

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

HUSSMANN CORPORATION
13770 Ramona Avenue
Chino, CA 91710

Employer

Docket No. 03-R3D1-2939

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above entitled matter.

JURISDICTION

On February 4, 2002, an employee of Hussmann Corporation (Employer) was injured in an accident which occurred at a place of employment in California operated by Employer.

On February 8, 2002, the California Division of Occupational Safety and Health (Division) began an investigation of that accident. On July 5, 2002, the Division issued a citation to Employer which alleged a general violation of California Code of Regulations, title 8, section 3202(a)(7) [failure to provide training for a new job assignment], and proposing a civil penalty of \$935.00.¹

Employer timely appealed the citation, contesting the existence of the alleged violation and raising the affirmative defense of independent employee act.

After a duly-noticed hearing before an Administrative Law Judge (ALJ) of the Board held on December 19 and 20, 2005, the ALJ issued a Decision on April 13, 2006. The Decision affirmed the citation and proposed penalty.

Employer timely filed a petition for reconsideration, which the Board took under submission by Order of June 29, 2006.

¹ References are to California Code of Regulations, title 8, unless otherwise specified.

SUMMARY OF EVIDENCE

Employer manufactures, installs and maintains refrigerated and other fixtures for commercial establishments such as grocery stores. At the time of the events giving rise to the citation at issue, one of Employer's customers was the Ralphs chain of grocery stores. On Friday, February 1, 2002, representatives of Ralphs asked Employer to send one or more of its employees to a Ralphs store in San Clemente, California, to remove and then reinstall a refrigerated bakery case. The bakery case needed to be moved to make room for removal of an old oven and installation of a replacement oven. Ralphs also asked Employer to dispose of the old oven. Employer agreed to do both. The de-installation of the old oven and installation of its replacement were to be done by another company. Both the oven work and the bakery case work were to be done during the evening and early morning hours of February 4 and 5, 2002, to avoid disruption of the grocery store's normal operations.

On Monday, February 4, 2002, two of Employer's supervisors separately contacted two employees to assign them to the case removal and reinstallation work. The record shows that Employer organized its business along functional or trade lines, such that carpentry was managed by one person and a different function such as refrigeration by another. One employee, the injured man, was a carpenter; the only other employee assigned to this job was a refrigeration technician. Each was instructed to arrive at the Ralphs in question at 9 p.m. that evening.

The carpenter, Mr. Garcia, received his assignment by telephone call on February 4, 2002.² His instructions were general in nature. He was to move the bakery case, and load the old oven on a truck provided by Employer for transportation to a dump. Employer did not inform Mr. Garcia whether he was to move the old oven from its in-store location to the loading dock at the store for loading on the truck, or explain who or how the old oven was to be moved to the loading dock.

In the event, after the old oven was disconnected and made ready to be moved from its in-store location, Mr. Garcia asked the other tradesmen involved, including a plumber, the oven contractor's personnel, and a "heating, ventilation and air conditioning" (HVAC) technician, who was going to move it. They all demurred. After discussion, it was agreed among several individuals involved that they would all move the oven from its installed location so it could be lowered onto dollies and then moved to the loading dock and there loaded

² The refrigeration technician, a Mr. Lund, also received his assignment to the Ralphs work by telephone that day. Employer maintains a staff of technicians on call who appear typically to receive work assignments by telephone. It further appears that due to the commercial nature of Employer's customers, most of the work it does at customers' locations is accomplished after normal business hours.

on the truck.³ It appears the intent was to place the oven on its side on the dollies. In the process the oven fell on Mr. Garcia and severely injured both of his legs. The oven weighed approximately 1,750 pounds.⁴

The evidence showed that Mr. Garcia was a journeyman carpenter. He had not been trained specifically in how to move objects of the size and weight of the oven involved in the accident. Employer provided its employees with written training materials which they were required to review, sign to indicate they had read the materials, and return to Employer for recordkeeping. None of the training materials in evidence related to manual handling of objects of the size and mass of the old oven. Employer introduced evidence that Mr. Garcia had also had training through his union on handling heavy objects. Employer also introduced evidence that Mr. Garcia had worked for a commercial door company which involved working with large doors, some of which were heavy. Mr. Garcia was also certified to operate a forklift, although a forklift was not involved in the work at issue. The record shows that the oven involved was intended to be and was moved by human power, not by mechanized equipment such as a forklift.

