

**BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD**

In the Matter of the Appeal of:

LAND O' LAKES PURINA FEED, LLC  
1125 Paulson Road  
Turlock, CA 95380

Employer

Dockets 08-R2D4-1843 and 1844

**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 the Division of Occupational Safety and Health (Division) matter under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on February 21, 2008, the Division conducted an accident inspection at a place of employment in Turlock, California maintained by Land O' Lakes Purina Feed, LLC (Employer). On April 15, 2008, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Citation 2 alleged a Serious violation of section 3099(j) [failure to prevent packaged goods from being carried on a manlift].

The Employer filed timely appeals of the citations.

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 August 25, 2009. The Decision granted Employer's appeal of Citation 2 and vacated the penalty.

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<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

The Division timely filed a petition for reconsideration of the Decision. The Employer filed an answer to the petition.

### **ISSUE**

Did Employer violate section 3099(j)(1)?

### **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.

Associate Safety Engineer Robert Pike (Pike) conducted an opening conference at Employer's facility, which manufactures packaged feed, on February 21, 2008. Pike met with Daniel McNutt (McNutt), Employer's plant manager. The alleged accident occurred on February 13, 2008, while two temporary employees, placed at Employer by Placement Pros, worked on the 4<sup>th</sup> and 5<sup>th</sup> floor of Employer's facility. According to the testimony of injured employee Brian Beauchamp (Beauchamp), he and the other temporary employee, Sean Taylor Turner (Turner), were instructed by supervisor Jeff Duffy (Duffy) to sweep waste feed littering the 5<sup>th</sup> floor into bags, and then move those bags onto the 4<sup>th</sup> floor, where they would be dumped into a chute. According to Duffy, the instruction was to simply fill the bags, and line them against the wall of the 5<sup>th</sup> floor, where they would be taken care of later.

Beauchamp testified that the bags were large and held about 50 pounds, but they would only be filled half way. He and Turner were told by Duffy that they could either walk the half-full bags down the stairs to the 4<sup>th</sup> floor chute, or set them on the manlift, which would carry them down. The two temporary workers chose to use the manlift to transport the bags—Turner loaded the bags at the 5<sup>th</sup> floor onto the small conveyor-like platform, and on the 4<sup>th</sup> floor, Beauchamp would take the bags off and stack them.

On the morning of the February 13<sup>th</sup>, around 10:30am, according to Beauchamp, one of the bags slipped off the manlift. Turner attempted to grab it, but was unable to, and it hit Beauchamp in the neck after falling nearly 30 feet, causing several fractures in his vertebrae, four days of hospitalization, and ultimately, the necessity of surgery.

According to Beauchamp, there was little training on the manlift; he was given a one page document, which he signed after reading it. He estimated that the one to two minutes it took him to read it were all of the training he received on the manlift. This is in contrast to Duffy's testimony, who stated he read aloud the entire document to the two temporary employees, and also rode the manlift with them, to ensure they were comfortable with using it. He stated

the training took around 20 minutes, and denied ever suggesting employees could carry materials on the manlift. Duffy did admit on cross examination that the training did not go over any prohibition on using the manlift to transport materials by themselves. The manlift itself is labeled about every 15 feet with a warning that it is not to be used to transport material. The label is somewhat worn and coated in the feed dust that permeates the facility, but is legible.

Duffy and Beauchamp also disagreed on what occurred on the 4<sup>th</sup> and 5<sup>th</sup> floor while Beauchamp worked at Employer. Beauchamp was a temporary employee at Employer for about three days prior to the accident, and a couple days in January. According to Beauchamp, Duffy came up to the floors to check on progress several times over the two days he and Turner were shoveling and hauling materials down via the manlift, and Duffy both saw the employees using the manlift to transport the bags, and that bags were piling up on the 4<sup>th</sup> floor.

Duffy testified he neither saw any bags on the 4<sup>th</sup> floor until the time of the accident (his last check in, he estimated, was around 9 a.m., about an hour and a half before the accident), and did not see the workers using the manlift. He also testified that he himself used the manlift to get around on both days.

Another employee known to Beauchamp as “Johnny,” (John Inacio) also testified—although Beauchamp testified that Inacio had come up and explained how to move feed bags via the manlift, Inacio denied having gone onto the 4<sup>th</sup> or 5<sup>th</sup> floors on the dates in question. He had worked with Beauchamp and Turner outside, loading a truck, but denied discussing the manlift with the two temporary workers. Finally, McNutt testified that he asked the temporary employees, after the accident, who had instructed them to use the manlift to haul materials contra the Employer’s policy, and neither one responded to his question.

