

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

In the Matter of the Appeal of:

**LARA LABOR CONTRACTORS
28081 Mace Boulevard
Davis, CA 95618**

Employer

**DOCKETS 13-R2D2-3608
and 3609**

DECISION

Statement of the Case

Lara Labor Contractors (“Employer”) is a farm labor contractor. Beginning on September 4, 2013 through November 18, 2013, the Division of Occupational Safety and Health (the Division) conducted an accident-related inspection at Sievers Road and Currey Road, Dixon, California (the site). On November 21, 2013, the Division cited Employer for three citations. The Division moved to withdraw the Regulatory violation (Citation 1, Item 1) because the injury was timely reported to the Division’s Sacramento office. The Employer agreed to waive costs and the motion was granted.

- Citation 1, Item 2, alleging a general violation of California Code of Regulations¹, Title 8, Section 3441(a)(2)(D) for failure to make sure employees were clear of machinery before starting and operating a tomato harvester machine, with a proposed penalty of \$560.
- Citation 2, Item 1, alleging an accident related serious violation of Section 3441(a)(2)(A) failure to keep the cover guard of the conveyor vine shredder in place prior to operating a tomato harvester machine on July 31, 2013 with a proposed penalty of \$18,000.

On November 26, 2013, Employer filed a timely appeal regarding whether the safety orders were violated and whether the penalty was reasonable.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, in Sacramento, California on July 2, 2014. The Employer, Lara Labor Contractors was represented by Daniel Castillo, Safety Consultant. The Division was represented by Cynthia Perez, Staff Counsel for California Occupational Safety and Health, Sacramento District Office. All parties presented

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

testimony and documentary evidence and gave closing arguments. The ALJ extended the submission date to April 13, 2015 on her own motion.

Employer moved to amend Citation 1, Item 2 and Citation 2, Item 1 to raise an affirmative defense of Independent Employee Action. The Division objected to the motion but stated that additional time was not needed to respond. This motion was granted.

Issues:

- A. Were employees clear of machinery before starting and operating a tomato harvester machine?
- B. Did Employer carry its burden of proof on the issue of the independent employee action defense (IEAD) affirmative defense to Citation 1, Item 2?
- C. Was the proposed penalty for Citation 1, Item 2 reasonable?
- D. Was the cover guard of the conveyor vine shredder in place prior to operating a tomato harvester machine?
- E. Was the IEAD available as an affirmative defense to Citation 2, Item 1?
- F. Was the proposed penalty for Citation 2, Item 1 reasonable?

Findings of Fact:

1. On July 31, 2013, Rivas used his right foot to push materials in the shredder compartment of the tomato harvester, a type of agricultural equipment. When he lost his balance, the blades cut his right leg and one of his testicles, in addition to causing other lacerations. He was hospitalized for two months and in a rehabilitation facility for five months.
2. The injured employee's right leg was not clear of the machinery in the shredder compartment of tomato harvester before the machine was started.
3. Rivas and Zarate worked for the employer for approximately twenty years and are experienced in the job being performed.
4. The Employer presented no evidence to establish it had a well-devised safety program, that training was provided to Rivas, when the training was provided, or what steps the employer has taken to effectively enforce the safety program.

5. The Employer presented no evidence regarding the disciplinary program and neither Zarate nor Rivas was disciplined.
6. The cover guard of the conveyor vine shredder was removed and not replaced when tomato harvester machine was started.
7. The IEAD is not available as an affirmative defense to Citation 2, Item 1 where Section 3441(a)(2)(A) requires guarding.
8. The proposed penalties for Citation 1, Item 2 and Citation 2, Item 1 are reasonable.

Analysis

A. Employer failed to make sure employees were clear of machinery before starting and operating a tomato harvester machine.

The Division cited Employer for a violation of Section 3441(a)(2)(D) which provides as follows:

(2) Agricultural equipment shall be operated in accordance with the following safe work practices and operating rules:

(D) Make sure everyone is clear of machinery before starting the engine, engaging power, or operating the machine.

Citation 1, Item 2 alleges as follows:

On 08/31/2013, the employer did not make sure employees were clear of machinery before starting and operating a tomato harvester machine. An employee kicking clogged vines at the conveyor discharge was seriously injured when he fell into the conveyor discharge while the machine was in operation.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980) at pp. 2-3; *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

It is the Division's burden to prove that 1) the equipment being operated was agricultural equipment, 2) the operator failed to make sure everyone was clear of the machinery before operating the machine.

