

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

In the Matter of the Appeal of:

NEWMAN FLANGE & FITTING COMPANY
P.O. Box 905
Newman, CA 95360

Employer

Docket No(s). 07-R2D4-2581
through 2583

**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 December 21, 2006, an injury accident involving an employee of Newman Flange & Fitting Company (Employer) occurred at a workplace in California. An investigator from the California Division of Occupational Safety and Health (Division) commenced an investigation of the accident on December 22, 2006. As a result of that investigation the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed, and administrative proceedings were held before Administrative Law Judges (ALJs) of the Board, including an evidentiary hearing on April 22 and 23, 2009. The hearing ALJ issued a Decision on September 30, 2009, which sustained some of the violations and granted Employer's appeal as to others.

On October 22, 2009, the Board issued an Order of Reconsideration of the Decision on its own motion, pursuant to its authority under Labor Code section 6614(b).

Both the Division and Employer submitted responses to the Order of Reconsideration.

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

EVIDENCE

Employer operates a foundry which produces metal flanges for the United States Navy, among other customers. The flanges are formed from large ingots of hot metal, and must meet stringent specifications. The ingots weigh between 5,000 and 20,000 pounds, and are forged at temperatures between 2,100 and 3,000 degrees Fahrenheit.

The forge used for this production process is commensurately large. It utilizes a pneumatically powered "hammer" weighing 20,000 pounds to strike the hot metal being formed, which rests upon a large floor-mounted anvil. The process is analogous to the work done by traditional blacksmiths, except that the scale of the work is far larger.

The hot ingots, described as balls of hot metal in the Decision, are placed on the anvil by a forklift. After a flange is partially formed by hammering, a metal cylinder called a pin is placed on top of it by one of the employees involved in the process, who uses a long pair of tongs to do so. The pin is then hammered through the flange to make an opening of a specific dimension. After penetrating the flange material the pin falls through a hole in the anvil to be recovered for cooling and re-use.

The accident involved here occurred when the operator of the forge's hammer activated it prematurely. As a result, the tongs which had placed the pin over the flange were forcibly ejected, striking and injuring the employee who had placed the pin.

Additional points of evidence will be included in the following discussion where relevant.

ISSUES

The Board's Order of Reconsideration stated the following issues to be considered by the Board:

1. Were the citations alleging violations of section 3314 properly decided?
2. Was the expert testimony properly considered and admitted?
3. Did the administrative law judge properly hold that Employer is not required to pay for steel toed safety shoes?

Each of the foregoing will be addressed below.

FINDINGS AND REASON FOR BOARD'S DECISION

After an independent review of the entire administrative record, the Board decides as follows.

I. The section 3314 violations.

The Division cited Employer for three separate violations of various subparts of section 3314. They are considered individually.

1. Section 3314(g)(2)(A); Citation 1, Item 3.

Citation 1, Item 3 alleged a general violation of section 3314(g)(2)(A), asserting that Employer had not established a written hazardous energy control program as required. That section provides:

(g) Hazardous Energy Control Procedures. A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.

[¶¶]

(2) The employer's hazardous energy control procedures shall be documented in writing.

(A) The employer's hazardous energy control procedure shall include separate procedural steps for the safe lockout/tagout of each machine or piece of equipment affected by the hazardous energy control procedure.

The evidence regarding this alleged violation showed that Employer had not developed a written hazardous energy control procedure for the forge in question. The record shows that Employer provided no written plan to the Division as requested by it, or at the hearing.

Employer argued that it was not required to comply with section 3314(g)(2)(A) because the forge could not be locked out during normal operations. That argument does not address the requirement at issue, namely that Employer have a written plan specific to the forge for repair, service and so on, as distinct from its normal operations. Nor did Employer introduce any evidence that the forge never required cleaning, servicing, repairing, or similar procedures when it was not in operation. Thus, the requirement was in effect and not met.

Moreover, we have held that section 3314(g)(2)(A) requires employers to have a plan for each machine, or for each group of similar machines at their places of employment. (*All American Asphalt*, Cal/OSHA App. 09-3871, Denial of Petition for Reconsideration (Jan. 11, 2011).) Thus, given Employer's failure

to produce a plan, we agree with the ALJ's Decision that Employer was in violation of section 3314(g)(2)(A).

