

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

In the Matter of the Appeal of:

**A TEICHERT & SON, INC**  
**dba TEICHERT AGGREGATES**  
P.O. Box 15002  
Sacramento, CA 95851-1002

Employer

Docket Nos. 04-R5D1-0850 and 0851

**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 November 21, 2003, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment maintained in California by A Teichert & Son, Inc, dba Teichert Aggregates (Employer).

On February 23, 2004 the Division issued two citations to Employer alleging one general and one serious violation of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup> Citation 1 alleged a general violation of section 3446(c) [conveyor guarding]; Citation 2 alleged a serious accident related violation of section 4002(a) [guarding of machinery parts]. Combined civil penalties of \$18,675.00 were proposed.

Employer timely filed appeals of both citations. It also asserted numerous affirmative defenses.

Administrative proceedings were held, which included an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After completion of the hearing the ALJ rendered his Decision on February 8, 2007. The Decision sustained the violation alleged in Citation 2 as serious and accident related, and assessed the full proposed penalty. The Decision granted Employer's appeal as to Citation 1.

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

On March 2, 2007, the Board issued an Order of Reconsideration on its own motion to consider two issues. First, was the motion to amend Employer's name properly granted, and second, does Title 8, California Code of Regulations, section 4002(a) apply to the cited hazard? On March 13, 2007, Employer petitioned for reconsideration of the Decision as to Citation 2, raising a third issue of whether the Division's motion to amend the name of the employer was timely filed and served under regulation 371(c)(1).<sup>2</sup> The Board took the petition for reconsideration under submission on April 20, 2007. The Division filed an Answer to Order of Reconsideration and Employer's Petition for Reconsideration on April 6, 2007.

### **EVIDENCE**

The Decision accurately summarizes the hearing record. The record shows that an employee of Employer was injured while working on the operator's platform of a machine designed to process, by crushing, concrete and other recyclable debris from very large pieces to three inch pieces. This very large machine (plant) is mobile, and can be moved to the debris location to perform its recycling operation.

The machine consists of a dumpster-type hopper bin at one end, at the bottom of which is a conveyor device, of unknown type, that moves the large material in to the initial crushing devices at the bottom of the hopper bin and, thereafter, into the machine. Depending on the size of the recycled material, it will either be sorted or partially crushed by the moving parts of the machine located at the bottom of the hopper.<sup>3</sup> The further crushing mechanisms, and additional conveyors, are concealed within the outer metal structure of the plant. Conveyors then transport the crushed material out of the machine.

The operator's platform is located on the outside of the hopper bin portion of the machine. The lower portion of the hopper bin consists of vertical walls that extend to about chest height of the operator, forming a rectangular box. The upper portion of the walls of the hopper bin begin at the top of the vertical portion, and extends approximately to the head height of the operator, and are angled outward at 45 degrees. These upper wall portions do not extend on all four sides of the box. At the location of the operator's platform, there is no upper slanted portion of the wall.

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<sup>2</sup> Employer also filed an Answer to Order of Reconsideration on April 2, 2007.

<sup>3</sup> Few details were provided regarding the parts of the mobile crusher plant other than the hopper bin portion. The photographs depict a large blue metal piece of equipment atop two caterpillar-type tread units. It appears much of the crushing activity occurs inside the fully contained mobile plant. Conveyors protrude out of the plant at two locations. The record does not provide further information about these other components of the mobile crusher plant.

The operator stands on a platform that is surrounded on three sides by railings and the fourth side by the vertical portion of the side wall of the hopper. The operator's job is to watch the crushing operation, and retrieve non-recyclable material such as rebar and wood, from the hopper bin before it is drawn in to the crusher jaws located at the bottom of the hopper bin.

On November 20, 2003, an operator was standing on the platform when some very large pieces of recyclable concrete were in the hopper bin being moved by the conveyors at the bottom of the hopper bin. These pieces moved toward the operator's end of the hopper bin and in to the machine at the bottom of the hopper. One piece began to come out of the hopper and on to the vertical hopper bin wall separating the hopper bin interior area from the operator's platform. Instinctively, the operator thrust both hands toward the moving piece of concrete (estimated based on size and material at 2700 pounds), successfully guiding it back in to the hopper. While his hands were inside the hopper, and still on the large piece of concrete, another large piece of concrete (estimated at 2250 pounds) struck his hand, crushing a finger between the first piece of concrete that was being shoved back in to the hopper, and the second piece that was moving down the hopper toward the jaws at the bottom of the hopper. His finger was ultimately amputated.

