

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

In the Matter of the Appeal of:

MARINE TERMINALS CORP.
dba EVERGREEN TERMINALS
2001 John S. Gibson Blvd.
San Pedro, CA 90731

Employer

Docket 08-R6D2-1920

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission hereby renders the following decision after reconsideration.

JURISDICTION

On December 21, 2007, the Division of Occupational Safety and Health (Division) commenced an accident inspection at a place of employment in San Pedro, California maintained by Marine Terminals Corp. dba Evergreen Terminals (Employer). On April 8, 2008, the Division issued one citation to Employer alleging a violation of California Code of Regulations, Title 8,¹ with a proposed civil penalty of \$18,000. Specifically, Employer was cited for a Serious violation of section 3203(a)(2) [IIPP: failure to have a system to ensure that employees comply with safe work practices].

Employer timely filed an appeal, and an evidentiary hearing was held on March 17-18, 2009, before an Administrative Law Judge (ALJ) of the Board. Both parties submitted post-hearing briefs, and Employer additionally filed a Motion to Conform Pleadings to Proof based upon evidence presented at the hearing regarding the merits of the serious classification. The ALJ issued her Decision on July 15, 2009, which sustained the serious citation and additionally denied Employer's motion to conform pleadings to proof.

¹ All section references are to California Code of Regulations, Title 8.

The Board ordered reconsideration on its own motion on August 6, 2009, the issue being whether the section 3203(a)(2) violation was properly sustained. Soon thereafter, on August 14, 2009, Employer filed its own Petition for Reconsideration, alleging that the ALJ was incorrect in denying Employer's motion to conform pleadings to proof. The Board took Employer's petition under submission on September 3, 2009.

Employer filed its response to the Board's order of reconsideration, and the Division filed a consolidated response to both the Board's Order of Reconsideration and Employer's Petition for Reconsideration. A week later, the Division submitted an addendum to its consolidated response, which Employer objected to.²

ISSUES

- 1.) Did the ALJ properly deny Employer's Motion to Conform Pleadings to Proof?
- 2.) Did the evidence establish that Employer violated section 3203(a)(2)?

EVIDENCE

On the day of the accident, Employer was using a crane in order to load containers onto a ship. The container at issue was placed onto a wheeled chassis equipped with locking pins at both the forward and aft end. Once the container was secured to the chassis via the pins, a truck would connect to the

² Employer objected to the Division's addendum on the basis that the Labor Code and applicable Board regulations do not allow for additional filings beyond the initial response to an order (or petition) for reconsideration. (Employer's Objection & Response to Division's Addendum, 2:2-8.) Employer is incorrect. Board Regulation § 392.3 provides that a party may make a motion to file a supplemental answer or petition. Furthermore, besides Labor Code § 6619's requirement that an initial answer must be filed within 30 days, there is no regulation or statute that specifically forbids the Board from receiving a supplemental filing. Therefore, the Board has discretion to accept a supplemental response if it believes that acceptance of the document will aid in properly adjudicating the appeal.

In its joint response to both the Board's order and Employer's petition for reconsideration, the Division (apparently by oversight) did not discuss the existence of the violation, the issue that was raised in the Board's order. It instead argued the merits of the serious classification "on the assumption that the Appeals Board will reverse [the decision of the ALJ denying Employer's motion]." (Division's Response to Order of Recon., 4:16-20.) One week after its initial response was filed, and in an apparent attempt to correct this oversight, the Division filed an addendum solely focusing on whether the ALJ properly sustained the violation. No explanation for the addendum was contained within its text.

The Board will not generally accept a supplemental response absent good cause being shown via motion. The Division should have made a motion to file its addendum under section 392.3, rather than simply filing it with the Board. However, because of the relatively short time period (one week) between its initial, timely-filed answer and its addendum, and because the addendum addressed the issue that the Board originally ordered reconsideration on, the Board will allow the Division's addendum. Most importantly, Employer has not been prejudiced by the Division's addendum, which stays within the confines of the record. The arguments raised in Employer's Response to the Addendum have also been fully considered by the Board.

chassis (much like a semi-trailer) and transport the container to a location under the crane for pickup.

