

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

In the Matter of the Appeal of:

STANISLAUS FOOD PRODUCTS
COMPANY
P.O. Box 3951
Modesto, CA 95352

Employer

Docket Nos. 13-R2D4-572
through 574

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby grants in part and denies in part the petition for reconsideration filed in the above entitled matter by Stanislaus Food Products Company (Employer).

JURISDICTION

Commencing on September 18, 2012 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer after an injury accident had occurred there.

On February 14, 2013, the Division issued three 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.

On January 30, 2015, the ALJ issued a Decision (Decision) which held that Employer had violated the cited safety standards as alleged and imposed civil penalties as proposed in the citations.

Employer timely filed a petition for reconsideration.

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

The Division answered the petition.

ISSUE

Did Employer violate the three safety orders as alleged in the citations?

DISCUSSION

One of Employer's employees was seriously injured when his hand was caught in the mechanism of a conveyor belt at Employer's tomato processing facility in Modesto, California. The employee was engaged in one of the periodic routine cleaning operations of the conveyor. After investigating the accident the Division issued three citations to Employer. Citation 1 alleged a general violation of section 3314, subdivision (e) [failure to provide locks]; Citation 2 alleged a serious violation of section 3314, subdivision (c) [failure to de-energize and lock out the conveyor]; and Citation 3 alleged Employer failed to guard the head pulley of the conveyor as required by section 3999, subdivision (b). After a hearing the ALJ upheld all three citations and assessed the penalties the Division proposed. For the reasons stated following, we hold that Employer did not violate section 3314 subdivision, (e), and did violate sections 3314, subdivision (c) and 3999, subdivision (b). Accordingly we grant Employer's petition in part and deny it in part.

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 is based on Labor Code section 6617, subdivisions (a), (c), and (e).

The Board has fully reviewed the record in this case, including the arguments presented in Employer's petition for reconsideration and the Division's answer. Based on our independent review of the record, we find that the Decision erred in finding a violation as to Citation 1 and that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances as to Citations 2 and 3. We turn to a discussion of each of the citations individually.

Citation 1

Citation 1 alleged that Employer committed a general violation of section 3314, subdivision (e), which states:

“Materials and Hardware. The employer shall provide accident prevention signs, tags, padlocks, seals or other similarly effective means which may be required for cleaning, servicing, adjusting, repair work or setting-up operations. Signs, tags, padlocks, and seals shall have means by which they can be readily secured to the controls. Tagout device attachment means shall be of a non-reusable type, attachable by hand, self-locking, and non-releasable with a minimum unlocking strength of no less than 50 pounds.”

The alleged violation description stated: “Employer failed to provide locks and hardware to a sanitation crew leader, required for cleaning operations.”

The Decision examines whether Employer “provide[d]” locks within the meaning of the safety order. As the term is undefined, the Decision referred to three Board cases which considered the term. Two of those cases dealt with the question of whether a ladder was “provided” as required by construction-related safety orders, and the third with the requirement that an employer “provide” single use drinking cups in the field sanitation context. Although the ALJ found those precedents to be applicable to the present case, they are distinguished on facts (access to ladders had to be available where ascents and descents occurred; total absence of cups meant they were not provided) and because they dealt with different safety orders. Moreover, as Employer’s petition points out, the Decision’s interpretation of “provide” in the current context reads language into the safety order. The Decision held: “To comply [with § 3314(e)] the employer must make the required supplies and equipment available to employees at the point of employee use[.]” (Decision, p. 5; original emphasis.)

As seen in the quotation of section 3314(e) above, its language does not include the words “at the point of employee use.” It is established that the Board may not read terms into or out of a safety order when interpreting it. (*Guardsmark*, Cal/OSHA App.OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011); citing *E. L. Yeager Construction Company, Inc.*, Cal/OSHA App.OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).)

In addition, there are significant elements of impracticality and imprecision in the language the Decision reads into the safety order. If locks have to be made available at the point of employee use, the implication is that the lock must be there before the employee arrives, meaning that the employee

cannot bring it with him to the point of use. Employer's practice was of this latter type.

How are locks to be stored, and safely, at the myriad locations where they may at some time be needed? If, for example, a cabinet with locks is placed near a machine's control panel, must the cabinet be locked in order to assure locks will not be "appropriated" or borrowed for other purposes? And if it is or must be locked, does that mean the locks are not available when needed? Why must the locks be at the location where they will be used as opposed to a central supply point? While that concept is reasonable, in the context of field sanitation requirements, for single use cups, which should be available at the point(s) of water supply, it is not practical in an industrial plant.

Further, the facts were that the conveyor belt in question was in motion and had to be in motion to conduct the cleaning operation in progress when the accident giving rise to all three citations occurred. Thus, while a lock may have been needed at some other time for a cleaning operation which did not require the conveyor to be in motion, there is no indication why a lock was necessary at the time of the accident. The safety order, even if it had been properly construed, did not apply to the cleaning operation at issue because the conveyor could not be both locked out and in motion simultaneously. This logical contradiction was itself suggested in the Citation's description of the alleged violation, which stated in part that locks were "required for cleaning operations," even though they were not.

Accordingly, we grant Employer's petition as to Citation 1 and dismiss Citation 1.

Citation 2.

Citation 2 alleged a serious violation of section 3314, subdivision (c), which states: "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 on the machinery or equipment." The citation alleged Employee did not de-energize the conveyor for the cleaning operation.