“Agricultural equipment” is defined in section 3437, which provides the definition applicable to section 3441(a) as including "tractors or implements, including self-propelled implements, and stationary equipment . . . used in agriculture." (*Veg Packer, Inc.* Cal/OSHA App. 95-759, Decision After Reconsideration (June 26, 1997).) The tomato harvester machine is a self-propelled machine which was being used to harvest tomatoes and meets the definition of “agricultural equipment”. (Exhibit 5, Model 5750TE-2 Tomato Harvester Service Manual)

The second element is established if the operator fails to make sure everyone is clear of machinery before starting the engine, engaging power, or operating the machine.

On August 31, 2013, Jose Refugio Zarate (Zarate) was operating the tomato harvester when the machine became stuck. He turned off the machine to inspect the place where the vines clogged the shredder/discharge compartment (shredder). Zarate removed the lid off the shredder. Adelfo Rivas (Rivas) and Guadalupe Morales Lara (Lara) climbed up onto the discharge compartment of the harvester to help Zarate unclog the machine. Rivas used a hoe, as well as his hands, to pull the vines out of the shredder blades. When that was not successful, he pushed his foot down into the discharge compartment to kick the vine. Zarate started the machine up without ensuring that Rivas was clear of the moving parts. Rivas lost his balance and fell into the discharge compartment when the motor started.

Tomato Harvester Service Manual, Exhibit 5, p. 2-7 states:

CAUTION

ALWAYS MAKE SURE ALL GROUND PERSONNEL ARE CLEAR OF THE MACHINE BEFORE MOVING.

The operator’s behavior of starting the machine before ensuring all people are clear of the machine establishes the violation. The ineffective audible warning is insufficient evidence of that the operator “ensured” all employees were clear of the shredders moving parts. Since “ensure” is the term in the safety order, it must be applied. “Ensure” connotes more than failed effort. It connotes all steps taken to achieve the intended behavior, or here, clearance. The operator violated the safety order when he started the machine without making sure that all employees were clear of the machine. Although Zarate testified that he told Rivas to get away from the shredder, he did not make sure that Rivas heard him or refrain from starting the machine until Rivas was out of harms way. Rivas testified credibly that he did not realize that Zarate was going to start the machine while he was pushing the vines down. Rivas did not hear Zarate or anyone else tell him not to push vines down in the discharge compartment.²

² In evaluating the support for the factual allegations of a citation, it is proper for an Administrative Law Judge to draw logical and reasonable inferences from the evidence presented. *MCM Construction Inc., Cal/OSHA App. 92-436*, Decision after Reconsideration (May 23, 1995);

Rivas and Zarate worked together for approximately twenty years. Rivas testified he used his feet as a lever all the time. Given the longstanding practice of Rivas pushing his foot into the discharge compartment to unstick the shredder, Zarate, the operator of the machine, was responsible to make sure all employees were clear before starting the machine. Division established a violation of Section 3441(a)(2)(D).

B. Independent Employee Action Defense

At the hearing, the Employer asserted an independent employee action defense (IEAD). To avoid liability through that affirmative defense, the employer must establish all the following elements: (1) the employee was experienced in the job being performed; (2) employer has a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments; (3) employer effectively enforces the safety program; (4) employer has a policy which it enforces of sanctions against employees who violate the safety program, and; (5) the employee caused a safety infraction which s/he knew was against employer's safety requirement. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).

The ultimate burden of proof is upon Employer to establish each of the five elements. The defense is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee's actions serve to circumvent or frustrate the employer's best efforts. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (March 27, 2014); *Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

The first element requires that the employee is experienced in the job being performed. Rivas and Zarate both worked as a truck driver of the tomato harvester for the employer for approximately twenty years and an inference can be made that they are experienced in working on the tomato harvesting machine. Rivas and Lara jumped up onto the harvester to help Zarate out.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. The Employer failed to establish what training was provided to Rivas and when it was provided.

Similarly, no evidence was presented regarding the third element in terms of what steps the employer has taken to effectively enforce the safety program. The fourth element requires employer to establish that it has a policy which it enforces of sanctions against employees who violate the safety program. There

ARB Inc., Cal/OSHA App. 93-2084, Decision after Reconsideration (Dec. 22, 1997) (p. 6 and cases cited therein).

was no evidence presented whatsoever regarding the disciplinary program and neither Zarate nor Rivas was disciplined.

