

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

In the Matter of the Appeal of:

SYAR INDUSTRIES INC.
P.O. Box 2540
Napa, CA 94558

Employer

Dockets. 13-R5D1-1876 through 1880

**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 Syar Industries Inc. (Employer).

JURISDICTION

Beginning February 26, 2013 the Division of Occupational Safety and Health (Division) commenced an inspection at a place of employment maintained by Employer in Napa, California.

On May 24, 2013 the Division issued five citations to Employer, three of which remain at issue.

Employer timely appealed. Administrative proceedings followed, including a duly-notice contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board.

On July 24, 2015 the ALJ issued a Decision (Decision) which sustained the citations and imposed civil penalties.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

ISSUES

Do section 3314, subdivisions (g)(1)(B) and (j)(1) apply under the present circumstances?

Did Employer satisfy all five elements of the “independent employee action defense (IEAD)?

Did the Division prove the alleged violations were serious?

Did Employer lack knowledge of the violation?

Did the Division commit “misconduct” and in so doing deprive Employer of due process of law?

Were the penalties assessed duplicative because they related to the same hazard which could be cured by a single method of abatement?

EVIDENCE

The Decision makes findings of fact and discusses the evidence in the record. We briefly recapitulate the evidence here to place our discussion in context.

One of Employer’s employees suffered a partial amputation of a finger when he attempted to clean the drive mechanism of a “horizontal band saw” while it was in operation. The saw was a moveable device equipped with a plug and cord which could be plugged into a standard electrical outlet. The injured employee testified that the saw was not cutting with its usual efficiency, so he opened the cover over the drive mechanism and observed that it was clogged with metal particles from previous cutting operations. When the employee then attempted to clear the material causing the clog with his gloved finger, the glove material was caught or snagged by the saw blade and pulled his finger into a pinch point. The employee’s finger was partially amputated as a result.

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 the Appeals Board acted in excess of its powers, the evidence does not justify the findings of fact made by the ALJ, 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. Based on our independent review of the record, we find that the ALJ's Decision upholding the citation was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

The three citations at issue are: Citation 2, which alleged a serious violation of section 3314, subdivision (g)(1)(B) [employer required to have hazardous energy control procedure]; Citation 3, which alleged a serious violation of section 3314, subdivision (j)(1) [employees must be trained on hazardous energy control procedures]; and Citation 5, which alleged a serious violation of section 3384, subdivision (b) [hand protection not to be worn where there is risk of entanglement].

We now discuss the issues identified above.

1. Do section 3314, subdivisions (g)(1)(B) and (j)(1) apply under the present circumstances?

Section 3314 addresses the "control of hazardous energy for the cleaning, repairing, servicing, setting-up, and adjusting operations of prime movers, machinery, and equipment, including lockout/tagout." Subdivisions (c) and (d) have an "exceptions" provision which Employer contends precludes application of subdivisions (g)(1)(B) and (j)(1) to the work which resulted in the employee's injury. We begin with an examination of the applicable provisions.

In pertinent part, section 3314 states the following:

- (a) Application.
 - (1) This section applies to the cleaning, repairing, servicing, setting-up, and adjusting of machines and equipment in which the unexpected energization or start-up of the machines or equipment, or release of stored energy could cause injury to employees.

(2) For purposes of this Section, cleaning repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment. . . .

(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. . . .

(d) Repair Work and Setting-Up Operations.

Prime movers, equipment, or power-driven machines equipped with lockable controls or readily adaptable to lockable controls shall be locked out or positively sealed in the “off” position during repair work and setting-up operations. Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy. . . .

Exceptions to subsections (c) and (d):

1. . . .

2. Work on cord and plug-connected electric equipment for which exposure to the hazards of unexpected energization or start up of the equipment is controlled by the unplugging of the equipment from the energy source and by the plug being under the exclusive control of the employee performing the work.

Employer argues that section 3314, subdivisions (g)(1)(B) and (j)(1) do not apply to the work at issue by virtue of Exception 2 quoted above. We disagree.