The Division cited Employer for a violation 4002(a). The name listed on the citations was "Teichert Aggregates." While employer does business as "Teichert Aggregates" its legal name is "A. Teichert & Son, Inc."

### **ISSUES**

1. Was the citation of the Employer in its business name of "Teichert Aggregates" valid?
2. Does section 4002(a) apply to the hazard established by Division?

### **DECISION AFTER RECONSIDERATION**

1. Correct Employer Name

The Decision of the Administrative Law Judge (ALJ) grants the Division's motion to amend the citation to include Employers legal name of "A. Teichert & Son, Inc." The propriety and timeliness of the motion to amend were raised by the Employer prior to the hearing. Since then, the Board has clarified that citing an employer using its fictitious business name is as effective as using its true legal name. (*Western Door*, Cal/OSHA App. 01-2827, Decision After Reconsideration (Jun. 8, 2008).) Thus, the citation issued to "Teichert Aggregates" did not need to be amended. We continue to agree with the reasoning and authority cited in *Western Door*, *supra*. Thereunder, the citation

of “Teichert Aggregates” was valid and not in need of amendment.<sup>4</sup> Any claim that the motion was improperly filed is therefore moot.

2. Does the cited Safety Order address the hazard proved by the Division?

Turning to the substantive matter before us, we must determine whether the evidence establishes a violation of 4002(a), and if any affirmative defenses raised by Employer have been established. Along with its appeal form, Employer asserted multiple affirmative defenses, including that “[t]he citation does not allege a violation of that safety order which most appropriately pertains to the alleged violation.”

This affirmative defense requires the employer to show that the hazard proven by the Division is not the hazard addressed by the cited safety order, and that the actual hazard established at the hearing is addressed by a different safety order. (*Truecast Concrete Products*, Cal/OSHA App. 80-394, Decision After Reconsideration (Nov.21, 1984); *Star-Kist Foods, Inc.*, Cal/OSHA App. 83-791 Decision After Reconsideration (Oct 16, 1987).)

The affirmative defense predates the adoption of Board Rule 386 which allows for post submission amendment of a citation. Specifically, section (a)(3) states the Appeals Board may amend the Division action after a proceeding is submitted for decision in order to “Amend the section number in the citation if the same set of facts apply to both the cited and proposed section.” To so amend the citation, each party must be given notice of the intended amendment and the opportunity to show any prejudice that may result from such amendment. (386(b); (*Kenko, Inc*, Cal/OSHA App. 00-672, Decision After Reconsideration (Oct. 16, 2002).)

We have also held that defects in a citation only invalidate the citation if the Employer shows it suffered prejudice in preparing and presenting a defense. (*Kelseyville Lumber & Supply Company, Inc.*, Cal/OSHA App. 04-119, Denial of Petition for Reconsideration (Jul. 17, 2007).) Here, the facts in the citation are consistent with the evidence actually presented at hearing. Those facts establish a violation of section 3273. Specifically, section 3273(i) states: “Machines or equipment shall be located and guarded so that the product, waste stock, or material being worked or processed does not endanger employees.” The hazard addressed by this safety order is the hazard of being struck by material being processed by a machine. This is the hazard encountered by Employer’s employee that was the subject of the investigation. It is the hazard the Division proved existed. It is not, however, the hazard addressed by the cited Safety Order, 4002(a). (See *Carris Reels*, supra

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<sup>4</sup> Thus, we further need not reach the merits of Employers third issue in its Petition for Reconsideration, to wit, whether filing with the appeals board occurs on the day the document is mailed to the appeals board.

[Division must cite appropriate safety order and present evidence in support thereof.]

However, the Division did not move to amend the citation at any time during the proceedings to reflect the operative Safety Order. Although the Board is unable to charge the Employer with a different violation, (*Pacific Underground Construction, Inc.*, Cal/OSHA App. 89-510, Decision After Reconsideration (Nov. 28, 1990); *Paramount Farms, supra.*), the ALJ could have and should have notified the parties of an intention to amend the citation to correct the section number cited in the citation, and then allowed the parties to demonstrate any prejudice they would suffer from such a post-submission amendment.

The rule is permissive, and does not require the Appeals Board to make any post-submission amendment. Due to the lapse of time, we decline to make such a post submission amendment to the section number in the citation in this case.

