BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **PAR ELECTRICAL CONTRACTORS, INC.** 525 Corporate Drive Escondido, CA 92029 Employer	**DOCKET 13-R3D3-3174** **DECISION**

Statement of the Case

Par Electrical Contractors, Inc. (Employer) is an electrical contractor. Beginning April 22, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Rubin Carr (Carr), conducted an accident inspection at a place of employment maintained by Employer at 30855 Corn Springs Road, Desert Center, California (the site). On October 2, 2013, the Division cited Employer for a single violation of California Code of Regulations, title 8.[1]

Employer filed a timely appeal contesting the existence of the alleged violation and the reasonableness of the proposed penalty as to Citation 1, item 1 (an alleged violation of section 3328, subdivision (a) [failure to ensure machinery or equipment is operated under safe speeds, stresses, or loads]). Employer further alleged the affirmative defenses of extreme departure and independent employee action.[2]

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on September 2, 2015. Robert B. Humphreys, Attorney, of Akin Gump Strauss Hauer & Feld LLP, represented Employer. William Cregar, Staff Counsel, represented the

[1] Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

[2] Although pleaded, Employer waived its logical time and statute of limitations affirmative defenses at hearing.

Division.[3] The matter was submitted on October 2, 2015 to allow the parties the opportunity to file post-hearing briefs.

Issues

1. Did Employee Elmer Diaz (Diaz) operate a Polaris Ranger Utility Vehicle (Ranger) under conditions of speeds, stresses, or loads which endanger employees?
2. Is Employer's violation excused by the independent employee act affirmative defense?
3. Did the Division propose a reasonable penalty for Employer's violation?

Findings of Fact

1. Diaz was operating the Ranger (a machine) at an unsafe speed above 15 miles per hour while trying to negotiate a tight turn, when the accident occurred.
2. The Ranger operates very similarly to a passenger car, and displays its current speed on a speedometer visible to the driver.
3. Diaz possessed a valid driver's license and a clean driving record at the time of the accident.
4. Employer observed Diaz safely operating the Ranger on multiple occasions prior to the accident.
5. Employer's overall safety program included requiring employees to review and acknowledge a safety code of conduct; successful completion of a written safety exam; instruction on Employer's zero tolerance policy re: unsafe acts and horseplay; and, regular site inspections by a dedicated safety team to observe employees and ensure their compliance with safety standards.
6. Employer maintained a 15 mile per hour speed limit at the site for safety reasons, and reminded employees of the speed limit nearly every day at morning safety meetings.
7. Employer enforced a policy of disciplining or firing employees for violations of its workplace safety program.
8. Employer fired Diaz for violating its safety standards and thereby causing the incident.
9. Diaz knew that Employer had zero tolerance for horseplay and other unsafe activities at work, and knew that he was forbidden to operate the Ranger above 15 miles per hour at the site.

[3] Prior to the hearing, Attorney Joel J. Thomas emailed the undersigned and the parties' counsel to indicate that the Third Party, Jasen Hendricks would not be attending the hearing.

Analysis

1. Did Diaz operate a Polaris Ranger Utility Vehicle (Ranger) under conditions of speeds, stresses, or loads which endanger employees?

Section 3328, subdivision (a), states:

> Machinery and equipment shall be of adequate design and shall not be used or operated under conditions of speeds, stresses, or loads which endanger employees.

In citing Employer, the Division specifically alleged:

> The operator's manual for the Polaris Ranger Utility Vehicle stated that the vehicle shall never be operated at excessive speeds and always travel at a speed proper for the terrain. The employer did not ensure that the employee operated the Polaris Ranger Utility Vehicle at a safe speed. On April 1, 2013, an employee [*was*] traveling at an unsafe speed and as he was turning left the Polaris Ranger Utility Vehicle went airborne causing a serious injury to the passenger.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

To establish a violation of section 3328, subdivision (a), the Division must show that: 1) the Ranger is machinery or equipment within the scope of the safety order; 2) the Ranger was used under conditions of speeds, stresses, or loads that endangered employees.

