

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BAY AREA RAPID TRANSIT DISTRICT (BART)
1330 Broadway, Suite 1530
Oakland, CA 94612

Employer

Docket No. 03-R1D1-5170

**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

The Bay Area Rapid Transit District (BART or Employer) is a California employer operating a regional transit system in the San Francisco Bay area. On May 3, 2003 an accident which injured one of its employees occurred at a BART facility in San Francisco. The Division of Occupational Safety and Health (Division) opened its investigation of the event on May 8, 2003. On August 29, 2003, the Division issued one Citation alleging a serious violation of an occupational safety and health standard codified at California Code of Regulations, title 8, section 2940(b) [failure to supply required safety devices] to Employer and further proposing a civil penalty of \$18,000.¹

BART's timely appeal challenged the existence of the violation and further asserted the "independent employee action defense."² Employer did not appeal the classification of the citation.

After Employer filed its appeal, a union representing some of BART's workers moved for and was granted party status in the administrative proceeding.

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

² The "independent employee action defense" or "IEAD" is an affirmative defense established by the Board in *Mercury Services, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). The ALJ's Decision below held that Employer did not prove the defense. Employer did not challenge that aspect of the Decision in its petition for reconsideration, and therefore waived the issue. (Labor Code section 6618.)

An evidentiary hearing before an administrative law judge (ALJ) of the Board was held. After the close of the hearing and submission of post-hearing briefs by the parties, the ALJ issued her Decision on July 3, 2007, which upheld the Citation and assessed a civil of \$18,000.

Employer timely filed a petition for reconsideration. The Division filed an answer to the petition.

On September 26, 2007, the Board issued an Order taking Employer's petition under submission and staying the Decision pending its 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 resolved the issues presented correctly. The Board has taken no additional evidence in this proceeding. The Board adopts and incorporates by this reference the summary of evidence set forth the ALJ's Decision, although we summarize the evidence below.

EVIDENCE

On the morning of May 3, 2003, two BART electricians were assigned work at the BART Daly City station. Later that morning, after they had worked at Daly City, their foreworker³ gave them a new assignment to help another pair of electricians working at the Balboa Park station in San Francisco. One of the two redeployed electricians was Mr. Leslie Lagdamen (Lagdamen), who was seriously injured in the incident giving rise to the citation at issue. Before summarizing that event, we provide a summary description of the equipment involved.

The BART facilities at Balboa Park include 34,500 volt or 34.5 kilovolt (kV) electrical substation. The Electrical Safety Orders (sections 2299 and following) define voltages above 600 volts as high voltage. (Section 2700.) The substation receives incoming power from the electric utility and adjusts the voltage down to 1,000 volts to supply the electric third rail which powers BART trains.

The substation is a small building, approximately 20 feet by 15 feet, with an entry area, and two "cubicles" each housing a high voltage circuit breaker.⁴

³ Employer's term for foreman or supervisor.

⁴ As explained in the testimony, a circuit breaker is analogous to a switch. It can open (disconnect or turn off) or close (connect or turn on) an electric circuit, in the fashion of an ordinary light switch, and the circuit breakers typically used in household applications. The differences are that the breakers in question were much larger and handle voltages much greater than normal household current of 110 volts.

The breakers are mounted on wheels so they can be “racked” in or out of contact with two sets of components called “studs,” which extend from the back wall of the cubicle and are arranged in two rows of about three feet apart vertically. From photographs in evidence, the studs appear to be cylindrical, perhaps 6 inches long and about 1.5 or 2 inches in diameter. When racked in, a breaker connects to the studs and thereby closes the electric circuit allowing current to flow. (This is analogous to plugging an electric appliance into a wall socket.) Conversely, when a breaker is racked out, it is disconnected and the circuit is open.⁵

The two cubicles are separated by a wall. Each cubicle houses one breaker. The cubicles were estimated to be about 6 feet high, 6 feet wide, and about 8 feet deep. The breaker was said to take up most of the space in each cubicle.

Another feature of this electric equipment is a device referred to as a “shutter,” which is similar to an articulated or segmented garage door. The shutter is designed to automatically lower when a breaker is racked out. Its purpose is to provide a protective barrier so that someone cannot accidentally contact the high voltage equipment inside when a breaker is racked out.

