

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

In the Matter of the Appeal
of

SEAFOOD CITY SUPERMARKET
11098 Foothill Boulevard
Rancho Cucamonga, CA 91739

Employer

DOCKETS 14-R4D4-2308
and 2309

DECISION

Statement of the Case

Seafood City Supermarket (Employer) sells meat. Beginning January 30, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Jerry Young conducted an accident inspection at a place of employment maintained by Employer at 11098 Foothill Boulevard, Rancho Cucamonga, California (the site). On July 8, 2014, the Division cited Employer for a serious violation of section 4543, subdivision (c)¹ for failure to use a pusher plate when slicing pork shoulder bone.

Employer filed a timely appeal contesting the existence of the alleged violation, its classification, and the reasonableness of the proposed penalty. Employer alleged multiple affirmative defenses. At the hearing, Employer withdrew the independent employee action defense.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on March 25, 2015. Ronald E. Medeiros, Attorney of the Robert D. Peterson Law Corporation, represented Employer. Sandra L. Hitt, Staff Counsel, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on March 25, 2015. The ALJ extended the submission date to April 1, 2015 on her own motion.

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

Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

Issues

1. Did Employer's employee fail to use a pusher plate when slicing short ends with a meat cutting band saw?
2. Was the violation properly classified as serious accident-related?
3. Did Employer know of the violation, or could Employer have known of the violation with the exercise of reasonable diligence?
4. Was there a causal nexus between the violation and the occurrence of Roland Moreno's injury?

Findings of Fact

1. On January 10, 2014, Employer's employee, Meat Clerk Roland Moreno (Moreno), held a cut of pork shoulder bone against a gauge plate when slicing short ends with a meat cutting band saw.
2. Moreno did not use a pusher plate. He held the bone with his hands.
3. Moreno's right index finger contacted the cutting edge of the band saw blade and it was partially amputated.
4. Serious physical harm as a result of the actual hazard created by failure to use a pusher plate was a realistic possibility.
5. Failure to use a pusher plate caused Moreno's injury².
6. Moreno's supervisor was present when Moreno used the band saw. Moreno was in the open when he used the band saw. Moreno's supervisor knew, or could have known with the exercise of reasonable diligence, that Moreno did not use a pusher plate.

Analysis

- 1. Did Employer's employee fail to use a pusher plate when slicing short ends with a meat cutting band saw?**

The Division cited Employer for a violation of section 4543, subdivision (c), which provides as follows:

Guarding of Meat Cutting Band Saw Blades.

(c) Pusher plates shall be used to hold the cut of meat against the gauge plate when slicing short ends to prevent the hands from nearing the cutting edge of the saw blade.

² Employer stipulated that Moreno's injury was serious within the meaning of the Labor Code section 6302, subdivision (h) and section 330, subdivision (h).

Citation 2, Item 1, alleges as follows:

On January 10, 2014, an employee working at Seafood City Supermarket, located at 11098 Foothill Boulevard, Rancho Cucamonga, California, sustained a serious injury while operating a Hobart band saw meat cutter (Model: 6801, Serial No.: 311467097). The Meat Manager instructed the employee to cut 24 bone-in pork shoulders. Each shoulder was approximately 8-9 inches long and approximately four inches in diameter. The accident occurred when the employee sliced the pork shoulder bone within approximately three inches of the cutting blade without using a pusher plate. The employer did not ensure that the employee used a pusher plate to prevent his hands from nearing the cutting edge of the saw blade.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

On January 10, 2014, Assistant Supervisor Antonio Ramos (Ramos) instructed Meat Clerk Roland Moreno (Moreno) to slice ends of pork bone into four parts approximately one inch or less each. Before being cut, the bones were 2½ to 3½ inches long. They are found to be short ends.

To make the cuts, Moreno used his two hands and a meat cutting band saw. He held the bone against the gauge plate with his hands. He did not use a pusher plate. The Division established a violation of section 4543, subdivision (c).

Employer argued that the safety order did not apply because Moreno was cutting bone only and not meat. At hearing, Moreno referred to cutting bone, but he did not say that the bone had no meat on it. The Assistant Opening Manager³ referred to meat when Associate Safety Engineer Jerry Young interviewed her. Employer's written statement referred to "meat" being cut. (Exhibit 3) Employer could have proven that there was no meat on the bones, but it chose not to present any evidence on the subject, thereby raising

³ Mangy DeLeon (phonetic spelling)

the inference that meat was on the bone. (Evidence Code §§412, 413)⁴ The evidence is sufficient to find that Moreno was cutting meat. Even if Moreno were cutting bone with no meat, the reference to “meat” in § 4543, subdivision (c) presumably includes bone. A contrary interpretation does not make sense⁵ and does not promote employee safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.)⁶

Therefore, the Division established a violation of section 4543, subdivision (c).

2. Was the violation properly classified as serious accident-related?

⁴ Evidence Code §413 provides, “In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party’s failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case. Evidence Code §412 provides, “If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.” The Board has gone beyond the “distrusting” weak evidence rule. In *Rudolph & Sletten, Inc.*, Cal/OSHA App. 85-419, Decision After Reconsideration (Dec. 24, 1985), it held that “failure to provide the testimony of a critical witness which would have established a defense may result in an inference adverse to Employer’s contention.” That employer relied on its project superintendent and foreman’s hearsay testimony rather than call the field superintendent who allegedly made the statements about what the workers were doing. This principle would apply where the Employer fails to call a critical employee necessary to establish lack of meat on the pork bone. Further, the Board has found that a party’s failure to offer evidence although production of the evidence was easily within the party’s power to do so raises the inference that the evidence, if produced, would have been adverse to their position. (*Shimmick-Obayashi*, Cal/OSHA App. 08-5023, Decision After Reconsideration (Dec. 30, 2013), citing *Shehtanian v. Kenny* (1958) 156 Cal. App. 2d 580.)

