

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

In the Matter of the Appeal of:

**UNITED PRODUCTION FRAMING, LLC
2100 RUSTIN AVENUE
RIVERSIDE, CA 92507**

Employer

Inspection No.
1566709

DECISION

Statement of the Case

United Production Framing, LLC (Employer) is a framing contractor. From December 2, 2021, to May 9, 2022, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Anthony Likovich III, commenced an inspection of the worksite at 27415 North Arborview Lane in Valencia, California, after a report of an employee injury.

On May 9, 2022, the Division issued two citations to Employer. Citation 1, Item 1, alleges that Employer did not ensure that all pneumatically-driven nailers were operated in accordance with the manufacturer's operating and safety instructions. Citation 1, Item 2, alleges that Employer did not establish, implement, and maintain an effective, written COVID-19 Prevention Plan. Employer filed timely appeals of the citations on the ground that the safety order was not violated. Additionally, Employer asserted various affirmative defenses to each citation.¹ At hearing, Employer moved to withdraw its appeal of Citation 1, Item 2.

This matter was heard by Presiding Administrative Law Judge Sam E. Lucas for the California Occupational Safety and Health Appeals Board on May 2, 2024, and June 27, 2024. Attorney Kevin Bland of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Melissa Viramontes, Staff Counsel, represented the Division. The matter was submitted on November 22, 2024.

Issues

1. Did Employer fail to ensure that all pneumatically-driven nailers were operated in accordance with the manufacturer's operating and safety instructions?

¹ Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Findings of Fact

1. Juan Pablo Gonzalez (Gonzalez) was an employee of Employer on November 11, 2021.²
2. Gonzalez is not a supervisor.
3. On November 11, 2021, Gonzalez, while working to frame a roof, was operating a Hitachi brand pneumatically-driven nailer, commonly called a “nail gun,” when the nail gun discharged a nail into Gonzalez’s knee.
4. Gonzalez’s nail gun’s air hose became stuck on trusses; he pulled on the nail gun to free the air hose and, in the process, Gonzalez shot a nail into his knee.
5. At the time of the accident, Gonzalez was not in the process of driving fasteners and had his finger on the trigger of the nail gun.
6. The nail gun was not malfunctioning during or prior to the accident.

Analysis

- 1. Did Employer fail to ensure that all pneumatically-driven nailers were operated in accordance with the manufacturer’s operating and safety instructions?**

Citation 1, Item 1, alleges a violation of California Code of Regulations, title 8, section 1704, subdivision (b)(2)³, which provides “[a]ll pneumatically-driven nailers and staplers shall be operated and maintained in accordance with the manufacturer’s operating and safety instructions.”

The Division alleges:

Prior to and during the course of the investigation, including, but not limited to, on or about November 11, 2021, the employer did not ensure that all pneumatically-driven nailers were operated in accordance with the manufacturer’s operating and safety instructions.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) “‘Preponderance of the evidence’ is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence.” (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932,

² Finding of Fact number 1 is pursuant to stipulation of the parties.

³ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

Decision After Reconsideration (May 21, 2020).) For the Division to meet its burden of proof, it must prove, by a preponderance of the evidence, using direct or circumstantial evidence, the following two elements: (1) a pneumatically-driven nailer (2) was not operated in accordance with the manufacturer's operating and safety instructions. (See *A. