referred to as bins throughout the hearing. These bins are used to transport almonds during one stage of the almond roasting and packaging process.

6. If an employee were to be struck by a forklift as being used in the instant matter there would be a realistic possibility of serious physical harm. As a result of being struck by the forklift Nasim sustained serious physical harm.³
7. Moyo's failure to operate the industrial truck with the load trailing when his forward view was obstructed was the main factor which led to Nasim's injuries.
8. The penalty associated with the citation, as amended, was calculated in accordance with the Division's policies and procedures.⁴

Analysis

1. Is the cited safety order unconstitutionally vague and therefore unenforceable?

The Appeals Board has authority to determine the validity of a regulation in light of constitutional standards. (See *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669, fn.18 [153 Cal.Rptr. 802, 592 P.2d 289].) Generally, the same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*California Drive-In Restaurant Association v. Clark* (1943) 22 Cal.2d 287, 292 [140 P.2d 657]; *California State Restaurant Association v. Whitlar* (1976) 58 Cal.App.3d 340, 344 [129 Cal.Rptr. 824].) Thus regulations like statutes are to be construed, if their language permits, to render them valid and constitutional rather than invalid and unconstitutional. (*People v. Amor* (1974) 12 Cal.3d 20, 30 [114 Cal.Rptr. 765, 523 P.2d 1173]; *Bryant v. Swoap* (1975) 48 Cal.App.3d 437, 439 [121 Cal.Rptr. 867].)

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

³ Findings of fact made pursuant to stipulations of the parties. Nasim sustained a broken leg, and other physical injuries requiring hospitalization.

⁴ The Division stipulated that the proposed penalty, under the Division's policies and procedures, should have been calculated at \$25,000. Good cause having been established, the proposed penalty was amended to \$25,000. Employer stipulated that the proposed penalty, as amended, was calculated in accordance with the Division's policies and procedures, except for the proposed reductions for Extent and Likelihood, which remained at issue during the hearing.

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*, it cannot be found that section 3650, subdivision (t)(11), is unconstitutionally vague as applied to the hazard of not operating an industrial truck in a safe manner, where, as in the instant matter, the Division is alleging that an industrial truck did not travel with the load trailing when the operator's view was obstructed. The regulation must be applied and considered under the specific facts of this case. Section 3650, subdivision (t)(11), requires employers to (1), operate industrial trucks in a safe manner, and (2), travel with the load trailing when the operator's view is obstructed.

The evidence in this matter demonstrates that Employer used industrial trucks in a mixed pedestrian and forklift travel area, where the operator did not travel with the load trailing, at which time the operator's view may have been obstructed. Such activity may properly be construed to be an unsafe condition, potentially leading to collisions between pedestrians and forklifts, forklifts with other forklifts or equipment, or forklifts with permanent or temporary structures or fixtures, thereby triggering Employer's obligation to correct the hazard. Therefore, section 3650, subsection (t)(11), cannot be found to be unconstitutionally vague and unenforceable, as the safety order can be given a reasonable and practical construction, in light of the specific facts as set forth in the instant matter.⁵

2. Did Employer fail to ensure that an industrial truck travel with the load trailing when the operator's view was obstructed?

Section 3650, subdivision (t)(11), under "Industrial Trucks, General," provides the following:

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

(11) The driver shall slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing.

⁵ Employer failed to present evidence sufficient to establish any other affirmative defense.

In the citation, the Division alleges the following:

On September 26, 2014, a temporary employee of Adecco working for Blue Diamond Growers located at 1701 C Street, Sacramento, CA sustained an accident-related serious injury when she was struck by an industrial truck while walking. The driver was not required to travel with the load trailing even though his vision was obstructed.

In order to find a violation of section 3650, subdivision (t)(11), the Division must establish that Employer failed to operate the industrial truck in a safe manner by (1), ensuring that the driver slow down and sound the horn at cross aisles and other locations where vision is obstructed, **or** (2), requiring the driver to travel with the load trailing when the load being carried obstructs forward view.

Nasim, the injured worker, testified that she is five feet tall. Nasim also testified that the roaster bin was six feet or more in height. Nasim observed forklifts “going around everywhere,” some driving forward, some driving backward. During the three weeks prior to the accident she would see forklifts driving forward with the bins in front. Two to three forklifts were operating on her floor.

John Yonkus (Yonkus), Manager of Occupational Health and Safety for Employer, testified that it was a common and accepted practice to drive the forklifts with the bins facing forward. This task was performed several times a day, and sometimes several times an hour. Yonkus explained that it can’t be done any other way. Yonkus testified that there is mixed pedestrian and forklift travel in the entire facility. On a normal day there would be two forklifts operating on the floor where Nasim was injured. Exhibit 6, subsections A, B, and C, is Employer’s recreation of the accident scene, depicting the location of the accident, a forklift, and a roaster bin.

