

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CALIFORNIA PRUNE PACKING CO.
2200 Encinal Road
Live Oak, CA 95953

Employer

Docket Nos. 01-R2D3-1630
through 1632

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by California Prune Packing Company [Employer] under submission, makes the following decision after reconsideration.

JURISDICTION

On September 27, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 2200 Encinal Rd., Live Oak, California (the site). On March 2, 2001, the Division issued citations to Employer alleging serious violations of sections¹ 3328(b) [machinery inspections according to manufacturer's recommendations], 3328(c) [use of defective machinery], and 4530(b) [fired oven safety pilot mechanism], with proposed civil penalties totaling \$34,650. The Division made a motion at hearing which was granted that reduced the proposed civil penalties to \$26,775.

Employer filed a timely appeal contesting the existence and classification of the alleged violations, the abatement requirement for the alleged violation of section 4530(b), and the reasonableness of the proposed civil penalties.

On November 19, 2002, a hearing was held before Bref French, Administrative Law Judge (ALJ) of the Board, in Sacramento, California.

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

Ronald E. Medeiros, Attorney, represented Employer. Allyce Kimerling, Staff Counsel, represented the Division.

On September 10, 2003, the ALJ issued a decision denying Employer's appeal from the alleged violation of section 3328(b); denying Employer's appeal from the alleged violation of section 3328(c) but reducing the proposed civil penalty for that violation from \$3,150 to zero as a duplicative penalty; and denying Employer's appeal from the alleged violation of section 4530(b) but found that the violation did not cause the accident and reduced the proposed civil penalty for that violation to \$6,750 for total proposed civil penalties of \$11,475.

On October 16, 2003, Employer filed a petition for reconsideration. The Division filed an answer on November 17, 2003. The Board took Employer's petition for reconsideration under submission on December 3, 2003.

EVIDENCE

Employer dehydrates prunes in heated, two-level tunnels or "prune dryers" (ovens) which are 25 to 30 feet long and six feet wide. The front end of the tunnel is equipped with doors, the back end is not. Prunes in trays are put on racks and wheeled into and out of the dryers on tracks or rails in the cement floor. The burner² to heat the air and a large "airplane propeller" type fan which circulates the heated air throughout the tunnel are located on the upper level.³ The burner and the fan are both located at the rear end of the dryer and face the front end, or door side, of the tunnel. The burner is fed by natural gas which flows through a main valve⁴ and is equipped with a pilot light. The main valve is an electric solenoid safety valve which automatically shuts off the gas when it is de-energized. Gas to the main valve is supplied through a 1¼ inch pipe; gas to the pilot light is supplied through a ¼ inch tube with a manual shut-off valve that is independent of the main valve. The burner is operated by pushing buttons at an ON/OFF switch located outside the front-end entrance to the tunnel;⁵ the switch is interlocked with, and simultaneously operates, the fan.

On September 6, 2000, two employees were seriously injured when a flareback occurred while one of them attempted to relight the pilot light that had somehow been extinguished. Milan Tica [Tica], Employer's foreman and prune drying operation supervisor, testified that the proper way to re-light the pilot light is to first push the OFF button which shuts off the gas supply to the burner and turns off the fan. Re-lighting the pilot is accomplished by lighting a diesel-soaked rag placed on the end of a three to three-and-one-half foot rod

² The burner output was described as one million BTUs [British Thermal Units], a measure of heat.

³ The upper level is set back 4.5 feet from the back end (open end) of the tunnel and approximately 5 feet from the front end (door end) to allow for complete circulation of heated air in the tunnel.

⁴ The main valve is a Model K3AB671 solenoid valve.

⁵ The tunnel at issue here is known as Prune Dryer No.3, one of a group of 12 tunnels.

that is lifted up from the ground to a hole in the back of the burner which is provided for such access. Tica said that this procedure was followed at the time of the accident. He also testified that the fan is so powerful you cannot light the pilot with the fan on because of the air movement. Francisco Hernandez [Hernandez], one of Employer's injured employees, testified that the OFF button to the burner was pushed prior to attempting to re-light the pilot. Employer stipulated that both employees suffered serious injuries as a result of the accident.

