

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

In the Matter of the Appeal of:

COMMERCIAL METAL FORMING
341 W. Collins Avenue
Orange, CA 92867

Employer

Docket. 09-R3D1-1592

**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 above-entitled matter under submission on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on January 26, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Orange, California maintained by Commercial Metal Forming (Employer). On April 24, 2009, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a Serious accident-related violation of section 3314(c)(1) [extension tool not provided to clean Boldrini Flanging machine].

Employer filed a timely appeal of the citation.

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 January 25, 2010. The Decision granted Employer's appeal and vacated the proposed civil penalty of \$14,400.

The Board ordered reconsideration of the Decision on its own motion. The Division and Employer filed an answer to the order of reconsideration.

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

ISSUES

1. Is the Administrative Law Judge’s finding—that the Employer’s method of cleaning the machine away from the in-running nip-point is sufficient as an “other method or means” of minimizing the hazard for purposes of Section 3314(c)(1)—supported by the record?
2. Did Employer prove the five elements of the Independent Employee Act Defense (IEAD)?

EVIDENCE

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

Employee Eddie Lievanos, a machine operator, was cleaning the Boldrini metal flanging machine from the operator’s side, when his finger was caught in the pinch point, resulting in its amputation. Lievanos testified that the proper way to clean the machine, which he learned from his father, who hired and trained him, is to go to the non-operator’s side and clean away from the in-running pinch point. On the operator’s side, two large rollers create an in-running pinch point when the upper and lower rollers touch and begin rolling. The upper roller is energized, and causes the lower roller (the “slave” roller) to move by making contact with it. Lievanos testified that he had cleaned the machine from the operator’s side “many” times, and had never been disciplined for doing so, although he knew it was not the right way to clean the machine.

Division Associate Safety Engineer Mary Ann Efron testified regarding the accident investigation she conducted at Employer’s worksite. Efron observed the flanging machine and interviewed Lievanos regarding the injury. The Employer told her the rolls would be difficult to clean through a process of inching and turning, which is why the Employer has a procedure of cleaning the rolls while the machine is energized.

Pablo Ramos, a twenty-nine year veteran employee of Employer, also testified. Ramos had warned Lievanos prior to Lievanos’ accident that the way he was cleaning on the operator’s side was dangerous. Ramos testified that there is a safe way to clean the machine on the operator’s side, as long as the rolls are not in contact and do not create a pinch point. He testified that he had often cleaned the machine in this way, by cleaning the top roll on the operator’s side, and the bottom roll from the non-operator’s side. Ramos explained that he had been taught to operate and clean the machine by another operator when he began to work as a flanger 27 years ago. He testified that operators learn their cleaning techniques on the job and from other

operators who train them, and that while no one explicitly states that it is best to go onto the non-operator side of the machine to clean, an operator learns to do this for his own safety.

Both Lievanos and Ramos testified on cross-examination that the machine could possibly be cleaned with an extension tool, and were unaware of any reason why an extension tool could not be used.

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 the Division and Employer's answers to the Board's order of reconsideration.

1. Is the Administrative Law Judge's finding—that the Employer's method of cleaning the machine away from the in-running nip-point is sufficient as an "other method or means" of minimizing the hazard for purposes of Section 3314(c)(1)—supported by the record?

The Division cited Employer under section 3314(c)(1) for failing to require the use of extension tools or other methods or means to protect employees from injury due to the in-running nip point of the Boldrini flanging machine. The section reads as follows:

(c) Cleaning, Servicing and Adjusting Operations.

Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

(1) If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

As the Board has explained in prior decisions after reconsideration, by citing the Employer under § 3314(c)(1), the Division is conceding that the Employer's flanging machine must be running while it is cleaned, and that the exception to § 3314(c) applies to Employer. The Division must now demonstrate that Employer's means or method of cleaning the equipment does not comply with the exception.

Employer acknowledges that its position is that the machine must be running in order to be cleaned properly, and that it does not provide an extension tool to its employees to use in cleaning the flanging machine. In its defense, Employer argues that it has a longstanding, safe method for cleaning the machine—the operator is to clean the rolls while standing on the non-operator side, so that he is not exposed to the in-running pinch point.