2. Section 3314(d), Citation 2, Item 1.

Citation 2 alleged a serious, accident-related violation of section 3314(d), which provides:

(d) Repair Work and Setting-Up Operations.

Prime movers, equipment, or power-driven machines equipped with lockable controls or readily adaptable to lockable controls shall be locked out or positively sealed in the "off" position during repair work and setting-up operations. Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with Section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover, or machine from inadvertent movement or release of stored energy. In all cases, accident prevention signs or tags or both shall be placed on the controls of the equipment, machines and prime movers during repair work and setting-up operations.

Exceptions to subsections (c) and (d):

1. Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

[Exceptions 2 and 3 omitted as not pertinent here.]

Putting the pin in place so a properly sized hole could be forged into the flange was not "repair work" or a "setting-up" operation. The forge was not being repaired, nor was placing the pin a repair, or contended to be a repair. The pin had to be put in place during the forging operation itself, between blows of the hammer. The evidence further established that the forging operation had to take place while the metal being forged was hot, and that it cooled rapidly. It was also shown that isolating the hammer from the air compressors so as to remove the "source of power" was a process that would take so long that the metal would cool to below the safe forging temperature. For section 3314(d) to apply, placing the pin had to be part of a "setting-up" process. We interpret "setting-up" to refer to the process of preparing a machine or equipment for operation, and not something done routinely while the machine or equipment is in operation which is a necessary part of that operation. (See *Louisiana-Pacific Corporation*, Cal/OSHA App. 76-454, Decision

After Reconsideration (Nov. 27, 1978) [changing a blade four times a week not repair or set up; evidence established machine had to be operating].)

In addition, the evidence was that placing the pin between the hammer and the metal being forged was a “routine” part of “normal production operations” and an integral part of the forging process. We conclude that placing the pin was not meant to be covered by either the main text of section 3314(d), or by Exception 1, above, because it was not a repair or setting-up operation. Even if Exception 1 were applicable, Employer was in compliance. The employee used a long pair of metal tongs to enable him to do so at a distance which protected him from the heat radiating from the hot metal and also at a distance from the hammer, anvil and flange material themselves. The person controlling the hammer was in sight, had positive control of the hammer, and was being directed by a third person who signaled when it was safe to activate the hammer. That third person was effectively controlling the operation. Thus, alternative measures to provide adequate protection as called for in Exception 1 were in effect.

Finally, the evidence also shows that the accident occurred when the employee whose job it was to activate the hammer misunderstood a hand motion by that third employee directing the action, and released the hammer prematurely, before the injured employee had removed the tongs from the forge.

For the foregoing reasons, we affirm the Decision’s holding that the evidence did not establish a violation of section 3314(d).

3. Section 3314(g)(1), Citation 3, Item 1.

Citation 3 alleged a serious violation of section 3314(g)(1), which provides:

(g) Hazardous Energy Control Procedures. A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.

- (1) The procedure shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including but not limited to the following:
 - (A) A statement of the intended use of the procedure;
 - (B) The procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;

- (C) The procedural steps for the placement, removal and transfer of lockout devices and tagout devices and responsibilities; and
- (D) The requirements for testing a machine or equipment, to determine and verify the effectiveness of lockout devices, tagout devices and other hazardous energy control devices.

The Decision granted Employer's appeal and dismissed Citation 3, holding that the Division was improperly seeking to expand section 3314 into all aspects of forging operations.

We disagree. We construe the citation to allege that Employer had not developed an energy control procedure for "the cleaning, repairing, servicing, setting-up, or adjusting" of the forge in question. As we found with respect to Citation 1, Item 3, there was no evidence Employer had such a plan at the time of the accident. Thus the violation was shown.

