BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection Number
BLUE DIAMOND GROWERS **1300 North Washington Road** **Turlock, CA 95380** **Employer**	**1040471** **DECISION AFTER RECONSIDERATION AFTER REMAND FROM SUPERIOR COURT**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and in accordance with the Judgment and Order Granting (In Part) Petition for Writ of Mandate issued by Judge Shelleyanne W.L. Chang, Sacramento County Superior Court, hereby sets aside its September 24, 2018, Decision After Reconsideration, and issues the following Amended Decision After Remand From Superior Court.

JURISDICTION

On October 24, 2014, the Division of Occupational Safety and Health (Division) initiated an inspection at an almond processing facility maintained and operated by Blue Diamond Growers (Employer) after Pauline Stewart (Stewart), a consultant from Stroud International, LLC (Stroud),[1] was seriously injured when she attempted to unjam an almond splitting machine.

On April 16, 2015, the Division issued three citations for violations of safety orders set forth in California Code of Regulations, title 8.[2] Employer timely appealed the citations. On October 3, 2017, after a duly noticed evidentiary hearing, the Administrative Law Judge (ALJ) issued a decision affirming two citations.[3]

On October 31, 2017, Employer petitioned the Board for reconsideration. The Division answered. On September 24, 2018, the Board issued a Decision After Reconsideration (Decision), which vacated both citations based on the newly-named Unforeseeable Extreme Departure Defense (UEDD).

[1] Employer was cited as Stewart's employer under a multi-employer framework Employer demonstrated control of safety issues and considerations at the almond processing facility. Employer contracted with Stroud to provide Employer with consulting services to assist Employer in qualifying certain products to meet customer specifications and to increase production yield at the site.

[2] References are to California Code of Regulations, title 8, unless otherwise stated.

[3] Citation 1 was resolved prior to hearing and is not at issue. The remaining two citations are for Serious violations of section 3314, subdivision (c) [machine-specific hazardous energy control procedures] and section 4187, subdivision (a) [machine guarding requirements].

The Division timely filed a Petition for Writ of Mandate (Division's Petition) in the Sacramento County Superior Court, seeking judicial review of the Board's Decision. The Division's Petition was heard by the Honorable Shelleyanne W.L. Chang (Judge Chang) on October 30, 2020, and was taken under submission. Subsequently, on November 3, 2020, Judge Chang issued a Ruling on Submitted Matter re: Writ of Mandate. On December 2, 2020, Judge Chang entered an Order (Superior Court Order) granting in part and denying in part the Division's Petition for Writ of Mandate.

The Superior Court Order concluded that the Board did not exceed its authority when choosing to consider the UEDD. The Order also preliminarily found that substantial evidence supported the Board's conclusion that the UEDD was established. However, the Order observed a defect in the Board's Decision. The Order found that the Division had not been provided with sufficient due process on the applicability of the UEDD defense. Therefore, the Order granted the Division's petition, remanded the matter to the Board, and directed the Board to provide the Division with the due process necessary to be heard on the applicability of the UEDD defense.

On February 19, 2021, the Board ordered the parties to submit additional briefs on the applicability of the UEDD defense. After the Board's February 19, 2021, order requesting further briefing, the parties requested and were granted several extensions of time to submit the requested briefs. On December 17, 2021, the Division filed its brief in response to the Board's request for additional briefs. On April 1, 2022, Employer filed its opposition to the Division's December 17, 2021, brief. On May 31, 2022, the Division filed its reply to Employer's April 1, 2022, opposition.

ISSUES

1. **Did Employer waive its right to raise the Unforeseeable Extreme Departure Defense (UEDD)?**
2. **Did the Board exceed its authority by amending Employer's appeal to include the UEDD?**
3. **Did the Board properly determine Employer established all three elements of the UEDD?**
4. **Has the Division been provided with sufficient due process?**
5. **Is the UEDD a complete affirmative defense?**
6. **Can the UEDD apply when there is an affirmative duty to guard?**

FINDINGS OF FACT

1. Employer operates an almond splitting facility. Employer contracted with Stroud to assist it with increasing production yields and qualifying certain products to meet customer specifications.
2. On October 21, 2014, Pauline Stewart (Stewart) worked with a team of Employer's employees to test three almond splitting machines. The machines were to run with guards in an open position during the testing procedure.