Here, the hazard addressed by the cited Safety Order, 4002(a), is injury to employees who come in to contact with non-point-of-operation movement hazards of a machine. (*Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 20, 2002); *Kelseyville Lumber & Supply Co. Inc.*, Cal/OSHA App. 04-119, Denial of Petition for Reconsideration (Jul. 17, 2007).) Section 4002(a) is located in the General Industry Safety Orders, Group 6, Power Transmission Equipment, Prime Movers, Machines and Machine Parts, Article 41, Prime Movers and Machinery. The first safety order within Group 6 is 3940, which states, “These orders apply to the guarding of power transmission equipment, prime movers, machines and machine parts, but do not include point of operation hazards.”<sup>5</sup>

Section 4002(a) addresses hazardous movement of machines and parts of machines, including pinch points and nip points.

a) All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

“Machine” is defined in Group 6 as “The driven unit as distinguished from the driving unit which is defined as a prime mover.” (3941.) “Nip-point” is also defined in the Group 6 definitions as “[t]hat location along the in running

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<sup>5</sup> Point-of-operation hazards on machines are covered by Group 8, beginning with section 4184. (See *PMR Racecars*, Cal/OSHA App. 03-1825 Decision After Reconsideration (Dec. 2, 2009).)

side(s) of rotating part(s) which permits a part of the body to be caught between two moving part(s) or between a moving part and a stationary object.” (3941.) “Pinch point” is not defined in Group 6, but there is a definition for that term in Group 8.<sup>6</sup> “Pinch point. Any point other than the point of operation at which it is possible for a part of the body to be caught between the moving part of a press or auxiliary equipment, or between moving and stationary parts of a press or auxiliary equipment, or between the material and moving part or parts of the press or auxiliary equipment.” If the definition from Group 8 applies to the Group 6 Safety Order, it would be consistent with the definition of “nip point”, which contemplates some potential contact being made by the exposed employee and the moving components of the machinery.

While the Safety Orders and prior Board decisions define machine broadly, to include anything driven by the prime mover, the term has never been construed to include the material manipulated or operated on by the machine. (*Aluminite Northwest, Inc.*, Cal/OSHA App 00-1220, Decision After Reconsideration (Sep. 25, 2002) [retraction action of sliding arm of pneumatic rigging table]; *Ray Products, Inc.*, *supra* [movement of machine created multiple pinch points between arms of machine and stationary frame]; *Massive Prints, Inc.*, Cal/OSHA App. 98-1789, Decision After Reconsideration (Jul. 27, 2001) [employee struck by arms of silk screen machine]; *Associated Ready-Mix, Inc.*, Cal/OSHA App. 95-3794, Decision After Reconsideration (Dec. 6, 2000) [employee arm caught between revolving drum of cement mixer and metal arm revolution-counting device]; *Roger Byg dba Packaging Plus*, Cal/OSHA App. 95-4574, Decision After Reconsideration (Jul. 19, 2000) [slotter wheels and blades of cardboard cutting machine]; *Paramount Farms*, Cal/OSHA App. 92-176, Decision After Reconsideration (Mar. 10, 1993) [moving parts of bucket feed elevator]; *Fibreboard Box and Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (Jun. 21, 1991) [adjustment bolt on lumber joiner machine]; *Napa Pipe Corp.*, Cal/OSHA App. 90-143, Decision After Reconsideration (Apr. 18, 1991) [pinch point created by revolving noisemaker on wheel of cable powered pipe-transport cart and recessed cable tray under the cart]; *Southern California Rapid Transit District*, Cal/OSHA App. 85-974, Decision After Reconsideration (Nov 6, 1987) [“the exposed cutting tool was a component part of the machine and as such is a hazard addressed by this safety order.”]; *Novo-Rados Constructors*, Cal/OSHA App. 78-135, Decision After Reconsideration (May 13, 1983) [wheels of a cement finishing machine]; *Sequoia Rock Company*, Cal/OSHA App. 76-1083, Decision After Reconsideration (Apr. 28, 1983) [several rollers, a revolving shaft, and the sprocket nip points on a cement mixer]; *Kaiser Steel Corp.*, Cal/OSHA App. 75-1135, Decision After Reconsideration (Jun. 21, 1982) [reciprocating part of

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<sup>6</sup> “[I]f a word or phrase is used repeatedly in a statute, it is presumed that the enacting legislative body intended to use the word or phrase in the same sense throughout. (*Hunstock v. Estate Development Corp.* (1943) 22 Cal.2d 205; *Stillwell v. State Bar of California* (1946) 29 Cal.2d 119.)” (*Waco/Arise Scaffolding & Equipment*, Cal/OSHA App. 91-010, Decision After Reconsideration (Dec. 30, 1992).)

surface grinder]; *ET Industries*, Cal/OSHA App. 76-809 Decision After Reconsideration (Nov. 30, 1978) [rotating auto polisher buffing wheel].)