While the Employer's method of cleaning the flanging machine may be appropriate with the proper training, Employer has failed to demonstrate that it has provided its employees "thorough training" in this alternative method as required by 3314(c)(1). Lievanos testified that he was trained to clean the machine on the non-operator side when he was initially hired, and the parties stipulated to his having knowledge of the procedure.² Lievanos was unable to recall many of the details of his training, and Employer does not provide a written policy regarding cleaning the flanging machine. Senior operator Ramos testified to having been trained on use of the flanging machine by another operator. Ramos did not recall being told specifically to stand on the non-operator's side of the machine while cleaning, and believed it was within the Employer's policy to clean on the operator's side, as long as the rolls were separated and no pinch point was created. Neither employee had received any refresher training on cleaning the flanging machine, although Lievanos had spoken to his co-workers at a safety meeting after his injury, to remind them to be careful as they work. In *Pacific Southeast Forest Products*, Cal/OSHA App. 80-355 Decision After Reconsideration (Mar. 31, 1981), the Board found employee to employee "word of mouth" training on cleaning with an extension tool to be insufficient; it is the employer's responsibility to ensure that employees are provided thorough safety training on the means and methods used to clean an energized machine under 3314(c)(1).

The testimony and evidence shows that Employer has not engaged in "thorough training" related to the means and methods of cleaning the flanging machine, as required by section 3314(c)(1). (See, *ThyssenKrupp Elevator Corporation*, Cal/OSHA App. 11-2217, Denial of Petition for Reconsideration (Mar. 11, 2013).)

² Specifically, the parties stipulated that: The injured employee (Lievanos) was experienced in the job being performed. On the day of the accident, Employer had a procedure for cleaning the Boldrini Flanging Machine while the rolls were moving. All employees were required to follow this procedure. The injured employee knew this procedure.

2. Did Employer prove the five elements of the Independent Employee Act Defense (IEAD)?

There are five elements, all of which must be proved for an employer to prevail on a claim of Independent Employee Act Defense (IEAD). Those elements are: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) At hearing, the parties reached several stipulations which are relevant to the defense of IEAD.³ Recognizing these stipulations between the parties, Employer is found to have met elements one, two, and four. At hearing, Lievanos admitted that he had made an error which was against the rules. He also testified that he had been warned by senior operator Ramos against cleaning the rolls from the operator side the prior week. Element five is therefore met.

Element three, however, requires Employer to demonstrate that it effectively enforces its safety program. While the parties may have stipulated to the Employer having a well-crafted safety program, Employer did not demonstrate that it has implemented that program on the shop floor in regards to the flanging machine. Machine operators have testified to cleaning the machine from the operator's side on multiple occasions, and yet have not been retrained or disciplined. The Board has discussed in past decisions an employer's responsibility to ensure compliance with safety orders; an employer may not claim IEAD simply because it has left its employees to make independent decisions regarding compliance with the relevant safety order. (*Ferro Union, Inc.*, Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000).) Employer has not demonstrated that its employees are discouraged from using unsafe procedures, or that its employees are on clear notice as to what the safe procedures are. (*Mercury Service, Inc.*, *supra*). Employer has not met element three, and therefore cannot rely on the Independent Employee Action Defense.

The parties stipulated to the serious classification; the Division may establish an accident related violation by showing the violation more likely than not was a cause of the injury. (*Dunnick Bros., Inc.*, Cal/OSHA App. 06-2870,

³ The stipulations include: The injured employee (Lievanos) was experienced in the job being performed. On the day of the accident, Employer had a procedure for cleaning the Boldrini Flanging Machine while the rolls were moving. All employees were required to follow this procedure. The injured employee knew this procedure. Employer had a system of sanctions for employees who violate its safety rules. Employer had a well-devised safety program.

Decision After Reconsideration and Order of Remand (Apr. 13, 2012), citing *Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); *Davey Tree Surgery Co.*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).) But for Employer's failure to provide an extension tool, or other adequate means or methods to clean the rollers of the flanging machine in violation of section 3314(c)(1), the machine operator's hand would not have made contact with the pinch point, leading to an amputation. Therefore, the accident may be properly classified as accident related serious.

We reverse the decision of the ALJ. Employer's appeal from a serious, accident related violation of Section 3314(c)(1) is denied. A civil penalty is assessed against Employer in the amount of \$14,400.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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