3. Stewart's job was to consult with Employer's employees on methods to increase productivity and identify areas of improvement; she was to observe the almond splitting machines only, not to touch them—operators were present to make adjustments to the machines, if necessary.
4. Givargis Khoshabeh, Employer's supervisor, and another employee were adjusting one of the almond splitting machines (splitter Cell C), which Employer had de-energized and locked out. Stewart noticed another running machine (splitter Cell B) was jamming so she attempted to unjam it with her hands. Stewart's hand was drawn into the in-running rollers and resulted in injury to three of her fingers, requiring surgical amputation.
5. The almond splitting machines had been operating for five hours before the incident occurred. Employer blocked off the area around them with caution tape and told the rest of the employees to stay away from the second cutting deck where the machines were located.

ANALYSIS

The Division raises several arguments: 1) Employer waived its right to raise the UEDD; 2) The Appeals Board exceeded its authority by amending Employer's appeal to include the UEDD and the Division was prejudiced by the amendment; 3) Employer failed to establish all elements of the UEDD; 4) The Division was denied due process on the elements of the UEDD; 5) The UEDD is only a partial defense to a Serious citation; 6) The UEDD should not apply when an Employer has an affirmative duty to guard; and 7) The UEDD should not apply to any violation that occurred prior to the employee's action of touching the equipment. We address each argument in turn, addressing the Division's seventh argument in our analysis of issue six, "Can the UEDD apply when there is an affirmative duty to guard?"

1. Did Employer waive its right to raise the UEDD?

A waiver is the intentional relinquishment or abandonment of a known right. (*W. v. Sundown Little League of Stockton* (2002) 96 Cal.App.4th 351, 362; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal. 4th 1.) Courts have recognized that it is not possible to have a waiver or forfeiture of a legal argument which was not recognized at the time. (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 311 [holding that a criminal defendant cannot waive an argument that was not yet recognized]; *People v. Cardenas* (2007) 155 Cal.App.4th 1468, 1479.)

Generally, in appeal proceedings before the Board an employer's affirmative defense to a citation must be raised or it is waived. (*California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503 and 504, Decision After Reconsideration (July 31, 1998); *Closets Unlimited*, Cal/OSHA App. 97-2887, Decision After Reconsideration (Mar. 27, 2001); *United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018).)

Within its post-hearing brief, Employer asserted that it should be relieved of liability because Stewart's act of unjamming the machinery was unforeseeable. Employer identified several cases in support of its argument including *California Prison Industry Authority*, Cal/OSHA App.

07-2171, Denial of Petitions for Reconsideration (June 3, 2010); *J.R. Wood, Inc.,* Cal/OSHA App. 95-4431, Decision After Reconsideration (Oct. 14, 1999); and *Louisiana-Pacific,* Cal/OSHA App. 85-449, Decision After Reconsideration (Sep. 1, 1987).

In the decision the ALJ did not address the cases cited by Employer and, instead, addressed the *Newbery* defense.[4]

Employer challenged the ALJ's decision via a petition for reconsideration (Petition) where Employer pointed out that the ALJ had incorrectly inferred it had raised the *Newbery* defense, when in fact it addressed the holdings of several other cases. The Division answered Employer's Petition.

To address the arguments raised in the Petition, we reviewed the record, considered the parties' arguments, and evaluated, prior case law, including *Andersen Tile Company*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000) [In rare cases, an extreme departure from the scope of the work that an employee has been instructed to do might result in a finding that a violation did not exist, rather than merely affecting its classification.]; *Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010) [An employer could not prove the employee engaged in extreme departure from his work assignments because he performed his regular work duties at a different time or place.]; *California Prison Industry Authority*, *supra,* Cal/OSHA App. 07-2171) [To find an extreme departure the employee must engage in work that was not within, nor within a reasonable understanding of, their employment duties.]. Within our Decision, we clarified that the cases cited by Employer raised a defense, which we newly labeled as the Unforeseeable Extreme Departure Defense (UEDD). We then detailed the elements of the UEDD and determined whether those elements were satisfied.

