

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

In the Matter of the Appeal of:

C & M FINE PACK, INC  
4162 Georgia Blvd South  
San Bernardino, CA 92407

Employer

Docket No. 07-R6D2-4149

**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 the matter under reconsideration on its own motion, and having taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

**JURISDICTION**

On April 10, 2007, the Division's programmed inspection of C & M Fine Pack, Inc. (Employer) revealed an unreported accident that occurred the previous year, on January 6, 2006. After investigation, the Division issued 7 citations alleging 9 violations of Title 8, California Code of Regulations. All citations were appealed, and the parties reached settlement on all but Citation 3, Item 1, which alleged a serious violation of section 4002(a) and proposed a penalty of \$18,000.<sup>1</sup>

After a hearing, held on August 26, 2008, an Administrative Law Judge (ALJ) for the Board issued a Decision affirming the violation, but not the classification, and imposed a reduced penalty of \$375.00. The Division filed a petition for reconsideration contending the Decision erred regarding the classification of Citation 3, and though not explicitly stated, infers that the evidence does not justify the findings, and that the findings do not justify the decision. (Labor Code section 6617.) The Board also ordered reconsideration of the matter on its own motion to review the Decision regarding the classification and the weight afforded any stipulations germane thereto. Employer answered both the Board's order and the Division's petition. After

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<sup>1</sup> All references are to Title 8, California Code of Regulations unless otherwise indicated.

review of the record and arguments, the Board issues this Decision After Reconsideration.

### **EVIDENCE**

Both the Division and Employer presented multiple witnesses and exhibits concerning the validity of the citation for a violation of section 4002(a), and Employer's various affirmative defenses. The evidence presented regarding the classification was limited, due to the stipulation that the serious classification was established unless Employer proved the affirmative defense of lack of employer knowledge. Although the existence of the violation is not before us, the circumstances of the violation are relevant to the employer knowledge defense, so we set those forth here.

Ronnie Marquez testified that he was seriously injured while operating a plastic material forming machine known as "F16". The machine is large, and is attended by two people, one at each end. The "operator" attends to the part of the machine where plastic sheeting is inserted on to a roller mechanism to be drawn in to the machine for forming. Another employee is at the other end of the machine as a "packager" compiling the formed plastic items, here bowls, for shipment elsewhere.

Marquez described his operator job. He inserted sheets of plastic into the roller feeder assembly with his hands. Once the rollers were engaged they pulled the sheets in to the machine. The rollers were covered by a guard. At times he would turn off the machine and reposition the sheet material if it was not entering the machine correctly. He used a knife (issued by Employer) and his hands to properly position the material entering the machine. On the day of the injury the material was not feeding in to the machine properly, and Marquez had to turn the machine off twice, cut the sheet of plastic with his knife, and attempt to reinsert the material. At some point after the machine was turned back on after the second time it was turned off, Marquez reached toward the machine near but below the material entry point, and his hand felt a shock sensation. At that point he realized his hand entered an area below the rollers and contacted a sprocket beneath the location on the machine where the material entered.

This material point-of-entry roller assembly, located above the exposed sprocket, is depicted in photographs as covered by a plexi-glass box-shaped device, which guarded the rollers. At the time of the injury, the plexi-glass box did not exist. A different metal guard was in place, covering the rollers. No photographs or schematics for that metal guard were ever presented to rebut Marquez's description of the guard on the day of his injury. Neither the metal guard nor the plexi-glass guard covered the sprocket beneath the roller assembly.

Employer offered testimony of Marquez's supervisor, Hayward Vanlue (Vanlue). Vanlue did not observe Marquez operating the machine, nor did he witness the incident. He first entered the area of the accident approximately one half hour after the injury occurred. He states he observed the metal guard out of place, though still resting atop the roller mechanism at the material entry point of the machine. He states he locked out and tagged out the machine at that time. He did not investigate or ask other employees if they removed the guard. Eight months after the incident, Employer wrote up Marquez for removing the guard.

