BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1332867**
GUY F. ATKINSON CONSTRUCTION, LLC. **dba ATKINSON CONSTRUCTION** **18201 VON KARMAN AVE., #800** **IRVINE, CA 92612** **Employer**	**DECISION**

Statement of the Case

Guy F. Atkinson Construction, LLC dba Atkinson Construction (Employer) is a construction company. On July 20, 2018, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Steve Honjio (Honjio) and Associate Safety Engineer Maria Eva Garland, commenced an inspection of a job site located at the intersection of the San Bernardino 10 East Freeway and Kellogg Drive in Pomona, California (job site), after report of an injury at the site on July 20, 2018. On January 19, 2019, the Division cited Employer for two violations, one of which remains at issue: failure to operate a forklift according to the manufacturer's recommendations.

Employer filed timely appeals of both citations. Citation 1 [Employer stipulated to accept Citation 1]. Employer appealed Citation 2 on the grounds that the safety order was not violated, the classification of the violation is incorrect and that the proposed penalty is unreasonable. Employer asserted numerous affirmative defenses, including Independent Employee Action and lack of Employer knowledge.[1]

This matter was heard by Jacqueline Jones, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, on February 23, 2021, and June 15, 2021. The parties and witnesses attended the hearing remotely via the Zoom video platform. Kevin Bland, Attorney, of Ogletree, Deakins, Nash, Smoak & Stewart P.C., represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. The matter was submitted on September 20, 2021.

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer violate section 3328, subdivision (a)(2), by using or operating the 1245Xtream forklift (forklift) under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations?

Findings of Fact

1. On July 20, 2018, Jordan Hoyt (Hoyt), an employee of the Employer, was fatally injured while operating a forklift eastbound on an unpaved compacted access road.

2. Hoyt was a certified forklift operator.

3. The forklift tipped over into a ravine at the job site.

4. The accident occurred on an access road that the California Department of Transportation (Caltrans) hired employer to build as part of a construction project.

5. The access road was flanked by a wall on one side and a ravine on the other side.

6. Employer never received any complaints about safety of the access road.

Analysis

1. Did Employer violate section 3328, subdivision (a)(2) by using or operating the 1245 Xtream forklift under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations?

California Code of Regulations, title 8, section 3328, subdivision (a)(2),[2] provides:

(a) All machinery and equipment:

[…]

(2) shall not be used or operated under conditions of speeds, stresses, loads or environmental conditions that are contrary to the manufacturer's

[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

recommendations or, where such recommendations are not available, the engineered design.

In Citation 2, Item 1, the Division alleges:

> Prior to and during the course of the investigation, the Employer failed to operate the 1245 Xtream Forklift according the manufacturer's recommendations by operating the forklift on soft edges of roads that could collapse under the forklift. As a result, on or about July 20, 2018, an employee operating the forklift on the soft edge of the access road near wall 2181 suffered a fatal injury when the access road collapsed and the forklift tipped over into a ravine.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983); *Timberworks Construction*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

The undisputed facts are that an accident occurred on an access road that the California Department of Transportation (Caltrans) hired employer to build as part of a construction project. Jordan Hoyt (Hoyt), while driving a forklift eastbound on the access road, flipped over into a ravine and was fatally injured. The access road was flanked by a wall on one side and a ravine on the other side.

In order to establish a violation of section 3328, subdivision (a)(2), the Division is required to prove that Employer operated the forklift under "conditions of speeds, stresses, loads, or environmental conditions" that are contrary to the manufacturer's recommendations.

It is a basic canon of statutory construction that where an undefined term is used in a statute, it must be construed in light of its common law meaning in the absence of evidence of a contrary meaning. (*Gerdau dba Gerdau Reinforcing Steel*, Cal/OSHA App. 315832014, Denial of Petition for Reconsideration (Feb. 27, 2017).) This is known as the "plain meaning rule," under which words in regulations should be given the meaning they have in ordinary usage. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010).) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the

regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013) (internal citations omitted).)

The rules of regulatory construction require courts and the Appeals Board "to give meaning to each word and phrase and to avoid a construction that makes any part of a regulation superfluous." (*Donley v. Davi* (2009) 180 Cal. App. 4th 447, 465.) Accepted canons of statutory construction oblige "giving meaning to each word if possible and avoid a construction that would render a term surplusage." (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal. App. 4th 684, 695.) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*California Highway Patrol*, Cal/OSHA App. 09-3762, Denial of Petition for Reconsideration (Aug. 16, 2021).)

a . Interpretation of the Regulation

The safety order on its face regulates conditions of use. The regulation is narrow, only prohibiting usage under conditions of speed, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations.