Galvez testified that the top of the bin is approximately 66 inches off the floor when it is on the forklift (Photo Exhibit 10-C). That photo demonstrates that the forward top edge of the bin must be at a height of at least 60 inches off the floor when the bin is being transported by a forklift.

Moyo testified that he, while seated in the forklift with a roaster bin on the forks, could see things far away by looking over the container. He could not see close things when looking over the container because it blocked his view. Moyo was not aware that Nasim was in the area at the time of the

accident. Moyo became aware of Nasim's presence when he heard her screams. Galvez testified that Moyo told him that, just prior to the accident, he did not see Nasim in the area, and that after he heard screams, he observed Nasim under the load.

There is no dispute between the parties that Moyo was transporting roaster bins on the forklift without the load trailing. The Division presented evidence sufficient to establish that Employer was not operating the forklift in a safe manner in that at the time of the accident, the forklift operator's forward view was obstructed by a roaster bin, and that the operator was not traveling with the load trailing, thus subjecting its employee to the hazard of being stricken by a moving forklift. Therefore, Employer is in violation of section 3650, subdivision (t)(11).

3. Did the Division establish the serious classification of the violation?

Labor Code section 6432, in relevant parts, states the following:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: [...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

[...]

(g) A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

The term "realistic possibility" means 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).)

As stated above, Employer violated section 3560, subdivision (t)(11), for failing to ensure that an industrial truck travel with the load trailing when the operator's view was obstructed.

Associate Safety Engineer Anthony Galvez (Galvez) testified that his Division-mandated training is current (Exhibit 11). Therefore, under Labor Code section 6432, subsection (g), Galvez is deemed competent to offer testimony to establish each element of the serious violation, and to offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation. Galvez has worked for Cal/OSHA for nearly 6 years. His background in private industry includes experience with forklifts, and training and safety issues related to forklifts.

Galvez testified that the driver of the forklift was not required by Employer to travel with the load trailing when his forward view was obstructed by the load. As such, the injured employee was subjected to the hazard of being stricken by a moving forklift. In the instant matter, the injured pedestrian employee suffered actual physical harm when she was stricken by that forklift.

The existence of serious physical harm as a result of the violation of the safety order combined with the actual hazard caused by Employer's failure to ensure that an industrial truck travel with the load trailing when the operator's view was obstructed, establishes a rebuttable presumption that the violation was properly classified as a serious violation. Employer provided no evidence to rebut this presumption. Therefore, as a matter of law, the serious classification is sustained.

4. Did the Division establish the accident-related characterization of the violation?

In order for a citation to be classified as accident related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury. (*MCM Construction, Inc.* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016), citing *Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011).)

The record supports a finding that Employer failed to ensure that an industrial truck was operated in a safe manner by ensuring that the industrial truck travel with the load trailing when the operator's view was obstructed. The record also supports a finding that if industrial truck operator Moyo would

have traveled with the load trailing his view would not have been obstructed, he likely would not have run over Ms. Nasim, and she would not have sustained serious physical harm.

In this matter, Moyo's failure to operate the industrial truck with the load trailing when his forward view was obstructed was the main factor which led to Nasim's injuries. The Division has met its burden to demonstrate a causal nexus between the violation of section 3650, subdivision (t)(11), and the serious injury sustained by Nasim. As such, the accident-related characterization of the serious violation is sustained.

5. Was the proposed penalty reasonable?

Employer stipulated that the proposed penalty, as amended, was calculated in accordance with the Division's policies and procedures, except for the proposed reductions for Extent and Likelihood, which remained at issue during the hearing.⁶

Section 335, subdivision (a)(2), in relevant parts, provides:

When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as: ... HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

Section 335, subdivision (a)(3), in relevant parts, provides:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as: Low, Moderate or High.

Section 336, subdivision (c)(1), in relevant parts, provides as follows: (1) the penalty of a Serious violation shall be assessed an initial base penalty of \$18,000; (2) if the Extent is rated High, 25% of the Base Penalty shall be added; (3) if the Likelihood is rated as High, 25% of the Base Penalty shall be

⁶ Exhibit 2, "Proposed Penalty Worksheet."

added; and (4) the civil penalty shall not exceed \$25,000. The resulting figure is called the Gravity-based penalty.

