BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: PARAMOUNT FARMS, KING FACILITY 13646 Highway 33 Lost Hills, CA 93249 Employer	Docket. 2009-R4D3-864 **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 by Paramount Farms, King Facility (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on December 2, 2008, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Lost Hills, California maintained by Employer. On February 27, 2009, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

The citation alleged a Serious violation of section 3657(a) [Employee elevated on pallet without guardrails and toeboard, pallet not secured to forks or mast of forklift to prevent tipping or falling]. An accident-related penalty of $18,000 was proposed.

Employer filed timely appeals of the citation.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on May 20, 2010. The Decision affirmed the Serious

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

classification, but concluded the accident-related classification was not established, and modified the civil penalty to $450.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division did not file an answer to the petition.

ISSUE

Did the Decision properly deny Employer's affirmative defenses and uphold the Serious classification of the violation of section 3657(a)?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On October 30, 2008, employee Otilio Martinez, a forklift driver for Employer, asked a coworker, Martin Cadena, to lift him on a pallet using a forklift so that he could clear a bag jam in one of Employer's bin dumpers. Martin Cadena, who had been a forklift driver for Employer for 18 years, testified that he lifted Martinez up about 8 or 10 feet, so that Martinez could reach the jammed bin dumper. After Martinez finished the task, he indicated that he was finished, and Cadena pulled the forklift back about a foot. The movement caused Martinez to lose his balance, and he fell off the pallet. He hit an electrical panel box with his foot, and landed sideways on the concrete floor.

Safety Manager Ernesto Ramirez testified for Employer. He has been with Employer for 12 years, and held the Safety Manager position for 3 years. Ramirez testified to the investigation he and his staff conducted of the accident. According to Ramirez, both Martinez and Cadena were experienced forklift drivers, who had attended regular "toolbox training" on appropriate forklift operation. He also testified that Employer trained employees on proper forklift use during new hire orientation, and stated that during the thirty day harvest season in particular, when the accident occurred, training will be held twice a day, once for day shift, and once for night.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

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.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e). Employer argues that the accident of Thursday, October 30, 2008, was a result of independent employee misconduct on the part of forklift operator Cadena, and that Employer has shown all elements of the Independent Employee Act Defense (or "IEAD"). Employer also contends it was unaware of Cadena's actions, and could not have had knowledge with exercise of reasonable diligence, and any serious classification of an alleged violation should be set aside due to Employer's lack of knowledge.

In her decision, the ALJ found that Employer was successful in demonstrating all elements of the IEAD defense as regards Cadena. IEAD is an affirmative defense which an employer may access where it can show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee actions serve to circumvent or frustrate the employer's best efforts. (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010, citing *Marine Terminals Corporation*, Cal/OSHA App. 95-896, Decision After Reconsideration (Sep. 28, 1999).)

There are five elements to the defense which an employer must demonstrate: (1) that the employee had experience in the job being performed, (2) that it had a well-devised safety program, (3) that it effectively enforced the safety program, (4) that it had a policy of applying sanctions for violations, and (5) that the employee causing the infraction knew he was acting contra to the employer's safety requirement. (*Mercury Services, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The evidence in the record established that Cadena, the driver of the forklift which injured Martinez, was experienced in the job being performed. Records of training, as well as testimony regarding Cadena's 18 years of experience as a forklift driver support the ALJ's finding. (Decision, p. 12). Testimony as well as evidence also supports a finding that Employer's safety program was well-devised: the Division's Safety Engineer, Paul Ricker, testified to having rated the Employer's Injury and Illness Prevention Program (IIPP) as

effective, based on his review of various programmatic elements. Testimony from Ramirez, and records of toolbox, new hire, and other trainings support the ALJ's finding that Employer made consistent efforts to train employees in English and Spanish on a variety of relevant workplace hazards.

Records of discipline and Ramirez's testimony establish that Employer had a policy of enforcing safety infractions through a progressive discipline policy. From the evidence and testimony, the ALJ also found, and the Board agrees, that Cadena was aware that lifting an individual on the forklift was in contravention of Employer's training and safety rules. Cadena's hesitant testimony on a meeting regarding forklift safety which took place about a month before the accident was not credible. The record reflected Cadena had had several safety infractions, despite his testimony to the contrary, although those infractions were in the somewhat distant past. An ALJ's credibility determinations are due great weight because she is present to observe the demeanor of testifying witnesses on the stand. (*Pacific Messenger Records Storage, Inc.*, Cal/OSHA App. 08-2263, Denial of Petition for Reconsideration (Sep. 8, 2010), *citing Kimes Morris Construction Inc.*, Cal/OSHA App. 02-1273, Decision After Reconsideration (Aug. 8, 2008), *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318-19).)