That is not to say, however, that work process ongoing at the time of the accident was "the cleaning, repairing, servicing, setting-up, or adjusting" of the forge. We have found it was not. Moreover, the Division did not prove how the failure to have such a plan was a serious violation as defined by Labor Code section 6432(a) as in effect at the time of the accident and citation.² The Division has the burden of proving all required elements of an alleged violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) Accordingly, we reclassify the violation to "General." (Labor Code section 6602; *Quang Trinh*, Cal/OSHA App. 93-1697, Decision After Reconsideration (May 4, 1999) [Board has authority to reclassify a violation on own motion].) However, since the hazard addressed by sections 3314(g)(1) and 3314(g)(2)(A) is the same, we impose only a single penalty for the violations. (*A. C. Transit*, Cal/OSHA App. 08-4611, Denial of Petition for Reconsideration (Jun. 10, 2011) [the Board does not impose multiple penalties for different citations addressing same hazard].)

II. Expert Testimony

In his Decision, the ALJ held that one of the Division's witnesses, a Division employee, could provide expert testimony. At the hearing the ALJ had granted Employer's motion to bar such expert testimony on the ground that Labor Code section 6304.5 precludes it.

As the ALJ later realized, his initial ruling was incorrect. The language of Labor Code section 6304.5 regarding the admissibility as expert opinion of the testimony of Division employees, in the context of the statute, applies to

² Labor Code section 6432(a) was subsequently amended effective January 1, 2011.

testimony in third party actions, not hearings before the Board. The Board allows Division employees to offer expert testimony in Board hearings. (*Davis Brothers Framing*, Cal/OSHA App. 03-0114, Decision After Reconsideration (Jun. 10, 2010).)

III. Citation 1, Item 4; Employer Must Pay for Safety Shoes

The Decision held that Employer was not required to pay for steel-toed safety shoes it required its employees to wear. The safety shoes were also required to be worn by section 3385(a), the safety order alleged to have been violated in Citation 1, Item 4.³ The ALJ reasoned that because section 3385(a) used the terms “required” but not “furnish” or “provide,” which appear in Labor Code sections 6401 and 6403, respectively, Employer was not required to pay for the steel-toed shoes. The ALJ erred in his analysis.

Labor Code sections 6401 and 6403 have been interpreted to mean that employers must pay for safety equipment which is required to protect employees from hazards they are exposed to at work. (*Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465, 470 and 471.) Those statutes, among others, are “general laws enacted to insure the health and safety of employee.” (*Bendix, supra*, at 470.) Contrary to the ALJ’s analysis, the use of “required” in section 3385(a) does not mean that Employer is not required to pay for safety shoes. Since safety shoes are “required” to be worn by employees, per section 3385(a), they are “reasonably necessary to protect the life, safety and health of employees[,]” and therefore must be furnished or provided by Employer at Employer’s expense. (Labor Code sections 6401 and 6403.) We disagreed with similar arguments advanced by the employer on the same issue in *Kaiser Steel Corporation Manufacturing Group*, Cal/OSHA App. 78-1161, Decision After Reconsideration (Mar. 5, 1981) and *Southern California Edison*, Cal/OSHA App, 81-663, Decision After Reconsideration (Aug. 26, 1985).

Although our holding in *Petroleum Maintenance Company*, Cal/OSHA App. 81-596, Decision After Reconsideration (May 1, 1985) addressed a situation in which there were both primary and secondary employers, our holding there that a primary employer must pay for necessary safety equipment applies with full force when there is *only one* employer. In other words, where there is only one employer, it is the primary employer. In cases where there is only one employer, it must require employees wear safety shoes where work conditions involve exposure to foot hazards. (*United Airlines, Inc.*, Cal/OSHA App. 83-595, Decision After Reconsideration (Apr. 24, 1986).)

³ Section 3385(a) states, “Appropriate foot protection shall be required for employees who are exposed to foot injuries from electrical hazards, hot, corrosive, poisonous substances, falling objects, crushing or penetrating actions which may cause injuries or who are required to work in abnormally wet locations.”

DECISION AFTER RECONSIDERATION

The Decision of the ALJ is affirmed in part and reversed in part, as follows:

Citation 1, Item 3 – affirmed; general violation of section 3314(g)(2(A), \$1,200 penalty.

Citation 1, Item 4 – reversed; general violation of section 3385(a) sustained, \$400 penalty.

Citation 2, Item 1 – affirmed; appeal granted.

Citation 3, Item 1 – reversed, violation of section 3314(g)(1) found, classification reduced to “general” and zero civil penalty assessed, as the citation related to the same hazard as Citation 1, Item 3.

In all other respects the Decision is affirmed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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