These conditions of use are examined herein to determine whether the Division has shown a violation of the safety order.

b. Speed Conditions

The regulation refers to machinery that shall not be operated under conditions of speeds, stress, loads and environmental condition. Certified Forklift Operator Hoyt suffered a fatality while driving the forklift on an unpaved access road. The forklift left the roadway and fell into an adjacent ravine. Honjio testified that during the investigation he did not find the forklift was operated at a high rate of speed beyond the manufacturer's recommendations. The Division did not offer any evidence about the imposition of speed conditions on the forklift that was contrary to the manufacturer's recommendations that would trigger a violation of the regulation.

c. Stress Conditions

The General Industry Safety Orders do not provide a definition of the word "stress." Based upon the ordinary use of the term, the Appeals Board has accepted the definition of "stress" as a force acting across a unit area in a solid material resisting the separation, compacting, or sliding that tends to be induced by external forces." (*The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001).) "Stress" and "load" are not the same term. The Division did not present any evidence establishing that the forklift

was operated under conditions of stress beyond the manufacturer's recommendations. Honjio testified that if a forklift is off balance or off center that could be stress that may cause a forklift to tip over. This is speculation as there were no witnesses to the accident. Ben Turnham, Employer's heavy equipment mechanic, testified that he observed the forklift on many occasions and that in order for the forklift to get to the point of where the center of gravity was heavier on one side, the forklift would need to be driven extremely far sideways so as to get it to flip. Turnham's testimony was credited because he worked on the roadway project for two years prior to the accident. Turnham traveled up and down the access road for various purposes at various times. Turnham witnessed heavier equipment drive on the access road with no problem. Turnham did not observe any of the roadway collapse or give way when viewing the accident site on the day of the accident. Here, there was no evidence that the forklift was driven extremely far sideways. There were no witnesses to the accident. Thus, the Division has not shown that the forklift was operated under conditions of stresses beyond manufacturer's recommendations.

d. Load conditions

The General Industry Safety Orders do not provide a definition for "load." The Appeals Board has established that "load" may have several meanings depending on the context. (*Michels Corp DBA Michels Pipeline Construction,* Cal/OSHA App. 07-4274, Decision After Reconsideration (Aug. 13, 1987).) The Appeals Board has defined "load" as a weight or quantity resting upon something else regarded as its support." (See *Western States Steel, Inc.*, Cal. App. 84-1089, Decision After Reconsideration (Aug. 13, 1987).) Here, there was no evidence that the forklift was carrying a load. Honjio testified that there were no stresses on the forklift from a load. Therefore, the Division has not shown that the forklift was operated under conditions of loads beyond manufacturer's recommendations.

e. Environmental conditions

The safety order does not define "environmental condition." The Merriam-Webster dictionary defines "environment" as "the circumstances, objects, or conditions by which one is surrounded." Here, the Division alleges that the environmental condition was that the road on which the forklift was driven collapsed due to it being driven on soft edges of the road that could collapse contrary to the manufacturer's recommendations. The Division's evidence was limited to Honjio's testimony regarding the manufacturer's recommendations. Although Honjio's testimony is credited, even Honjio conceded that this forklift is a rough terrain forklift which is to be driven on rough terrain, which is usually dirt roads. The Division referred to, but did not produce, the manufacturer's manual. The Appeals Board has previously stated, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produced stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.: (*A*

Tiechert & Sons, Inc. dba Teichert Rock Products, Cal/OSHA App. 1047912, Decision After Reconsideration (June 30, 2017), citing Evid. Code §412.) Thus Honjio's testimony regarding the manufacturer's recommendations cannot be fully credited. According to Honjio's testimony, the manufacturer's guide states, "Stay away from soft edges that could collapse under the forklift."

Employer argues that the forklift was not operated under environmental conditions contrary to the manufacturer's recommendations. Here, the term soft edges is ambiguous and vague. Where language in a manufacturer's recommendation is ambiguous, the Division has the burden to prove that its interpretation is correct. (*Washington Ornamental Iron Works dba Washington Iron Works*, Cal/OSHA 1226666, Decision After Reconsideration (Dec. 28, 2020).) Honjio interviewed various people about the condition of the road. Rex Henderson, Employer's grading foreman, indicated that there had been no complaints about the access road. Honjio also interviewed Travis Todd Hicks, Foreman for Employer, who indicated that there is no limitation on what equipment could be used on the access road.

Honjio's testimony did not include testimony indicating that the forklift was operated under conditions contrary to engineered design. Honjio's testimony did not include any evidence of collapse due to soft soil. The Division's witness, Ramsey Douvani (Douvani), soil/materials tester for California Department of Transportation (Caltrans) testified that he goes to sites and tests materials such as soil and concrete for quality assurance. Douvani's testimony included that he tested the soil on July 20, 2018, and conducted a Relative Compaction test, which showed the average compaction of the soil along the access road to be 91 per cent.[3] There was no evidence linking the 91 per cent average compaction with the manufacturer's recommendation regarding soft soil.

Accordingly, the Division failed to establish by a preponderance of the evidence that the forklift was operated under conditions contrary to the manufacturer's recommendations.

Conclusion

The evidence fails to support a finding that Employer violated section 3328, subdivision (a)(2). Accordingly, Employer's appeal is granted.

[3] Employer filed a Miscellaneous Brief on July 30, 2021 requesting Judicial Notice. At the conclusion of the hearing both parties were made aware that if they wished to present further evidence a motion requesting leave to submit additional evidence was required. Employer did not file said motion and the Miscellaneous Brief was not considered in this Decision.

ORDER

It is hereby ordered that Citation 1, Item 1, is affirmed as set forth in the attached Summary Table. Citation 2 is vacated.

Dated: 10/20/2021

Jacqueline Jones
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**