

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MK AUTO INC
2301 Arden Way
Sacramento, CA 95825

Employer

DOCKETS 12-R2D1-2893
and 2894

DECISION

Introduction

MK Auto Inc (Employer) is an automotive sales and service company. Beginning May 11, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Rhyanne Truax, conducted a safety inspection at a place of employment maintained by Employer at 2301 Arden Way, Sacramento, California. On October 1, 2012, the Division cited Employer for violations of Title 8, California Code of Regulations, section 342(a) failure to report a serious injury, section 3314(c) failure to stop or de-energize or disengage vehicle engine, or lock or block moveable parts to prevent inadvertent movement during the servicing and adjusting process.¹

Employer filed timely appeals for Citation 1, Item 1, and Citation 2, Item 1, contesting the existence of the violation and the reasonableness of the proposed penalty on each citation.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on October 30, 2013. Christopher Hearty represented Employer. Jon Weiss, District Manager, represented the Division. The parties presented oral and documentary evidence. The parties filed post-hearing briefs. The matter was submitted for decision on December 13, 2013. The submission date was extended to March 31, 2014 by the ALJ.

Stipulations and Pre-Hearing Determinations

The parties stipulated to the following (Exhibit 3):

1. An accident occurred on March 30, 2012.

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

2. MK Auto Inc was the employer of the injured employee at the time of the accident.
3. The accident site was 2301 Arden Way in Sacramento, California.
4. Randolph Ank (Ank) was the injured employee who sustained a serious injury (fingertip amputation) as defined by §330(h) and Labor Code section 6432(e) as a result of the accident.
5. Rhyanne Truax (Truax), at the time of the accident, an Associate Safety Engineer with Cal/OSHA, was assigned to investigate the accident.
6. The penalty associated with the citation was calculated in accordance with the Division's policies and procedures.
7. In addition, and in regard to Citation 1, Item 1, a reporting violation, the parties, during the hearing, agreed to settle that item and stipulated to the following:
 - a) An employee of Employer suffered a serious and reportable workplace injury on March 30, 2012.
 - b) Employer made late notification to the Division.
 - c) The proper penalty reduction for a late report, under the circumstances, and pursuant to *Central Valley Engineering & Asphalt Cal/OSHA App. 08-5001 Decision After Reconsideration* (December 4, 2012), applying Labor Code Section 6319 adjustments for good faith (15%), size (20%) and history (10%), is \$2,250.

Pursuant to *Central Valley Engineering & Asphalt, supra*, Citation 1, Item 1, a violation of § 342(a), is affirmed and a penalty of \$2,750 is assessed as set forth in this Decision and in the attached Summary Table.

Issues

1. Did Employer violate §3314(c) by failing to stop and de-energize or disengage a motor vehicle engine, or lock or block moveable parts to prevent inadvertent movement during the servicing and adjusting process?

2. Assuming Employer had intended to assert §3314(c)(1) as an affirmative defense, did Employer carry its burden of proof to establish each of the three requirements of that safety order?²
3. Assuming the affirmative defense of Independent Employee Action had been properly asserted, did Employer carry its burden of proof to establish each the five elements of the Independent Employee Action Defense (IEAD)?³

Findings of Fact:

1. Employer failed to stop and de-energize or disengage moving parts of a motor vehicle engine, or lock or block moveable parts to prevent inadvertent movement during the servicing and adjusting process.
2. Employer failed to carry its burden of proof to establish any of the three elements required by §3314(c)(1).
3. Employer failed to carry its burden of proof to establish four of the five elements of the IEAD.

Analysis:

- 1. The violation is established. Employer failed to stop and de-energize or disengage a motor vehicle engine, nor did Employer lock or block moveable parts to prevent inadvertent movement during the servicing and adjusting process.**

Section 3314(c), under Cleaning, Servicing and Adjusting Operations, provides the following:

Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

² Section 386 allows the Appeals Board to amend an appeal to conform to proof presented during the hearing. Employer offered evidence to suggest that it was relying upon §3314(c)(1) as an affirmative defense. Such an amendment is not necessary in the instant matter, as Employer failed to present sufficient evidence to establish this affirmative defense.

³ Section 386 allows the Appeals Board to amend an appeal to conform to proof presented during the hearing. Employer offered evidence to suggest that it was asserting the Independent Employee Action Defense. Such an amendment is not necessary in the instant matter, as Employer failed to present sufficient evidence to establish this affirmative defense.

In the citation, the Division alleges the following:

On March 30, 2012 an employee of MK Auto Inc was seriously injured at the employer's jobsite located at 2301 Arden Way in Sacramento, CA while diagnosing and repairing an automobile. The vehicle had not been stopped or the power source de-energized or disengaged or the moveable parts blocked or locked to prevent inadvertent movement during the servicing and adjusting process.

