

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CONTRA COSTA ELECTRIC, INC.
P.O. Box 2523
Martinez, CA 94553

Employer

Dockets 09-R1D4-3271, 3272 and 3960

**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 petition for reconsideration filed by Contra Costa Electric, Inc. (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on July 16, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a construction site in Dublin, California where Employer was engaged in construction activities. On September 17, 2009 and November 12, 2009, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a Serious violation of section 1509(a) [failure to establish, implement and enforce an effective Injury and Illness Plan (IIPP)]. Citation 2 alleged a Serious violation of section 1599(b) [failure to use a flagger, spotter or monitor at a construction site]. Citation 3 alleged a Serious violation of section 3332(b) [no system of controls to safeguard employees during railcar movement].

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

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

issued an Amended Decision on March 16, 2011. The Decision denied Employer's appeal in part. Citation 1 was sustained, with a reduced penalty of \$675. The appeal of Citation 2 was granted and the citation was dismissed. Citation 3 was sustained as issued, with a penalty of \$18,000.

Employer timely filed a petition for reconsideration of the ALJ's Amended Decision of Citations 1 and 3. The Division filed an answer to the petition.

LAW AND MOTION

On May 31, 2011, in response to the Division's Answer to Employer's initial Petition for Reconsideration, Employer filed a Motion to Strike Improper References in the Division's Corrected Answer with the Board. According to Employer, the Division's references to "3/17 tapes" (a reference to the tape recordings of the hearing on March 17, 2010) were hopelessly unspecific, as there were eight tapes made on the day of hearing. Furthermore, Employer requested that the Division's citations of Federal OSHA case law be stricken.

Under the Board's rules of practice and procedure, the Appeals Board shall make the official record for hearings. (Section 376.7). An electronic and tape recording was created of the hearing by the Board, and was provided to the parties at their request. (Section 351). In a Reply to Petitioner's Motion to Strike, the Division subsequently provided more specific references to the citations based on the March 17 tapes, adding a tape number (tape 1 through 8) to all references to the March 17 hearing recording tapes. This is sufficient for all parties to locate the citations by the Division in its initial answer, and we decline to strike those references.

Employer also requests that the Division's citations to Federal OSHA case law be struck from the Division's reply. Presumably both parties are aware that Cal/OSHA acts as an independent authority. "[The] California Occupational Safety and Health Act of 1973 (Act) establishes the sovereignty and preeminence of California law and the interpretation of that law by California Courts." (*Kaiser Steel Corporation, Steel Manufacturing Group*, Cal/OSHA App. 78-1161, Decision After Reconsideration (Mar. 5, 1981).) While that is the law, the Board does not forbid parties to cite to the Fed/OSHA counterpart for whatever persuasive value they believe such a decision may have. The Board is neither bound by those Fed/OSHA decisions, nor will we strike all references to those cases simply because they have no precedential value in this forum. Employer's motion is denied.

ISSUES

Did the Employer fail to Establish and Maintain an Effective IIPP as Required by Section 3203(a)(6) and Section 1509(a), by Failing to Include a System of Traffic Controls, Monitors or Flaggers to Protect Employees From Entering Live Traffic Zones?

Did Employer Develop, Implement or Maintain a System of Controls to Safeguard Personnel During Railcar Movement per Section 3332(b)?

EVIDENCE

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

Employer was engaged as an electrical subcontractor on the Bay Area Regional Transit District (BART) station project in Dublin, California. The station and tracks were located on the median between the east- and westbound portions of Interstate Highway 580. During the course of construction BART trains continued to pass by, single-tracking on one “live track”, so that train traffic was moving in an east and west direction on the live track, at approximately one train every 7 minutes. Work by the construction crews, including Employer’s electrical work, was to be done on either the “dead track,” or dead side of the platform, while an imaginary dividing line on the platform delineated the dead and live sides.

By mid-July 2009, the station structure was largely completed. It included a platform, and an upper concourse linking to a parking deck. The platform itself, where riders would eventually wait for trains, was 25 feet, 8 inches wide. A wooden fence had been installed along the perimeter edge of the platform; the fence was approximately 6 feet tall. The station platform also included an elevator shaft which connected to the upper concourse level. At this point, the width of the platform narrowed to 71 inches between the elevator shaft and the fence. Beyond the fence on this side of the platform was the live track.

On the date of the accident, Adrian Ibarra (Ibarra) was tasked with moving an aerial lift to the west end of the platform, where material drop off and pickup occurred with the aid of a crane at night, when a portion of the 580 freeway could be shut down. There were two lifts on the platform, a blue Genie belonging to Employer and an orange JLG, which belonged to the plumbing subcontractor, Lescure. Due to the size of the platform, Ibarra determined that he would need to move Lescure’s orange lift before he would be able to get the Genie to its location. It was not uncommon for the various trades working on the platform to trade off using the lifts, rather than to try to maneuver them around one another, and Ibarra had driven both a number of times.