Lagdamen was assigned the task of disconnecting four grounding cables from the lower row of studs in one of the two breaker cubicles. The breaker had previously been racked out thus enabling Lagdamen access to the wall of the cubicle where the studs were located, so as to be able to reach the grounding cables. The shutter, which was supposed to automatically close so as to isolate the cubicle, had been disabled so it would remain open by using an unofficial but widely known and practiced procedure.

An alternative process would have involved using a device called a “grounding cart” which was approximately the size of a breaker. After the breaker is racked out, the grounding cart is pushed into the cubicle until it makes contact with the studs. From openings in the front of the grounding cart one row of studs can be worked on safely without exposing the worker to the other row. The testimony was that although Employer had at least some grounding carts, they were not used. Instead, it was common practice for BART employees to change or remove ground cables by the same method Lagdamen used.

Lagdamen removed three of the four grounding cables without incident. But before he removed the fourth, the metal box wrench he was using either contacted a stud or came close enough to a stud to cause an electric arc. The

⁵ The breakers also had an intermediate or “test” position. The testimony was that one could ascertain by marks on the floor or interior of the cubicle what position (connected, test, not connected) the breaker was in. In addition, there are indicator lights which tell the connection status of the breaker.

arc caused a fire which resulted in second and third degree burns to Lagdamen, among other injuries. Lagdamen was not wearing protective equipment, nor had he “probed” (tested) the studs to determine whether they were energized before removing the grounds. He did not probe because he did not have the appropriate equipment with him and did not know whether it was available at Balboa Park. Although use of protective gear was optional under Employer’s procedures, they did require the studs to be probed before the work was started.

It is also noted that Lagdamen’s foreworker had instructed him to be sure the other breaker was racked out before disconnecting the grounds. In the event, Lagdamen’s co-worker had visually checked the other breaker, and mistakenly believed it to have been racked out, and Lagdamen himself had looked into the other cubicle from the one where he was working, and did not disagree. Had the other breaker been in fact racked out, the accident might not have occurred or the voltage to which Lagdamen was exposed would likely not have occurred.⁶

ISSUES

Whether Employer was in compliance with section 2940(b).

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

Section 2940(b), the cited safety order, states:

(b) Employer’s Responsibility. The employer shall furnish such safety devices and safeguards as may be reasonably necessary to make the employment or place of employment as free from danger to the safety and health of employees as the nature of the employment reasonably permits. The employer shall examine or test each safety device at such intervals as may be reasonably necessary to ensure that it is in good condition and adequate to perform the function for which it is intended. Any device furnished by the employer found to be unsafe shall be repaired or replaced.

Employees shall be instructed to inspect each safety device, tool or piece of equipment, each time it is used and to use only those in good condition. The employer shall require the use of safety devices and safeguards where applicable.”

⁶ Both breakers had to be racked out to completely isolate and so de-energize the studs on which Lagdamen was working. With the other still connected, the circuitry was such that electric power still flowed to the studs involved.

The plain language of the safety order requires use of physical equipment (“devices and safeguards” which are to be “examine[d] or test[ed] . . . to ensure it is in good condition”) as safety equipment. (*Id.*)

Employer argues that it had complied with section 2940(b) by establishing safety procedures and providing specific instruction to Lagdamen, which he did not follow. Employer further argues that the safety order “does not create an absolute liability standard.” (Petition, p. 3.)

While we agree that the safety order does not impose absolute liability on an employer, we disagree with the remainder of Employer’s contentions. Although BART had established procedures, which were not followed, for the work being done, the evidence is that BART knew that its employees were regularly working on electrical equipment in breaker cubicles such as the one at the Balboa Park station with the shutters kept open by disabling or overriding their automatic function. Thus, Employer knew that the safety device or safeguard was not “furnish[ed]” as required. (Section 2940(b).) Moreover, an employer may not successfully contend an alleged violation did not exist because it had established written procedures when it permitted those same procedures to be regularly ignored. (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).)