### **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 the Division’s petition for reconsideration and Employer’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.

The Division petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e). In its petition, the Division argues that the ALJ inappropriately required the Division to establish “foreseeability of the hazard” as part of its prima facie case in proving a violation.

Section 3099(j)(1) states: “[n]o freight or packaged goods shall be carried on any manlift.” The ALJ found that Beauchamp and Turner were working with goods packaged in a bag, making the safety order applicable on its face. It is the Division’s burden to prove through a preponderance of the evidence that a violation of the safety order occurred. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) The Division and the Employer both presented documentary evidence and witness testimony; the Employer asserted the affirmative defense of independent employee action, and lack of employer knowledge of existence of the violation as a defense to the serious classification of the citation.

From the testimony presented, it is not in dispute that packaged goods were carried on the manlift on February 13, 2008. The injured employee, Beauchamp, provided uncontradicted direct testimony as to how the injury occurred: his neck injury was a result of a junk feed bag falling off of the manlift from the 5<sup>th</sup> floor onto the 4<sup>th</sup> floor. Duffy testified he went up to the 4<sup>th</sup> floor after Turner came to inform him that Beauchamp was injured, and he found Beauchamp leaning on the gate of the manlift. There were bags of feed in the area. He also testified that Turner informed him that he (Turner) had dropped a bag on Beauchamp. The Board is able to find that the Division established by a preponderance of the evidence a prima facie violation of section 3099(j)(1).

**Did the Employees Perform Work Outside the Scope of Their Assigned Duties? Was That Unassigned Work an “Extreme Departure” From Their Assigned Task?**

In her decision, the ALJ finds that that although there were the necessary ingredients to establish a violation of 3099(j)(1), no violation was present, due to the great deviation in assignment that Beauchamp had taken. Although the manlift may have been used to move goods, this was not work assigned to either temporary employee. Weighing the testimony of Beauchamp, which she found to be inconsistent or illogical at times, against the testimony of three of Employer’s witnesses, and taking into account the unexplained absence of Turner, the ALJ found that the Employer’s version of the work

assignment was most credible. Considering all testimony and evidence, the ALJ was able to conclude there was no reason to believe that the Employer would assign employees to use the manlift for anything but moving persons between floors.

An ALJ's credibility determination is accorded great weight, and will be deferred to by the Board, barring substantial evidence that the determinations are unwarranted. (*Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344 Decision After Reconsideration (Aug. 20, 2007), citing *Rudolph and Sletten, Inc.*, Cal/OSHA App. 01-478 Decision After Reconsideration (Mar. 30, 2004); *River Ranch Fresh Foods-Salinas, Inc.*, Cal/OSHA App 01-1977, Decision After Reconsideration (Jul. 21, 2003); see also *Lamb v. Workers Compensation Appeal Board* (1974) 11 Cal.3d 274, 281.) The Board adopts the ALJ's credibility determinations and finds that the employees performed work that was not assigned by their supervisors on February 13, 2008.

The Board has stated that an "extreme departure" from an assigned task may be grounds for relieving an employer of liability for a violation of a safety order. (*Andersen Tile Company*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000).) To the extent that the Division understands the ALJ's decision to impose upon the Division the burden of showing "foreseeability of the hazard," the Division misinterprets the ALJ's discussion of the relevant standard. The Division is correct: its burden is only to show by a preponderance of the evidence that a violation of the cited safety standard occurred. There is no extra showing imposed on the Division in a 3099(j)(1) violation, and the usual affirmative defenses are still available to the employer.

However, there is always a "general principle of foreseeability" that exists, both in terms of exposure to a workplace hazard, and as to employee behaviors. (See, *J.R. Wood, Inc.*, Cal/OSHA App. 95-4431, Decision After Reconsideration (Oct. 14, 1999), *Louisiana-Pacific*, Cal/OSHA App. 85-449, Decision After Reconsideration (Sept. 1, 1987).) There are foreseeable workplace hazards and accidents, as well as foreseeable employee mistakes, misunderstandings, and insubordinations. Those foreseeable hazards and human errors must be taken into account as employers act to comply with applicable safety orders. At the other end of the spectrum are accidents and behaviors that are unforeseen and unforeseeable. As the Board discussed in *California Prison Industry Authority*, Cal/OSHA App. 07-2171, Denial of Petitions for Reconsideration (Jun. 3, 2010), and *J.R. Wood, Inc.*, *supra*, an employer has a responsibility to plan and prepare for only employee exposure to hazards that it, as a reasonably prudent employer, might reasonably expect their employees would be exposed to. In situations where an employee takes an action that is both unforeseeable and unforeseen by the employer, the Board may find the employer relieved of liability, or as discussed in *Bay Area Systems & Solutions dba Bass Electric*, Cal/OSHA App. 01-106 Decision After

Reconsideration (Oct. 10, 2008), the employer may argue the unforeseeability as an affirmative defense to the serious classification of the citation. (See also, *Newbery Electric Corp. v. Occupational Safety and Health Appeals Bd.* (1981) 123 Cal.App.3d 641).