In regard to Extent: Safety Manager Yonkus testified that it was a common and accepted practice to drive the forklifts with the bins facing forward, when they were transporting the bins to and from the sorting production area. This task was performed several times a day, and sometimes several times an hour. Yonkus explained that there was no other way to accomplish this task, but failed to explain why. Moyo also testified that it was the practice to transport the roaster bins in the forward direction with the bins in front. Nasim observed forklifts “going around everywhere,” some driving forward, some driving backward. Nasim observed forklifts driving forward with the bins in front. Two to three of these forklifts were operating on her floor.

The Division demonstrated that Employer’s violation of the safety order was commonplace. The forklifts in Nasim’s work area were all being driven without the load trailing where the operator’s view was obstructed. All the forklifts in operation were allowed to carry the roaster bins while driving forward with the load in front. Therefore, the Division has established that this practice was widespread, that more than 50 per cent of the forklifts were involved, and that its rating of High is proper. Therefore, under section 336, subdivision (a)(2), 25 per cent of the Base Penalty, or \$4,500, is added to the base penalty.

In regard to Likelihood: Yonkus testified that the floor on which Nasim was injured was an area of high activity for both pedestrians and forklifts. There were no delineated walkways in the area of the accident. Galvez testified that just about all the pedestrian employees were exposed to danger when the forklifts were on the move. Galvez, who is experienced in forklift operations, testified that when vision is obstructed, there is a good chance of striking someone. The plant operates around the clock, and as such, workers on other shifts were also exposed to the risk of being stricken by forklifts carrying roaster bins in the forward position while the operator’s vision was obstructed.

The Division demonstrated that Nasim, and most, if not all, of the workers in her work area, were exposed to the danger created whenever the forklifts were operated by a driver with an obstructed view. Galvez testified that such a violation creates a good chance that the forklift would strike someone, as happened to Nasim in the instant matter. Therefore, the Division established that most, if not all of the employees were exposed to the hazard of being stricken by a forklift, and that in an industry where there are forklift operations, there is a clear danger presented when a forklift driver operates the forklift with an obstructed view in an area of mixed pedestrian and forklift traffic. As such, the Division’s rating of High is proper. Therefore, under

section 336, subdivision (a)(3), 25 per cent of the Base Penalty, or \$4,500, is added to the base penalty.

In the instant matter, following the provisions of section 336, subdivision (c)(1), high extent adds \$4,500 to the initial based penalty of \$18,000. High likelihood adds another \$4,500 to the initial based penalty, bringing the total to \$27,000. The proposed penalty was amended to \$25,000 at hearing, the regulatory maximum. Therefore, the \$25,000 proposed penalty, as amended, is found to be correctly calculated and is reasonable.

Conclusions

The evidence supports a finding that Employer violated section 3650, subdivision (t)(11), by failing to ensure that an industrial truck travel with the load trailing when the operator's view was obstructed. The Division established the serious classification and the accident-related characterization of the violation. The proposed penalty, as amended herein, is reasonable.

ORDER

It is hereby ordered that Citation 1, Item 1, is established, and the associated penalty of \$935 is sustained, as set forth in the attached Summary Table.⁷

It is hereby ordered that Citation 2, Item 1, is upheld and the associated penalty of \$25,000 is sustained, as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: July 19, 2016
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KEVIN J. REEDY
Administrative Law Judge

⁷ At the onset of the hearing Employer withdrew its appeal of Citation 1, Item 1.

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
BLUE DIAMOND GROWERS
DOCKETS 15-R2D1-1196 and 1197

Dates of Hearing: February 25, 26, and April 8, 2016

Division's Exhibits

Exh. No.	<u>Exhibit Description</u>	
1	Jurisdictional documents	ADMITTED
2	Proposed Penalty Worksheet	ADMITTED
3	Cal/OSHA form 1BY	ADMITTED
4	Cal/OSHA form 1A	ADMITTED
5	Matthew Orlousky email of September 27, 2016	ADMITTED
6	Employer's photos of forklift carrying roaster bin staged in approximate area of accident (includes subsection A through D)	ADMITTED
7	Blue Diamond Accident/Investigation Form	ADMITTED
8	Employer Floor Plan	ADMITTED
9	Employer Powered Industrial Truck Operator Training	ADMITTED
10	Division photos of forklift carrying roaster bin staged in approximate area of accident (includes subsections A through M)	ADMITTED
11	Letter of February 18, 2016, related to division-mandated training of Anthony Galvez	ADMITTED
12	Photo labeled "Forklift Involved in Accident, Approximate Area for Accident"	ADMITTED
13	Carlos Moyo Noe witness statement	ADMITTED

Employer's Exhibits

None

Witnesses Testifying at Hearing

Saeeda Nasim
John Yonkus
Anthony Galvez
Carlos Moyo Noe

CERTIFICATION OF RECORDING

*I, **Kevin J. Reedy**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

Signature

Date