On September 27, 2000, Associate Industrial Hygienist Robert Senchy [Senchy] conducted an accident investigation and on March 2, 2001, he issued a citation to Employer alleging a serious violation of section 3328(b) for failing to inspect and maintain the gas safety valve in the gas valve train for the prune dryer as recommended by the manufacturer. He testified that in February, 2001, he obtained pages from a manual on K3A solenoid valves from an establishment entitled Control Company [Control Co.] which distributed these valves in Sacramento and which he located in the course of doing internet research. Senchy testified that, as a result of his research he determined that General Control Co. was the valve's manufacturer; that it no longer exists; and that it was bought out by ITT General Controls. In response to a question as to there being any label on the valve itself that started him on his research he answered "Yes; on the top of the solenoid and it says 'K3A' on it and then 'K3AB671'." Asked if there was the name of any company, Senchy responded: "No. Yes there is; under the screw you can kind of make out some other writing in there, but just K3A valve."

Senchy also issued a citation for a serious violation of section 3328(c) for having a defective main valve in the gas train. Employer's management told Senchy that the main valve had been in place for 20 years. Senchy obtained Employer's permission to remove the valve and did so on September 27, 2000. Jack Miller, Employer's safety officer, told Senchy that PG & E checked all the valves. However, Senchy's investigation established that Employer did not inspect the main gas valve at dryer #3.⁶

Senchy testified that he was familiar with this type of K3A valve. He said he had previous experience taking apart a valve of this type—albeit a smaller size. He said that when the solenoid valve is de-energized, a spring-loaded plunger attached to a diaphragm closes off the gas passageway through the valve and should prevent the flow of gas to the burner. The manual pages which Senchy obtained from Control Co. corroborated his description of the solenoid valve's operation. Senchy testified that he determined the valve was defective as a result of his performing what he described as a "blow test." Just after removing the valve he blew through the pipe on the gas supply side of the

⁶ Miller told Senchy that PG&E "checked everything" before the prune harvest. Senchy confirmed that PG&E only checked *its own* meters into the plant. Tica told Senchy that Brad Taylor, maintenance man for Employer, inspected the valves. When Senchy interviewed Taylor, Taylor denied inspecting or performing preventative maintenance on the gas valves but would do repairs when asked.

valve and air came through the pipe on the other side. He said his breath met no resistance which would be expected if the valve were properly closed. He therefore concluded that since the valve was de-energized and air passed through it, it was defective because the passageway should have been sealed off and prevented the air from passing through to the other side of the valve. Senchy further testified that when he brought the valve to Control Co., a distributor of solenoid valves, Control Co. also did a "blow test" on the valve and told him that there was a bad diaphragm in the valve.

Senchy also issued a citation for a serious violation of section 4530(b) because the #3 prune dryer was an automatically controlled gas fired oven which had no safety pilot mechanism that would shut off fuel to the pilot burner. He opined that the prune dryer is automatically controlled despite the fact that it was necessary to push the ON button to open the main gas valve. Senchy explained that the burner is automatically controlled through a thermostat connected to a variable fire rate control valve that regulates the flow of gas. The thermostat is set at 185° and if the temperature drops below that set point the thermostat sends a signal to the variable fire rate control valve which opens up and sends more gas to the burner. The variable fire rate control valve restricts the flow of gas when the temperature is high enough to where a minimum amount of gas goes to the burner; it does not completely close down. Senchy testified that he examined the burner on prune dryer #3 and found no safety pilot mechanism.

ISSUES

1. Did the Division establish the availability of the manufacturer's recommendations for Employer's K3A solenoid valve in order to prove a violation of section 3328(b)?
2. Was Employer's K3A valve defective and a hazard to be avoided in violation of section 3328(c)?
3. Does section 4530(b) apply to Employer's prune dryer oven #3?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. The Division Failed to Establish the Identity of the Manufacturer of Employer's K3A Valve.