Marquez testified on rebuttal that he refused to sign the discipline notice because he disagreed with the conclusion that he removed the guard. At that time, Raul Salazar, the maintenance worker who assisted Marquez at the time of the injury in getting to the office for medical attention, told Marquez the he was the person who removed the metal guard after the injury.

Vanlue further testified that, on the day of Marquez's injury, he observed the operator of the F16 at the close of the preceding shift, and the machine at that time appeared to be in normal working order, though no in-depth inspection was conducted. The Employer allows an operator to turn a machine off twice while attempting to attain proper alignment of plastic sheet material entering the machine. If further adjustment requires shutting down the machine a third time, Employer requires operators to call maintenance. Another supervisory employee, Coates, testified that the metal guard installed on the machine at the time of the accident was designed and fabricated in-house by Employer's engineers and mechanics. Since that time, in-house engineers and mechanics designed the plexi-glass guard depicted in the photograph, and additional guards including the current guard which, when removed from the rollers, disengages the machine. No testimony was offered as to any guard fabricated or installed over the exposed sprocket located beneath the roller assembly.

### **ISSUE**

Whether the classification and penalty were properly resolved given the stipulations of the parties.

### **DECISION**

The violation of section 4002(a) [failure to guard machine to prevent inadvertent contact], was affirmed after hearing. Since the propriety thereof was not raised by any party, or by the Board in its Order of Reconsideration, is not before us. (Labor Code section 6618.)<sup>2</sup>

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<sup>2</sup> IEA defense cannot be asserted as a defense to a machine guarding violation. *City of Los Angeles Department of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986); *Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19,

What is before us is the classification of the violation. The record reveals the parties stipulated that the serious classification was established subject to the Employer's right to establish the statutory affirmative defense to the classification. Such stipulations are binding on the parties and the Appeals Board. (*Capital National Bank v. Smith*, 62 Cal. App. 2d 328, 343; *Safeway #951*, Cal/OSHA App. 05-1410 Decision After Reconsideration (Jul. 6, 2007).) Thus, we abide by the stipulation that there exists a substantial probability that assumed injuries resulting from this violation would be serious, as defined in the Act. The only issue for the ALJ to determine was whether Employer could prove the affirmative defense, then in effect pursuant to Labor Code section 6432, that Employer neither knew nor could have known of the violation.<sup>3</sup>

Employer asserts in its Answer to the Board's Order of Reconsideration that it did not enter in to this stipulation and that while it did put on evidence attempting to establish the affirmative defense of Labor Code section 6432(b), it did not agree that the Division need not present evidence establishing the serious classification.

The Decision does not contain any stipulation regarding the serious classification. The Decision did not recite that the only issue was whether Employer established an affirmative defense under Labor Code section 6432. Both Employer's position and the omission of the stipulation in the Decision are contradicted by the record.

The hearing transcript reveals the following exchanges:

Division Counsel, Raymond Towne, states: "I'd also like to note for the record that the employer has stipulated that the classification, serious classification – employer stipulates that he will not contest the classification of citation 3 dash 1, . . ."

Employer's representative, Financial Officer Laurence Huff, states: "Excuse me your Honor; we intended to argue the serious classification is incorrect."

Division's counsel proceeded to make an opening statement regarding the evidence to be presented and its legal theories. This was followed by

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1985).) Even so, Employer raised the defense, and presented evidence thereon. While it was error to consider the defense after concluding a machine guarding violation was established, the error is irrelevant since the ALJ concluded that IEAD was not proved.

<sup>3</sup> Labor Code section 6432(b) stated: "Notwithstanding subdivision (a), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." Subsection (c) clarifies that "substantial probability" refers not to the likelihood of injury, but to the probability of serious injury or death occurring assuming an accident or injury results from the violation. For violations occurring after January 1, 2011, this rule does not apply.

