

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

In the Matter of the Appeal of:

ORANGE COUNTY SANITATION DISTRICT
10844 Ellis Avenue
Fountain Valley, CA 92708

Employer

Docket. 13-R3D1-0287

**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 in the matter of the appeal of Orange County Sanitation District (Employer) on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on July 19, 2012, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Bakersfield, California maintained by Employer. On January 11, 2013, 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

Citation 1 alleges a Serious, Accident Related violation of section 3314(c) [failure to have a procedure to block or lock parts capable of inadvertent movement].

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 December 22, 2014. The Decision denied Employer's

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

appeal and upheld the serious, accident related classification, for a total penalty of \$22,500.

The Board ordered reconsideration of the ALJ's Decision on its own motion on January 21, 2015. The Division and Employer both filed an answer to the order of reconsideration. Employer also filed for reconsideration of the ALJ's decision, and the Board accepted the petition on February 23, 2015.

ISSUE

Was the lack of employer knowledge rule properly stated by the ALJ in this Decision?

EVIDENCE

The Board, consistent with the record makes following findings of fact:

1. Employee of Employer, George Crawford (Crawford), was hospitalized as a result of an amputation of the finger tip of his left index finger and an avulsion of the tip of his middle finger.
2. During the performance of regularly scheduled periodic maintenance on Employer's foul air fan, Crawford followed a printed work order for his task, which included Employer's lockout/tagout and de-energization procedures for the fan.
3. Employer's work order did not include instructions for blocking inadvertent movement of the fan.
4. A pinch point was created between the fan belt and a pulley.
5. When Crawford's finger became entangled in the pinch point that was created as he attempted to remove the cover (or shroud) of the fan, a serious injury occurred.

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 reviewed both the Employer and Division's answer to the Board's order of reconsideration. The Board has also reviewed the Employer's petition for reconsideration.

The Division cited Employer for a serious, accident-related violation of section 3314(c), The Control of Hazardous Energy for the Cleaning, Repairing, Servicing, Setting-Up, and Adjusting Operations of Prime Movers, Machinery and Equipment, Including Lockout/Tagout. The regulation states:

(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.

The Division's alleged violation description reads as follows:

On and prior to July 17, 2012, the employer failed to ensure that employees adequately blocked out the moveable parts on the Foul Air Fan to prevent inadvertent movement, or the release of stored energy, while performing periodic maintenance. As a result, on July 17, 2012, an employee suffered an amputation while attempting to service and maintain the Foul Air Fan.

As the ALJ's Decision discusses, the safety order on its face requires parts that are capable of movement to be stopped, and the power source to be de-energized or disengaged. Where parts of the equipment are still capable of inadvertent movement even after initial de-energization steps have occurred, the safety order requires another affirmative step—blocking or locking out the moving part to prevent that inadvertent movement. (Decision, p. 3, citing *Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), citing *Maaco Constructors, Inc.*, Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993).) As the Board has stated in a Decision After Reconsideration discussing a similar safety order that requires blocking out, “[t]he additional blocking requirement is applicable in a situation where, as here, the mode of de-energizing does not completely eliminate the possibility of movement during cleaning operations.” (*Simpson Timber Company*, Cal/OSHA App. 77-1038, Decision After Reconsideration (Jun. 9, 1980).) Although Employer took some steps to comply with the safety order, its failure to ensure that moving parts were blocked and no longer capable of movement constitutes a violation of the safety order. Stored energy in the fan's motor continued to be released, and because the moving parts were not blocked, the employee was exposed to a hazard that resulted in an amputation of a fingertip and an avulsion of another finger.

The violation is upheld.

Classification of the Citation

Employer, in its initial appeal, did not dispute the classification of the citation or the penalty amount. An issue not properly raised in the appeal is deemed waived; Employer has waived the issue of the classification of the citation and the penalty amount, as the ALJ's Decision properly found. (Decision, p. 4. See, section 361.3 Issues on Appeal). Given that the Employer did not raise the issue in its appeal, the Division was not required to make any showing on the issue of the classification or penalty amount, and the ALJ's analysis on this issue is not relevant to the ultimate outcome.

However, the Board notes that the Labor Code has been amended, and had Employer properly raised the issue of classification of the citation, Labor Code section 6432(a) requires a showing that is different from the Board's prior Decisions After Reconsideration on this topic, and the ALJ's discussion in this section is inapposite.² (Decision, p. 4). In a hypothetical scenario where an employer properly appeals the serious classification of the citation, should the Board find that there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation,"³ Labor Code section 6432(c) explicitly provides an employer the opportunity to rebut the presumption of a serious violation. Specifically, a cited employer is provided the opportunity through statute to demonstrate that although it had exercised reasonable diligence, it could not have, and did not, know of the violation.⁴ (Labor Code section 6432(a).) An employer need not raise this statutory defense in its initial appeal (or through appropriate amendment of the appeal), as it is provided within the Labor Code and is automatically available to the employer once the classification is appealed.

Rebuttable presumptions generally fall into two categories, those that impact the burden of producing evidence, and those that affect the burden of proof. (*Farr v. County of Nevada* (2010) 187 Cal. App. 4th (Cal. App. 3d Dist. 2010) 699, 680.) The legislature, in this instance, has created a statutory

² Section 6432 of the Labor Code was amended effective January 1, 2011. The relevant section of Labor Code 6432(a) reads as follows: There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

³ The term "serious physical harm" is defined by the Labor Code section 6432(e): "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.

(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

⁴ 6432(c): If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following: [...]

scheme that impacts the burden of proof that falls to each party, wherein the employer need not exercise their right to rebut until the Division has met their initial burden of demonstrating that there is a serious violation. (See, Evid. Code, section 606; *Farr v. County of Nevada* (2010) 187 Cal. App. 4th 669, 680-681 (Cal. App. 3d Dist. 2010).)⁵ The parties must closely look to the language of section 6432, as rebuttable presumptions which impact the burden of proof may have a more profound impact on the ultimate outcome of a case than those that simply reassign the burden of producing evidence. Here, the legislature has chosen to implement a policy change through statute, and the Board is tasked with following the statute as written. (See, *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418.)

In this instance, the Employer did not appeal the serious classification, or amend its appeal to include the classification. Because the Employer's appeal only included whether the safety order was violated, and did not include an appeal of the classification, the Division was under no obligation to "establish a presumption pursuant to subdivision (a) that a violation is serious"; therefore, the burden never shifted to the Employer to rebut. Employer's arguments on this point are moot, and the serious classification is upheld.

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

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⁵ Evidence Code 606. The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact.