

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

In the Matter of the Appeal of:

FOSTER DAIRY FARMS  
529 Kansas Avenue  
Modesto, CA 95351

Employer

Docket. 10-R2D1-1981

**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 Foster Dairy Farms (Employer).

**JURISDICTION**

Commencing on March 4, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On June 15, 2010, the Division issued a citation to Employer alleging a serious violation of occupational safety and health standards codified in California Code of Regulations, Title 8, section 3337(b) [failure to secure mobile dock plate].<sup>1</sup>

Employer timely appealed.

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

On November 28, 2012, the ALJ issued a Decision which sustained the alleged violation, denied Employer's appeal, and imposed a civil penalty of \$18,000.

Employer timely filed a petition for reconsideration.

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

The Division filed an answer to the petition.

**ISSUE**

Did the ALJ err in sustaining the violation?

**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.

Employer's petition contends the Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on substantial evidence in the record as a whole and appropriate under the circumstances.

The Decision contains a detailed summary of the testimony and other evidence, which is incorporated by reference. The evidence is summarized below for convenience and to provide context for our decision.

The citation alleged Employer had failed to comply with section 3337(b), which states:

Dock plates or loading ramps shall be secured in position when spanning the space between the dock or unloading area and the vehicle. The dock plate or loading ramp, together with its securing devices, where used over spans of different lengths, shall be of such construction as will readily obtain rigid security over such spans.

One of Employer's employees was seriously injured in a fall from a portable dock plate (also referred to as a "ramp") at Employer's West Sacramento facility. A portable dock plate is, as the name suggests, a metal plate or platform which is used to span the gap between a vehicle and a loading dock or two vehicles. In this case the employee placed the dock plate between his truck and a refrigerated trailer in order to move product from the trailer to his truck for delivery to customers. The dock plate slipped during one such transfer causing the employee to fall and be injured.

The dock plate or ramp in question had no components to prevent slippage or movement when it was in use, and was not otherwise secured to prevent movement. Employer had other ramps equipped with anti-slip features but they were not available in adequate numbers. The employee testified that he was instructed to use the ramp in question by the "lead man" or supervisor on duty and that it was the only ramp available at the time. The employee and the supervisor had a conversation about the product loading while the employee was standing on the ramp, although Employer disputed the employee's estimate of the conversation's duration.

The employee further testified he did not like to use the ramp in question. He had used the ramp several times previously, and had seen other employees use it, and neither he nor they had been disciplined for doing so. His testimony also was that other members of management had seen him using the ramp in question and he had not been told not to do so.

Employer's witnesses testified that the lead man did not have supervisory authority, and that employees were not to use the ramp involved in the subject accident. The ALJ found, based on substantial evidence in the record, that the lead man had supervisory and safety authority, that he had personally observed the injured employee using the ramp, and that such knowledge is attributable to Employer.

The evidence is undisputed that the ramp in question was not in compliance with section 3337(b). It was not "secured in position when spanning" the gap between the truck and the refrigerated trailer, either by built-in components or by other means of securement.

Employer argues that the violation was not proved to be "serious" as defined in the Labor Code. This argument is incorrect. The violation occurred in 2010, meaning the "substantial probability" definition of serious applies. (Lab. Code § 6432(a) prior to its amendment effective in 2011.) The inspector testified that based on his experience it was more likely than not that a fall of the type involved would result in serious injury. That testimony satisfied the applicable standard, as set forth in Board decisions such as *Blue Diamond Growers*, Cal/OSHA App. 10-1280, Denial of Petition for Reconsideration (Oct. 17, 2012) [applying 2010 version of Lab. Code § 6432(a), "more likely than not"]

test]. Specifically, the inspector testified that more than 60% of the similar falls he had investigated had resulted in serious injuries, thus satisfying the Division's burden of proof on the issue. The parties had also stipulated that the injuries suffered were serious as defined in section 330(h) [requiring hospitalization for more than 24 hours for other than observation].

Employer also argues that the "independent employee action defense" or IEAD affirmative defense applied and was satisfied. The IEAD was first articulated by the Board in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). To prevail under the IEAD, the employer asserting it must prove all five of the following: (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 respecting their particular job assignments; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions against employees who violate the safety program; and (5) the employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements. (Id.) The defense fails if the employer does not prove all five elements.

Here there was no question that the employee was experienced. The ALJ found, however, that Employer did not effectively enforce its safety program, since the non-complying ramp was used in the presence of the lead man. Further, a review of the evidence reveals that there are questions about whether Employer's safety program was "well-devised," since training on ramp use and availability of the proper ramps was lacking, and whether Employer enforced the ramp requirement or sanctioned employees who violated it; and whether the injured employee knew he was acting contrary to Employer's safety requirements.

Lastly, Employer argues that because the lead man was not a supervisor, it did not have knowledge of the violation and therefore the serious classification should not be upheld. The Decision correctly found that the lead man had responsibility for safety. His duties included evaluation of other workers' performance, including safety at the facility. Delegated authority over safety matters qualifies an employee as a supervisor for purposes of the California OSH Act (Labor Code §§ 6300 et seq.). (*Chevron USA, Inc.*, Cal/OSHA App. 89-283, Decision After Reconsideration (Feb. 8, 1991).) The injured employee used the non-complying act in the presence of the lead man. Since the lead man is considered a foreman, and a foreman's knowledge is imputed to the employer, Employer knew of the violation. (*Szemenyei Construction, Inc.*, Cal/OSHA App. 10-0008, Denial of Petition for Reconsideration (Mar, 4, 2011).) In addition, an employer's lack of knowledge, even where it is established, must also be reasonable. Here the evidence was that there was an inadequate number of complying ramps at the facility, which further militates against Employer's claim of lack of knowledge in addition to

the lead man's being in the presence of the violation. (*Davis Brothers Framing*, Cal/OSHA App. 03-0114, Decision After Reconsideration (Jun. 10, 2010).) In addition, the injured employee testified that members of management had observed employees using the non-complying ramp and took no steps to prevent it. That evidence shows that managers had direct personal knowledge of the ramp's use, and that the violation was ongoing continuing at least up to the time of the accident. (See *United Airlines, Inc.*, Cal/OSHA App. 83-595, Decision After Reconsideration (Apr. 24, 1986).)

### **DECISION**

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

ART R. CARTER, Chairman (Not Present)  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: February 8, 2013