Employer testified that it used the following general procedure on the day of the accident. Three workers (called “swingmen”) were positioned several feet ahead of the container’s pickup location. When the container reached their position, the swingmen were responsible for ensuring that all the pins were in the release position, which would allow for the container to detach from the chassis during the lift. Once the pins were in the correct release position, the swingmen would then signal the truck driver to proceed forward to the crane pickup location, where another worker known as a “signalman” was stationed. The signalman’s responsibility was to communicate with the crane operator, and to double check that the pins were in the release position. If no problems existed, the signalman would then give an “all clear signal” to the crane operator, who would then pick up the container, initially “floating” it only a few inches above the chassis, to ensure that the container detached from the chassis and truck. The crane operator floats the load so that he can personally observe the truck driving away.

George Vojkovich was the signalman involved in the accident. He testified that the swingmen had given the truck driver the signal to proceed forward to his location. He testified that normally he would “squat down” and check for separation between the container and chassis before giving the “all clear” signal to the crane operator, apparently while the container was still floating. However, on this particular occasion, he was distracted by another worker who shouted out to him, causing him to look away from the chassis. This distraction apparently caused him to give the all clear signal before realizing that one of the front pins was not in the release position. By the time he looked back at the container it was too late, as the crane operator, James Trotter (Trotter), had already picked up the container, which was still attached to the chassis and truck via the stuck pin.

Although Trotter testified that he always floats the load a few inches and then looks down to confirm that the truck has driven away, that didn’t happen in this instance. He testified that it all “happened so fast...” The truck “accordioned,” meaning it bent forward with its front end facing the ground, and then fell. The truck driver was then ejected out of the cab and sustained extensive injuries.

REASONS FOR DECISION AFTER RECONSIDERATION

1.) Whether the ALJ properly denied Employer’s Motion to Conform Pleadings to Proof (Employer’s Petition for Reconsideration)

Employer claims that the ALJ acted in excess of her powers when she denied its motion to conform pleadings to proof. (Lab. Code § 6617(a).) For the following reasons, we agree that the amendment should have been allowed.

Employer only contested the existence of the violation on its appeal form; it did not contest the “Serious” classification or the reasonableness of the proposed penalty.³ Notwithstanding these omissions, the parties freely litigated whether the violation was properly classified as serious, with neither party (nor the ALJ) objecting or mentioning in any way the irrelevancy of each other’s testimony on the issue. (Division’s Post-Hearing Reply Brief, 4:8-20; Division’s Response to Order of Reconsideration, 3:10-14.) The fact that Employer had not contested the serious classification on its appeal form was finally brought to light in the Division’s post-hearing brief, which was submitted seven weeks after the hearing adjourned. (Division’s Post-Hearing Brief, 2:13-14, 6:19-20 [“classification and penalty were not appealed ... only issue before [Board] is whether the cited standard was violated”].) Employer then filed a Motion to Conform Pleadings to Proof, requesting that the appeal be amended to include the appropriateness of the serious classification, as litigated during the hearing. The Division did not oppose the motion, and acknowledged that the parties introduced evidence on the issue. The Division further agreed that, “Employer’s contentions on this point are well taken ... [we] do not oppose Employer’s motion to conform pleadings to proof.” (Division’s Post-Hearing Reply Brief, 4:16-20; Division’s Response to Order of Reconsideration, 3:6-14.)

Regardless, the ALJ denied the motion citing Board Regulation 371(c). (Decision, p. 2, fn. 2.) Section 371(c) requires pre-hearing motions to be filed 20 days before the hearing. The ALJ reasoned that Employer had sufficient time to file and serve its motion before the hearing, yet chose not to. (*Ibid.*)

We find that the ALJ erred by applying section 371(c) under this circumstance. Section 371(c) does not apply to all motions, but only to *pre-hearing* motions. (See sections 371 [“Prehearing Motions”] and 371(c) [service timelines “apply to pre-hearing motions”].) Had Employer made a motion to include the serious classification before the hearing, or even during the hearing itself but before testimony was allowed on the issue, then section 371(c) would have been the appropriate rule to apply in considering whether or not to accept the late motion. However, here, the ALJ allowed both parties to fully argue and introduce evidence concerning the merits of the serious classification. The classification of the violation was thus “at-issue” during the hearing, and Employer’s Motion to Conform Pleadings to Proof was correctly submitted as a post-hearing motion. The pre-hearing time requirements under section 371 do

³ In addition to “directly” appealing the classification, classification is also at issue whenever a party contests the reasonableness of the penalty. This is because the classification directly affects the proposed penalty amount.

not apply when the subject of the motion is not capable of being in existence before the hearing.

