

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

In the Matter of the Appeal of:

PRESTON PIPELINES, INC.
133 Bothelo Avenue
Milpitas, CA 95035

Employer

Docket 11-R2D4-2530

**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 Preston Pipelines, Inc. (Employer).

JURISDICTION

Commencing on July 26, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 20, 2011, the Division issued a citation to Employer alleging a General violation of Title 8, Cal. Code of Regulations, section 3704 [failure to secure load against dangerous displacement].¹

Employer timely appealed, and administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board.

On October 30, 2012, the ALJ issued a Decision (Decision) which sustained the alleged violation and civil penalty of \$560.

Employer timely filed a petition for reconsideration. The Division did not answer the petition.

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

ISSUE

Did Employer violate section 3704?

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 contends that the ALJ acted in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the decision. (Labor Code §§ 6617(a), (c) and (e).)

The present matter arose from an accident involving one of Employer's employees, a truck driver, who was injured while loading a 15-foot length of pipe onto a flatbed truck. The pipe had been lifted to the edge of the flatbed by a forklift, and the employee positioned a section of 2x4 lumber between him and the pipe, parallel to the pipe. Employee then began to roll the pipe onto the flatbed, with the idea that the movement of the pipe would be limited by the piece of 2x4. However, because the flatbed was parked such that the bed tilted or listed slightly to one side, and because the pipe was being loaded onto the higher side, the pipe gained momentum and rolled over the 2x4. Seeing that 2x4 failed to stop the pipe from rolling, the employee jumped off the flatbed to avoid being hit by the pipe. He sustained injuries after impacting the surface below, and additional injuries from the pipe itself when it rolled into him while he was on the ground. (See "Summary of Evidence," Decision, pp. 2-6, incorporated herein.)

While Employer admits that the load had not been secured, it argues that the safety order does not apply to the particular circumstances of this case. (Petition, p. 3.) It contends that the pipe was not a "load" while it was being moved from the forklift to the flatbed, and that the pipe could not be

secured – and was not, therefore, required to be secured – because it would be impossible to secure an object against displacement while one is in the process of moving it. (Petition, pp. 3, 4.) Employer’s argument is an example of the “logical time” affirmative defense, which provides that “[t]he requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard.” (*JSA Engineering, Inc.*, Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002) citing *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) For the following reasons, we find that Employer has not established a logical time defense.

Section 3704 requires that “[a]ll loads shall be secured against dangerous displacement either by proper piling or other securing means.” Notably, the safety order does not necessarily require immobilization of the load, but rather requires that the load be limited in the distance it can move so as to avoid “dangerous displacement.” (§ 3704.) Here, the Division presented credible testimony, accepted and referenced in the Decision, that slings, vertical stakes, or similar means could have been used to both allow the pipe to be moved off the forklift and onto the flatbed while also limiting the distance it could roll. (Decision, pp. 3-4, 7-9.) Alternatively, the employee also could have used blocking that was higher than the 2x4 used in this instance. Such methods limiting the amount of travel would have fulfilled the safety order’s requirement to secure the pipe against “dangerous displacement,” while also allowing the employee to load the pipe onto the flatbed. Thus, contrary to Employer’s argument, the move could still be accomplished while abiding by section 3704’s requirements, and Employer’s logical time defense fails.²

Furthermore, were we to accept Employer’s interpretation under the facts of this case, it would lead to the conclusion that no protection against displacement of a load would be required during the time it is actually being loaded or unloaded. All loading procedures would be excluded from the requirements of section 3704. This would result in a gap in worker protection not called for in the safety order, contrary to the Supreme Court’s holding in *Carmona v. Industrial Safety* (1975) 12 Cal.3d 303 [safety orders to be construed in ways more protective of workers].

² To the extent that Employer argues that no load existed in this circumstance, the Board has consistently recognized that loading and unloading of materials constitutes transportation requiring the securing of such loads, activities it has referred to as “incident to transportation.” (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011) [failure to secure load on forklift before moving it]; *Oakmont Holdings, Inc.*, Cal/OSHA App. 04-1951, Denial of Petition for Reconsideration (Feb. 8, 2007) [loading, unloading material incident to transportation requires loads to be secured]; *Bragg Crane and Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (Jun. 28, 2004) [transport necessarily includes loading, unloading].)

DECISION

For the above reasons, Employer's appeal is denied. The citation and penalty are affirmed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: January 3, 2013