The difference between Employer’s written procedures and the actual practices it allowed are critical in this proceeding. The second paragraph of section 2940(b), quoted above, speaks directly to Employer’s actual practice. “Employees shall be instructed . . . to use only those [safety devices] in good condition. Employer shall require the use of safety devices and safeguards where applicable.” (Section 2940(b).) The shutter cannot be “in good condition” if it is consciously and deliberately prevented from functioning, and thereby from fulfilling its protective purpose. The evidence was unrefuted that Employer knew this to be common practice and took no steps to stop the practice. By not putting a stop to that common practice, Employer failed to comply with the safety order’s command that it “require the use of safety devices and safeguards[.]” Although an employer establishes an extensive safety program, it may not claim to be in compliance with a safety order if it does not also enforce its program. (*Crosby & Overton, Inc.*, Cal/OSHA App. 82-778, Decision After Reconsideration (Nov. 27, 1985); *Kingston Constructors, Inc.*, Cal/OSHA App. 95-1098, Decision After Reconsideration (Sep. 15, 1999), citing *Chevron USA Inc.*, Cal/OSHA App. 89-283, Decision After Reconsideration (Feb. 8, 1991); *Broat Manufacturing*, Cal/OSHA App. 85-193, Decision After Reconsideration (Dec. 17, 1985).) Establishing safety practices and procedures is necessary but not itself sufficient to comply with section 2940(b). An employer must also actively enforce its practices and procedures lest they be deviated from, or worse, generally ignored. Otherwise, merely establishing rules or procedures requiring use of safeguards but not requiring

their actual use would be held to be compliance. That would be an absurd result. Interpretations of statutes and regulations leading to absurd results are disfavored. (*Cal Energy Operating Corp.*, Cal/OSHA App. 09-3675, Denial of Petition for Reconsideration (Nov. 12, 2010), citing *Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762.) The affirmative defenses such as the IEAD (*Mercury Services, Inc.*, Cal-OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980) and unforeseeability (*Newberry Electric Corporation v. Occupational Safety and Health Appeals Bd.* (1981) 123 Cal.App. 3d 641, 648) require employers to demonstrate effective enforcement of safety procedures, which Employer here did not show. That an employee made a mistake or did not check, or check more carefully, is not a defense. (*Royal Electric Company*, Cal/OSHA App. 91-949, Decision After Reconsideration (Jun. 15, 1993).)

Similarly, the foreworker's admonition to Lagdamen and his co-worker to rack out the other breaker was insufficient to be compliance with section 2940(b). Administrative controls such as written procedures are not "devices and safeguards" required by the safety order. While following the foreworker's instructions may have made using the shutter unnecessary because the electrical components would have been de-energized, Employer's tacit acceptance of the practice of disabling the shutter created a situation in which its employee lacked protection at a time when he most needed it. It created an actual practice at odds with its written program, and relied on one employee checking the status of equipment rather than on automated safety equipment as provided in the written program. Moreover, the foreworker's admonition to be sure to rack out the second breaker in essence amounted to a change from the written procedure to one of reliance on an employee not to make a mistake in evaluating the second breaker's status. Doing so is not compliance with the requirements of the safety order. (See *Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration (Jun. 10, 2010).)

The record shows that as the Balboa Park substation breaker cubicles were designed and built, the shutters have to be up for BART employees to attach and remove grounding cables.⁷ Yet, as the cubicles were designed and built, the shutters would lower automatically to provide a protective barrier. When the shutters deployed automatically, thereby blocking access to equipment intended to be worked on, it led to the unofficial but commonly used and management-accepted process of overriding the automatic shutter mechanism to keep them up. Employer's tacit endorsement of the practice of working around the protective devices instead of redesigning the system or requiring the use of grounding carts or some other device which would provide equivalent safety was the root cause of the accident involved here.

⁷ The testimony was that a "grounding cart" or "grounding buggy" could have been used. However, the testimony further indicated that BART rarely if ever used such devices, though it had a small number, and that they were not made available for the work at issue.

DECISION

For the reasons stated above, the ALJ's Decision is affirmed and reinstated, and a civil penalty of \$18,000.00 assessed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: FEBRUARY 18, 2011