Rather, the ALJ should have addressed the propriety of Employer's post-hearing motion under Board Regulation 386(a)(2). Section 386 is the Board's post-submission amendment rule, and provides that the ALJ "may amend the issues on appeal after a proceeding is submitted in order to address an issue litigated by the parties." (§ 386(a)(2).) Thus, it allows amendment of pleadings to conform to proof, as long as the non-moving party is given the opportunity to demonstrate prejudice from the intended amendment. (§ 386(b); *Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration (Sept. 6, 2012).)

Using this standard, the ALJ should have granted Employer's motion and amended the appeal. Both parties fully argued and introduced evidence concerning the appropriateness of the serious classification. No one during the hearing, including the ALJ, ever noticed that the serious classification was not at issue to begin with. Not only was there no prejudice to the Division, but the Division was the party that initially brought up the issue, contending in its opening statement that the evidence would support the serious classification. To this point, the Division conceded that Employer's motion was "well-taken," and therefore "did not oppose Employer's motion to conform pleadings to proof." (Division's Post-Hearing Reply Brief, 4:16-19.)

Further guidance regarding motions to conform pleadings to proof is found in Code of Civil Procedure sections 469 and 470. These Civil Procedure sections provide that differences (or variances) between the allegations in a pleading and the proof adduced during trial are not to be deemed "material variances" unless the variance "actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." (Code Civ. Proc. § 469.) When the variance is immaterial (i.e., non-prejudicial), the court may order an immediate amendment to the pleadings, thus allowing the pleadings to correspond to the proof. (Code Civ. Proc. § 470.) When prejudice is not shown by the non-moving party, amendments are highly favored by the courts and should be liberally granted, the purpose being to promote justice and avoid useless litigation. (See *Garcia v. Roberts* (2009) 173 Cal.App.4th 900, 909, citing *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400.) As stated by the California Supreme Court, this liberal standard for amendments squarely applies to the Board as an administrative body:

[T]his court should not impose a more rigid rule for a variance in an administrative proceeding than in a court action. . . . [C]ertainly no more onerous rule should apply to this administrative proceeding. Since such proceedings are not bound by strict rules of pleading (*Taylor v. Bureau of Private Investigators and Adjusters*

of Cal. (1954) 128 Cal.App.2d 219, 229), courts, in reviewing such proceedings, are even less inclined to treat a variance as reversible error.

(*Stearns v. Fair Employment Practices Com.* (1971) 6 Cal. 3d 205, 213.)

For the above reasons, the ALJ's decision denying Employer's motion to conform pleadings to proof is reversed. The appeal is amended to include the appropriateness of the serious classification.⁴

2.) Whether section 3203(a)(2) was violated.

Section 3203(a)(2) requires employers to have a system in place for "ensuring that employees comply with safe and healthy work practices." (§ 3203(a)(2).) The Division's citation alleged that Employer did not ensure that employees complied with the following rules contained in the Pacific Coast Marine Safety Code (PCMSC):⁵

- (1) Rules 422, 662, and 1452: "All containers shall be floated and hoisted only when there is no danger of lifting chassis or bomb carts";
- (2) Rule 921: "All operators shall have the seat belt properly fastened whenever a vehicle is in motion";
- (3) Rule 628: "Employees shall not engage in any activity which will distract them."

(Decision, p. 11.)

The ALJ found that Trotter did not properly float the load, and that the pins were not completely disengaged prior to the signal to hoist the load. (Decision, p. 12.) She therefore ruled that Employer was in violation of its rules that prohibited floating or hoisting of containers when there was a danger of lifting the chassis.⁶ (*Id.*, p. 12.) Without further analysis on the issue, the ALJ then concluded that Employer violated section 3203(a)(2) and had an ineffective IIPP "in failing to float the load." (*Id.*, pp. 10, 12.)

⁴ While we do not find for a violation of the safety order, thus making a determination of the serious classification moot, this discussion is included for guidance regarding variance requests.