Ibarra entered the JLG’s basket, drove it east, and then turned left between the elevator shaft and a work table which was near a wall. He then elevated the JLG basket five or six feet, so that he would have the ability to see obstacles, such as plywood covering a hole on the platform floor, pipes, the elevator shaft, and other debris. As he was making these maneuvers, the lift’s

basket with Ibarra in it passed over the six foot fence, to which he had his back, intruding into the space over the live track. His vision was blocked by a “Knaak box” (or “gang box”) used for storing tools, as well as the elevator shaft, and he did not see any train movement, or hear a horn.

Ibarra was hit by a BART train, although he does not remember seeing the train, or being hit. His next memory is of waking in the hospital. There were no other employees of any employer on the platform at that time.

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 Employer’s petition for reconsideration and the Division’s answer to it.

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.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e).

Citation 1, Item 1

Citation 1 alleges a violation of section 1590(a), with reference to section 3203(a)(6), which reads as follows:

1590(a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

[...]

3203(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and shall, at a minimum:

[...]

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard: (A) when observed or when discovered; and (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The citation alleges the following facts:

On and before July 16, 2009, the employer did not establish, implement and enforce an effective IIPP to include a system of traffic controls, monitors, or flaggers to protect employees from entering live traffic zones. On July 16, 2009, an employee was seriously injured when he operated a JLG aerial lift into the pathway of a moving BART train traveling at about 50 MPH.

Employer's Motion to Dismiss Citation 1, Item 1

At the outset of hearing, Employer moved for dismissal of Citation 1, alleging that the factual allegations in the citation did not constitute a violation of section 3203(a)(6). The ALJ declined to rule on the motion at the time of hearing, and in the decision, found that "the facts alleged are sufficient to establish a violation." (Decision, p. 9).

Employer argues that because section 3203(a) does not include in its plain language requirements for flaggers, monitors or spotters, the Division's citation reads requirements into the safety order which the Standards Board had declined to include. The lack of specificity in the standard is not a flaw, but is intentional, as the standard is a "performance standard," which establishes a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions. (*Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012), citing, *Estenson Logistics, LLC*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011).) Having addressed the issue of performance standards in the past, the Appeals Court has explained, "it would not be feasible to draft detailed plans and specifications of all acts or conduct to be performed or prohibited, and it is not necessary to do so." (*Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App. 4th 883, 891). Although *Teichert* did not involve an IIPP violation, the employer in that instance argued that the performance standard in that case, which involved earth-moving operations, was unenforcably vague; the Appeals Court has upheld leaving discretion to employers to design appropriate means of compliance with the safety orders as both reasonable and necessary.

The Board has found that a citation must give an employer notice of the allegation it must defend against; the citation in this instance provided Employer notice of section 1590(a) referencing 3203(a)(6). (*Rex Moore Electrical Contractors and Engineers*, Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (Nov 4, 2009).) The facts alleged by the Division put Employer on notice of the nature and substance of the charge, and provide Employer with the ability to formulate a defense. (*Granite Construction Co.*, Cal/OSHA App. 07-3611, Denial of Petition for Reconsideration (Jun. 22, 2010).) Although there is no single method for compliance, the citation alleged facts which, on their face, could potentially amount to a violation of the cited performance standard, as the ALJ found. In other words, the Division's asserted facts, which alleged that Employer failed to implement and enforce a system of traffic controls under its IIPP to prevent employees from entering live traffic areas, and lead to an accident with moving equipment and a BART train, could be found to amount to a violation of 1590(a) referencing 3203(a)(6). Employer has been given adequate notice of the substance of the charge, and opportunity to mount a defense.

The Board upholds the ALJ's determination, and finds that the Division's citation is sufficient as written, and declines to dismiss Citation 1 for failure to allege a violation of section 3203(a)(6).

Employer is correct in its statement that the Board's rules of practice and procedure require notice before a citation may be amended. (Sections 371.2, 382). However, the ALJ's decision, which finds a violation of section 1509(a), incorporating section 3203(a)(6), does not amend the citation as Employer asserts, but finds a violation based on the facts as alleged in the citation and the evidence presented by the parties at hearing. The ALJ's finding, that "the absence of a traffic control system for the lifts was certainly known, or knowable, to Employer," fits squarely within the factual allegation described in the original citation. The Board declines to reverse the decision on these grounds.

Did the Employer fail to Establish and Maintain an Effective IIPP as Required by Section 3203(a)(6) and Section 1509(a) by Failing to Include a System of Traffic Controls, Monitors or Flaggers to Protect Employees From Entering Live Traffic Zones?

