

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

STILES PAINT MANUFACTURING
21595 Curtis Street
Hayward, California 94545

Employer

Docket No. 02-R1D4-1630

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration pursuant to the authority vested in it by the California Labor Code. This decision is rendered in response to the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) in the referenced matter.

JURISDICTION

Commencing on December 18, 2001, a Division representative investigated an accident at a place of employment operated by Stiles Paint Manufacturing (Employer), located at 21595 Curtis Street, Hayward, California. On March 22, 2002, the Division cited Employer alleging a general violation of section 3661(c) [warning horn on an industrial truck] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations. The Division proposed a civil penalty of \$150 for the violation.

Employer filed a timely appeal, contesting the existence of the alleged violation and the reasonableness of the proposed civil penalty.

On February 20, 2004, a hearing was held before Manuel M. Melgoza, Administrative Law Judge (ALJ) of the Board in Oakland, California. Donovan R. Marble, Attorney, represented Employer. Michael Horowitz, District Manager, represented the Division. On March 24, 2004, the ALJ issued a decision granting Employer's appeal and dismissing the alleged section 3661(c) violation.

On April 26, 2004, the Division filed a petition for reconsideration regarding the dismissal of the violation. Employer filed an answer on May 21, 2004. The Board took the Division's petition under submission on June 11, 2004, and stayed the decision of the ALJ pending a decision after reconsideration.

EVIDENCE

Employer makes paint on its premises and uses industrial trucks (i.e., forklifts)¹ to transport palletized containers of product through the plant.

On December 18, 2001, Division inspector William Somers conducted an investigation of the worksite. During the course of the investigation, Somers observed an employee operating a forklift and Somers asked the employee to back up the vehicle. As the employee drove the forklift in reverse, Somers did not hear the audible warning required by section 3661(c). Somers inquired about the audible warning, and the employee explained that a horn is used to satisfy the requirement. When Somers requested that the employee sound the horn, the horn did not work. Accordingly, Somers issued a citation.

At the hearing on Employer's appeal, the Division introduced into evidence pictures taken by Somers that show an employee operating the forklift while the horn was inoperative. Although the ALJ found that the forklift was operated without a functional horn, the ALJ noted that the Division failed to establish that employees were exposed to the hazard created by the violation and dismissed the citation on that basis. The Division disagreed with the ALJ's finding and filed a petition for reconsideration on April 24, 2004.

ISSUE

Did the Division establish that employees were exposed to the hazard created by a forklift operating without an audible warning device?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Division Failed To Establish That Employees Were Exposed To The Condition Created By The Violation Of Section 3661(c)

¹ The Board has held that a forklift is an industrial truck under section 3661(c). See *Western Pacific Roofing Corporation*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996).

Section 3661(c) states:

Every industrial truck and industrial tow tractor, except those guided or controlled by a walking operator, shall be equipped with a warning horn, whistle, gong, or other device which can be heard clearly above the normal industrial noises in the places of employment.

Board precedent holds that in order to establish a violation of a regulation, the Division has the burden of proving that employees of the cited employer were exposed to the hazard addressed by the safety order. *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003); and see, *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (March 5, 1981). The Board defines “exposure” as reliable proof that employees are endangered by an existing hazardous condition or circumstance. *Ford Motor Company* Cal/OSHA App. 76-706 Decision After Reconsideration (July 20, 1979). A violation “may not be based on speculation, assumptions, or conjecture that employees will be exposed to the hazard which the safety order is designed to abate, but rather upon definite evidence of a past or existing danger.” *Id.*

The ALJ dismissed the citation because he found that the Division failed to present any evidence that employees were exposed to the cited condition. In its petition for reconsideration, the Division contends that the ALJ erred in reaching this conclusion.

The Division’s petition raises various arguments. First, the Division argues that Exhibits 16 and 17 support a finding of employee exposure, because the exhibits show a forklift entering Employer’s building from an outdoor area in which a loaded flatbed truck and several parked cars are located. The Division maintains that the safety order is intended to alert operators of these vehicles, and other individuals who might arrive in the area, to the forklift’s movement. The Division asserts that Somers and other unidentified people, in fact, did arrive at the loading bay. The Division asserts that Employer could be cited as an “exposing employer”² if these individuals were employees of other employers.³

The Division further references Employer testimony of Clint Sohrabi, Employer’s president, that the Division believes indicates that the worksite was small and a “virtual beehive of activity.” The Division maintains that the ALJ

² Title 8, California Code of Regulations, Section 336.10 (multi-employer worksite standard). See also, California Labor Code Section 6400(b).

³ Although the Division suggests that Employer could be cited as an “exposing employer” if another employer’s employees were present at Employer’s worksite, we suspect that the Division intended to suggest that the presence of these employees could result in Employer being cited as a controlling, correcting or creating employer under section 336.10. We evaluate the issue below without considering which category of “employer” might best apply under the multi-employer worksite standard.

ignored this testimony and contends that the nature of the work environment increased the chance that employees would be exposed to the deficient forklift. The Division also alleges that the Mr. Sohrabi's testimony implies that it had only one forklift, that the forklift operator had no other responsibilities, and that the driver had been operating the forklift for approximately three hours, all of which Employer refuted in a written response to the Division's petition. Finally, the Division contends that the forklift operator himself was an employee exposed to the hazard.

The Division can establish employee exposure by either proving employees were actually exposed to the hazard created by the violation or by demonstrating exposure to the zone of danger around the hazard. *Ja Con Construction Systems, Inc.*, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006). The Board has defined the "zone of danger" to be the area surrounding the hazard created by the violation. *Benicia Foundry & Iron Works, Inc.*, *supra*.