Employer was cited for a serious violation of section 3328(b) which provides:

Machinery and equipment in service shall be inspected and maintained as recommended by the manufacturer where such recommendations are available.

Specifically, the citation charged:

The employer did not inspect or test or maintain the gas safety valves used in the gas train at prune dryer #3 as recommended by the manufacturer. The General Controls K3A Solenoid Valve from prune dryer #3 had a faulty diaphragm that allowed gas to pass into the combustion chamber even if the valve was “switched off.” Two employees were seriously burned when one attempted to relight the dryer’s pilot light and an explosion occurred.

In order to establish this violation of section 3328(b) the Division must establish that the manufacturer of the K3A solenoid valve on prune dryer #3 made available recommendations as to the inspection and maintenance for the valve.⁷

The Division has not laid a proper foundation for establishing the availability of the manufacturer’s recommendation for the inspection and maintenance of this particular valve. In order to establish that the manufacturer’s recommendations were available, the identity of the manufacturer must first be established.

The charge in the citation alleges that General Controls manufactured the valve at issue. Senchy’s testimony is consistent with this allegation. When asked how he determined that, Senchy said there was a label on the valve which identified that manufacturer. The Board has examined this valve which is in evidence and cannot locate any manufacturer’s name imprinted on the valve.

The Division failed to present sufficient credible evidence of the specific manufacturer of the valve; nor did it establish that General Controls or its alleged successor company, ITT General Controls, was the *exclusive* manufacturer of K3A valves. Without the establishment of this exclusivity of manufacture, any number of companies may have produced this valve and it would be speculation to conclude, on the basis of this record, that this valve was manufactured by General Controls or ITT General Controls.

The Division has the burden to prove by a preponderance of the evidence, the applicability and violation of section 3328(b).⁸ Because it cannot be determined who the manufacturer is the Board cannot conclude that the manufacturer’s recommendations were available in this case.

2. Employer’s K3A Valve was not Proven to be Defective.

⁷ See *Lee Way Motor Freight, Inc.*, Cal/OSHA App. 82-067, DAR (Jan. 17, 1986). “DAR” and “DDAR” in this Decision After Reconsideration refers to Appeals Board Decisions After Reconsideration and Denials of Decisions After Reconsideration respectively.

⁸ See *Howard J. White, Inc.*, Cal/OSHA App. 78-741, DAR (June 16, 1983).

Employer was cited for a serious violation of section 3328(c) which requires that “[m]achinery and equipment with defective parts which create a hazard shall not be used.” The specification of the charge read:

The employer’s gas train for prune dryer #3 had a defective gas valve that allowed natural gas to pass right through the valve even if it was “switched off.” After the pilot light went out, gas continued to flow and fill the combustion chamber, and when an employee attempted to relight the pilot light, an explosion occurred that seriously burned two employees.

Employer asserts that the evidence failed to establish that the valve was defective *before* the accident. As stated above, the Division has the burden to prove,⁹ by a preponderance of the evidence, the applicability and violation of section 3328(c). “Preponderance of evidence” is usually defined in terms of probability of truth, or of evidence that when weighed 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.¹⁰

The Board finds that the evidence established this sequence of events: The OFF button to the burner was pushed which was designed to shut off the gas to the burner. The pilot light is not affected by the ON/OPFF switch. The pilot light, however, was extinguished. When employees attempted to re-light the pilot an explosion occurred, seriously injuring two employees. The explosion was the result of the flame source used to re-light the pilot coming in contact with natural gas in sufficient quantity and mixture to cause its rapid ignition, or explosion. There is nothing in the record to establish the source of the natural gas that exploded. Senchy’s concession that it was *possible* that the valve was damaged in the explosion from a backflow of gas weighs heavily against the Division’s burden of showing that Employer used defective parts which created a hazard.