The Division argues that the Board erred in considering the UEDD because Employer failed to plead the defense or request an appropriate amendment. The Division correctly notes the Board has previously held that employers are normally foreclosed from presenting an unpled affirmative defense at hearing without the formality of an amendment to the employer's appeal.

However, although Employer never expressly pled the UEDD nor sought an amendment, we nonetheless conclude that Employer sufficiently raised and preserved the defense. Employer accomplished this by citing, in its post-hearing brief and petition for reconsideration, the theories, principles, and concepts contained in several disparate, fact-specific decisions that we ultimately relied on to name and formally identify the elements of the UEDD. Employer cannot be faulted

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[4] The *Newbery* defense derives its name from the decision in *Newbery Electric Corp.* v. *Occupational Safety & Health Appeals Bd*. (1981) 123 Cal.App.3d 641, 649. Under this defense, a violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist: (1) that the employer knew or should have known of the potential danger to employees; (2) that the employer failed to exercise supervision adequate to assure safety; (3) that the employer failed to ensure employee compliance with its safety rules; and (4) that the violation was foreseeable. (*Gaehwiler v. Occupational Safety & Health Appeals Bd*. (1983) 141 Cal.App.3d 1041.)

for failing to explicitly plead the UEDD because the defense had not yet fully evolved and crystallized into a properly identified affirmative defense with clearly defined elements.

Under these circumstances, we cannot find a waiver of the defense because Employer never intentionally relinquished or abandoned a known right. (*W. v. Sundown Little League of Stockton, supra*, 96 Cal.App.4th 351, 362; *Waller v. Truck Ins. Exchange, Inc., supra*, 11 Cal. 4th 1.) Employer could not have intentionally or inadvertently abandoned its right to assert the UEDD because the defense had not been fully identified, named, and its elements defined. (*People v. Yarbrough*, *supra*, 169 Cal.App.4th 303, 311; *People v. Cardenas, supra*, 155 Cal.App.4th 1468, 1479.)

Because the UEDD had not yet been named nor its elements recognized until the Board issued its Decision, we concur with the Superior Court which found, under the specific circumstances of this case, that Employer sufficiently raised and preserved the defense. As such, we find Employer did not waive its right to assert the UEDD.

2. Did the Board exceed its authority by amending Employer's appeal to include the UEDD?

As discussed above, we find that Employer sufficiently raised and preserved the UEDD within its post-hearing brief. However, in considering the UEDD, we recognize that we essentially permitted a post-submission amendment. Therefore, we analyze whether such an amendment is permitted.

As a preliminary matter, the Board's rules of practice and procedure permit post-submission amendments. The Board has explicit authority to amend an appeal after a proceeding is submitted for decision. Section 386 of the Board's rules of practice and procedure states,

> (a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision.
>
> (b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby unless the case is continued to permit the introduction of additional evidence in the party's behalf. If such prejudice is shown, the proceeding shall be continued to permit the introduction of additional evidence. In the immediate case, the Board effectively permitted a post-submission amendment but, arguably, failed to fully comply with section 386 because, as the Superior Court noted, the Board failed to give the Division a sufficient opportunity to address the amendment. As such, the parties did not have a meaningful opportunity to present arguments on how the amendment may cause prejudice.