Mr. Garcia testified that he had worked with refrigerated cases weighing 500 to 600 pounds for Employer, but never any ovens, nor any object as heavy as the oven here. Similarly, Employer's witnesses testified that Hussmann did not work on or with ovens.

Garcia testified that he believed he was acting within the scope of his assignment in helping place the old oven on the dollies so it could be rolled to the loading dock and then on to the truck for disposal. Employer's witnesses testified they believed Garcia was only to move the oven from the loading dock onto the truck. There was, however, no evidence as to who was supposed to move the oven from its in-store location to the loading dock. There was no testimony or other evidence regarding any arrangements by Employer or anyone else to accomplish that part of the assignment.

ISSUES

1. Whether the violation was proved.
2. Whether Employer proved the affirmative defense of independent employee act.

³ A dolly is a low platform on wheels used to support objects for movement. The ones involved in this matter were about 3 or 4 inches high, rectangular in shape, and had wheels at each of the corners.

⁴ The oven was approximately 4 feet wide, 4 feet deep and 8 feet high.

**FINDINGS AND REASON
FOR
DECISION AFTER RECONSIDERATION**

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on substantial evidence in the record as a whole and appropriate under the circumstances.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer contends that the ALJ acted in excess of her powers, the evidence did not justify the findings of fact, and that the findings of fact do not support the Decision.

Employer was cited for allegedly violating section 3203(a)(7), which states in pertinent part:

- (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program) [also "IIPP"]. The Program shall be in writing and, shall, at a minimum:

“[¶¶]

“(7) Provide training and instruction:

“[¶¶]

“(C) To all employees given new job assignments, for which training has not previously been received[.]

The Division cited Employer because it had not trained Mr. Garcia in how to move ovens, or how to move objects of the size and weight of the oven involved in the accident. Employer counters in its petition with two arguments. First, that Mr. Garcia had various on-the-job training from Hussmann, during his union apprenticeship and from another employer that involved lifting heavy objects; and second, that Mr. Garcia exceeded the scope of his assignment

when he undertook, with others, to place the oven on dollies prior to its being moved to the loading dock and loaded on the truck.

Regarding Employer's first point, there is no evidence in the record that Mr. Garcia had any experience in manually moving or maneuvering objects weighing as much as the oven. Although he did have experience and on-the-job training in moving cases, such as the bakery case, which weighed 500 to 600 pounds, there was no evidence that he had training or experience in moving objects more than 1,000 pounds heavier than the bakery case. Also, Employer's evidence emphasized that Hussmann did not deal with ovens. Thus we find that Mr. Garcia had not been trained in moving ovens or in moving objects weighing 1,750 pounds, as the oven here did. (See *Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) We further find that Mr. Garcia had neither the training nor experience to know that the oven weighed more than 1,000 pounds more than the equipment he dealt with in the regular course of his employment. "[S]ection 3203(a)(7)(C) requires more than just instructing an employee in what physical actions are involved in a work assignment. The employee must also be trained in the hazards the assignment presents." (*James, Robert & Don Clark, dba Clark Pacific*, Cal/OSHA App. 06-0024, Denial of Petition for Reconsideration (Dec. 30, 2008).) Here, even if we assume Garcia had some instruction on moving heavy objects, there is no evidence that he was trained to recognize "the hazards the assignment present[ed]." (*Id.*) The same principle applies to a related point Employer raised, that its employees were authorized and expected to refuse unsafe work: here Mr. Garcia had insufficient training or experience to recognize the hazard presented by the oven.