The accident occurred when a Polaris Ranger Utility Vehicle off road vehicle (ORV) driven at the site by Diaz overturned, seriously injuring Diaz's occupant, Jasen Hendricks (Hendricks). The parties did not dispute that the Ranger is machinery or equipment within the scope of section 3328,

subdivision (a). Furthermore, both the Division and Employer agreed, and offered evidence to establish, that the underlying accident was the result of the Ranger being operated by then-employee Diaz at unsafe speed. (Testimony of Carr, Christopher Larson, Christopher Robinson, and Steve Welshons; see Exhibits 1, 3, A and B.) Specifically, Steve Welshons (Welshons) testified credibly that based on his extensive experience driving identical Rangers, and based on the physical evidence he observed at the scene (as depicted in Exhibits J and K), he estimated that Diaz was driving the Ranger at approximately 25 to 30 miles per hour while attempting to negotiate a tight turn when the accident occurred. That is approximately twice the posted speed limit at the site. Welshons reasonably concluded based on his experience and observations that Diaz was attempting to fishtail[4] the Ranger, and he testified that at that speed one could overturn a Ranger while attempting to negotiate a sharp turn. Welshons' credible testimony is sufficient to show that Diaz was operating the Ranger at an unsafe speed or under stresses that endangered himself and his passenger, Hendricks. This is further corroborated by Carr's testiimony that he based his conclusion that Diaz was operating the Ranger at unsafe speed on Employer's accident investigation report, (Exhibit 3), and he disregarded Hendricks' claim that Diaz was driving at 15 miles per hour when the accident occurred. (See Exhibit A.) Therefore, for the foregoing reasons, the Division met its burden of establishing by a preponderance of the evidence that Diaz operated of the Ranger at unsafe speeds and under unsafe stresses, in violation of section 3328, subdivision (a).

2. Is Employer's violation excused by the independent employee act affirmative defense?

Employer contends that its violation of section 3328, subdivision (a), resulted from Diaz's willful or intentional violation of Employer's safety rules, and therefore, Employer is entitled to relief under the independent employee action affirmative defense (IEAD). Independent employee action is an affirmative defense established by the Board. (*Paso Robles Tank, Inc.*, Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009), citing *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). In order to prevail under the defense, an employer must prove by a preponderance of the evidence that:

> 1. The employee was experienced in the job being performed.

[4] Literally, "The lateral movement of the rear of a motor vehicle in a skid." (Ballentine's Law Dict. (3d. ed. 2010).)

> 2. The employer has a well-devised safety program which includes training employees in matters of safety respective to 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.
>
> 5. The employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements.

Employer must prove all five elements by a preponderance of the evidence in order to establish the defense. (*Paso Robles Tank, Inc.*, supra; *Mercury Service, Inc.*, supra.)

The evidence showed that Diaz was reasonably experienced in the job being performed. Christopher Larson, Employer's director of training for its western region, testified that Diaz had been working at the site for approximately 4 months when the accident occurred. Previously, the Board has found that approximately 30 hours of experience driving a forklift over the space of 3 months was insufficient to establish an employee was experienced at his job. (*Home Depot USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).) The forklift in that case operated much differently from a regular car. (*Id.*)

Here, Robinson, Employer's safety coordinator for the site at the time of the accident acknowledged there was no formal instruction in the operation of the Ranger. Nonetheless, he gave unrebutted testimony that the Ranger operated very similarly to a car and clearly displayed its current speed. Critically, Robinson testified he had personally observed Diaz drive the Ranger (or similar ORVs) safely at the site prior to the accident. (See *West Coast Communication,* Cal/OSHA App. 05-2801-02, Decision After Reconsideration (Feb. 4, 2011) [employer need only show that employee had sufficient experience to not commit the violation].) Both Robinson and Welshons, who was the site superintendent at the time of the accident, testified that all that was legally required to drive the Ranger was a valid driver's license, and Diaz had a valid driver's license and clean driving record on the date of the accident. (See Exhibit G.) Finally, it was uncontroverted that Diaz was driving on recently graded, flat ground at the time of the accident, and there was no evidence of hazards in Diaz's path that would have necessitated special training. (See Exhibit I; Testimony of Robinson.) In light of the overwhelming and uncontroverted evidence that the Ranger did not require special skill to

drive, and that Diaz had been observed safely driving the Ranger prior to the accident, Employer established the first element of its defense by a preponderance of the evidence.