Moreover, not only do the Board's rules of practice and procedure contemplate post-submission amendments, the Board, like California courts, applies a policy of liberality when considering allowing amendments at trial, or even after trial. (*L&S Framing, Inc. v. Occupational Safety and Health Appeals Bd.* (2023) 93 Cal.App.5th 995, 1011 (*L&S Framing),* citing *Calstrip Steel Corporation*, Cal/OSHA App. 312668825, Decision After Reconsideration (Jun. 30, 2017); see also *Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945; *Duchrow v. Forrest* (2013) 215 Cal.App.4th 1359, 1377-1379.) "Resolving an issue on the merits, rather than disposing of a case due to technical defect is the favored means of resolving matters in California courts" and the Board also follows this policy. (*Crop Production Services*, Cal/OSHA App. 09-4036, Decision After Reconsideration (Mar. 28, 2016).) As we have previously noted,

> Liberal construction and easy amendment of pleadings are accepted procedure in an administrative law context... "'(t)he most important characteristic about pleadings in the administrative process is their unimportance.' 1 K. Davis, Administrative Law 523 (1958). (*Morgan & Culpeper, Inc. v. OSHRC* (5th Cir. 1982) 676 F.2d 1065, 1066.)"

(*L & S Construction, Inc.*, Cal/OSHA App. 10-1821, Decision After Reconsideration (Oct. 7, 2016).)

In California the general rule is that amendments to conform to proof are favored, and liberally permitted, since their purpose is to do justice and avoid further useless litigation absent a showing of prejudice. (*L&S Framing, Inc.*, *supra*, 93 Cal.App.5th at 1012, citing *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909; see also *L&S Framing, Inc.*, Cal/OSHA App. 1173183, Decision After Reconsideration (April 2, 2021).) An amendment to conform to proof may occur after submission of the cause. (*Jud Whitehead Heater Co. v. Obler* (1952) 111 Cal.App.2d 861, 868-869.)

However, even with a liberal policy of supporting amendments, that policy is not without bounds. We also consider factors such as prejudice, the futility of amendment, and bad faith. (*L&S Framing, Inc., supra,* 93 Cal.App.5th 995, 1011*,* [citing *Calstrip Steel Corporation*, *supra*, Cal/OSHA App. 312668825].) Indeed, consideration of whether the amendment will cause prejudice is required by the Board's operative regulation. (§ 386.)

In deciding whether we properly permitted this post-submission amendment, we first consider whether the Division has shown it will be prejudiced by the amendment. As discussed below, we hold that the Division was not prejudiced. "As to claim of prejudice, the showing must demonstrate the party was 'unfairly disadvantaged or deprived of the opportunity to present facts or evidence it would have offered had the ... amendments been timely.'" (*L&S Framing, Inc.*, *supra*, Cal/OSHA 1173183; *Calstrip Steel Corporation*, *supra,* Cal/OSHA App. 312668825.) "The employer must demonstrate that its ability to present its case would "be seriously impaired were

amendment allowed." (*L&S Framing, Inc.*, *supra*, Cal/OSHA 1173183); *Dole v. Arco Chemical Co.* (3d Cir. 1990) 921 F.2d 484, 488.) The burden is on the non-moving party to establish prejudice through production of evidence; prejudice will not be presumed. (*Sierra Forest Products*, Cal/OSHA App. 09-3979, Decision After Reconsideration (Apr. 8, 2016).)

Prejudice is not demonstrated merely because an amendment changes the legal theory. "If the same set of facts supports merely a different theory….no prejudice can result." (*Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 910; *Donovan v. Royal Logging Co.*, (9th Cir. 1981) 645 F.2d 822, 827.) It is irrelevant that new legal theories are introduced as long as the proposed amendments relate to the same general facts. (*Atkinson v. Elk Corp.* (2003) 109 Cal.App.4th 739, 761.) "It is established . . . that if a case is actually tried on the theory which is later added by an amendment to the pleadings, the adverse party suffers no prejudice from the variance." (*L&S Framing, Inc., supra,* 93 Cal.App.5th 995, 1011, [citing *In re Sierra Forest Products*, *supra*, 2016 Cal/OSHA App.; quoting *Conolley v. Bull* (1968) 258 Cal.App.2d 183, 193].) We have previously found that there is no indication of prejudice from an issue involving a theory that was actually litigated. (*L&S Framing, Inc., supra,* 93 Cal.App.5th 995, 1011 [citing *In re Sierra Forest Products*, *supra*, Cal/OSHA App.; quoting *Conolley v. Bull, supra,* 258 Cal.App.2d 183, 193].)

