

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

In the Matter of the Appeal of:

BRUNTON ENTERPRISES
dba PLAS-TAL MFG CO
8815 Sorensen Avenue
Santa Fe Springs, CA 90670

Employer

Dockets. 09-R6D2-2239 through 2241

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

JURISDICTION

Beginning on March 23, 2009, the Division conducted an accident inspection at a place of employment in Santa Fe Springs, California maintained by Employer. On June 11, 2009, the Division issued four citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on June 1, 2010. The Decision granted Employer's appeal in part and denied it in part; Citation 1 was affirmed, Citations 2 and 4 were vacated, and Citation 3 was reclassified from Serious to General.

The Division timely filed a petition for reconsideration of the ALJ's Decision. The Employer filed an answer to the Board's order of reconsideration and the Division's petition for reconsideration.

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

ISSUE

1. Regarding Citation 2, whether the Division met its burden of proof of employee exposure.
2. Regarding Citation 3, whether the Division proved the serious classification of the violation.
3. Regarding Citation 4, whether the Division proved employee exposure.

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Employer is a metal manufacturing and fabrication facility. On March 23, 2009, Charlene Gloriani, Associate Safety Engineer for the Division, conducted an inspection of the worksite. Gloriani testified that she was introduced to Employer's Operations Manager, Patrick Scott, upon entering the premises. Scott granted permission to conduct the inspection and toured the facility with Gloriani. During the course of the inspection, Gloriani observed a Piranha brand hydraulic press brake. She took a photo and observed that the point of operation of the press brake was unguarded. Scott showed Gloriani a piece of metal, which had been bent by the press brake, when she asked how the press brake works.

Gloriani also examined Employer's punch press, and took several photos of the point of operation, which has a yellow mesh covering what Gloriani described as a partial guard. She testified that Scott told her that employees operated the machine once a week.

Another set of photographs depict a horizontal belt sander. In one of the photos of the belt sander, an employee is standing at the sander, his back to the photographer. Gloriani testified that she was told by the Employer that the in-running belt on the sander may run in either direction. She described a nip-point at the point where the belt and wheel intersect; the area is partially enclosed, but a two inch gap remains.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Division's petition for reconsideration and the Employer's answer.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Division petitioned for reconsideration on the basis of Labor Code section 6617(c).

1. Regarding Citation 2, whether the Division met its burden of proof of employee exposure.

Citation 2 alleges a serious violation of section 4214(a):

- (a) Press brakes, mechanically or hydraulically powered, shall be guarded in a manner that will accomplish the following:
 - (1) Restrain the operator(s) from inadvertently reaching into the point of operation, or
 - (2) Inhibit machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or
 - (3) Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

Testimony and photographic evidence (Ex. 2D) establish that Employer's press brake was not guarded on the day of Gloriani's inspection. No restraint kept an operator's hand from inadvertently reaching into the point of operation, and no guard or other device protected an operator's hands from the point of operation.

The Division, in its petition for reconsideration, argues that it has met its burden in establishing employee exposure to the hazard of the unguarded press brake. It is the Division's burden to show employee exposure to a violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 Decision After Reconsideration (Apr. 24, 2003), citing *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) Direct evidence is not required; circumstantial evidence may be used to

demonstrate that employee exposure is more likely than not. (*Benicia Foundry & Iron Works, Inc.*, *supra*, citing *C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26 2001).)

As in *Benicia Foundry & Iron Works, Inc.*, the evidence presented, while perhaps not the strongest case possible, does meet the threshold for a finding that the Division met its burden. The testimony of the Division's inspector establishes that she did see employees in "the big bay" area, and spoke to one employee—although not someone at work on this particular machine. Another photograph shows a worker bent over another piece of equipment. This machine is located on Employer's premises and was set up for use, presumably for the purpose of metal manufacture and fabrication. (*Benicia Foundry & Iron Works, supra*). Scott, Employer's operations manager, showed Gloriani a piece of bent metal (Ex. 2E) when she asked how the press brake works, demonstrating that the machine was operative at that time.