Employer's opening statement. At the conclusion of Employer's opening statement, its representative stated: "We believe that the evidence will show the following: that the machine in question was guarded and the safety order was not violated, that the classification of serious and the alleged violation is incorrect based on the lack of actual or constructive employer knowledge, that the guard had been removed, and that the guard was removed by the injured employee." Employer then listed the five affirmative defenses it intended to assert, one of which was "that there was a lack of actual or constructive employer knowledge."

An off-the-record discussion ensued, and upon returning to the record, the Division's representative stated: "You honor, I believe we have a stipulation from the employer as to the serious classification of the citation without prejudice to them making an employer knowledge defense pursuant to 6432(b)." Employer's representative then stated: "That's correct."

These statements clearly evince agreement among the parties that the Division need not present evidence establishing the serious classification initially, and that the serious classification will turn on whether Employer can establish the statutory affirmative defense of Labor Code section 6432(b). The Division's actual forbearance from questioning its investigator regarding her opinion as to the severity of assumed injuries resulting from the violation corroborates the intent of the parties established by the terms of the stipulation contained in the hearing record. (See *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredics* (1998) 61 Cal. App. 4<sup>th</sup> 672, 679.) The parties are bound by this stipulation. (*Naprodix, Inc.* Cal/OSHA App. 08-0825, Denial of Petition for Reconsideration (Dec. 26, 2008).)

However, the Decision fails to recite this stipulation. Instead, it concludes the Division did not submit evidence in support of the serious classification. While the division indeed did not present such evidence, it is clear the evidence is not in the record because the parties stipulated to its existence. Thus, the conclusion that the Division did not sustain its burden to establish the classification is an error.

As a result of the omission of the stipulation, the Decision never considers whether the affirmative defense in Labor Code section 6432(b) has been established. Since the parties clarified that employer knowledge of the violation was in issue, and was the basis of Employer's defense to the classification of Citation 3, item 1, they were afforded an opportunity to present evidence thereon. We need not remand the matter to the ALJ for further development of the record.

In evaluating the evidence submitted regarding Employer's lack of knowledge defense, we conclude the affirmative defense has not been established.

The violative condition was determined to be the exposed sprocket beneath the roller assembly that resulted from Employer's failure to prevent inadvertent contact with the moving parts of a machine. Violations of section 4002(a) located in plain sight are violations an employer should be aware of in the exercise of reasonable diligence. (*Roger Byg dba Packaging Plus*, Cal/OSHA App. 95-4577, Decision After Reconsideration (Jul. 19, 2000).) The evidence shows, through photographs and the testimony of Marquez, that there was no cover over the *sprocket* beneath the material feeding rollers where the operator is located on the F16 machine. Since it is in plain sight, Employer has failed to show it could not have known of the violation despite reasonable diligence, such as an inspection. Moreover, Employer's own engineers and mechanics designed and installed the guard, and thus were aware of its dimensions and shortcomings. No reason is offered as to why it was designed with the gap in place. The evidence supports the ALJ's conclusion that the injury occurred due to inadvertent contact with the sprocket, rather than due to Employer's theory that the guard over the rollers was removed prior to the injury. "The machine had been running for approximately twenty minutes when his [Marquez's] hand came in contact with the sprocket as he was guiding the material through the machine." (ALJ Decision, page 10.)<sup>4</sup>

Employer's failures to observe the worker on this shift, or to notice the unguarded sprocket hazard at any time prior to the injury, are irrelevant since the violation is in plain sight. The gap was identified by Marquez in the photographs. There was no evidence as to the reasonableness of Employer's failure to appreciate the danger resulting from the guard it designed and installed, which left a gap that allowed inadvertent contact with the sprocket beneath the rollers. There was no evidence the uncovered sprocket was hidden from a reasonable inspection. It was clearly shown in photographs. Since Employer bears the burden of proving it was reasonable in its ignorance of the hazard, the lack of evidence here compels a finding that the affirmative defense has not been shown.

