

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

In the Matter of the Appeal of:

FRANK M. BOOTH, INC.
P.O. Box 5
Marysville, CA 95901

Employer

Docket. 12-R2D3-0601

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by the California Division of Occupational Safety and Health (Division).

JURISDICTION

Commencing on December 28, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 9, 2012, the Division issued a citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On March 13, 2014, the ALJ issued a Decision which granted Employer's appeal and dismissed the citation.

The Division timely filed a petition for reconsideration.

Employer answered the petition.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

ISSUE

Does the evidence show that Employer satisfied the requirements of the “independent employee act defense?”

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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’s petition is grounded on Labor Code section 6617, subdivisions (a), (c), and (e).

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. The Board has taken no new evidence. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The Decision includes a detailed summary of the evidence, which we briefly review here.

It was not disputed that a serious injury accident occurred at Employer’s place of employment when a qualified rigger failed to ensure that a load was secured or supported before detaching it from the crane which had lifted the load. It was also not disputed that a violation of section 4999(h) occurred. Section 4999(h) provides: “Loads shall not be released or detached from a crane or other hoisting apparatus until the qualified person (rigger) detaching the load has verified that the load has been secured or supported to prevent inadvertent movement.”

Employer’s employee Smith was the qualified rigger involved and the person injured in the accident. Smith observed another employee, a forklift operator, having difficulty while attempting to transfer a “skid,” which was

suspended from a crane, to the forks of a forklift. Smith went over to help. While helping with the transfer, Smith told the forklift operator to get on the forklift, which he did. Meanwhile, Smith acting alone detached the skid from the crane apparently planning on stabilizing it by hand. Smith failed in that attempt, and the skid fell from the forks of the forklift, striking and injuring him. Smith violated section 4999(h) when he detached the skid from the crane without first verifying the load was secured or supported.

Employer defended on the grounds of the “independent employee action defense” or IEAD. The IEAD is an affirmative defense established by the Board in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).² If an employer satisfies the defense, it is not responsible for the violation at issue and its appeal is granted. The defense requires an employer to prove all five of its elements; failure to prove any one or more elements means the defense fails. The elements are: (1) that the employee who caused the violation was experienced in the job being performed; (2) that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments; (3) that the employer effectively enforces the safety program; (4) that the employer has a policy of sanctions against employees who violate the safety program; and (5) that the employer caused a safety violation which he or she knew was contrary to the employer’s safety requirements.

The Division’s petition contends, in essence, that Employer had to satisfy the IEAD elements with respect to both of the employees involved in this incident, and that Employer failed to prove elements 1, 2, 4, and 5 because the forklift operator was not an experienced and qualified rigger.³ The Decision reviewed the evidence in detail and explained how each element of the IEAD was satisfied. We agree with the Decision’s findings as to each of the elements. Accordingly, we disagree with the Division’s contentions.

Although the Division is correct that in certain circumstances the IEAD will apply to more than one employee, such is not the case here. Only Smith was acting in the capacity of a rigger, and Smith acted alone in detaching the skid from the crane while the other employee was on the forklift. Thus, as to element 1, it was Smith’s experience in rigging that had to be and was shown. As to element 2, it was Smith’s training in rigging that was at issue, and Employer showed Smith was adequately trained, and Employer also established its safety program was well devised and in active practice. As to the fourth element, enforcement and sanctions against employees who violate the safety program, we agree with the ALJ that Employer presented evidence sufficient to prove it imposes sanctions. For example, the ALJ found that

² The IEAD is analogous to an affirmative defense recognized by the federal Occupational Safety and Health Review Commission, which it terms the “employee misconduct” defense.

³ As to element 3, Employer proved it effectively enforces its safety program, and the Division does not petition regarding that aspect of the Decision.

Employer's witnesses credibly testified about discipline and verbal warnings having been issued as a result of this accident. In the absence of contrary evidence of substantial weight we are loathe to reverse the ALJ. (*Lamb v. Workmen's Compensation Appeals Bd.* (1974) 11 Cal.3d 274, 281.) As to element 5, Smith testified that he knew he was breaking company rules when he disconnected the skid from the crane. Since he was the individual causing the violation, and the forklift operator had no role in the violation, element 5 was proved.

In this case it was only Smith who caused the violation, only Smith who was the qualified rigger, and thus only Smith whose actions or omissions need be considered in determining whether Employer satisfied the burden of proving the IEAD.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 30, 2014