⁵ It has long been held that where a statute is susceptible of two constructions, one leading to mischief and absurdity, and the other leading to sound sense and wise policy, the latter construction is adopted. (*Tiechert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002), citing *Lockheed Missiles & Space Co.*, Cal/OSHA App. 79-492, Decision After Reconsideration (Apr. 14, 1982).)

⁶ In *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, the California Supreme Court held that the state’s work place safety and health law should be given a “liberal interpretation for the purpose of achieving a safe working environment.” (*Id.* at 313) The Appeals Board has applied that instruction to mean that the law requires any safety order interpretation “to be done in a light most favorable to employee safety.” (*Baldwin Contraction Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001).) The Board adopts an approach that safety orders must be interpreted in a manner that affords maximum protection to workers. (*Beutler Heating and Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001).) In *Anning Johnson Company*, Cal/OSHA App. 06-1975, Decision After Reconsideration (Jan 13, 2012), the Board, citing *Carmona, supra*, and relying on the principle of viewing safety orders in the way that is most protective of worker safety, rejected an employer’s view of the meaning of a safety order, because to adopt that interpretation would “render the safety order applicable to a smaller number of dangerous work activities, and would thus render the safety order less protective of worker safety.”

Labor Code § 6432 states:

(a) There shall be a rebuttable presumption that a ‘serious violation’ exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: ...

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*)

The violation was failure to use a pusher plate⁷. The pusher plate is required as it acts as a guard for an employee’s hands and fingers. The hazard created by the violation is laceration or amputation of hands and fingers. Here, Moreno’s right index finger was partially amputated when it contacted the band saw blade as he was slicing. Employer stipulated that the injury was serious. The occurrence of a serious injury is proof that a serious injury is a realistic possibility.

The realistic possibility of a serious injury combined with existence of the actual hazard caused by failure to use of a pusher plate comes within the definition of “serious” set forth in section 6432. Therefore, the violation was properly classified as a serious violation.

3. Did Employer know of the violation, or could Employer have known of the violation with the exercise of reasonable diligence?

Under Labor Code section 6432, subdivision (b), a serious violation is not found where employer demonstrates that “it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” (See *Central Coast Pipeline*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).) To establish that it could not have known of

⁷ Neither Moreno nor his supervisor, Ramos, used pusher plates. Moreno credibly testified that he saw Ramos cutting without using a pusher plate. This evidence was not disputed.

the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A. A. Portonova & Sons, Inc.* Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

Moreno's supervisor, Ramos, was present on January 10, 2014. Ramos instructed Moreno to make the cuts. Moreno had been using the band saw all morning. Ramos was approximately eight to 10 feet away from Moreno when Moreno was cutting. Ramos was on the other side of the band saw, so his vision of Moreno may have been blocked to some degree. However, Moreno was in an open area, easily visible to anyone walking by and to anyone at the meat counter. Moreno credibly testified that he did not use the pusher plate because the shape of the bone would cause the bone to slip and because he saw Ramos cutting bone without using a pusher plate.

Under these circumstances, Employer had a reasonable opportunity to detect Moreno's failure to use a pusher plate.

Therefore, Employer's lack of knowledge defense fails and the serious classification stands.

4. Was there a causal nexus between the violation and the occurrence of Roland Moreno's injury?

To be accident-related, there must be a causal nexus between the violation and the employee's injuries. (See *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).)

Moreno's right index finger would not have been partially amputated if he had used a pusher plate. A pusher plate would have kept his fingers away from the saw blade. The Division established that the serious violation was the cause of Moreno's injuries, and, therefore, the violation is accident-related.

Accordingly, Citation 2 was properly classified as serious accident-related. Employer stipulated that the \$18,000 penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

Conclusion

Therefore, Employer's appeal is denied. Citation 2 is affirmed and a penalty of \$18,000 is assessed.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

DALE A. RAYMOND
Administrative Law Judge

Dated: April 22, 2015
DAR: ml

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
SEAFOOD CITY SUPERMARKET**

**Dockets 14-R4D4-2308 and 2309
Date of Hearing: March 25, 2015**

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Field documentation worksheet	Yes
3	Letter dated June 10, 2014 to Jerry Young	Yes
4	Form C-10 Penalty Worksheet	Yes
5	Photograph of meat cutter band saw	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Close up photograph of meat cutter band saw	Yes

Witnesses Testifying at Hearing

1. Roland Moreno
2. Sonny Reantaso
3. Jerry Young

CERTIFICATION OF RECORDING

I, Dale A. Raymond, 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.

DALE A. RAYMOND
Signature

April 22, 2015
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

SEAFOOD CITY SUPERMARKET
Dockets 14-R4D4-2308 and 2309

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

IMIS No. 316348606

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R4D4-2308	1	1	3203(b)(2)	Reg	Er withdrew appeal	X		\$375	\$375	\$375
14-R4D4-2309	2	2	4543(c)	S	ALJ affirmed violation	X		18,000	18,000	18,000
Sub-Total								\$18,375	\$18,375	\$18,375

Total Amount Due*

\$18,375

(INCLUDES APPEALED CITATIONS ONLY)

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

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

Please call (415) 703-4295 if you have any questions.

ALJ: DAR/ml
 POS: 04/22/15