There is no dispute that at the time of the accident, Employer had a written IIPP in effect. However, the Division argues that Employer had failed to implement methods or procedures of traffic control to protect employees from entering the BART train pathways while driving lifts. An IIPP may be satisfactory as written on paper, but failure to implement that plan, through failure to correct hazards, may constitute a violation of section 3203(a)(6), as is alleged here. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).)

The record establishes that there was a regular need at the work site to move the two aerial lifts on the narrow platform, which contained various obstructions. Employer's management personnel-- including at least one foreman and superintendent-- were present at the jobsite with some regularity, and the Board is in agreement with the ALJ's inference that the movement of the lifts was known to supervisory staff.

Employer argues that it had taken steps to ensure the hazard of employees entering the live tracks was corrected, through erection of a safety fence, and a verbal policy which forbid employees from working on the live side of the platform. While Employer crafted these measures in cooperation with general contractor Shimmick and BART prior to work starting at the jobsite, once work began, the evidence preponderates to a finding that Employer neither enforced the live side rule consistently, nor did it take further steps per the IIPP to evaluate and address hazards of moving equipment.

Gang boxes for storage of tools were pushed up against the safety fences on both tracks, where Employer's employees would need to go to access tools. Aerial lifts were driven on the live side of the platform, although a Lescure employee, Mark Thomas (Thomas), who had driven a lift at the jobsite, testified that the general contractor did not want the lifts driven close (within 2 feet) to the safety fence. Both Thomas and Ibarra testified that there was no rule requiring an employee to utilize a BART monitor when driving a lift at the jobsite and neither testified to requesting a BART monitor. There was no evidence presented of any employee being warned or disciplined for driving a lift on the live side of the platform, or for leaving tools or other material on the live side.

The danger of maneuvering an aerial lift on the live side of the platform without a system of traffic controls was established by the Division. Due to the narrow platform and various obstacles in this cramped work location, Ibarra had to engage in careful maneuvering while moving the lift in order to keep its tires from becoming stuck, and had only limited visibility due to the elevator shaft, the low ceiling, and gang boxes. The lack of visibility may have prevented Ibarra, and potentially other employees engaged in moving the lifts, from spotting an oncoming BART train, and noise from construction, as well as the traffic from the 580 freeway could well have masked the sound of a train's approach. The Board declines to reverse the findings of the ALJ, and agrees that the Employer's failure to implement a system of traffic controls at the construction site constituted a violation of section 1509(a) incorporating section 3203(a).

Serious Classification

A serious classification may be upheld where there is a substantial probability of death or serious physical harm resulting from a violation.² (Section 334(c)(1).) The Division's inspector, Fabricante, testified to the substantial probability of an accident involving a moving vehicle and construction equipment without a system of traffic controls resulting in a serious injury. Her testimony, which was based on her experience investigating such injuries and accidents with the Division, was un rebutted, and was credited by the ALJ; the Board credits that testimony as well.

Employer argues the serious violation under section 6432 should not be upheld based on the Employer's lack of knowledge of the violation. Section 6432(b) states:

notwithstanding subdivision (a), a serious violation shall be deemed not 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.

Lack of knowledge of a violation is an affirmative defense which requires that the Employer demonstrate that even with reasonable diligence, the Employer could not, and did not, know of the presence of the condition that violates the safety order. (*C.C. Myers, Inc.*, Cal/OSHA App. 08-952, Decision After Reconsideration (Dec. 6, 2013).) The Employer has not met that burden. As discussed in the ALJ's decision, through the exercise of reasonable diligence, Employer should have been able to recognize the violation. The narrow and crowded platform caused drivers of the lifts to encroach on live side of the platform; reasonable diligence should have made employer aware of this condition.

The serious classification of the citation is upheld.

Citation 3, Item 1

Citation 3 alleges a violation of section 3332(b): Controls to safeguard personnel during railcar movement shall be instituted. The Division's citation alleges the following facts:

On and before July 16, 2009, the employer did not develop, implement and maintain a system of controls or any other method to safeguard employees from the hazards of operating aerial lifts and other equipment; working; standing; traveling or being so otherwise located within the danger zone of the movement of

² Labor Code section 6432 was amended effective January 1, 2011. The rule is applied as it was in effect at the time of the violation.

oncoming BART railroad car trains. On July 16, 2009 an employee suffered serious injuries when he operated a JLG aerial lift into the pathway and was struck by a BART train traveling at 50 MPH.

Due Process

Employer argues that the Division's interpretation of section 3332(b) violates Employer's due process rights, as an Employer cannot anticipate how the Division will apply the safety standard in any particular set of circumstances. As in the discussion of Employer's motion to dismiss Citation 1, when crafting performance standards, the Standards Board recognized that it would not reasonably be able to anticipate every situation that may arise at worksites around California, and has intentionally left room for employers to comply in a variety of ways. (*Teichert*, supra).