The actual exposure test requires the Division to prove that employees were actually exposed to the hazard addressed by the safety order. *Rudolph & Sletten, Inc.* Cal/OSHA App. 80-602 Decision After Reconsideration (March 5, 1981); and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381 Decision After Reconsideration (Jan. 28, 1975). In order to prevail on the zone of danger test, the Division must prove that "employees have been *or are likely to be exposed* to the hazard created by the violative condition" (*emphasis in original*). *Ja Con Construction Systems, supra*; and *The Home Depot U.S.A., Inc.* Cal/OSHA App. 99-690 Decision After Reconsideration (March 21, 2002). There must be some evidence that employees came within the zone of danger while performing work-related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations for there to be a violation. *Ja Con Construction Systems, Inc.*, *supra*; and *Benicia Foundry & Iron Works, Inc.*, *supra*. Proof that employees were not prevented from accessing a worksite does not alone suffice to prove that employees were likely to access the danger zone. *Ja Con Construction Systems, Inc.*, *supra*.

With these precedents in mind, we first address the issue of employee exposure as it applies to employees other than the forklift driver. We find that the Division failed to meet its burden of proof under both of the referenced tests. There are no employees depicted in the Division's photographs of the forklift other than the forklift driver. The ALJ noted that Somers did not testify regarding the presence of employees and that the Division failed to ask Employer's owner whether any workers were in the vicinity of the forklift.

Similarly, the Division offered no evidence regarding the operation of the flatbed truck or the cars depicted in the Division's photographs of the forklift. The Division provided no information regarding the owners of the vehicles, the vehicles' use, or the amount of time they had been parked in the lot. The Division also presented no information regarding pedestrian or vehicular traffic

patterns that might support its assertion that employees could have entered the forklift's vicinity. In addition, the Division failed to show that the opening in the building visible in the exhibits "was a normal means of ingress and egress." *Id.* Moreover, the ALJ concluded that the Division failed to refute Employer's assertion that the forklift's horn was inoperative only momentarily. A momentary failure of the horn reduces the likelihood of employee exposure.

We will not disturb the ALJ's findings in the absence of compelling evidence to the contrary, and we find no such evidence here.⁴ The Division's petition for reconsideration would have us infer from the Division's photographs of the forklift that other employees might have been exposed to the hazard created by the forklift's disabled horn, but such an inference is precisely the type of conjecture and speculation regarding employee exposure that the Board has held will not support a citation. *Ford Motor Company, supra.*⁵

Although the Division's petition asserts that Somers as well as other individuals entered the loading bay while the forklift was operating, the Division does not identify these other individuals or provide any basis on which the Board could find that Employer is subject to citation under a multi-employer worksite theory.⁶ In addition, because the Division did not cite Employer under the multi-employer worksite standard, the Division's argument is academic at best.

We next address the assertion in the Division's petition for reconsideration that section 3661(c) includes the forklift driver in its protection. The Division failed to present evidence to support its understanding of the harm that the safety order is intended to prevent. Without some foundation, the Division's argument is unsubstantiated opinion and cannot support a Board finding. See *Ja Con Construction Systems, Inc., supra.*

To discern the standard's meaning, we must look to the principles of statutory construction. The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. *Auchmoody v. 911 Emergency Services* (1989) 214 Cal. App. 3d, 1510, 1517. Under the "plain meaning rule," words used in a safety order should be given the meaning they bear in ordinary use and if the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of legislative intent. *The Home Depot, Cal/OSHA App. 98-2236 Decision After Reconsideration* (Dec.20, 2001).

⁴ See *Lamb v. Workmen's Compensation Appeals Board* (1974) 11 Cal. 3d 274, 281.

⁵ See also, *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* 189 Cal. App. 3d 1574, 1584, (6th Dist. 1987)(an inference must be based on probabilities; it cannot be based on mere possibilities.)

⁶ We do not understand the Division to argue, and believe it could not argue, that Employer is subject to citation under the multi-employer standard based on Somers presence at Employer's workplace.

We now examine section 3661(c) with these rules in mind. Section 3661 is entitled “Brakes and *Warning Devices*” (*emphasis added*). The plain language of section 3661(c) requires that a “*warning* horn, whistle, gong, or other device which can be heard clearly above the normal industrial noises in the places of employment” be provided (*emphasis added*). “Warning” is not defined in the safety orders, but the dictionary definition of “warn” reads, “to put on guard: give notice, information, or intimation to beforehand, especially of approaching or probable danger . . .” *Webster’s Third New International Dictionary* (1981) at page 2577. The safety order cannot reasonably be understood to suggest that the forklift operator must be “put on guard” or “given notice” of the forklift’s movement. Accordingly, we believe the standard’s plain meaning is clear: to warn *others* of the forklift’s movement.

While the Division seems to argue that an audible warning device might serve to avert a collision and protect the forklift driver by allowing other individuals to avoid the forklift’s path of travel, this argument is only meaningful to the extent that other employees or moving vehicles are shown to be present in the forklift’s vicinity.

Similarly, the Division does not argue that the warning device would prevent the forklift operator from colliding with immobile objects (e.g., walls, palletized materials). As a result, even if we were to accept the Division’s argument that section 3661(c) is intended to protect the forklift operator, we cannot find employee exposure in the absence of evidence to demonstrate the presence of other moving vehicles or people in the area. As previously noted, insufficient evidence was presented to support such a finding. Because the Division failed to meet its burden of proof on the issue of employee exposure, the citation must be dismissed. See, *Benicia Foundry & Iron Works, Inc., supra*.

DECISION AFTER RECONSIDERATION

The Board upholds the ALJ decision dismissing Item 2 of Citation No. 1 which alleged a violation of section 3661(c).

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: 8/18/06