Here, the Division's primary argument to establish prejudice is that it should have had the opportunity to reopen the record. The Division speculates that it may have had been able to elicit testimony that Stewart exceeded the scope of her duties on other days, which would speak to the foreseeability element of the UEDD. The Division's speculative argument is unpersuasive.

Ultimately, we find that the amendment was merely made to conform to proof and that the Division was not prejudiced thereby. The record contains ample testimony regarding the scope of Stewart's job duties, what tasks the Employer reasonably expected Stewart to perform, and why her actions were unforeseeable. (Hearing Transcript (HT) February 8, 2017 Day 1 pg. 93, pp. 97-101, pp. 129-130, pg. 132, pp. 190-193; HT August 9, 2017 Day 2 pg. 95, pg. 98, pp. 145-156, pp. 161-164, pp. 171; Exhibit 4; Exhibit 12, p. 2; Exhibit B, pp. 13; HT August 10, 2017 Day 3 pg. 12-13, pp. 28-29, pp. 37-39, pg. 97).) In short, the parties amply litigated the issue of the foreseeability of Stewart's actions. Moreover, we do not find the amendment was made in bad faith or futile.

As such, the amendment of the instant appeal was proper to conform to proof because the UEDD had been properly preserved, as discussed above, fully litigated on the merits, and the Division is not prejudiced.

3. Did the Board properly determine Employer established all three elements of the UEDD?

The Superior Court Order held that the Board acted within its authority to identify the UEDD, list its elements, and render a decision based on the evidence in the administrative record.

However, the Superior Court Order also required that the Division be given an opportunity to be heard and make arguments as to the applicability of the UEDD.

In compliance with the court's directive, we required additional briefing and argument from the parties. After consideration of the additional briefing and arguments made by the Division and Employer, and in light of the entire record, we again find that Employer established all three elements of the UEDD.

As set forth in our prior Decision, an employer may successfully establish the UEDD by proving the following elements: 1) the employee engaged in an extreme departure from the scope of a reasonable understanding of their assigned work duties; 2) the employee knew their work duties did not encompass the specific activity; and 3) the employer did not and could not have known through the exercise of reasonable diligence and supervision that the employee would so act. (*Blue Diamond Growers*, Cal/OSHA App. 1040471, Decision After Reconsideration (September 24, 2018) (hereinafter "Blue Diamond "I"."") Below, we address whether Employer established each element.

a. Did Employer establish the first element that Stewart engaged in an extreme departure from any reasonable understanding of her working duties?

To demonstrate the first element, Employer must demonstrate that the employee engaged in an extreme departure from the scope of a reasonable understanding of their assigned work duties. We previously determined that the first element of the UEDD was met because Stewart engaged in an extreme departure from any reasonable understanding of her work duties.

The Division argues that the first element of the UEDD was not met because, "Stewart's accepted and expected duties required her to be exposed to hazards of unguarded rollers for an extended period of time prior to her accident." The Division argues that in the course of Stewart's job performance it was "reasonably foreseeable that she would attempt to brush off the almonds so she could continue with her job duties of observation." (Division's Further Briefing Upon Remand pg. 8)

After the consideration of additional arguments and a fresh review of the record, we continue to conclude that the record supports our prior determination regarding the first element, i.e., that Stewart engaged in an extreme departure from the scope of any reasonable understanding of her assigned work duties.

We previously found that Stewart's job was "to consult Employer's employees on methods to increase productivity and identify areas of improvement; she was to observe the almond splitting machines only, not to touch them—operators were present to make necessary adjustments to the machines, if necessary." (*Blue Diamond I*, *supra,* Cal/OSHA App. 1040471.) More specifically, Stewart was a consultant and her assigned work duties were to observe the operation of the machinery, provide solutions to increase productivity, and identify opportunities for improvement

and achieving better results. Employer offered credible testimony from two operators that unjamming the machinery was their job, not Stewart's. The first element is satisfied here because the scope of Stewart's job was to observe the almond splitting machines and to consult Employer on ways of increasing productivity and identifying areas of achieving product improvement. Stewart's act of unjamming the machinery—an operator's job—was neither within the actual scope of her consultation duties nor within reasonable contemplation of it. (*Blue Diamond I*, *supra,* Cal/OSHA App. 1040471.) We continue to conclude that the record supports this determination.