Employer presented significant evidence that it had a well-devised safety program including training employees in matters of safety relative to their job assignments. Larson testified to the extensiveness of Employer's overall safety program, which included: requiring employees to review and acknowledge a safety code of conduct; successful completion of a written safety exam; instruction on Employer's zero tolerance policy re: unsafe acts and horseplay; and, regular training on safety topics that meets or exceeds the Division's requirements. Larson also testified that the site was regularly inspected by a dedicated safety team. Although the Division points out that Diaz did not receive formal classroom training on how to safely operate the Ranger, nonetheless, he was required to ride along with more senior and experienced employees such as Hendricks as part of his training. (Testimony of Robinson.) Thus, Diaz had ample opportunity to observe the safe operation of the Ranger (or other, similarly operated ORVs) and further training would have been unnecessary. Furthermore, Robinson and Welshons both testified that numerous signs around the site advised employees of a 15 mile per hour speed limit, and Welshons also stated that the speed limit was discussed almost daily at morning safety briefings. Given the uncontroverted evidence of the myriad steps taken by Employer to safeguard the site and communicate its established safety policies to employees such as Diaz, Employer cannot be faulted for its safety program. Indeed, the Division failed to offer substantial evidence of deficiencies in Employer's training program. Therefore, based on the totality of the evidence adduced at hearing, Employer established the second element of its affirmative defense by a preponderance of the evidence.

Employer demonstrated that it effectively enforced its safety program. Prompt investigation of workplace accidents is indicia of effective enforcement. (See *David Fisher, dba Fisher Transport, A Sole Proprietorship*, Cal/OSHA App. 90-0726, Decision After Reconsideration (Oct. 16, 1991). Here, the uncontroverted evidence demonstrated that Employer promptly and thoroughly investigated the incident. (Exhibits 3, A.) In addition, Employer offered evidence of regular and comprehensive training and safety inspections, and Employer previously observed Diaz operating the Ranger safely. (See, e.g., *Roger Byg dba Packaging Plus*, Cal/OSHA App. 96-4574, Decision After Reconsideration (July 19, 2000) [holding that the employer did not effectively enforce its safety program where a supervisor had previously observed employee operating machine without a guard in place, and took ineffective actions to stop or correct the behavior].) Finally, Employer offered uncontroverted evidence that this type of accident had never happened previously at the site. This leads to a conclusion that Employer had been effectively enforcing its safety program with respect to safe operation of ORVs.

Thus, Employer proved the third element of its affirmative defense by a preponderance of the evidence.

With regard to the fourth element, that the employer must maintain a policy of sanctions against employees who violate its safety program, Employer offered uncontroverted evidence that it promptly dismissed Diaz following the incident. In rebuttal, the Division argued that there was no evidence that Hendricks was disciplined, thereby calling Employer's enforcement into question. The Division's position, however, has previously been rejected by the Board, which has held that the independent employee act defense "does not require any particular sanction for a safety offense". (*David Fisher, dba Fisher Transport, A Sole Proprietorship*, supra.) There, the Board granted the employer's appeal, where the preponderance of the evidence established a policy of sanctions, including termination, for the underlying behavior (failure to wear appropriate protective gear). (*Id.*)

Here, by comparison, Employer offered unrebutted testimony that it fired Diaz after the incident in response to his conduct. Larson also testified that Employer made all of its employees, including Diaz, acknowledge in writing that it "has a zero tolerance policy toward unsafe acts," (Exhibit E), and that Employer maintained a progressive discipline approach that included terminating employees for safety violations. The uncontroverted evidence shows that Diaz was operating the Ranger when the incident occurred, and there was only minimal evidence of Hendricks' involvement by way of his hearsay statement to Employer that he and Diaz were engaged in horseplay[5]. The weight of the evidence supports a finding that Diaz knowingly violated a workplace safety rule by operating the Ranger above 15 miles per hour while attempting to negotiate a tight turn, and explains why Employer terminated Diaz but why it may not have terminated (or disciplined) Hendricks. Therefore, Employer met its burden of establishing the fourth element of its defense by a preponderance of the evidence.

The fifth element requires evidence that the employee caused a safety infraction which he or she knew was contrary to the employer's safety requirements. Here, the overwhelming evidence established that Diaz was experienced in driving the Ranger, that he had been repeatedly instructed not to operate the Ranger above 15 miles per hour, and that he had received visual reinforcement of this instruction via numerous speed limit signs throughout the site. Furthermore, Diaz acknowledged Employer's zero tolerance policy for horse play and other unsafe actions, prior to the incident. There is no dispute that Diaz understood what was expected of him at work, and that Diaz consciously committed an action in violation of Employer's safety requirements when he operated the Ranger at approximately 20-30

[5] Hendricks' motive for his statement is unknown, and he was not produced at hearing where he could be cross-examined. Thus, little weight is given to his out of court statements.

miles per hour while attempting to negotiate a tight turn. Therefore, Employer established the fifth element of its defense by a preponderance of the evidence.

