

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

In the Matter of the Appeal of:

RAJ KUMAR SHARMA dba SUNRISE ORCHARDS
P.O. Box 1107
Wheatland, CA 95692

Employer

Docket 10-R2D1-3391

**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 Raj Kumar Sharma doing business as (dba) Sunrise Orchards (Employer).

JURISDICTION

Commencing on May 26, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 28, 2010 the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Citation 1 alleged two General violations related to section 3395 [various aspects of heat illness prevention]. Citation 2 alleged a Serious violation of section 3653(a) [failure to provide and require use of seat belts].

Employer timely appealed.

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

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

On December 28, 2012, an ALJ issued a Decision (Decision) which granted Employer's appeal as to Citation 1 (docket number 10-R2D1-3390) and sustained the violation alleged in Citation 2.²

Employer timely filed a petition for reconsideration of the Decision only with respect to Citation 2, docket number 10-R2D1-3391.

The Division filed an answer to the petition.

ISSUE

Does the evidence establish a Serious violation of section 3653(a)?

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 asserts the Decision was procured by fraud and the evidence does not justify the findings of fact.

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 Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

² An Erratum was issued on January 23, 2013 to correct docket numbers entered incorrectly on the Summary Table issued with the Decision. Those corrections are not substantive do not affect the subject matter of Employer's petition or this Denial of Petition for Reconsideration.

During his inspection of Employer's place of employment the Division inspector observed an employee driving the tractor without wearing a seat belt. Upon examining the tractor, the seat belt was found to be inoperative – it would not extend from the retracted position. The inspector subsequently cited Employer for violating section 3653(a), which provides:

Seat belt assemblies shall be provided and used on all equipment where rollover protection is installed and employees shall be instructed in their use. Seat belt assemblies installed after June 26, 1998, shall be labeled as meeting the design requirements of SAE J386 JUN93, Operator Restraint System For Off-Road Work Machines. Seat belt assemblies installed on or before June 26, 1998, shall be labeled as meeting either the design requirements of the SAE standard indicated above or the SAE J386 JUN85 standard.

Employer contends, first, that the employee observed driving the tractor did so knowing the seat belt was inoperative so that the inspector would become aware of that fact. The Decision points out that the tractor operator was one of Employer's supervisors. (Decision, pp. 5, 6; *Webcor Builders, Inc.*, Cal/OSHA App. 06-3031, Denial of Petition for Reconsideration (Jan. 11, 2010).) Therefore, if the supervisor drove the tractor knowing the seat belt was inoperative, the violation is established. And if the supervisor did not know as much when he started to drive the tractor on the day of the inspection, he drove the tractor without using the seat belt as required in violation of section 3653(a). (Seat belts "shall be . . . used[.]" § 3653(a).) Further, the Decision points out that Employer was allowed to demonstrate proper use, and therefore operability, of the seat belt during the inspection, but failed in his attempts. (Decision, p. 10.) Thus a violation was established. Employer did not dispute the violation's classification or the proposed penalty, so they are not at issue.

Employer contends that the tractor was not used in the business. We agree with the Decision's finding to the contrary. The tractor was at Employer's worksite and part of his equipment inventory and it is therefore reasonable to infer that it was used in the business.

Employer also argues that the employee who drove the tractor on the day of the inspection was not authorized to use it. First we point out again that the individual was a supervisor. And, regardless of that fact, one of Employer's employees did operate the tractor at the place of employment with the seat belt inoperative. Even if the employee's motive was to bring the violative condition to the inspector's attention, the fact remains that a violation existed. Employer's argument on this point is accordingly rejected.

Employer next argues that the Decision should not have rejected his “independent employee action defense” (IEAD). The IEAD is an affirmative defense to an alleged violation. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) If a cited employer is able to prove all five elements of the IEAD by a preponderance of the evidence, it is a complete defense to the alleged violation. The defense is not applicable, however, if the employee causing the violation is a supervisor or foreman. (*Sign Designs, Inc.*, Cal/OSHA App. 08-4686, Denial of Petition for Reconsideration (Feb. 23, 2012); *Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232.) The ALJ correctly so ruled, since the evidence shows that the tractor operator was a supervisor.

Employer’s parry to that ruling is the claim that the employee was a supervisor in its *nursery* business, not the orchard business which was the subject of the inspection. Even if we assume they are separate, the two enterprises, however, are co-located and both are operated by Employer. Further, the employee who operated the tractor on the day of the inspection is a supervisor and violated the safety order by operating a tractor with an inoperative seat belt. In the hearing Employer raised a similar argument, that the tractor was not of use in the nursery. The ALJ rejected this contention, finding the tractor purchased by Employer for the nursery business as part of the nursery equipment, and that it could and had been used in the nursery. The ALJ specifically found the contrary testimony not to be credible. In the absence of compelling contrary evidence – and there is none such – we will not disturb the ALJ’s credibility finding. (*Nibbelink Masonry Construction Corporation*, Cal/OSHA App. 02-1399, Decision After Reconsideration (Dec. 20, 2007), citing *Lamb v. Workmen’s Compensation Appeals Bd.* (1974) 11 Cal.3d 274.) Thus, the IEAD was not applicable, despite Employer’s contentions.

Lastly Employer argues that the ALJ erred in rejected offered testimony when the witness in question needed a Spanish-English translator and none was available. Prior to the hearing Employer had not requested that an interpreter be present. Employer failed to follow Board procedures regarding translation requirements, and the ALJ ruled correctly in not allowing the witness to testify. (Board Regulation 376.5(b) [request for interpreter to be made at least 10 days before hearing].) In a related argument, Employer contends the ALJ erred in rejecting written statements and a request to submit additional testimony. The Decision (p. 2) notes that the substance of the statements did not set forth the substance of the proposed testimony, and that Employer’s proffered letters jump from one conclusion to another without factual basis. As such, even if Employer’s motion was deemed an offer of proof, it was deficient and the evidence properly rejected. (See *Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration (Jun. 10, 2010).)

DECISION

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

ART R. CARTER, Chairman
ED LOWRY, Member

NOT PRESENT
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MARCH 19, 2013