⁵ The Pacific Coast Marine Safety Code (PCMSC) is a book of safety rules that is incorporated into Employer's IIPP. (Ex. B.) The rules are made in agreement between the International Longshore and Warehouse Union (ILWU) and the Pacific Maritime Association (PMA). The PMA acts as a liaison between various maritime companies, including Employer, and the ILWU. (Decision, p. 8, ¶ 2.)

⁶ The ALJ did not find that Employer violated Rule 921 (seat belt requirement) or Rule 628 (shall not engage in distracting activity). Neither party contests either of these findings.

We do not agree with the ALJ's reasoning. Section 3203(a)(2) requires employers to have a system in place to ensure that employees comply with safe work practices. "Substantial compliance" with this provision is specifically provided via the following methods: "recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices." (§ 3203(a)(2).)

The decision does not analyze the above options – any one of which, if established – would satisfy the requirement for ensuring compliance. The ALJ instead concentrated on the accident's occurrence itself, and the fact that Employer's employee(s) violated a rule contained in the PCMSC. (Decision, pp. 10-12.) Simply put, the ALJ ruled that Employer failed to have a system for ensuring compliance with safe work practices because its employee(s) had violated one of its own safety rules. However, there is no authority to support such a *per se* violation of section 3203(a)(2). For these reasons, the ALJ exceeded her authority in finding for a violation of the safety order.⁷

The Division also did not analyze whether Employer met any of the listed methods under section 3203(a)(2). Rather, the Division argued that: "Employer's IIPP was expanded to incorporate the PCMSC rule that 'All containers shall be floated and hoisted only when there is no danger of lifting chassis or bomb carts.' Thus, the Employer incorporated into its IIPP a work rule written in the PMA Code which, if not effectively enforced, violated section 3203(a)." (Division's Addendum, 3:9-15.) The Division also argued that "the failure to release pins was not an isolated occurrence," relying on the testimonies of Trotter and union representative Louis Mascola (Mascola). (*Id.*, 3:19-24.)

The Division's argument is not convincing. First, the testimonies of Trotter and Mascola do not support a finding that Employer had "non-isolated," or more frequent occurrences of stuck-pin incidents. Trotter never testified that he was involved in a similar stuck-pin type of accident while working for Employer; rather, he testified that he was involved in a similar accident years

⁷ The decision also denied Employer's Independent Employee Act Defense, reasoning that Employer did not meet all five of the required elements. (Decision, p. 14.) While we do not find for a violation and thus the IEAD issue is moot, we wish to clarify that the IEAD is not an available defense when an employer has an affirmative requirement to protect its employees. (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeal Bd.* (1985) 167 Cal.App.3d 1232, 1242 [IEAD recognizes that "where the employer has done its best to comply with OSHA, the purposes of the act would not be furthered by punishing it for the violation"].)

Here, section 3203(a)(2) requires that Employer have a system in place to ensure its employees comply with safe work practices. The ALJ found that Employer violated that requirement. IEAD is therefore not available. (See *Davey Tree Surgery*, *supra*, at p. 1242, citing *In re Mercury Service*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980) [purpose of IEAD is to protect against employees that nevertheless act against their employer's best safety efforts]; see also *Kenyon Plastering Inc.*, Cal/OSHA App. 10-2710, Decision After Reconsideration (Aug. 13, 2012) [IEAD not available when employer violates a positive guarding requirement].)

ago while working for a different employer. Regarding Mascola, he was of the opinion that all waterfront employers generally did not float the load. However, he had only worked for Employer for approximately 5-10% of his waterfront career (which started in 1995), and even during this time he did not testify that he had witnessed any similar, stuck-pin type incidents while specifically working at Employer's site.

More importantly, neither the occurrence of stuck-pin incidents in the past, nor the frequency of such occurrences, are in any way relevant when determining if Employer was in violation of section 3203(a)(2). As explained, section 3203(a)(2) specifically lists four methods that can be used by an employer to ensure that its employees comply with safe work practices: recognition of employees, training and retraining programs, disciplinary actions, or any other such means that ensures compliance. The listed methods are written with the disjunctive "or," and the final method allows for, "any *other such means that ensures compliance*," indicating that any one (or more) of the previous three methods are sufficient to ensure compliance.⁸ (See, e.g., Vehicle Code § 14104.2, subd. (b) [proceedings at hearing may be recorded by "mechanical, electronic, or other means capable of reproduction or transcription"].) Therefore, the Division must show that Employer did not comply with any of the four listed options under section 3203(a)(2). (See *E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007); *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999) [when safety order written in disjunctive, Division has burden to prove that employer did not comply with any of the listed options].)