The evidence is sufficient to establish that it was more likely than not that employees of Employer had used the press brake with the unguarded point of operation. (*Truestone Block, Inc.*, Cal/OSHA App. 82-1280, Decision After Reconsideration (Nov. 27, 1985).) The Board has consistently found indirect or circumstantial evidence may support an inference of employee exposure, including the location of hazardous equipment in an active workplace, making it available for use by employees. (*Santa Fe Aggregates, Inc.*, Cal/OSHA App. 00-388, Decision After Reconsideration (Nov. 13, 2001), citing *Kaiser Steel Corporation, Steel Manufacturing Division*, Cal/OSHA App. 75-1135, Decision After Reconsideration (Jun. 21, 1982). [exposure inferred from footprints, grease, location of equipment, worn condition of hammer, files, and ladder]). In *Santa Fe Aggregates*, the Division's witness observed a ladder at the edge of a culvert, which went to a work area. Although the witness did not see employees using the ladder (which was established as posing a safety hazard), a reasonable inference established that the ladder was in use by employees to reach the work area. Here we may reasonably infer from the testimony and evidence presented that the press brake, as a large piece of machinery taking up floor space in Employer's metal fabrication facility, and which shows signs of usage and wear, and had recently been used to bend the metal shown in Division's exhibit 2E, has been used by employees with the point of operation unguarded. This is sufficient to show exposure, particularly as Employer failed to rebut the Division's evidence. (*Truestone Block, Inc.*, *supra*).

The Division's witness, Efren Gomez, testified regarding the serious classification of the citation. According to Gomez, in his prior employment with the State Compensation Insurance Fund (SCIF), Gomez conducted inspections and investigations, and reviewed employers' first reports of injuries. He stated he was familiar with press brakes from this work. In Gomez's experience, the

most common injury with a press brake would be due to the employee placing his hands down on the object to be modified by the press, close enough for top portion to come down on the employee's hand. Due to the force of the top of the press brake, which Gomez testified could be 10 to 30 tons, as the machines have various capacities since they are made to bend metal, an amputation of the employee's hand would occur. Gomez testified that in his experience, this was a 100 percent risk of amputation to either the finger or entire hand, due to the force from the machine.

The Board finds a preponderance of evidence establishes the serious classification is appropriate. Gomez's testified based upon his experience investigating claims at SCIF, and was able to testify based on twenty years of experience in a safety field. (See, *Duke Pacific, Inc.*, Cal/OSHA App. 08-574, Decision After Reconsideration (Aug. 30, 2012).) Therefore, the Division met its burden of showing that death or serious injury would result, should an employee be injured due to the violation of section 4214(a).

2. Regarding Citation 3, whether the Division proved the serious classification of the violation.

In Citation 3, issued for a violation related to Employer's hydraulic 125 pound punch press, the ALJ found a violation of section 4215(a):

(a) Hydraulic power presses shall be guarded in a manner that will accomplish the following:

(1) Restrain the operator(s) from inadvertently reaching into the point of operation, or

(2) Inhibit machine operation if the operator's hand or hands are inadvertently within the presence sensing field or inadvertently within or placed within the point of operation, or

(3) Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

The Division was able to establish by a preponderance of the evidence that Employer's punch press was unguarded at the point of operation as required by the safety order. Employer admitted to employee exposure on a weekly basis.

The Division's witness, Efren Gomez, testified regarding the punch press. Gomez was not present for the inspection of Employer's shop, but reviewed photographs taken by Gloriani.

Gomez testified to his experience in the safety field. At SCIF he conducted inspections of worksites, investigated accidents, and eventually became a supervisor in the loss control department, where he delegated cases to representatives, covering a territory of approximately 4000 employers. Gomez testified that he was familiar with punch presses, as he had serviced an industrial area prior to becoming a supervisor at SCIF, and had come across punch presses “quite frequently.” He stated he had dealt with injuries which had occurred due to working with punch presses. Gomez testified that 100 percent of the time, the injury that would occur with a punch press would be amputation of a finger.

In order to prove that a violation is serious, the Division must present evidence that shows, assuming the accident or exposure results from the violation, that the result of the accident will more likely than not be death or serious injury.² The Board has defined serious injury to include such serious instances as a permanent loss or disfigurement, or hospitalization for 24 hours. (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011), citing *BLF, Inc. dba Larrabure Framing*, Cal/OSHA App. 03-4428, Decision After Reconsideration (Jan 21, 2011); *MV Transportation, Inc.*, Cal/OSHA App. 02-2930, Decision After Reconsideration (Dec. 10, 2004).) Opinion presented by a witness regarding substantial probability of serious physical harm or death must be based upon a valid evidentiary foundation: expertise on the subject, reasonably specific scientific evidence, an experience-based rationale, or generally accepted empirical evidence. (*Forklift Sales of Sacramento, Inc.*, *supra*, citing *R. Wright & Associates, Inc., dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

