

**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

DECISION

Statement of the Case

Evergreen Nursery (Employer) sells fruit and nut trees. Beginning August 28, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Louis Vicario, conducted a complaint inspection at a place of employment maintained by Employer at 9708 Flynn Springs Road, El Cajon, California (the site). On December 5, 2014, the Division issued a citation to Employer for failure to have employees secured to the boom or basket of an elevated aerial lift.¹

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on February 24, 2016. Mark L. Collins, Chief Executive Officer, represented Employer. Kathy Derham, District Manager, represented the Division. The matter was submitted for decision on March 9, 2016.

¹ Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8. Employer did not appeal Citation 1. During the hearing, the Division withdrew Citation 2 (an alleged violation of section 3363, subdivision (h)), at which time Employer agreed to waive any rights it may have pursuant to Labor Code section 149.5 to petition for or recover costs or fees, if any, incurred in connection with the appeal of Citation 2.

Issues

1. Were employer's employees working in an aerial device without being secured to the boom or basket?
2. Was Employer's aerial device an orchard man-lift?

Findings of Fact

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, body 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 400 S was used for pruning fruit and nut trees, which is one of the uses for which it was designed.
7. Employer's LYG-400S qualifies as an orchard man-lift.

Analysis

1. Were employer's employees working in an aerial device without being secured to the boom or basket?

The Division cited Employer for a violation of section 3648, subdivision (o), which reads:

3648. Operating Instructions (Aerial Devices)

(o) 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 manufactured after September 1, 1991 with guardrails 42 inches or higher above the platform floor.

The Division alleged as follows:

Prior to and during the course of the investigation, including, but not limited to September 4, 2014, employees were observed working in the elevated basket of JLG 400S aerial device without being

secured to the boom or basket through the use of a safety belt, body belt or body harness equipped with a safety strap or lanyard.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

To establish the violation, the Division must prove that 1) employer's employees were working in an aerial device and that 2) the employees were not secured to the boom or basket through use of a safety belt, body belt or body harness equipped with a safety strap or lanyard.

On September 4, 2014, Associate Safety Engineer Louis Vicario went to the site. After obtaining permission to perform an inspection, he observed two employees in the elevated basket of a JLG 400S telescopic boom lift² installing poles. They were not secured to the boom or basket. At hearing, Employer agreed with these facts. Accordingly, the Division established that two employees were working in an aerial device without being secured to the boom or basket.

2. Was Employer's aerial device an orchard man lift?

Section 3648, subdivision (o) contains an exception to the requirement that employees be secured to the boom or basket for "Orchard man-lifts manufactured after September 1, 1991 with guardrails 42 inches or higher above the platform floor."

Section 3637 defines "Orchard Man-Lift (Pruning Tower)" as "An aerial device designed to elevate and position personnel for the purpose of harvesting and/or pruning fruit and nut trees."

Section 3641 lists extensive requirements for orchard man-lifts.³

² He took photographs. Exhibits 9 and 10.

³ Section 3641 Orchard Man-Lifts (Pruning Tower) provides as follows:

(a) Orchard Man-Lifts manufactured after September 1, 1991 shall have a permanently affixed, legible plate or be conspicuously marked, as follows:

(1) The device meets either ANSI A92.5-1980, Sections 3 and 4 or ANSI/SIA A92.5-1992, Section 4 requirements for construction and stability. ...

(2) Make, model, serial number and manufacturer's name and address;

(3) Rated platform workload;

(4) Maximum platform height and travel height;

(5) Alternative configuration statement, if applicable;

(6) Work-in-proximity-to-high-voltage overhead-lines warning, and,

(7) Maximum slope on which the device may be operated when the platform is elevated.

When an exception exists to a safety order, it is treated as an affirmative defense, requiring the employer to show it has satisfied the terms of the exception. (*A C Transit*, Cal/OSHA App. 08-4611, Denial of Petition For Reconsideration (June 10, 2011); *Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar. 2, 2001); *Barnard Engineering*, Cal/OSHA App. 81-0241, Decision After Reconsideration (May 28, 1982).)

The aerial device used was a JLG 400S telescoping boom lift⁴. Two men could stand in the platform at the same time. Mark Collins (Collins), Employer's CEO, testified that the lift was manufactured in 1996, and that the guardrails were 42½ inches above the platform. Collins further testified that the JLG 400S met each of the relevant requirements set forth in section 3641 by going over each requirement one by one.

The JLG 400S was used in the regular course of Employer's business. Employer owned a large number of fruit trees⁵, which were pruned using the JLG 400S. On the day of the inspection, employees were using the JLG 400S to plant poles and string wire so they could hang a shade covering for fruit trees.