Regarding Employer's second point, that Mr. Garcia exceeded the scope of his assignment, we are not persuaded. The evidence shows that Mr. Garcia was given a vague and ambiguous assignment regarding the oven. Even if we accept Employer's position that he was told only to load the oven on the truck, there is no evidence that Employer informed him how he was to accomplish that goal or what the intended scope of the assignment was. For example, the testimony was that it would and did take two men to push the dollies after the oven was loaded on them, yet Garcia's assignment was silent as to who was to help him do so. There is no evidence that Employer considered how the oven was to be moved from its in-store location to the loading dock, or by whom. Likewise, there is no evidence that Employer gave Mr. Garcia any information or instruction about how that ineluctable portion of his assignment and the customer's requirements were to be satisfied. In light of that lacuna in the assignment regarding getting the oven from the store to the store's loading dock, we find that Mr. Garcia acted reasonably in attempting to solve the problem with the resources available (the other workmen) at the time. Moreover, and contrary to Employer's contention, it was foreseeable that an employee would seek to fill the logical gap in his instructions (i.e. how the oven

was to be moved from store to loading dock) by undertaking to solve on his own initiative the portion of the assigned task not explicitly addressed and yet implicitly obvious and necessary.⁵ “[W]hen viewed in the context of the assignment which gave rise to it, [the work being done when the injury occurred] was a vital part of the jig servicing process. (See *Miller Brewing Co.*, OSHAB 81-1313, Decision After Reconsideration (Dec. 20, 1984) (repair work on conveyor drive began when mechanic removed some screws in order to inspect the drive).)” (*Lights of America*, Cal/ OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

We infer from other testimony in the record that Employer’s installation crews were often working under pressure to complete the assigned work with alacrity, which is understandable given that Hussmann’s business is to provide fixtures and equipment to other commercial enterprises. In that context we further infer that had Garcia not taken initiative both his superiors at Hussmann and personnel at Ralphs, Hussmann’s client, would have been displeased that the oven was not moved out of its in-store location.⁶

We therefore affirm the Decision and hold that Mr. Garcia was not trained in how to move an oven weighing 1, 750 pounds, as required by section 3203(a)(7).

Employer’s other main challenge to the Decision is that, contrary to the ALJ’s determination, it satisfied the requirements of the “independent employee action defense” or IEAD.

The IEAD is an affirmative defense. To prevail under it, an employer must prove by a preponderance of the evidence all five of the following:

- (1) The employee was experienced in the job being performed.
- (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 its safety program.
- (4) The employer has a policy which it enforces 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.

⁵ “Necessary” because oven had to be moved by someone although Employer’s arrangements with Ralphs and instructions to Garcia failed to address this portion of the work explicitly.

⁶ Moreover, the record shows that the oven was moved to the truck later that night, after Garcia’s accident, by Mr. Lund and another worker.

(*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980); see *Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal.App.3d 1232.) Failure to prove any one or more of the IEAD's elements causes the defense to fail. (*Mercury Service, supra.*)

In her Decision, the ALJ found that Employer failed to meet any of the elements. Even if we were to give Employer the benefit of the doubt as to the third and fourth elements, we find the evidence shows that it failed to prove the remaining three. The evidence was that Mr. Garcia was not experienced in moving either ovens or objects weighing as much as the oven here did. Thus the first element was not met. Since Employer did not train Mr. Garcia with respect to moving ovens weighing almost one ton, it did not train him with respect to the "particular job assignment" involved here, and so failed to satisfy element 2. Finally, the evidence does not show that Mr. Garcia was aware he was causing a safety infraction that was contrary to Employer's safety requirements, element 5. Since Employer failed, at best, to satisfy three of the five elements, the IEAD was not satisfied, and the violation was established.

One final point remains to be addressed. Employer filed a motion for summary judgment before the hearing was held. As far as we have been able to determine, the administrative record does not indicate the ALJ ruled on that motion. A failure to rule on the motion, assuming that is what occurred, is an implicit denial. Since Employer participated in the hearing without objection and without referring to or renewing its motion for summary judgment, and since the ostensible failure to rule on the motion was not raised in the petition for reconsideration, we deem it to have been abandoned. (See *People v. Obie* (1974) 41 Cal.App.3d 744, 750, disapproved on another ground in *People v. Rollo* (1977) 20 Cal.3d 109, 120; Labor Code section 6618.)

DECISION AFTER RECONSIDERATION

For the reasons stated above, we affirm and reinstate the Decision of the administrative law judge.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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