Employer presented no evidence of its safety program or its safety training. Further, an employer must enforce safety procedures so that safety becomes a vital part of any work task. As Employer has not established elements two, three or four of the IEA test, it cannot rely on this defense. (*Mercury Service, Inc., supra*).

C. Was the Penalty Reasonable?

Employer appealed the reasonableness of the penalty. The citation was classified as “general”. The Division’s Inspector, Ronald Aruejo explained that he calculated the penalties in accordance with the Division’s procedures. The violation was given a rating of high severity, which has a penalty of \$2,000. The extent was rated low, and \$500 was subtracted. The gravity based penalty was \$1,500. He reduced the penalty by 25%, based on the penalty adjustment factors of 15% good faith and 10% history. No credit was given for size, due to the fact that the employer had over 200 employees. (Section 336(d).) This is calculated as: \$1,500 minus \$375 (25%) equals \$1,125. The penalty was further reduced by 50%, due to abatement credit given and rounded down to \$560. (Exhibit 2, Proposed Penalty Worksheet.) The employer did not rebut this analysis. The proposed penalty of \$560 is found reasonable and is assessed.

D. Employer failed to keep the cover guard of the conveyor discharge/vine shredder in place prior to operating a tomato harvester machine.

The Division cited Employer for a violation of Section 3441(a)(2)(A) which provides as follows:

(2) Agricultural equipment shall be operated in accordance with the following safe work practices and operating rules:

(A) Keep all guards in place when the machine is in operation.

Citation 2, Item 1 alleges as follows:

On 08/31/2013, employees of Lara Farm Labor Contractors, did not keep the cover guard of the conveyor discharge vine shredder in place prior to operating a tomato harvester machine. An employee kicking clogged vines at the conveyor discharge was seriously injured when he fell into the conveyor discharge while the machine was in operation.

The Division's burden of proving a violation includes establishing that the cited safety order applies. As stated above, Section 3441 applies to the tomato

harvester machine, which is agricultural equipment. (*Veg Packer, Inc., supra.*) The Division is also required to establish that the employer failed to keep all guards in place when the machine is in operation.

Where employee protection against a particular hazard must be provided by means of positive guarding, an employer's instructions, admonitions or warnings are not a substitute for adequate guarding. (*Bethlehem Steel Corporation, Cal/OSHA App. 78-723, Decision After Reconsideration (Aug. 17, 1984).*)

Mechanical tomato harvesting involves separating the ripe tomatoes from the vines by moving the vines and tomatoes up conveyors which separate into different sections of the harvester. (Exhibit 5, Tomato Harvester Service Manual.) The fruit passes through a suction fan area, is sorted by color and is moved to a bulk loader elevator. The dirt, trash and green tomatoes are allowed to fall onto the trash chute. Tomato Harvester Service Manual cautions: "Keep all shields and guards in place. Failure to do so could result in personnel entanglement in moving parts."

On August 31, 2013, tomato vines clogged the shredder/discharge compartment. (Exhibit 8.) Zarate stopped the tomato harvester, turned off the motor, and took the compartment cover off the shredder to inspect it. Rivas and Lara climbed up onto the harvester to help Zarate dislodge the vines and unclog the machine. Before replacing the compartment cover which guarded the shredder, Zarate got back in the driver's seat and started the motor. At this point, Rivas was using his foot to push down the vines. Rivas lost his footing, while he was kicking the mechanism in the shredder, and fell into the compartment. He sustained severe injuries.

By removing the compartment cover to inspect the shredder, and starting the motor before replacing the compartment cover, the driver created the hazard which caused the accident. Employer's argument that the machine was not in operating mode when the compartment cover was removed is rejected, since the machine was started back up before the cover was put back on.

The Employer raised the IEAD in connection with Citation 2, Item 1. The Board has held that the IEAD is unavailable where the cited safety order requires protection against a particular hazard by means of positive guarding, since the purpose of a guard is to prevent inadvertent or accidental contact. *Architectural Glass & Aluminum Co., Inc., Cal/OSHA App. 01-5031, Decision After Reconsideration (March 22, 2004); City of Los Angeles, Dept. of Public Works, Cal/OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986).* IEAD is not available for this citation.

The Division established that employer failed to comply with the safety order which requires that the guard must be in place before the machine is placed in operating mode. Based on the testimony of Zarate and Rivas, the compartment cover was off when the machine was restarted. The Division has established a violation of Section 3441(a)(2)(A).