The Decision makes some statements regarding the employer knowledge defense, but does not make a necessary ruling on the defense.<sup>5</sup> The few statements in the Decision regarding employer knowledge are either irrelevant

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<sup>4</sup> Though the Decision is somewhat imprecise when it later states Marquez's hand was injured by contacting rollers, the testimony of Marquez and his indication with a marker on the photograph of the machine showing his hand contacting the sprocket beneath the rollers confirm he was injured not by rollers to which he was exposed after allegedly removing the metal cover, or guard, but by the unguarded sprocket beneath the roller / conveyor / feeder mechanism. In any event, since neither party, nor the Board by Order of Reconsideration, preserved for reconsideration the issue of whether the safety order (§ 4002(a)) had been violated, the Decision upholding the 4002(a) violation is final. (Labor Code §6618).

<sup>5</sup> This error appears as a result of ALJ concluding the Serious classification was not established since the record lacked evidence regarding the likelihood of serious injury resulting from the violation. This evinces a failure to recognize the stipulation of the parties, which resolved the issue of whether there was a substantial probability of serious physical harm resulting from the violation in the Division's favor, retaining only the issue of whether Employer established a reasonable lack of knowledge regarding the violation.

to the employer knowledge defense, or are contradicted by un-impeached evidence in the record. Thus, the Board does not rely on the portion of the Decision facially addressing the issue of employer knowledge. We clarify here how the comments regarding employer knowledge fail to resolve the issue.

Specifically, the Decision states: “Nor did she [Division investigator Ali] consider whether the exhaust guard was temporarily misaligned or not properly secured, latent conditions which the Employer may have been unaware.” This statement is contradicted by the record. Ali did consider such a scenario when she testified that she followed up with Marquez to confirm his version of events as being an injury while the guard was in place. She stated she was made aware of Employer’s version of events which included speculation that Marquez loosened and moved the guard, though doing so required a special tool and no evidence shows if or how Marquez actually obtained such tool. There was no evidence of misalignment of the guard at the time of the injury. There was conjecture by Employer’s supervisor Vanlue that the injured employee removed the guard based on Vanlue’s observation of the unsecured guard, and his conclusion that no one else, to his knowledge, actually did loosen and remove the guard. He undertook no investigation to determine if any other employee tampered with the guard.

The Decision further states: “Neither Marquez nor Employer may have been able to know the hidden danger, which would explain why Employer thought Marquez removed the exhaust guard prior to the accident. Thus, Employer may not have had the requisite knowledge that the exhaust guard, which in place, allowed the accidental contact.” This statement is also contradicted by the record. The Employer provided evidence through the testimony of witness Coates that its own engineers and senior mechanics designed and installed the guard. Without any evidence establishing why it was reasonable for those employees to fail to appreciate the gap in the protection afforded by the house-made guard, the Employer must be considered to have knowledge of all aspects of the guard, including its ineffectiveness at preventing inadvertent contact, as occurred here.

Then the Decision states: “It may have been a temporary condition, since there had not been any previous accidents using the F16 machine.” There is no evidence that the gap in the metal guard was temporary. And, there was a prior injury to another employee working at this location on the machine, but the cause of that injury was not established. Testimony established that after that first accident, Employer fabricated and installed the metal guard which was in place during this injury, and which left a gap, as discussed. Since that time, a plexi-glass hood guard was fabricated and installed, which appears in the photographs. The metal guard does not appear in any photograph, and we cannot infer from such non evidence that the gap was temporary.

Neither party provided sufficient evidence of the mechanism of the previous injury to allow meaningful comparison to this injury. Due to the size and complexity of the mechanical aspects of the machine, it is impossible to conclude from photographs that the two incidents were the same. Also, there is no logical connection between a prior dissimilar accident and a conclusion of a temporary condition.

