

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

In the Matter of the Appeal of:

ROBERT A. BOTHMAN, INC.

Employer

Inspection No.

317201556

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

Commencing on August 27, 2013, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in California maintained by Employer.

On January 30, 2014, the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-notice contested evidentiary hearing.

On September 13, 2016, the ALJ issued a Decision (Decision) which upheld the alleged violations and imposed a single penalty.

Employer timely filed a petition for reconsideration.

The Division filed answer to the petition.

ISSUE

Did Employer prove all elements of the “independent employee action defense” (IEAD)?

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

**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 that 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 a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

FINDINGS OF FACT

- 1. Employer's employee parked a truck at the worksite, leaving the motor running, and exited the truck. At and after that time the truck was unattended.
- 2. The employee who operated and parked the truck possessed a Class A commercial driver's license.
- 3. The employee worked as both a laborer and a driver for Employer; he was not a full-time driver.
- 4. The employee did not set the truck's parking brake.
- 5. The employee did not chock the wheels of the truck.
- 6. Employer did not train the employee to set the parking brake after parking the truck.
- 7. The unattended truck rolled down a slope, striking and fatally injuring another employee.
- 8. Employer did not train the driver in setting the parking brake and Employer's safety program did not specifically refer to or require setting the parking brake.

9. The truck involved in the accident had at least two separate parking brake systems.

DISCUSSION

Employer was cited for serious accident-related violations of section 1593, subdivision (b), and section 1593, subdivision (h). Both citations arose from an incident in which it was undisputed that Employer's employee parked a "haulage vehicle" (truck) without taking proper measures to prevent it from moving while unattended.

Employer's petition for reconsideration states, "This case, thus, hinges on the question of the proof of the elements of the IEAD." (Petition, 2:25.) We agree with Employer on that point, and begin our discussion with an examination of the IEAD and its elements.

The independent employee action defense or IEAD² is an affirmative defense which "[R]ecognizes that some employees may act against their employer's best safety efforts." (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) If it establishes the IEAD, the cited employer is relieved of responsibility for the violation by its employee. (*Marine Terminal Corporation*, Cal/OSHA App. 95-896, Decision After Reconsideration (Sep. 28, 1999).)

To establish the defense, the employer must prove all 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 in matters of safety with respect to the employee's particular job assignment; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and (5) the employee caused a safety infraction which he knew was contrary to the employer's safety requirements. (*Mercury Service, Inc.*, *supra.*) If the employer asserting the IEAD fails to prove one or more of the elements, the defense fails. (*Id.*)

The Decision held that Employer failed to prove element number two. (Decision, pp. 9, 10.) The Decision points out that Exhibits J, 28, 29, and 30 make no reference to setting parking brakes.³ (*Id.*) Employer counters that the employee had obtained his Class A license 25 years ago, maintained a perfect driving record for all those years, both commercial and personal, and that he was trained in the importance of setting the parking brake during his commercial driver training.

Assuming for purpose of discussion the employee was so trained during his initial commercial driver training, that does not help Employer. The training was twenty-five ago, and we cannot determine what vehicles and systems the employee trained on, as compared to the

² The IEAD is analogous to the federal Occupational Safety and Health Review Commission's "employee misconduct defense." (See e.g., *Wheeling-Pittsburgh Steel Corp; United Steelworkers of America, Authorized Employee Representative*, OSHRC 1994.)

³ Exhibit J is Employer's Injury and Illness Prevention Program; Exhibit 28 is its "Fleet Motor Vehicle Safety Program"; Exhibit 29 is Employer's training log; Exhibit 30 is Employer's Job Safety Analysis Worksheet.

truck involved in the subject accident, nor can we determine the efficacy of any such training. While Employer may be said to argue that it is a matter of common sense or understanding that setting the parking brake is proper, the brake was not set in this instance.

Further, while some training may be “portable,” we think it has to be shown to be training applicable to the work, tools, equipment, or vehicle involved in a particular instance, and there must also be some showing regarding the content and quality of the historical training. We note, for example, that Exhibit 32 is a photograph of the dashboard and controls of the truck involved in the accident. It shows, among other features, a red knob used to set the parking brake on a trailer and a yellow knob used to activate the truck’s own separate parking brakes. There is no evidence that the employee was trained 25 years ago on a vehicle which had dual systems such as these.

Moreover, there is no evidence that Employer trained him on which system to use and under what circumstances to use each. The employee testified that Employer had not trained him to set the parking brake. Employer apparently assumed its employee would set the parking brake because of his Class A certification. Employer failed to show it had a well-devised safety program in part because it had not trained its employee to set the parking brake, or which brake system to use under specific circumstances, or in the particulars of the various brake systems on the truck involved in the accident. Also, Employer’s safety program, insofar as the evidence reveals, did not include elements or training related to maintaining positive control of the truck or setting its brake when parking it. Thus, there was insufficient evidence to find that Employer’s safety program was “well devised” since it lacked provisions and training related to section 1593, subdivision (h).

For the foregoing reasons we affirm the finding in the Decision that Employer did not prove its safety program included “training in matters of safety with respect to the employee’s particular job assignment.” (*Mercury Service, Inc.*, supra, element two.)

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

FILED ON: 03/01/2017