We also note that our prior determination was upheld by the Superior Court, which also found substantial evidence supported the Board's determination that the first element of the UEDD was met. Because Stewart's job duties only required her to observe the equipment and no part of her job involved handling the equipment, the Superior Court found the act of trying to unjam equipment was completely outside the scope of a reasonable understanding of her assigned work duties. Although the Division admits that Stewart's job duties only required her to observe the machine in operation, the Division contends that it was nonetheless foreseeable that Stewart would touch the splitting machine to remove a buildup of almonds so she could continue observing. We disagree with the latter argument. The parties devoted considerable time during the hearing discussing and identifying Stewart's job duties. The record demonstrates that Stewart's attempt to clear almonds from a running machine was not foreseeable.[5]

As such, we uphold our prior finding that the first element of the UEDD was satisfied by Employer.

b. The Division has waived any argument as to the second element because it failed to argue that the second element was not satisfied.

To prove the second element, an employer must demonstrate that the employee knew their work duties did not encompass the specific activity that caused the injury.

Here, both the Division's opening and reply briefs fail to address the second element of the UEDD. As such, we find that the Division abandoned and waived any challenge to our holding that Stewart knew her work duties did not encompass touching or unjamming the machinery, satisfying the second element.

However, even if we were to assume that the Division is still challenging this element, we would continue to hold that the second element was satisfied because Stewart knew her work duties did not encompass the specific activities of touching or unjamming the machinery. We determined that the second element of the UEDD was met by the examination of training records that show Stewart was instructed never to touch or operate machines. Furthermore, multiple witnesses testified that Stewart understood that her assigned job duties did not include touching or

[5] We note further that, the Division's foreseeability argument in element one is improper because foreseeability is a component of the third element of the UEDD.

unjamming the almond splitting machine. We uphold our prior finding that the second element of the UEDD was satisfied by Employer.

We also observe that the Superior Court also found that the evidence supported our finding on this element, noting that Stewart had, just four days before the incident, been specifically told by her employer "never to touch or operate equipment, ever."

We uphold our prior holding that Employer established the second element of the UEDD.

c. Did Employer establish the third element was met by demonstrating it could not reasonably foresee that Stewart would try to unjam the machinery during the normal course of her assigned duties?

To establish the third element, the Employer must demonstrate it did not and could not have known through the exercise of reasonable diligence and supervision that the employee would so act.

The Division argues the third UEDD element was not met because the injury was foreseeable because of "hazards present due to the safety guards being open" and further argues that Employer's affirmative duty to guard prohibits the application of UEDD. Specifically, the Division argues that an employee's body parts could be caught in a pinch point created by unguarded rollers because,

> "[Witness] testimony that Blue Diamond explicitly warned Ms. Stewart and the other workers that the unguarded rollers and blades presented a serious hazard undermines the Appeals Board's finding that Blue Diamond 'did not and could not have known through the exercise of reasonable diligence and supervision' that a worker would act in a way that would put them at risk of those hazards." (Division's Further Briefing on Remand, pp. 9.)

The Division also argues that Employer's safety briefings and instruction on the dangers associated with the almond splitting machine test being run with the guards open equates to foreseeability.

We disagree with the Division's argument. As we previously found, "It is undisputed Ms. Stewart's duty was to provide consulting services. Employer did not and could not have known through reasonable diligence and supervision its consultant would engage in duties of a machine operator." (*Blue Diamond I*, *supra,* Cal/OSHA App. 1040471.) The Superior Court found, and we agree, "…[Employer] could not have known Ms. Stewart would intentionally place her hand in a running machine to unjam it despite having been expressly informed that she was not to engage in such conduct." In sum, Stewart attempt to unjam the machine was not foreseeable by Employer under any reasonable understanding of her role as consultant, i.e. expressly not an operator.