The violation was for accidental contact with an unguarded portion of the machine. (§ 4002(a).) Employer must establish by a preponderance of the evidence that it was reasonably unaware of the unguarded state of the machine that allowed accidental contact to occur. The Employer did not convince the ALJ that the guard had been temporarily removed in the moments before the injury, or that injury occurred due to contact with the *rollers* whose guard had been removed. The ALJ specifically rejected this theory of Employer's. The Decision states: "Conflicting evidence was presented regarding whether the guard was removed when the accident occurred. The testimony of Ali and Marquez indicated that the exhaust guard did not cover a gap that exposed the pinch-point area that Marquez's hand came in contact with. Employer's evidence of Marquez removing the exhaust guard is not compelling. There are no percipient witnesses who observed Marquez remove the exhaust guard. Vanlue did not observe the machine until an hour after the accident. Employer did not present any evidence of employees loaning Marquez tools, which would have required a special "Allen wrench" to remove the bolts attached to the guard." Since there is no substantial evidence to the contrary, we affirm the ALJ's conclusion here. (*Johns-Manville Sales Corp.*, Cal/OSHA App. 77-339, Decision After Reconsideration (Dec. 28, 1983); *Lamb v. Workmen's Compensation Ap. Bd.* (1974) 11 Cal. 3d 274.)<sup>6</sup>

Employer offered no evidence that it was reasonably unaware of this exposure that existed during the normal operation of the machine. Employer either failed to inspect the machine, or failed to appreciate the hazard.

The fact that an employer has been fortunate enough to avoid an injury for an extended period does not mean it could not have known of the hazard. On the contrary, the Board has held that unguarded machine parts that are in plain view constitute a serious hazard because an employer can detect them through the use of reasonable diligence. *New England Sheet Metal Works*,

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<sup>6</sup> The evidence relied on by the ALJ is corroborated by the several hearsay statements of mechanic Salazar who 1) admitted to the injured worker that he had removed the guard after the injury, 2) stated to the Division inspector that a hand could get in to the gap below the guard, and 3) stated to Employer's supervisor that he wondered why the injured worker put his hand in the opening. (§ 376.2; *Robinson Enterprises, Inc.*, Cal/OSHA App. 91-1316, Decision After Reconsideration (Jul. 29, 1993); *Chooljian Brothers Packing Co.*, Cal/OSHA App. 05-984, Denial of Petition for Reconsideration (Sep. 4, 2007).) The ALJ concluded the injured worker "had to work around the exposed sprocket in operating the F16 machine," and thus concluded a violation occurred.

Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 6, 2005); *Chicken of the Sea International*, Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 28, 2003). A machine is in plain view if it is located in an employer's facility and is of sufficient size to be easily detectable and recognizable. *Id.*

(*Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug. 20, 2007).)

Thus, the employer's defense under Labor Code section 6432(b) has not been established on this record.

Regarding the penalty calculation, the citation alleges a serious violation caused a serious accident. If shown, such fact prevents the reduction of the penalty for any reason other than size, which does not apply in this case since Employer has 500 employees. (§ 336(c)(3).) The evidence shows the unguarded portion of the machine, the gap, allowed inadvertent contact with the hand of employee Marquez. There is no other evidence as to the cause of the injury, the ALJ having rejected Employer's theory that the violation was one of failure to lock out the machine prior to the removal of the guard. Since the evidence did not convince the ALJ that Marquez removed the guard, and there is no compelling evidence in the record to the contrary, we conclude the injury occurred because the guard, while in place, failed to protect against this inadvertent contact, which resulted in amputation of part of the employee's finger. (*New England Sheet Metal Works*, Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 6, 2005).) Since the serious violation caused serious injury, no deductions are allowed. (Labor Code § 6619(d).) The accident related portion of the classification is affirmed, and the penalty of \$18,000.00 is imposed.

ART R. CARTER, Chairman  
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: MAY 11, 2012