Senchy testified that when de-energized, the plunger and diaphragm would provide a complete seal from pressurized gas. Senchy was asked: “What exactly does the movement of the diaphragm do?” He answered:

That is the part that opens and closes inside the valve. The diaphragm lifts up from the seat in the body, there is a chamber where the air enters in, it comes up against the diaphragm. The diaphragm in this case would be a rubber seal that lifts up when the solenoid activates the plunger that’s attached to the middle of the diaphragm to pull it up and then when it pulls up it allows the

⁹ “Burden of proof” means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. Evid. Code section 115.

¹⁰ *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, DAR (Oct. 30, 2001) citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, review denied.

air from the incoming chamber to go to the outgoing chamber inside the body.

Senchy determined that the gas valve at issue was defective by use of what he called a “blow test.” His testimony was that when de-energized, a spring loaded plunger attached to a diaphragm closes off the gas passageway through the valve and prevents the flow of gas to the burner. The operation and function of a solenoid valve as testified to by Senchy is consistent with the information provided in Exhibit 16.¹¹ Senchy testified that the valve was held in a “closed” position (when de-energized) by two simultaneous forces: the spring loaded solenoid plunger and four to five pounds of gas pressure exerted on the diaphragm from the supply side. When Senchy removed the valve he removed the valve from its gas supply and thus, removed one of the two forces (gas pressure) for holding the diaphragm in a closed position. Employer contends that there is no evidence offered that Senchy blew sufficiently to properly seat the valve under the conditions to which the valve is subjected under normal operations, *i.e.*, four to five pounds of gas pressure. Senchy admitted that his breath is not calibrated and he didn’t know how much pressure he exerted in his “blow test.”

The Board finds that the Division failed to explain how the absence of this four to five pounds of pressure within the valve in its disconnected state was not a factor in allowing Senchy’s breath to flow from one side of the valve to the other. Consequently, the Board finds that the “blow test” performed by Senchy was insufficient in itself to establish that Employer’s K3A valve was defective.

3. Section 4530(b) Applies to Employer’s Prune Dryer Oven #3.

Employer was cited for a serious violation of section 4530(b) which provides:

Fired Ovens. Fired ovens shall be safeguarded against failure of fuel, air or ignition. Automatically controlled gas or oil fired equipment shall have a safety pilot mechanism installed by the manufacturer and so arranged that fuel will be shut off to both the main burner and pilot burner in case of failure of the pilot burner flame or of the spark igniter.

The citation specifically charged:

The employer’s gas fired prune dryers/ovens were not safeguarded against failure of fuel, air or ignition. The automatically controlled

¹¹ Although the Board previously found that the Division’s proffer of Exhibit 16 as constituting the manufacturer’s recommendations for the specific valve used by Employer lacked foundation for purposes of establishing a violation of section 3328(b), the exhibit has both relevance and corroborative value for establishing the general operation of solenoid valves.

gas equipment did not have a safety pilot mechanism that shut off fuel to both the main burner and pilot burner in case of failure of pilot burner flame. After the pilot light went out on the #3 prune dryer/oven, gas continued to flow into the oven. When an employee later attempted to relight the pilot light, an explosion occurred that serious [sic] burned two employees.

Section 4530 is titled “Bakery Ovens.” It is contained in “Article 69. Food and Tobacco Machinery” which is part of: “Group 8. Points of Operation and Other Hazardous Part of Machinery” of Title 8, California Code of Regulations. Group 8 includes 18 Articles covering a wide variety of industrial machinery extending from Article 55 [power operated presses] through Article 74 [cotton gin and seed cotton processing machines]. Employer, in its petition for reconsideration, contends that its prune dryers are not within the scope of the section it was charged with violating because its prune dryer ovens are not “bakery ovens.” Employer asserts that because the Occupational Safety and Health Standards Board used the words “Bakery Ovens” in the title of section 4530 it must have intended to use those words and argues that “[t]here is no need to ‘interpret’ the meaning of ‘bakery oven’ because the meaning of those words are commonly understood, clear, and unambiguous.”