In an effort to defeat the third element, the Division next cites to the *Newbery* defense, and cases applying the defense. (Division's Further Briefing on Remand, pp. 8-9 [citing *Gaehwiler v. Occupational Safety & Health Appeals Bd*., *supra,* 141 Cal.App.3d 1041; *Bellingham Marine, Bellingham Marine Industries, Inc*., Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).) However, these citations are inapposite. Specifically, the cases cited by the Division discussing the "*Newbery"* defense are not relevant because that affirmative defense is not at issue here and because the foreseeability evaluation for the purposes of the UEDD differs from the foreseeability evaluation for the *Newbery* defense. (*Bellingham Marine Industries, Inc., supra*, Cal/OSHA App. 12-3144; *Gaehwiler v. Occupational Safety & Health Appeals Bd., supra*, 141 Cal.App.3d 1041.) Foreseeability in *Newbery* is predicated on the violation being foreseeable when an employee is engaged in their normal duties or a foreseeable departure from their normal job duties. In contrast, when examining foreseeability in the UEDD, the correct inquiry is whether the departure from assigned job duties was so extreme that the act could not have been reasonably contemplated by the employer.

The Division also relies on the Board's decision in *Southland Industries*, Cal/OSHA App. 1137088, Denial of Petition for Reconsideration (Jul. 1, 2019) to argue that the third element of the UEDD was not satisfied.

In *Southland Industries* the employer fabricated sheet metal heating and cooling ducts using a machine which shapes, bends, and cuts sheet metal. The machine used conveyer belts to move sheet metal through the machine with the belts being driven by an unguarded rotating shaft. The unguarded rotating shaft caused an injury to an employee operating the machine in the normal course of the employee's duties. The Board found that the UEDD was unavailable in *Southland Industries* because the employee was performing his normal duties, negating the first and second elements of the UEDD. The Board also found that the hazard was foreseeable since the proximate cause of the accident was the Employer's failure to guard the shaft during the normal operation of the machine used by the employee as part of their assigned and understood duties, negating the third element of the UEDD. (*Southland Industries*, *supra*, Cal/OSHA App. 1137088.)

Here, the Division's reliance on *Southland Industries* is misplaced because, unlike the instant case, the employee in *Southland Industries* was performing their normal job duties. (*Southland Industries*, *supra*, Cal/OSHA App. 1137088.) The third element of UEDD examines the foreseeability of employee conduct, not potential hazards, precisely because the entire basis for the UEDD is a departure from expected work activity so extreme that it is impossible for an employer to predict.

Furthermore, we hold that the guarding requirement is not an automatic bar on the availability of the UEDD, as discussed more thoroughly below.

For the reasons stated above we find that Employer satisfied the third element of the UEDD.

4. Has the Division been provided with sufficient due process?

The Division asserts that it was denied due process because it was not provided notice and an opportunity to present evidence to rebut the applicability of the UEDD. The Division also claims that its due process right was violated because it did not have an opportunity to propose a fourth element be required to establish the UEDD.

Examining the Division's first claim regarding due process, as mentioned above, we agree that the Division was initially not provided with sufficient notice and an opportunity to present arguments based on the post-hearing amendment by Employer and subsequent Board Decision pertaining to the UEDD defense. However, any due process defect has now been remedied. Our request for the parties to submit additional briefing, and our close review of the submitted briefs, adequately remedied the Division's lack of notice and opportunity to be heard on the merits.

As to the Division's second claim, we have heard the Division and considered its arguments. We decline to add any additional elements to the UEDD.

As such, we find the Division, having received notice and an opportunity to present its argument on the applicability of the UEDD, has been provided sufficient due process. We also find that the Division has been provided due process on the issue of potential additional elements of the UEDD and find that the UEDD was properly named and its elements properly defined.