The elements of the regulation are: (1) machinery or equipment capable of movement; (2) shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out; and (3) accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

The accident leading to the citations occurred in the following circumstances. On March 30, 2012, Ank, the injured employee, was servicing the running engine on a vehicle. The employee was trying to determine the source of a noise coming from the engine. While the engine was running Ank grabbed a rag and was holding it in his right hand while reaching into the engine compartment to push on the timing cover with his finger to ascertain the source of the noise. The rag became entangled in the crank and alternator belt, and this entanglement pulled his right hand into the steel crankshaft pulley.

The engine was idling at the time of the accident. Ank's right index finger was pulled around the pulley and as it exited the pulley he saw that the flesh had been stripped from the bone. Ank was taken to the hospital where approximately one half of Ank's right index finger was amputated. The parties stipulated that the employee sustained a serious injury as defined by §330(h) and Labor Code section 6432(e) as a result of the accident.

The above facts are sufficient to establish a violation of §3314(c). The Serious Accident-related classification is not under appeal and is therefore established by operation of law.

Employer, in its brief, asserts that §3314(c) is not applicable in the instant matter based on the language contained in §3314(a)(1). Section 3314(a)(1), in relevant part, provides the following:

(a) Application.

(1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or

start up of the machines or equipment, or release of stored energy could cause injury to employees.

Employer argues that “as the intention of Mr. Ank’s Diagnosis was to isolate a noise when the engine was running then there would be no possibility of ‘unexpected energization or start up of the machines or equipment, or release of stored energy.’” Employer is correct in its assertion that § 3314(a)(1) contemplates that the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees. In the instant matter Employer maintains that the engine must be running to diagnose the source of the noise. Section 3314(c)(1) contemplates situations where machinery must be in motion during servicing operations. In *Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2217, Decision After Reconsideration, (March 11, 2013) the Board held:

Section 3314(c) is itself internally consistent in view of §3314(c)(1), and one need not refer to §3314(a) to apply §3314(c). If a machine must be in motion for the work to be done, additional tools or "other methods or means to protect employees from injury" must be provided. (§3314(c)(1).)

Employer, in the instant matter, argues that the engine needed to be in motion for the work to be done. Therefore, according to *Thyssenkrupp, supra*, Employer cannot rely on §3314(a) to absolve itself from the responsibilities created by §3314(c)(1). The requirements of §3314(c)(1), and analysis of whether Employer satisfied those requirements, are set out below.

2) Employer failed to carry its burden of proof to establish each of the three requirements of §3314(c)(1).

Section 3314(c)(1) provides the following:

If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (eg., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

In *Dade Behring Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (December 30, 2008), the Board held:

An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden-of raising and proving at the hearing. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982); *Roof Structures, Mc.*, Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983); and *The Koll Company*, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983).)

Here, Employer did not raise §3314(c)(1) as a defense or otherwise allege facts in its appeal form providing notice that it would seek to raise the alternative provisions as applicable when the machine is required to be running. Employer did, however, provide testimony during the hearing and argument in its closing brief that §3314(c)(1) was applicable in the instant matter. As such, the requirements of §3314(c)(1) and its application will be afforded further analysis.

Section 3314(c)(1) has three elements, which if proven by an employer, would excuse the violation and result in employer's appeal being granted. Employer must prove (1) that the machinery must be capable of movement during this period in order to perform the specific task; (2) that the employer minimized the hazard by providing and requiring the use of extension tools or other methods or means to protect employees from injury due to such movement; and (3) that employees were made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

The first element is whether the machinery must be capable of movement during the servicing operation to perform the task. Ank testified that, at the time of the accident, the engine was running and that he was trying to determine if the timing cover could be moved to stop the noise. Ank was poking on the timing cover when the rag got caught. Employer provided no testimony that the engine must be running during this type of servicing operation. Weiss testified that, in light of the type of work being done, there was no need for the engine to be running when Ank was testing the timing cover. Weiss testified as to other procedures that Ank could have followed to diagnose the source of the noise with the engine off. Weiss's testimony was credible, and establishes that Employer did not need to run the engine to accomplish the task that Ank was carrying out. Employer, therefore, failed to prove the first requirement of §3314(c)(1).

The second element requires employers to minimize the hazard by providing and requiring the use of extension tools or other methods or means to protect employees from injury due to such movement. Employer provided no

such tools or other equipment to Ank for this task. Truax testified that Employer did not provide an extension tool to Ank. Employer provided no evidence that it provided extension tools to its employees. Ank testified that he should have used a screwdriver, a punch, or any other thing to perform the service operation. There is no evidence that Employer provided such an extension tool. Employer provided no evidence that it required the use of extension tools or other methods or means to protect employees from injuries associated with moving machinery. Employer, therefore, failed to prove the second requirement of §3314(c)(1).

The third element requires employers to make employees familiar with the safe use and maintenance of such tools, methods or means, by thorough training. Truax testified that Employer provided no training to Ank regarding the use of extension tools. Employer, in its response to the Division's 1BY, "Notice of Intent to Issue Serious Violation," states that Ank "was of journeyman status and had received training related to this procedure as far back as trade school" (Exhibit 7). Employer provided no evidence that it provided training to Ank regarding the use of extension tools. Employer, therefore, failed to prove the third requirement of §3314(c)(1).