After an independent review, we do not find that the Division met its burden. The record contains substantial evidence that Employer conducted training and retraining of its employees, which is sufficient in itself to grant the appeal. Trotter, the crane operator, attended a corrective action meeting after the accident, where he and members of Employer's management specifically addressed what went wrong and how such accidents can be prevented. (Decision, p. 6.) As a result of the corrective action meeting, he was sent to refresher training. (*Id.*, p. 10.) Trotter also attends a day-long, general safety training course put on by the PMA every 2-3 years, and just recently attended the training before the hearing. The course covers all aspects of working on the

⁸ We note that the standard is broad and arguably loose, and that because of these qualities one may instinctively feel that a more exact or inclusive standard is appropriate in order to "ensure compliance." This is especially where, as here, Employer had multiple people and checkpoints in place, yet each person failed in their respective duty to ensure that the pins had actually been released.

However, the Division chose to cite Employer for a section 3203(a)(2) violation, and the Board cannot impose harsher or stricter standards other than those written in the safety order. (See *Pouk & Steinle*, Cal/OSHA App. 09-0491, Decision After Reconsideration (Oct. 26, 2012); *Webcor Construction*, Cal/OSHA App. 08-2365, Denial of Petition for Reconsideration (Sept. 2, 2010) [Board cannot read terms into a safety order that the Standards Board has not included].) The safety order is clear and unambiguous, and we must apply the safety order as written.

crane and working in the yard. He also gives safety training to the signalmen. (*Id.*, p. 6.) Vojkovich, the signalman, testified that he received training for his position, and that the swingmen received both formal and “on-the-job” training. Greg Barker (Barker), Employer’s safety manager, testified that all employees must go through training before starting work for Employer, and that they are all issued Employer’s Safety Code Book (the PCMSC). Pre-shift safety audits are conducted. (Decision, p. 9.) In addition, safety “walkabouts” and inspections are done, where supervisors recognize employees engaged in safe conduct, correct unsafe conduct, and reinforce the safety rules. (*Ibid.*) Monthly safety meetings are held, with sign-in sheets. (*Ibid.*) Barker hosts training seminars and attends joint accident prevention committee meetings, where he communicates various safety issues to the other waterfront employers. (Decision, p. 9.) He testified that labor/foremen are invited to attend joint accident committee meetings, and that they are encouraged to bring up their concerns to management. Barker also testified that safety flyers are sent out at least once a month, and submitted into evidence examples of such flyers that emphasize the importance of properly floating the load and the proper signaling methods to use when communicating with the crane. (Decision, pp. 8-9; Exs. G, H, I.) Additionally, the Division obtained and introduced into evidence a document entitled “Dock Safety Talk,” which requires that the supervisor (known as the “Dock Boss”) perform a safety talk before each shift. (Ex. 7.) The safety talk includes discussion of the rule that, “Signalmen must make sure containers are unlocked from chassis before giving the hoist away signal.” (Ex. 7, Item no. 4.) The Division inspector testified that he received the Dock Safety Talk sheet from Employer, and that it pertained to the shift when the accident occurred. The sheet is signed for at the bottom by Employer’s superintendent, indicating that the safety talk was completed for that shift. (See Decision, p. 8 [“[Dock Boss] had given a safety talk prior to the start of the shift on the day of the accident.”]; Ex. 7 [“Completion of this form indicates that the safety talk was completed.”].)

The Division did not dispute the above evidence. The record therefore establishes that Employer had, at a minimum, conducted training and retraining of its employees.⁹ Nothing more is required for compliance with section 3203(a)(2).

⁹ The record also supports that Employer had a system for disciplining its employees, ranging from verbal warnings to a formal complaint that can be filed with the union’s labor relations committee. (See Ex. 13.)

DECISION

For the above reasons, the Division did not establish that Employer violated section 3203(a)(2). Employer's appeal is granted and the associated \$18,000 penalty is vacated.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: March 5, 2013