5. Is the UEDD a complete affirmative defense?

The Division argues if the UEDD applies, then it is only a partial defense to a Serious citation. The Division correctly points out, in both *Andersen Tile Company, supra*, Cal/OSHA App. 94-3076, and *Glass Pak, supra*, Cal/OSHA App. 03-750, in applying the appropriate affirmative defense, we only reduced the classification of the violation from Serious to General, rather than finding the affirmative defense resulted in no violation at all. However, within those cases, we made clear that a complete defense could exist in some circumstances. We noted,

> "*Anderson* [sic] *Tile Company and Glass Pak* hold the defense does not apply in cases where employees do more work than they were supposed to but the work performed does not depart from the duties of their position. In those circumstances, employers may be able to rebut the serious violation presumption, but they cannot assert the defense to vacate a violation. For there to be extreme departure, an employee must engage in work that was not within, nor in reasonable understanding, of their position's duties. (*California Prison Authority*, Cal/OSHA App. 07-2171, Decision After Reconsideration (Jun. 03, 2010) [vacating the citation because the employee's job did not encompass cleaning a duct and employer could not have anticipated such an act].) (*Blue Diamond I*, *supra,* Cal/OSHA App. 1040471.)

Put a different way, in both *Andersen Tile Company* and *Glass Pak* we effectively found that the first element of UEDD was not met. Additionally, neither the Independent Employee Action Defense (IEAD) nor *Newbery* defense were available, however, we concluded a reduction of classification was warranted under Labor Code section 6432. Here, an extreme departure warranting a complete defense did occur because all elements of UEDD were met. (*Blue Diamond I*, *supra,* Cal/OSHA App. 1040471.)

The situation where an employer can satisfactorily meet all elements of UEDD is sufficiently rare because successfully establishing all UEDD elements demonstrates that the employer could not have done more to protect the employee from the alleged violation because the action which gave rise to the violation simply could not have been reasonably anticipated by the employer.

6. Can the UEDD apply when there is an affirmative duty to guard?

The Division argues the UEDD should not apply to citations where an employer has an affirmative duty to protect employees. The Division draws a parallel between the rule that the IEAD is not available when an employer has an affirmative requirement to protect employees. Furthermore, the Division argues that based on Section 4187, subdivision (a), Employer had an affirmative duty to guard Stewart and thus should be foreclosed from utilizing the UEDD. We disagree.

We do not believe that an affirmative guarding requirement automatically bars an employer from asserting the UEDD. The UEDD can rarely be utilized as a defense largely because the circumstances must be, as the namesake suggests, so extreme and unforeseeable that it is nearly impossible for an employer to effectively guard against the employee's action that caused the injury. However, we recognize there may be situations where an affirmative duty to guard would defeat the application of the UEDD. Every application of the UEDD is a fact-specific inquiry into each element and must consider the totality of the circumstances to determine if there is a compelling reason to bar assertion of the UEDD. Here, even if we assume a violation of Labor Code section 4187, subdivision (a), occurred, we do not find the affirmative guarding requirement defeats application of the UEDD.

The ALJ found, and we concur, that the guards on the almond splitting machine were run open to allow Stewart to perform her assigned and understood consulting duties to observe the machine and recommend adjustments. (*Blue Diamond I*, *supra,* Cal/OSHA App. 1040471.) The testing could not be done without the almond splitting machine running. (*Id*.) Stewart was provided training to stay away from and never touch the machine. (*Id*.) Employer could not have known that Stewart, a consultant, would take on the role of operating the almond splitting machine to clean it. Under these precise circumstances, we find the affirmative guarding requirement of Section 4187, subdivision (a), does not prevent application of the UEDD. For the same reasons as stated above, we find the UEDD does apply to Stewart's actions prior to touching the machine.

DECISION

After having heard, read, and considered all arguments on remand, for the reasons discussed above, we uphold our previous Decision vacating both Citation 2, Item 1, and Citation 3, Item 1, based on Employer having established all elements of the Unforeseeable Extreme Departure Defense.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 04/24/2026