The Division’s witness testified to his experience with machines of this kind. He testified to adjusting up to 1200 claims a month, and making worksite visits at industrial sites which utilized punch presses. Gomez specifically stated he had investigated accidents where employees had been injured by punch presses, and gave an opinion that these accidents would result in an amputation 100 percent of the time. Similar to the rehabilitation counselor in *Forklift Sales of Sacramento, Inc.*, who testified to counseling injured workers and studying hundreds of case files involving injured workers, Gomez’s 20 years with SCIF, where he was able to study thousands of case files involving various workplace accidents, provided him with an experienced-based rationale for making the statement regarding punch press accidents. Furthermore, as the Board noted in *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), where a Division witness provides evidence based on experience in the field of safety, and no countervailing evidence is produced, nor is the testimony impeached on cross-

² Labor Code 6432 had been revised; the revised statute does not apply to the facts of this case as the effective date of the revision is January 1, 2011.

examination, the Division has met its burden of proof to show the serious classification. (*Sherwood Mechanical, supra*, citing *Forklift Sales of Sacramento, Inc., supra*).

3. Regarding Citation 4, whether the Division proved employee exposure.

Citation 4 alleges that the horizontal belt sander was unguarded, per section 4312:

Belt sanders shall have both pulleys and the unused run of the sanding belt enclosed. Rim guards will be acceptable for pulleys with smooth disc wheels provided that in-running nip points are guarded.

Gloriani testified that there was a nip point between the pulley and the belt of about two inches, where an employee could inadvertently catch his or her fingers. The Division's Exhibit 2I, a close-up photo of the nip-point, further establishes the unguarded nip-point between the belt and pulley.

As discussed above, the Division must not only show a violation of the safety order, but establish employee exposure to the violative condition. (*C.A. Rasmussen, Inc., supra*). Exposure may be shown through indirect evidence establishing that employee exposure was more likely than not to have occurred. (*Truestone Block, Inc., supra*). In this case, the Board need not look to indirect evidence of exposure, as the Division was able to provide evidence of employee exposure through testimony and photographic evidence. Gloriani responded affirmatively when asked if the employee, who appears to be using the sander, was present at the time she took the photo. The photo, Division's Exhibit 2H, shows a man in a hard hat, leaning over the sander. He has something in his hand, and he appears to be using the sander, or preparing to use it. No evidence was presented by the Employer to suggest that anyone besides Employer's own employees utilized the Employer's workspace and machines. The evidence establishes a violation of section 4312. (*Truestone Block, Inc., supra*).

Division witness Gomez testified regarding the classification of the violation of section 4312. Gomez stated that he was familiar with the machine pictured in the Division's Exhibits, and believed it to be a bi-directional sander. He stated that accidents with the sanders typically occurred when employees, place a hand in an area that is unguarded. He testified that injuries at minimum from this exposure would range from deep lacerations and could extend to amputations. Looking specifically at the photograph of the nip-point in Division Exhibit 2I, Gomez testified that he believed that amputation would more likely than not be the outcome of an accidental exposure. He explained that he believed this to be the case because of the tautness of the belt, which

does not allow the belt to move as it is pressed against the pulley. Based on the size of the opening, he surmised that a fingertip amputation would be likely, as the opening would not allow an entire hand to fit through. Gomez stated that there would more likely than not be some bone loss.

As discussed above, the Division established Gomez has 20 years of experience investigating industrial accidents, and testified to familiarity with the belt sander and other industrial machines. He testified to the regularity with which he investigated industrial accidents and reviewed accident files for 4000 employers in his assigned area. His testimony regarding the types of injuries he would expect to see from this particular sander, based upon his experience in the safety field, is opinion testimony that the Board may rely upon in making a determination. (*Blue Diamond Materials*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).) Although Employer had the opportunity, it did not cross-examine Gomez (or Gloriani), or present evidence of its own, leaving his evidence on the issue of the seriousness of the belt sander uncontroverted. (*Jensen Precast*, Cal/OSHA App. 05-2377, Decision After Reconsideration (Mar. 26, 2012).) The Board finds the violation of Section 4312 is properly classified as serious.

The parties stipulated that penalties were properly calculated. A serious violation is affirmed in Citation 2, with a penalty of \$3375. The general penalty in Citation 3 is reclassified to serious, and a penalty of \$3375 is assessed. A serious penalty is affirmed in Citation 4, and a penalty of \$3375 is affirmed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MARCH 26, 2014