

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

In the Matter of the Appeal of:

MK AUTO, INC.
2301 Arden Way
Sacramento, CA 95825

Employer

Dockets. 12-R2D1-2893 and 2894

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by MK Auto Inc. (Employer).

JURISDICTION

Commencing on May 11, 2012 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On October 1, 2012 the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing held on October 30, 2013.

On April 24, 2014, the ALJ issued a Decision (Decision).

Employer timely filed a petition for reconsideration.

The Division answered the petition.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

ISSUE

Was the ALJ's Decision correct in sustaining the alleged violations?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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's petition contends that the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. The Board has taken no new evidence. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer operates an automobile sales and service company. While he was trying to determine the source of a rattle in the motor of a vehicle he was servicing, one of Employer's employee's fingers was caught by a belt in the running motor causing an injury which required a partial amputation of the finger.

Employer was cited for an alleged regulatory violation of § 342(a) [late report of the serious injury], and an alleged serious violation of § 3314(c) [lockout/tagout]. The parties entered into a number of factual stipulations, including that Employer was the employer of the injured worker; that the injury suffered was "serious" as defined by Labor Code section 6432 and section 330(h); that the report required by section 342(a) was late; and the penalty for the late report was subject to adjustment under Labor Code section 6319 such that the final penalty was \$2,250.

The stipulations noted above resolve the alleged violation of the section 342(a) reporting requirement against Employer. The injured worker was admitted to be an employee who suffered a serious injury at Employer's place of employment, and the penalty was properly calculated.

We further note that Employer argues in the petition that the employee's injury was not the reason for the hospital stay in excess of 24 hours. However, the amputation the employee suffered was a serious injury by definition, and was required to be reported regardless of the length of hospitalization. (Labor Code § 6302(h) [loss of any body part a serious injury].)

As to the alleged violation of 3314(c), Employer raises a number of arguments. Employer contends in the petition for reconsideration that he was not aware that the stipulations made regarding the reporting violation would apply to the second citation as well. Employer states he is a layman and was representing himself. A self-represented party is bound by his agreements and stipulations in the absence of fraud or misrepresentation. (*Akash Dirk Von Rueben, dba New Dimensions*, Cal/OSHA App. 11-2958, Denial of Petition for Reconsideration (Oct. 25, 2012).) There is no evidence or claim of fraud or misrepresentation here, nor any indication that the stipulations were against public policy. Moreover, misunderstanding the appeal process is not good cause for reversing the Decision. (See *19th Auto Body Center*, Cal/OSHA App. 94-9001, Denial of Petition for Reconsideration (Apr. 13, 1995).)

Employer also appears to argue that the provisions of section 3314(c)(1) apply. Section 3314(c) requires that machinery and equipment which is capable of movement or which contains other forms of hazardous energy, such as electric current, must be secured (locked out and tagged out) to prevent inadvertent movement or discharge of energy prior to servicing, adjustment or repair. Section 3314(c)(1) is a further provision, in the nature of an exception to the primary requirement, which recognizes that some machines may need to be in motion or operation during servicing or repair. Section 3314(c)(1) provides:

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 and 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.

The employee had performed a repair on the car motor in question and when testing it discovered a noise in the engine compartment when the motor was running. The employee believed the noise was caused by the "timing

cover,” and pressed on the cover with his finger. It appears the employee’s intent was to test whether the cover was the source by pressing on it – if doing so stopped the noise, it would establish the source of the noise as the cover. Unfortunately a rag he was holding became entangled in a belt and drew his finger into a pulley wheel resulting in the injury. This repair effort described by the injured worker is sufficient evidence that the machine must have been capable of movement in order to perform the testing task. No evidence contradicted the employee’s version of why the machine was running when he attempted to press the “timing cover”.

However, the record further supports the conclusion that Employer did not “provid[e] and requir[e]” the use of extension tools or other devices, as mandated by section 3314(c)(1). Rather, Employer argues that the employee was a trained, experienced and certified automotive technician who possessed an array of personal tools. Further, that training should have caused the employee to use a tool and not his finger to press on the timing cover. It appears Employer expected the employee to do so on his own initiative. Also, Employer does not contend it trained the injured employee on the use of extension tools or other methods or means to minimize the hazards of working on the operating motor; Employer expected the employee’s own prior experience and certification to satisfy that requirement. (See *Hypower, Inc. dba Hypower Electric Services*, Cal/OSHA App. 12-1498 (Sep. 11, 2013).) Thus the Employer appears to have assumed the employee would use a tool other than his finger in needed circumstances, but neither required the use of such tools, not provided such tools, for such circumstances. These are required by the section Employer attempts to avail itself of as a defense to the section 3314(c) citation. Since the conditions of the exception in section 3314(c)(1) were not met, the section does not provide a defense.

Employer also contends in the petition that the worker was an independent contractor, and not an employee. As noted above, Employer’s stipulation that the worker was an employee disposes of that aspect of Employer’s contention.²

² The Decision also held that Employer did not meet the requirements of the affirmative defense of “independent employee action defense” (IEAD). (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133 Decision After Reconsideration (Oct. 16, 1980).) Employer does not petition for reconsideration of that aspect of the Decision, and so waives any claim of error or irregularity as to it. (Labor Code § 6618.) In addition the record does not show that Employer proved any of the IEAD’s five elements, all of which must be established for the defense to succeed. (*Mercury Service, Inc.*, *supra*.)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JULY 23, 2014