By its plain language, the exception 2 to subsections (c) and (d) applies only to those two subsections. Since the Standards Board wrote the exception with the limiting wording, “to subsections (c) and (d),” it is clear it knew how to make explicit the provisions being excepted. Had the Standards Board intended the exceptions to apply to other subsections, it could have so stated at this point, or included other exceptions later in the regulation. It did neither. Where, as here, the plain language of the safety order is unambiguous, the Board assumes the Standards Board meant what it said and applies the language as written. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015), citing *Branciforte Heights LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 934.) Moreover, to read the exception as applicable to operations governed by subdivision (g) and (j) would be to “consume the rule,” that is, to nullify the protections intended by them.

We may not properly do so. (*Thyssenkrupp Elevator Corp.*, Cal/OSHA App. 11-2217, Denial of Petition for Reconsideration (Mar. 11, 2013).)

As the Decision recognizes, Employer did not establish lockout/tagout procedures as required by section 3314, subdivision (g)(1)(B), or train the injured worker as required by subdivision (j)(1). It may well be that those failures resulted from the erroneous interpretation of the safety order advanced by Employer, but they nonetheless occurred.

2. Did Employer satisfy all five elements of the “independent employee action defense (IEAD)?

Employer argues that it satisfied all five elements of the “independent employee action defense” or IEAD. The IEAD is an affirmative defense which absolves a cited employer of a violation if it can prove all the elements; failure to establish even one element defeats the defense. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) The five elements are (1) the employee was experienced in the job being performed. (2) The employer has a well-devised safety program which includes training employees 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 against employees who violate the safety program. (5) The employee caused a safety infraction which he or she knew was a violation of the employer’s safety requirement. (*Id.*)

The evidence in this matter, at a minimum, established that Employer did not satisfy elements 3 and 4, as the Decision finds. (Decision, pp. 10-12.) Thus, we need not decide if Employer satisfied the other elements of the defense. Even if one assumes the other three elements were satisfied, the defense fails here.

3. Did the Division prove the alleged violations were serious?

Employer argues that the text of section 334, the Division’s regulation defining the various classifications of violations, among other items, uses the “substantial probability” test from the pre-2011 version of Labor Code section 6432. The violations alleged in this matter, however, occurred in 2013, after Labor Code section 6432 was amended to provided that a violation was serious if it creates a hazard presenting “a realistic possibility” that death or serious harm could result. (Lab. Code § 6432, subd. (a).) Therefore the amended statute applies, and takes precedence over the regulation.

The evidence was that the injured employee’s finger was drawn into a pinch point of the saw’s drive mechanism while it was running. Given the evidence that the band saw is used to cut materials such as steel, it was established that there is a realistic possibility that it was powerful enough to

cause serious injury were a finger to be caught in a pinch point. In addition, the occurrence of the accident itself shows that it is a realistic possibility for an amputation to occur. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015), citing *Home Depot, USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012), writ denied, Los Angeles Superior Court, July 2014.)

4. Did Employer lack knowledge of the violation?

There was conflicting testimony about the relative locations of the injured employee and his supervisor at or shortly before the accident. Employer points to testimony of the injured worker and his supervisor that the supervisor was some 50 feet away in a Quonset hut and out of sight of the worker's actions. The Division inspector testified the supervisor told him during his investigation that the supervisor was 12 feet to the left of the saw when the accident occurred. The ALJ considered this conflicting testimony and, in combination with the evidence that Employer had not established lockout/tagout procedures for the saw and had not trained the injured worker on such procedures, found Employer failed to provide adequate supervision. (Decision, p. 15, citing *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (Mar. 9, 1990) inter alia.) Failure to adequately supervise means that even if Employer's supervisor was some distance away from the injured worker at the time of his accident, it had still failed to exercise due diligence because it had not properly trained the injured worker in lockout/tagout procedures for the band saw. The Decision properly analyzed the issue.