For the foregoing reasons, Employer established the independent employee act affirmative defense by a preponderance of the evidence. As such, Employer's appeal is granted.[6]

3. Did the Division propose a reasonable penalty for Employer's violation?

As noted above, Employer's appeal is granted and the citation and proposed penalty are therefore vacated.

Conclusion

The Division established by a preponderance of the evidence that Employer violated section 3328, subdivision (a), because Diaz operated the Ranger, a machine, at unsafe speed and under conditions of unsafe stresses, thereby endangering himself and Hendricks. Employer established by a preponderance of the evidence that its violation is excused as the result of independent employee action.

Order

It is hereby ordered that Employer's appeal of Citation 1, item 1 is granted, and, as such, the citation is vacated.

Dated: October 22, 2015
HIC:ml

HOWARD I. CHERNIN
Administrative Law Judge

[6] In light of the fact that Employer's appeal is granted for the reasons stated above, the undersigned ALJ has determined that there is no need to discuss Employer's contention that the violation is excused by Diaz's alleged extreme departure from Employer's instructions regarding the scope of his work assignment.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

Name: PAR Electrical Contractors Inc.
Docket 13-R3D3-3174

Date of Hearing: September 2, 2015

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional documents	**X**
2	Division's Accident Report dated April 8, 2013	**X**
3	Employer's Injury/Illness Investigation Form #008, dated April 2, 2013	**X**
4	Division's C-10 Proposed Penalty Worksheet	**X**

Employer's Exhibits[7]

Exhibit Letter	Exhibit Description	Admitted
A	Employer's Workplace Accident Interview Questionnaire re Jason Hendricks	**X**
B	Documentation Worksheet	**X**
C	Signed Safety Code of Conduct Acknowledgment Card re Elmer Diaz	**X**
D	Signed Safety Code of Conduct Acknowledgment Card re Jasen Hendricks	**X**
E	Employer's Safety Manual Comprehensive Exam re Elmer Diaz	**X**

[7] Exhibits 2, 3, A, B, G, and H were ordered to be sealed after hearing by the undersigned ALJ, in order to protect the personally identifying information (PII) contained therein from disclosure. Post-hearing, the parties filed and served copies of the above-referenced exhibits that were redacted of all protected PII. The redacted versions of the above-referenced exhibits are hereby made part of the public (unsealed) record of this proceeding, and references within the Decision are to the redacted versions unless explicitly stated otherwise.

F	Employer's Safety Manual Comprehensive Exam re Jasen Hendricks	**X**
G	Motor Vehicle Record re Elmer Diaz	**X**
H	Motor Vehicle Record re Jasen Hendricks	**X**
I	Aerial view of site as depicted in Employer's promotional calendar	**X**
J	Rollover photo # 1 taken by Steve Welshons	**X**
K	Rollover photo # 2 depicting vehicle tracks, taken by Steve Welshons	**X**
L	Diagram of scene prepared by Steve Welshons during testimony at hearing	**X**

Witnesses Testifying at Hearing

Rubin Carr
Christopher Larson
Christopher Robinson
Steve Welshons

CERTIFICATION OF RECORDING

I, HOWARD I. CHERNIN, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

_____ _____

HOWARD I. CHERNIN Date

SUMMARY TABLE
DECISION

In the Matter of the Appeal of:

PAR ELECTRICAL CONTRACTORS, INC.
DOCKET 13-R3D3-3174

Abbreviation Key: Reg=Regulatory
G=General W=Willful
S=Serious R=Repeat
Er=Employer DOSH=Division
AR-Accident Related

IMIS No. 316211457

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	**FINAL PENALTY ASSESSED BY BOARD**
13-R3D3-3174	1	1	3328(a)	G	ALJ granted Employer's appeal as set forth in attached Decision		X	$1,125	$1,125	**$0**
					Sub-Total			$1,125	$1,125	**$0**
					Total Amount Due*					**$0**

(INCLUDES APPEALED CITATIONS ONLY)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

NOTE: *Please do not send payments to the Appeals Board.* **All penalty payments should be made to:**
Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

ALJ: HIC/ml
POS: 10/21/15