As the Division called Cadenas as a witness, the Employer was able to introduce testimony on several key points related to his experience and knowledge as a forklift driver. However, neither party called the injured employee, Martinez, to testify at hearing. Employer maintains that it has successfully established the IEAD by showing Cadenas engaged in action contra to a safety rule. The evidence in the record demonstrates that both Cadenas and Martinez were engaged in an action that led to Martinez's injury. Cadenas credibly testified that Martinez asked him to lift him on the forklift so that he would be able to remove a jam from the bin dumper.

While the record reflects that Martinez had some forklift training in the course of his employment with Employer, it is unclear what duties or position Martinez was fulfilling on the day of the accident. The testimony of Cadena suggests that a forklift driver might be assigned other duties—Cadena was working in the dryer at least for some period during the September 2008 harvest, and did not consider himself a forklift operator at that time.

For Martinez, Employer was unable to meet all elements of the IEAD. The evidence regarding Martinez's experience as a forklift operator came only in the form of hearsay statements from Ramirez. While Cadena's name appears to be on a Westec forklift training from 2006, and a certificate of completion shows Cadena to be certified to operate a forklift, no similar documentation was provided for Martinez. (Ex. D). Employer would have the Board agree on the basis of Ramirez's testimony that Martinez was working as a forklift

operator on the day of the accident, and not in some other capacity in the facility for which he was not adequately trained in safety matters. Employer presented no evidence outside of the toolbox sign-in sheets to establish that Martinez was aware that he caused a safety infraction which he knew was contra to Employer's safety rules.[2] For these reasons, Employer has failed to meet both the first and the fifth elements of the IEAD, as they apply to the actions of Martinez.

As the ALJ stated in her decision, where there are two actors who contribute to an accident, in order to show IEAD, the employer must prove all elements as to both employees. For instance, in *Home Depot USA, Inc.*, Cal/OSHA App. 10-3284 Decision After Reconsideration (Dec. 24, 2012), employer Home Depot asserted the IEAD defense in an accident where a lot technician assisted a forklift operator in unloading a bundle of railroad ties. The Board looked to all five IEAD criteria for both employees, not just the injured lot technician, or the forklift driver. As here, both employees were involved in some manner in the series of events that lead to the injury. (See also, *Chicken of the Sea International*, Cal/OSHA App. 01-281 Decision After Reconsideration (Feb. 28, 2003), [four technicians work on a machine, one injured due to co-worker error, Board looks to all four employees in deciding IEAD].)

Employer also asserts lack of knowledge as a defense to the serious classification of the citation. To establish lack of knowledge, an employer must demonstrate that the violation occurred at a time and under circumstances which did not provide employer with a reasonable opportunity to detect it. (*Bryant Rubber Corp.*, Cal/OSHA App. 01-1360, Decision After Reconsideration (Aug. 21, 2003).) Although one of Employer's front-line supervisors, Manuel Angulo, testified on various matters, he failed to provide any testimony that would have established that the violation of Employer's rule occurred in an area of the workplace which was isolated, that it was at a time when the work area was not in use, or some other factor that would help to establish the defense. (Decision, p. 13). Rather, the testimony suggests that someone requested that Martinez remove the jam from the bin dumper so that work on the line would not be stopped.[3] Who was actually responsible for clearing jams from the bin dumper, or how that procedure was typically and safely accomplished are questions left unanswered by Employer. Nor was a photograph provided of the basket lift which Employer's witness testified was

[2] Employer's sign-in sheets for toolbox safety meetings do appear to have Martinez's signature on them. These were objected to as hearsay by the Division. (Ex. G, H, I). The meetings addressed forklift safety, among several other scheduled topics, according to the testimony of supervisor Manuel Angulo.

[3] This testimony was hearsay from Ricker, who testified that Martinez informed him that Juana Cazares instructed him to unjam the bin dumper. Ricker testified that Cazares denied having told Martinez to unjam the bin. There is no testimony in the record as to Cazares' position at Employer. Cadena testified that if the system was empty, Juana would be upset, and although he knew lifting Martinez with the forklift was contra to Employer's safety rules, he was in a rush because if there was no product, she would be angry. Presumably, the Juana that Cadena is referring to is Juana Cazares.

near the accident scene, and which Cadena testified he had never seen during his tenure at Employer. The affirmative defense of lack of knowledge is not established.

Therefore, we affirm the result of Decision sustaining the citation.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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