We do not find that the action taken by Beauchamp to have constituted an “extreme departure” from his work assignment of sweeping, bagging and moving junk feed. Unlike a chain of events stemming from an inexplicably damaged piece of equipment, resulting in an unintended accident, such as the circumstances in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct 16, 1980), Beauchamp’s activities were not out of the realm of the foreseeable. In *Newbury* (supra) a foreman with many years of experience and a track record as a safe, responsible employee had been trusted to follow familiar instructions. It was unforeseeable for such an employee to diverge from usual instructions, and found to be an “extreme departure”; the expectation that an employee will not deviate significantly from instructions is not as reasonable when dealing with new or inexperienced employees, in contrast to the highly experienced and (previously) reliable employee in *Newbery* (supra).

While the Employer may have found Beauchamp and Turner’s initiative (or misunderstanding of directions) to have been unanticipated, a reasonably prudent employer would likely see the superficial appeal to employees of finding a less arduous way to move 25 pound feed bags in lieu of carrying them down stairs. The focus of Employer’s training is keeping its employees from falling while they ride the manlift; the training centers on discouraging employees from carrying tools and being alert. This is important, but a new employee may not immediately see any danger in placing a heavy, seemingly stable bag of feed on the manlift.

Having found that the employee’s action was not an “extreme departure” from the task assigned by the Employer, the Board will analyze the Employer’s affirmative defenses.

### **Employer was Able to Prove the Independent Employee Action Defense**

There are several elements to the Independent Employee Action Defense (IEAD), which is an affirmative defense the Employer bears the preponderance of proving. These elements are as follows: 1) The employee was experienced in the job being performed; 2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments; 3) The employer effectively enforces the safety program; 4) The employer has a policy of sanctions against employees who violated the safety program; 5) The employee caused a safety infraction which he or she knew was contra to the employer’s safety requirements. (*Bay Area*

*Systems & Solutions dba Bass Electric*, supra, citing *Mercury Service, Inc.*, supra; *Gal Concrete Construction, Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sep. 27, 1990); *Central Coast Pipeline Construction Company, Inc.*, Cal/OSHA App. 76-1342, Decision After Reconsideration (Jul. 16, 1980). Employer must show all five elements to meet its burden under the defense.

The first element of the defense is to demonstrate that the employee was experienced in the particular job being performed—here, using a manlift in a feed operation. Beauchamp had only worked at Employer’s facility for a handful of days, three in the week he was injured, and several days in the month before. While there are tasks that may take months or more to become proficient in, an industrial manlift is a simple device for transporting employees, and Beauchamp was given training and opportunity to become accustomed to the lift. Beauchamp can be described as having experience in use of the manlift, and the Employer meets this first element.

Prong two of the defense is a showing of a well-devised safety program, including training employees in matters of safety respective to their particular job assignments. Employer introduced evidence which showed that it provided training to new employees, including temporary employees Beauchamp and Turner, on the manlift. The training included riding the manlift with a supervisor, who was available to address questions. Employer also introduced testimony related to a functioning safety committee, which holds trainings, meetings, and involves employees in safety issues. The Division and Employer stipulated that Employer has an effective safety program which includes an Illness and Injury Prevention Program. (Decision, p. 3).

Employer must also show that it enforces its safety program. Employer was able to show through documents that it does issue safety-related discipline to employees who violate its established safety program. This meets the Employer’s burden to establish elements 3 and 4 of the IEAD.

Finally, the Employer must show that the employee caused a safety infraction which he or she knew was against the employer’s safety requirements. The evidence shows that Beauchamp used the manlift to transport materials, which he knew was against the Employer’s safety rule. Beauchamp testified that he did know the safety rules stated that the lift was only for transportation of personnel, and he testified that he saw the notice on the manlift, which reads, “DO NOT TRANSPORT MATERIAL.” Nonetheless, he and Turner agreed to move bags of feed on the lift, in direct contravention of the Employer’s safety rule.

The Employer has met its burden under the IEAD; the Board will uphold the ALJ’s decision vacating the citation, but on different grounds. Having so

found, the Board need not analyze the Employer's defense to the serious classification of the penalty.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
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