The Board has weighed the question of whether a safety order is unconstitutionally vague through the analysis used by the *Teichert* court: "In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case." (*Teichert Construction v. California Occupational Safety & Health Appeals Bd.* (2006) 140 Cal.App.4th 883, 890-891). The safety order is simply stated: Controls to safeguard personnel during railcar movement shall be instituted. Viewed in light of the fact that a BART monitor was not present, and Ibarra was moving the lift on the live side, the kind of controls that were required by the safety order were not vague in light of the safety order. The safety order cannot be said to be unconstitutionally vague, either on its face, or as applied to the specific facts of this case. (*Guardsmark, LLC*, Cal/OSHA App. 12-0056, Denial of Petition for Reconsideration (Apr. 22, 2013).)

Did Employer Develop, Implement or Maintain a System of Controls to Safeguard Personnel During Railcar Movement per Section 3332(b)?

Employer argues that section 3332(b) places on Employer the general requirement to ensure some form of controls are in place to protect employees during railcar movement. Employer argues that in its discretion, it may use a system as simple as a stop sign, or as elaborate as an alarm system to safeguard its personnel, and in this instance, chose to use a six-foot high safety fence. While Employer is correct in its assertion that the performance standard does grant employers the freedom to develop and implement controls that are best suited to its particular worksite, those controls must provide personnel with meaningful protection from the risks of railcar movement. The Division, to establish a violation, must show that the controls developed by an employer did not effectively safeguard personnel.

The Division has met the burden of establishing a violation of section 3332(b). As discussed in the decision of the ALJ, the controls established by

the Employer were inadequate. Having initially created a system involving a six foot fence and BART monitors, Employer failed to assess the effectiveness of these controls, or institute further controls to protect those employees responsible for operating equipment from the hazards of railcar movement. (Decision, p. 24). In order to move the lift and navigate obstacles and hazards on the platform, Ibarra was required to raise the lift basket. He was easily able to clear the 6 foot fence which separated the platform from the live rail, but was not able to easily see due to the various obstructions, or hear due to traffic and construction noise. Employees who used the lifts regularly moved onto the live side of the platform, and although there were BART monitors at the worksite, employees were not required to inform the monitors that they would be moving the lifts. (Decision, p. 25). Nor was there a BART monitor on the platform at the time Ibarra moved the lift on July 16.

Serious Classification

We affirm the serious, accident related classification of the citation. The Division's inspector credibly testified on the probability of serious injury where a violation of section 3332(b) occurs, and her unrefuted testimony may be used to establish a serious violation. Fabricante testified to having investigated over 11 accidents involving vehicles, and stated that all involved serious injuries, and one a fatality. Her testimony noted that the range of speeds in these accidents with work vehicles ranged from as low as 10 miles per hour (m.p.h.) and as fast as 75 m.p.h., and in her experience and opinion, the impact of metal and blunt objects with the human body would lead to serious injury. Where a Division witness provides testimony based on her experience in the safety field, and that evidence is not impeached on cross examination or otherwise called into question through evidence entered into the record, the Division has met its burden of proof to show the serious classification of a citation. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), citing *Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011).)

To show that a violation is accident related, the Division must establish by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) Testimony on this point by Fabricante is credited; but for the Employer's failure to establish controls during railcar movement, the accident involving movement of the lift and BART train, which resulted in serious injury to employee, would not have occurred.

Employer cites lack of knowledge as a defense to the serious citation; as discussed in Citation 1, lack of knowledge is an affirmative defense to the serious classification of a citation. When raised, it becomes the employer's burden to prove the defense; an employer may defend by establishing that the

violation occurred at a time and under circumstances which did not provide Employer with a reasonable opportunity to detect the violation. (*Bryant Rubber Corp.*, Cal/OSHA App. 01-1358, Decision After Reconsideration (Aug. 21, 2003).) Employer has made no such showing in this instance. The Board adopts the finding of the ALJ: the physical circumstances which called for control measures were in plain sight for Employer to observe, including the sometimes close operation of aerial lifts to the BART tracks, the size, movement and operating abilities of the lifts, the crowded state of the platform, the necessity for driving the lifts on the live side and with the basket raised in order to maneuver, and the high noise level due to the work being done at the site and the 580 highway surrounding the construction site. (Decision, p. 26). Employer failed to present evidence demonstrating that it was unaware of these circumstances.

Therefore, we affirm the result of Decision sustaining the citations, and affirm the modification of penalties assessed by the ALJ, with Citation 1, Item 1 resulting in a \$675 civil penalty, and Citation 3, Item 1 resulting in an \$18,000 civil penalty.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 13, 2014