Employer has failed to prove any of the three elements which are required to meet its burden of proof to establish an affirmative defense by way of §3314(c)(1). Therefore, Employer may not avail itself of this affirmative defense.

3) Employer failed to carry its burden of proof to establish each of the five elements of the IEAD.

The Independent Employee Action Defense has five elements, which if proven by an employer, excuses the violation and results in employer's appeal being granted. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration, (October 16, 1980)) Employer must prove: (1) that the employee who caused the violation was experienced in the job being performed; (2) that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments; (3) that the employer effectively enforces the safety program; (4) that the employer has a policy of sanctions against employees who violate the safety program; and (5) that the employee caused a safety infraction which he or she knew was contrary to employer's safety requirements.

The first element is whether the injured employee, Ank, was experienced in the job being performed. The evidence shows that Ank is a journeyman automobile repair mechanic, who has been doing mechanical repairs since 1974. Employer has proven that Ank had the requisite experience to meet the first requirement of the IEAD.

The second requirement for the IEAD is that the employer had a well-devised safety program which includes training employees in matters of safety respective to their job assignments. Employer provided no evidence regarding its safety program, nor did it produce any documentation of training provided to Ank. Employer, therefore, failed to prove the second element of the IEAD.

The third element of the IEAD defense requires proof that Employer effectively enforces its safety program. Employer provided no evidence that it effectively enforces its safety program. Employer, therefore, failed to prove the third element of the IEAD.

Element four of the IEAD requires proof that Employer has a policy of sanctions against employees who violate the safety program. Employer provided no evidence that it has a policy of sanctions against employees who violate the safety program. Employer, therefore, failed to prove the fourth element of the IEAD.

Finally, element five requires proof that the employee caused a safety infraction which he or she knew was contrary to employer's safety requirements. Employer provided no testimony that Ank knowingly acted contrary to Employer's safety requirements. Ank testified that he works on vehicles with the engine running all day long, and that he should not have stuck his finger near the running engine. Ank could not recall why he picked up the rag with his hand before placing that hand within the area of the running engine. Ank testified that a normal procedure would have included the use of a screwdriver, a punch, or any other thing that would have prevented his finger from being taken off.

In retrospect, Ank knew that he should have used a different procedure to find the source of the engine noise, but Employer provided no evidence that Ank knew, at the time of the accident, that he had caused a safety infraction which was contrary to Employer's safety requirements. Employer, therefore, failed to prove the fifth element of the IEAD.

Employer has proven only one of the five elements which are required to meet its burden of proof to establish an Independent Employee Action Defense. (*Mercury Service, Inc., supra.*) Therefore, Employer may not avail itself of this affirmative defense.

Conclusions and Order

In regard to Citation 1, Item 1, pursuant to the parties' stipulations, a violation of § 342(a) is affirmed and a penalty of \$2,750 is assessed as set forth in this Decision and in the attached Summary Table.

In regard to Citation 2, Item 1, the evidence supports a finding that Employer violated §3314(c) by failing to stop or de-energize or disengage a motor vehicle engine, or lock or block moveable parts to prevent inadvertent movement during the servicing and adjusting process, which exposed its employees to hazards §3314(c) was designed to address. The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures. Therefore, a penalty of \$18,000 is assessed for the reasons described herein, and as set forth in the attached Summary Table.

Total penalties are assessed in the amount of \$20,750.

Dated: April 24, 2014

KEVIN J. REEDY
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

MK Auto Inc

Dockets 12-R2D1-2893 and 2894

Date of Hearing – October 30, 2013

Division's Exhibits – Admitted

Exhibit Number	Exhibit Description
1.	Jurisdictional documents
2.	Penalty calculation worksheet
3.	Stipulations of parties
4.	Photo of top view of Timing Cover area
5.	Cal/OSHA Accident Report
6.	Statement of Magdi Gendi
7.	Cal/OSHA form 1BY and Employer response

Employer's Exhibits – None submitted

Witnesses Testifying at Hearing

1. Randolph Ank
2. Rhyanne Truax
3. Jon Weiss
4. Christopher Hearty

CERTIFICATION OF RECORDING

I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled 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.

Signature

Date

SUMMARY TABLE

DECISION

<i>In the Matter of the Appeal of:</i> MK AUTO INC DOCKETS 12-R2D1-2893 and 2894					ABBREVIATION KEY: Reg=Regulatory G=General S=Serious ER=Employer DOSH=Division W=Willful R=Repeat 					
IMIS No. 314577354										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A F F I R M	V A C A T E	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R2D1-2893	1	1	342(a)	Reg	Penalty reduced by ALJ - late notification	X		\$5,000	\$5,000	\$2,750
12-R2D1-2894	2	1	3314(c)	S	ALJ affirmed violation	X		\$18,000	\$18,000	\$18,000
Sub-Total								\$23,000	\$23,000	\$20,750
Total Due										\$20,750
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> All penalty payments must be made to: Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142					(INCLUDES APPEALD CITATIONS ONLY)					
					*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have questions					

ALJ: KR
POS: 04/24/14