The Division did not refute any of Employer's evidence. The Division maintained that the JLG 400S was not an orchard man-lift because an

(b) In addition to having permanently affixed, legible plates or markings stating that the orchard man-lift meets the applicable ANSI or ANSI/SIA A92.5, Sections 3 and/or 4 requirements, orchard man-lifts manufactured after September 1, 1991 shall incorporate the following:

- (1) A rigid platform guardrail at least 36 inches in height, surrounding the entire platform. Midrails are not required;
- (2) A work platform fully enclosed below the guardrail to within three inches of the platform floor or enclosed with vertical members spaced not more than nine inches apart. Access to the platform shall be provided by one of the following:
 - (A) Access opening not to exceed 20 inches in width; or
 - (B) Access gate or door provided it is designed to prevent unintentional opening and provide a closed guardrail around the platform.
- (3) Access to or from the platform shall not be over the guardrail.
- (4) A safety belt with attached lifeline shall be worn when guardrail height is less than 42 inches above the platform floor. A lifeline anchorage point shall be provided on the platform.
- (5) A secondary set of platform controls shall be provided at ground level capable of raising and lowering the platform and deenergizing the system.
- (6) All operating controls shall move in the direction of the function which they control, and shall be of the type which automatically return to "off" or the "neutral" position when released.
- (7) The platform elevating system shall be designed to limit descent of the raised platform to 135 feet per minute in the event of an elevating system failure.

...

(e) Use and marking of orchard man-lifts shall be in accordance with Article 37 of the High Voltage Electrical Safety Orders.

⁴ Exhibits 11, 12

⁵ Collins testified that Employer was the largest fruit tree grower in San Diego county.

orchard man-lift could have a platform that held only one person. The Division referred to legislative history⁶ and photographs from an internet search⁷.

However, there is no requirement that an orchard man-lift have a platform that can accommodate only one person. There is also no prohibition against using an orchard man-lift for purposes other than pruning or harvesting. The Division would have the Appeals Board read these requirements into the safety order. The Board cannot read terms into a safety order that the Standards Board has not included. (*Webcor Construction*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sep. 2, 2010); *Rudolph & Sletten, Inc*, Cal/OSHA App. 93-1251, Decision After Reconsideration (Apr. 8, 1998); *Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (Apr. 18, 1991).)

The uses of the JLG 400S included pruning fruit trees (Exhibit D), and it is among the purposes for which it was designed. (Exhibit 11). It is substantially the same as other aerial devices that are specifically called “pruning towers” or “orchard man-lifts.”⁸ A preponderance of the evidence supports the finding that the JLG 400S was designed for pruning fruit and nut trees.

Therefore, Employer has met its burden of proof. It is found that the JLG 400S qualifies as an orchard man-lift. Employees were not required to be secured to the basket or boom through the use of a safety belt, body belt, or body harness equipped with safety strap or lanyard. As such, Employer’s appeal is granted.

Conclusion

Employer’s employees used a JLG 400S aerial device without being secured to the basket or boom. The evidence supports a finding that the device was manufactured after September 1, 1991, that the guardrails were 42½ inches above the platform, and that it met all of the relevant requirements in section 3641. It qualifies as an orchard man-lift. Employer fell within the exception for section 3648, subdivision (o). The employees were not required to be secured to the basket or boom through the use of a safety belt, body belt, or body harness equipped with safety strap or lanyard.

Order

Citation 3, Item 1, and is vacated and the proposed penalty set aside.

⁶ Exhibit 3

⁷ Exhibits 4-8.

⁸ Exhibits B and C

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

DALE A. RAYMOND
Administrative Law Judge

DAR: ao

Dated: April 8, 2016

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
EVERGREEN NURSERY
Dockets 15-R3D2-0083 and 0084**

Dates of Hearing: February 24, 2016

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents and 1BY	Yes
2	Proposed Penalty Worksheet	Yes
3	Policy Statement Overview – Orchard Man-Lifts	Yes
4	Photograph—Orchard Man-Lift	Yes
5	Photograph—Orchard Man-Lift	Yes
6	Photograph—Orchard Man-Lift	Yes
7	Photograph—Orchard Man-Lift	Yes
8	Photograph—Orchard Man-Lift	Yes
9	Photograph—Day of Inspection: men in JLG lift	Yes
10	Photograph—Day of Inspection: men in JLG lift	Yes
11	Manufacturer Specifications for JLG 400S lift	Yes
12	JLG letter from Product Safety and Reliability Dept	Yes
13	Google photograph of site	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Color photo of JLG lift	Yes

B	Afron Pruning/Picking Towers	Yes
C	GVF Pruning Towers	Yes
D	Color photo of JLG lift pruning tree	Yes
E	Black and white photo of GVF lift with basket down	Yes
F	Black and white photo of Exhibit D	Yes
G	Not offered	No
H	Not offered	No
I	Not offered	No
J	Standards Presentation re Orchard Man-Lifts	Yes

Witnesses Testifying at Hearing

1. Louis Vicario
2. Mark L. Collins

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

DALE A. RAYMOND

Date 2016

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

EVERGREEN NURSERY
Dockets 15-R3D2-0083 and 0084

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

IMIS No. 317232726

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	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 HEARING	FINAL PENALTY ASSESSED BY BOARD
15-R3D2-0083	2	1	3363(h)	S	DOSH withdrew		X	\$5,400	\$0	\$0
15-R3D2-0084	3	1	3648(o)	S	ALJ vacated		X	\$2,700	\$2,700	\$0
Sub-Total								\$8,100	\$2,700	\$0

Total Amount Due*

\$0

(INCLUDES APPEALED CITATIONS ONLY)

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

All penalty payments should 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: DR/ao
POS: 04/08/2016