STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
(916) 274-5721

In the Matter of a Petition by:	)	
	)	PETITION FILE NO. 565
	)	DECISION
Mr. James T. Dufour, J.D., C.I.H.	)	
Dufour Law	)	
819 F Street	)	
Sacramento, CA 95814	)	
	)	
Applicant.	)	

The Occupational Safety and Health Standards Board hereby adopts the attached PROPOSED DECISION.

OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD

DAVID THOMAS, Chairman

DAVE HARRISON, Member

CHRIS LASZCZ-DAVIS, Member

PATTY QUINLAN, Member

BARBARA SMISKO, Member

LAURA STOCK, Member

By: _____
Marley Hart, Executive Officer

DATE: September 14, 2017
Attachments

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PROPOSED DECISION OF THE OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD REGARDING PETITION FILE NO. 565

Introduction

On April 28, 2017, the Occupational Safety and Health Standards Board (Board or OSHSB) received a submission from attorney James T. Dufour, on behalf of a group described as "the California Date Commission and a coalition of growers and labor contractors." Upon receipt by the Board, pursuant to Labor Code Section 142.2, the submission of Mr. Dufour was designated OSHSB Petition 565 (Petition). It seeks changes in California Code of Regulations, Title 8, General Industry Safety Orders pertaining to use of lift truck mounted engineered platforms for the elevated work of employees engaged in date palm tending and harvesting.

Labor Code Section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals and to render its decision no later than six months following their receipt.

Summary

The Petition focuses on Title 8 regulation of tending and harvesting work done on date palm trees from elevating platforms mounted on lift trucks. The Petitioner requests that conditional exceptions be added for purposes of that work, by amendment of existing Title 8 Section 3657, and addition of a new Section 3458.2.

Requested exceptions to Section 3657 would permit the following (currently prohibited) practices for date palm tree operations:

1. Absence of the operator from the control position of a stationary lift truck while employees remain on the elevated lift truck-mounted platform.

2. Movement of the lift truck with employees remaining on the truck mounted work platform.

Detailed draft regulatory language included within the Petition, calls for a new Section 3458.2, having more than 20 highly prescriptive subparts, allowing for employees to remain on an elevated work platform without a lift truck operator at the controls, and allowing for employees to remain on the work platform during lift truck positioning, and travel between date palms.

Existing Subject Title 8 Standards

Existing Title 8, Section 3458—*Fall Protection for Date Palm Operations*, and Section 3458.1—*Ladders Attached to Date Palm,* found within General Industry Safety Order (GISO) Article 13—*Agricultural Operations,* focus specifically upon date palm tending and harvesting operations from elevated locations.

- Section 3458 sets out numerous requirements for protection of employees engaged in date palm operations at heights greater than 7.5 feet, by means of approved devices and equipment, including but not limited to, elevating work platforms.

- Section 3458.1 sets out requirements for ladders permanently attached to date palms.

Existing Section 3657—*Elevating Employees with Lift Trucks*, within GISO Article 25—Industrial Trucks, Tractors, Haulage Vehicles, and Earth Moving, applies to workplaces generally, including those engaged in agriculture. The Petition focuses most particularly on Section 3657(e), prescribing that a lift truck operator remain "in the control position on the truck while employees are on the elevated platform," and subsection (j)(7), prohibiting lift truck travel with employees on the platform.

Existing Related Permanent Variances

Permanent variances are granted to employers in accordance with Labor Code Section 143 "upon a showing of an alternate program, method, practice, means, device, or process which will provide equal or superior safety for employees." Three past variance proceedings have resulted in Board grant of 15 permanent variances to employers endeavoring to utilize lift truck mounted, elevating work platforms or baskets, for purposes of date palm tending and harvesting.

These still in-effect permanent variances, in matters 08-V-212 through 08-V-223, 14-V-103 and 14-V-104, and 14-V-230, make allowances for particular workplace locations of particular employers, conditioned upon numerous requirements similar, in many respects, to the conditional allowances the Petitioner now seeks to have incorporated into Title 8 itself.

More particularly, each of the 15 previously granted variances were from requirements of Section 3657(e), calling for a lift truck operator to remain "in the control position on the truck while employees are on the elevated platform" and from Section 3657(j)(7), prohibition of lift truck travel with employees on the work platform.

The granting of each of these 15 permanent variances has been subject to no fewer than 18 prescriptive preconditions. Beyond that, it must be understood that grant of variance to one, or even several employers, does not necessarily indicate that a change in regulation is appropriate. In many cases, the detailed and specific scrutiny, brought to bear during permanent variance proceeding, upon the working conditions of a particular applicant's employees, proves essential to ensuring those employees are protected to the same degree they would be given unvarying compliance with the given Title 8 requirements. Variance conditions are tailored to the particular circumstances of the subject workplace, as well.

Division Recommendation

In its report concerning the Petition, dated August 24, 2017, the Division favors the convening of an advisory committee to discuss possible amendments to Group 4, Article 25, pertaining to date palm operations, with consideration of amendments limited to that group of regulations.

However, the Division recommends against Petitioner's proposal, as drafted, to allow an operator to leave the controls of a lift truck with employees still on the truck mounted platform. It is the Division's position that the Petitioner proposed language would not equivalently protect employees from the hazards addressed by existing Subsection 3657(e).

Board Staff Recommendation

In its evaluation of the Petition, completed August 25, 2017, Board staff finds some merit in the Petitioner's proposal, in light of the above-cited 15 existing permanent variances from the same or closely related Title 8 Safety Order requirements—especially given Board staff and Division analyses, and Board findings, supportive of conditional grant of variance in each of those instances. However Board staff believes possible changes in this area of regulation would benefit from further study in advisory committee.

The Rulemaking Development Process

In a certain respect, the Petitioner is correct in characterizing the present request as the straight forward "adoption as amendments to Group 4, Article 13 and 25, [of] the same exemptions and applicable conditions included in previously-issued variances." Nonetheless, the process of developing a rulemaking proposal enforceable across an entire industry, calls for more wide ranging scrutiny then that involved in even the most thorough vetting of any particular permanent variance application. This is all the more understandable given that even within a focused subject area of occupational safety, the protective conditions placed upon each of numerous permanent variances granted over a span of time, not infrequently undergo safety enhancing refinement, in light of accumulating evidence and consideration. In addition, the rulemaking process requires that a proposal's protective equivalence to existing Federal OSHA regulations be formally confirmed. And while permanent variance proceedings quite appropriately focus upon the circumstances of a particular applicant's employees, any potential changes to a Title 8 Safety Order, call for consideration of input from any number of interested stakeholders.

CONCLUSION AND ORDER

Having considered the Petition, and associated analyses and recommendations of the Division and Board staff, the Petition is hereby Granted to the limited extent that Board staff is directed to convene an advisory committee, inclusive of stakeholders, to consider recommendation of amendments to Title 8, best providing for the safe use of lift truck mounted engineered platforms by employees engaged in elevated date palm tending and harvesting.