Employer’s reliance on interpretation of the safety order’s title is misplaced. Employer asserts that since the Standards Board chose the use of the adjective “bakery” in the title of section 4530 to describe “oven” then the Appeals Board must give that effect to all parts of the safety order, including the title, without creating an absurd result.¹²

It is a general rule of statutory construction that “section headings or titles may not be used for the purpose of controlling, restraining, or enlarging the positive provisions in the body of the regulation.”¹³ If the language of the regulation is vague and ambiguous, however, the title can be considered in interpreting the regulation.¹⁴

The Board finds that section 4530 does not require further interpretation; it is not vague, ambiguous or in need of interpretation. In construing regulations, the Appeals Board gives words “their usual, ordinary, and common-sense meaning based on the language the [drafters] used and the evident purpose for which the [regulation or safety order] was adopted”¹⁵ if the words used are not vague, ambiguous or in need of interpretation. Section

¹² *Banfield v. Sierra View Local District Hospital* (1981) 124 Cal.App.3d 444, 460.

¹³ *Central Coast Pipeline Construction Co. Inc.*, Cal/OSHA App. 76-1342, DAR (July 16, 1980) citing *Chicago Bridge & Iron Co.*, Cal/OSHA App. 77-808, DAR (July 20, 1979), *Johnson Aluminum Foundry*, Cal/OSHA App. 78-593, DAR (Aug. 28, 1979).

¹⁴ *Central Coast Pipeline Construction Co.*, *supra*; the caption to a safety order is not part of the safety order and cannot be considered in interpreting its plain and unambiguous meaning.

¹⁵ *In re Rojas* (1979) 23 Cal.3d 152, 155.

4530 is reasonable and clear regarding the type of machinery it covers, and thus, the title may not be used to restrict the coverage of the safety order.

Employer does not dispute that the #3 prune dryer was gas-fired; it does assert, however, that the burner on the prune dryer was not “automatically controlled” because the ON button had to be manually pushed to open the main gas valve. Employer contends that the burner unit was manual and thus no safety pilot light mechanism was required. Employer argues that since “there can be no automatic accumulation of gas related to the automatic opening of [the] main valves” the violation should be overturned. The Board finds that the prune dryers operated as “fired-ovens” within the meaning of section 4530 and Employer’s prune dryer ovens are not exempted from coverage of section 4530.

The evidence established that the manual ON/OFF switch supplies electrical energy to the main gas valve that supplies the fuel to the burner. Once the system is energized by the ON button, the flow of gas to the burner is automatically controlled and moderated by the thermostat and variable fire rate control valve. The Board finds that it is not relevant whether or not the burner flame cycles completely on and off during the prune drying process since the supply of gas is automatically controlled so that the temperature is maintained at 185°.

The ALJ found, and the Board concurs, that Employer’s prune drying oven #3 is automatically controlled gas-fired equipment for purposes of enforcement of section 4530(b). The Appeals Board does not interpret this safety regulation in an unduly restrictive manner which would subvert the purpose of providing a safe working environment for Employer’s employees.¹⁶

It is undisputed that the #3 prune dryer oven did not have a safety pilot mechanism. Based on the above, the Board finds that a violation of section 4530(b) is established and a penalty of \$6,750 is found to be reasonable.

DECISION AFTER RECONSIDERATION

Docket No. 01-R2D3-1630

A violation of section 3328(b) was not established, Employer’s appeal is granted and the civil penalty of \$4,725 is set aside.

Docket No. 01-R2D3-1631

A violation of section 3328(c) was not established, Employer’s appeal is granted and the civil penalty of \$3,150 is set aside.

Docket No. 01-R2D3-1632

¹⁶ *Sierra Production Service, Inc.*, Cal/OSHA App. 74-607, DAR (June 25, 1976).

A violation of section 4530(b) was established and a civil penalty of \$6,750 is assessed.

CANDICE A. TRAEGER, Chairwoman
GERALD PAYTON O'HARA, Member
MARCY V. SAUNDERS, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: February 25, 2005