The safety order includes a provision which recognizes that there are occasions or types of machines which must be in operation for cleaning, adjusting, and so on. Section 3314, subdivision (c)(1) states: "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.” Section 3314, subdivision (c)(1) thus requires proof of three elements: (1) the equipment must be moving; (2) alternative means or methods to minimize the hazards are furnished; and (3) employees are trained in such alternatives.

The Decision accepts that the conveyor needed to be running for the cleaning operation involved. (Decision, pp. 9-10.) The ALJ then properly followed prior Board reasoning that in such situations the employer must prove it provided appropriate tools or other methods and that it trained its employees in the use of such alternatives. (*Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2217, Decision After Reconsideration (Mar. 11, 2013); writ denied, appeal filed.) There was at best insufficient evidence in the record to show Employer had satisfied the other two elements.

Employer’s petition also challenges the serious classification of the violation on the grounds that it had no knowledge that the injured employee would use a scouring pad to clean the conveyor and that in doing so he exceeded the scope of his assignment. In part Employer relies on Labor Code section 6432, subdivision (c) in this regard.

Labor Code section 6432, subdivision (c) provides:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious [i.e. demonstrates a realistic possibility of death or serious physical harm could result from hazard], 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:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [i.e. training; discovering and controlling access to, correcting hazards; supervision; communicating safety rules to employees; information about circumstances provided to division after incident].

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

The Decision notes that among the equipment Employer provided its employees for cleaning the conveyor were “small green scouring pads[.]” (Decision, p. 10.) It can be inferred that Employer expected its employees to use the scouring pads in their cleaning operations. Therefore, Employer’s argument in the petition that it did not know or have reason to believe that the injured employee would use any equipment other than the spraying equipment to clean the conveyor is not supported by the evidence. (See Petition, p. 7.)

Likewise, Employer’s argument that the injured employee exceeded the scope of his assignment by using the scouring pad is not supported by the evidence. An employer may defend against a serious classification based on an employee’s unforeseeable decision to exceed the scope of his assignment because proving the employee took such action would establish the employer’s lack of knowledge. (*Bay Area Systems & Solutions dba BASS Electric*, Cal/OSHA App. 01-106, Decision After Reconsideration (Oct. 10, 2008).) Here Employer provided its employee with a tool, the scouring pad, in addition to the hose and sprayer used to apply the chlorine solution and rinse it off. It cannot be said that the employee, by using the scouring pad, was exceeding the scope of his assignment, even if Employer assumed that he would not need to use it in the circumstances. (Cf. *Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration (Jun. 10, 2010) [no clear instructions re scope of work to injured employee].) Had Employer proved that it had instructed the injured employee to use only the hose and sprayer, his use of the pad may have been shown to be outside the scope of the assignment. There was no such evidence adduced at hearing; accordingly the arguments in the petition for reconsideration are not supported by the evidence. We therefore affirm the Decision’s holding that Employer committed a serious violation of section 3314, subdivision (c).

Citation 3.

Citation 3 alleged a serious violation of section 3999, subdivision (b), which provides:

Belt conveyor head pulleys, tail pulleys, single tension pulleys, dip take-up pulleys, chain conveyor head drums or sprockets and dip take-up drums and sprockets shall be guarded. The guard shall be such that a person cannot reach behind it and become caught in the nip point between the belt, chain, drum, pulley or sprocket.

The citation alleged that “Employer failed to guard the head pulley of the crossover conveyor[.]”

The petition argues that the pulley in question was not a “head pulley,” and therefore Employer was denied due process because it did not know what was being alleged against it. The ALJ’s Decision acknowledges that the term “head pulley” was not used consistently, and that several other terms were used by various witnesses to refer to the pulley. (Decision, p. 16.) The Decision also points out that there was no question which pulley was involved in the accident, even if no one seemed to know its proper technical name. The ALJ therefore concluded, citing Board authority, that Employer had adequate information upon which to defend against the citation. (*Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985) [if employer informed of substance of violation and has fair notice, can’t complain of technical flaws].)

An issue not raised in the petition is whether the safety order applies to the actual type of pulley involved in the accident. In view of the testimony noted in the Decision that the pulley was a “tension” or “take-up” pulley, the evidence is sufficient to find that it fell within the scope of section 3999, subdivision (b). And, in any event Employer’s petition does not raise that issue, and it is waived. (Labor Code § 6618.)

DECISION

For the reasons stated above, the petition for reconsideration is granted in part and denied in part. A new Summary Table is attached and incorporated herein by reference.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 23, 2015

SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

STANISLAUS FOOD PRODUCTS COMPANY
Docket No(s). 13-R2D4-572 through 574

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 314999616

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T I O N	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
13-R2D4-572	1	1	3314(e)	G	Failure to provide locks and other hardware to sanitation crew leader, for cleaning operation.		X	\$635	\$635	\$0
13-R2D4-573	2	1	3314(c)	S	Failure to ensure crossover conveyor was de-energized for cleaning activities	X		\$7,650	\$7,650	\$7,650
13-R2D4-574	3	1	3999(b)	S	Failure to guard head pulley of conveyor, resulting in serious injury	X		\$18,000	\$18,000	\$18,000
Sub-Total								\$26,285	\$26,285	\$25,650

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$25,650

NOTE: Payment of final penalty amount should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

POS: 04/23/2015