5. Did the Division commit "misconduct" and in so doing deprive Employer of due process of law?

Employer claims the Division was guilty of "misconduct" because the inspector did not take a written statement from one of Employer's superintendents. Employer goes on to state, "Of the notes the inspector may have taken of his conversation with [the superintendent], he threw them away." (Petition, p. 13.) Yet it is not stated that the inspector actually took notes. Employer goes on to make similar claims as to other interviews, but the claims are couched in speculative terms: "If [the inspector] had done so [i.e. taken notes], presumably he would have thrown any such notes away[.]" Such speculation is not a sufficient basis for a finding of misconduct by the Division. And, the Board has addressed a similar claim in a matter where, as here, the content of handwritten notes was transcribed into typed notes, and held that the destruction of the handwritten notes was not a denial of due process. (*Clark Pacific Precast, LLC et al.*, Cal/OSHA App. 09-0283, Denial of Petition for Reconsideration (Oct. 25, 2012).) We follow that reasoning here. The evidence was that such notes as the inspector took were transcribed from handwritten to typed form, and in that latter form provided to Employer.

We note that other than so far as the above may be construed to address implicitly Citation 5, the alleged violation of section 3384 [wearing gloves where risk of entanglement exists], Employer makes no argument which specifically offers a reason to reverse the Decision's holding that Employer violated section 3384, subdivision (b). Labor Code section 6616 requires a petition to "set forth specifically and in full detail" the grounds for reconsideration. Employer's failure to do so in its petition essentially concedes Citation 5.

6. Were the penalties assessed duplicative because they related to the same hazard?

We note that the Decision imposed separate penalties of \$5,400 each for the violations of section 3314, subdivisions (g)(1)(B) and (j)(1). Both address the hazard presented by failing to turn off the band saw before the injured employee tried to clear away the clogging metal particles with his finger. Although one citation addressed not having a specific written procedure requiring employees to turn the saw off and the other concerned not specifically training employees to do so, both violations deal with the same hazard and can be abated by the same means, turning the band saw off before attempting to clean it. Where two citations address a hazard which can be eliminated by a single means of abatement, it is improper to impose two penalties. (*Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2219, Denial of Petition for Reconsideration (Mar. 11, 2013).) Therefore, the Board will assess only one penalty of \$5,400 for the section 3314 violations.

DECISION

The Decision of the ALJ is affirmed and Employer's petition is denied, but the penalty for violation of section 3314, subdivision (j)(1) is eliminated as duplicative of the penalty imposed for the violation of section 3314, subdivision (g)(1)(B). We attach hereto a revised Summary Table showing the amended penalties.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: OCT 15, 2015

SUMMARY TABLE DENIAL OF PETITION FOR RECONSIDERATION

In the Matter of the Appeal of:

SYAR INDUSTRIES, INC
Docket No(s). 2013-R5D-1876 through 1880

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

IMIS No. 314452202

Site: 2301 Napa Vallejo Hwy, Napa , CA 94558
Date of Inspection: 02/26/2013 ~ 04/16/2013

Date of Citation: 05/24/2013

DOCKET	C I T E M	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 E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
13-R5D1-1876	1	1	342(a)	Reg	Not at issue.	x		\$3,000	\$3,000	\$3,000
13- R5D1-1877	2	1	3314(g)(1)(B)	S	[employer required to have hazardous energy control procedure]	x		\$22,500	\$5,400	\$5,400
13- R5D1-1878	3	1	3314(j)(1)	S	Penalty eliminated as duplicative	x		\$18,000	\$5,400	\$0
13- R5D1-1879	4	1	3328(c)	S	Not at issue.		x	\$6,750	\$0	\$0
13- R5D1-1880	5	1	3384(b)	S	[hand protection not to be worn where there is risk of entanglement]	x		\$18,000	\$18,000	\$18,000
Sub-Total								\$68,250	\$31,800	\$26,400

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$26,400

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: 10/15/2015