E. Was the Penalty Reasonable?

When the penalty is appealed, the classification is placed in issue. (See *Hudson Plastering Co., Inc.*, Cal-OSHA App. 85-1271, DAR (Nov. 19, 1987).) Because the violation is alleged to be accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury. *Obayashi Corporation*, Cal/OSHA App. 98-3674, DAR (June 5, 2001). In this case, as a result of the failure to guard the shredder by replacing the compartment cover before starting the motor, the machine cut Rivas's right leg and one of his testicles, in addition to causing other lacerations. (Exhibit 12.) Rivas was hospitalized for two months and in a rehabilitation facility for five months. Therefore, the Division established a serious accident-related violation of section 3441(a)(2)(A) by a preponderance of the evidence.

Penalty calculations for accident-related serious violations begin with a base of \$ 18,000. (Section 336(c)(1).) If an employer commits a serious violation and the violation causes death or serious injury, as this violation did, the penalty shall not be reduced pursuant to the regulation except for Employer's size. (Section 336(c)(3).) Labor Code § 6319(d) provides that "if serious injury . . . is caused by any serious . . . violation, the penalty shall not be reduced for any reason other than the size of the business of the employer being charged." The Division did not reduce the penalty from \$18,000 in compliance with this regulation. Employer did not dispute the fact that zero size credit was given or offer evidence that the number of employees was less than 100, thus the penalty was properly calculated.

Conclusion

Citation 1, Item 2 is sustained and the proposed penalty of \$560 is affirmed. Citation 2, Item 1 is sustained as to a serious accident-related violation and the proposed penalty of \$18,000 is affirmed.

Order

It is hereby ordered that the Employer's appeal of Citation 1, Item 2 and Citation 2, Item 1 are denied as discussed above and set forth in the attached Summary Table.

It is further ordered that the penalties as set forth in the attached Summary Table be assessed.

DATED: March _____, 2015

MARY DRYOVAGE
Administrative Law Judge

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
LARA LABOR CONTRACTORS
DOCKETS 13-R2D2-3608 and 3609
DATE OF HEARING: July 2, 2014**

Division's Exhibits

Exh. No.	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Proposed penalty worksheet	Yes
3	I-B-Y notice dated October 28, 2013; employer response; training record; certificate of service by mail	Yes
4	Photo – front of Tomato Harvester	Yes
5	Tomato Harvester Service Manuel Model 5750TE-2 (37 pages - incomplete copy provided by Employer)	Yes
6	Photo – Rear entrance to shredder compartment of Tomato Harvester	Yes
7	Photo – Engine compartment of Tomato Harvester	Yes
8	Two Photos of Guadalupe Lara on Tomato Harvester	Yes
9	Two Photos of Guadalupe Lara on Tomato Harvester	Yes
10	Witness Statement of Guadalupe Lara taken on September 10, 2013	Yes
11	Photo – Handle and cover guard on shredder/discharge compartment of Tomato Harvester	Yes
12	Adelfo Rivas Medical Records (under seal) (3 pages)	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
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None.

Witnesses Testifying at Hearing

1. Adelfo Monjares-Rivas
2. Ronald Aruejo
3. Refugio Zarate

CERTIFICATION OR RECORDING

I, MARY DRYOVAGE, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled 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.

MARY DRYOVAGE

March 26, 2015
DATE

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
LARA LABOR CONTRACTORS
DOCKETS 13-R2D2-3608 and 3609

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

DOCKET	C	I	SECTION	T	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A	V	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
	I	T		Y		F	A			
	T	E		P		I	C			
	A	M		E		R	A			
	T	I		R		M	T			
	I	O		E		E	E			
	O	N		D		D	D			
13-R2D2-3608	1	1	342(a)	Reg	[Failure to report serious injury to Division.] DOSH withdrew citation based on evidence that timely notice was given, but sent to wrong office.		X	\$5,000	\$0	\$0
	1	2	3441(a)(2)(D)	G	[Failure to make sure employees were clear of machinery before starting tomato harvester machine.] ALJ affirmed violation.	X		\$560	\$560	\$560
13-R2D2-3609	2	1	3441(a)(2)(A)	S	[Failure to keep cover guard of conveyor vine shredder in place prior to operating a tomato harvester.] ALJ affirmed violation.	X		\$18,000	\$18,000	\$18,000
Sub-Total								\$23,560	\$18,560	\$18,560
Total Amount Due*										\$18,560

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
PO Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*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: MD/sp
POS: 03/ 26 /15