Contrary to this history, the ALJ decision reasons that “material” should be included in the definition of “machine” since the action of the machine causes the movement of the material, which is the hazard proved by the Division. While the Board should refrain from reading unnecessary restrictions in to Safety Orders, we are also constrained to not read new words in to a Safety Order. (*E.L. Yeager*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) Certainly, the material is moved by the machine, but there is nothing in the Safety Order, or the definition of “machine,” that indicates movement of material is contemplated by the use of the term “driven unit.” “Unit” is not defined in the Safety Orders, though it is used extensively throughout. Webster’s defines “unit” as “a distinct part or object with a specific purpose.” (Webster’s New World Dictionary, 2d, (2002).)<sup>7</sup> Thus, a “driven unit” is the part of the mechanized equipment driven by the prime mover.

In other circumstances the Board has declined to include material handling hazards within safety orders that specifically limit their application to hazardous machine parts. (*Carris Reels*, Cal/OSHA App. 95-1456 Decision After Reconsideration (Dec. 6, 2000) [3328(a) unsecured equipment safety order does not apply to hazard posed by unsecured large end of spool in spool assembly factory since unsecured item was material, not equipment.]

We also consider whether the Division proved any moving part of the mobile crushing plant exposed employees to the hazard addressed by section 4002(a), to wit, moving machinery. The record does not state how far the operator’s platform was located from the conveyor and chopper in the bottom of the dumpster-sized hopper. (*Star-Kist Foods, Inc.*, Cal/OSHA App. 83-791, Decision After Reconsideration (Oct 16, 1987); *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) Thus, it cannot be said the employee was exposed to that machinery hazard, even if it is covered by section 4002(a).<sup>8</sup> There is no evidence in the record of any other moving part of the mobile plant to which any employee was exposed.<sup>9</sup> The evidence adduced at hearing established the movement of

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<sup>7</sup> “Where the safety orders do not supply a definition for a term used in a section, the Appeals Board applies the common usage or common law meaning, in the absence of evidence of a contrary meaning. (*D. Robert Schwartz dba Alameda Metal Recycling and Alameda Street Metals*, Cal/OSHA App. 96-3553, Decision After Reconsideration (Mar. 15, 2001) *citing* *Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (Apr. 18, 1991).) In interpreting statutory (or regulatory) language, words should be given the meaning they bear in ordinary use and dictionary definitions are often used to ascertain the ordinary meaning of words. (*In re Marriage of Bonds*, (2000) 24 Cal.4<sup>th</sup> 1, 16).” (*Nassco*, Cal/OSHA App. 00-2743 Decision After Reconsideration (Oct. 17, 2002).)

<sup>8</sup> If the chopper jaw is a point of operation, 4002(a) would not apply. Further, the depth and dimensions of the hopper bin are not part of the record.

<sup>9</sup> We can speculate from the photographs showing conveyors protruding out of the sides of this large device that, when the crushed material moves out along the conveyor, machinery is moving that

material was the hazard to which the employee was exposed. Since another safety order addresses that hazard, and the hazard addressed by the cited safety order was not proven, it is appropriate to grant Employer's appeal. (*United Foods, Inc.*, Cal/OSHA App. 89-197, Decision After Reconsideration (Nov. 15, 1990).)

Employer's appeal of Citation 2 is hereby granted.

ART R. CARTER, Chairman  
CANDICE A. TRAEGER, Member  
ED LOWRY, Member

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potentially exposes employees to the hazard addressed by 4002(a). No details about the work processes were presented to enable us to conclude any employee was ever exposed to those potentially moving parts. Since we are constrained to the record, we must conclude there is no evidence of a violation of 4002(a). (*Dollar Construction Company*, Cal/OSHA App. 84-726, Decision After Reconsideration (Dec 12, 1988).)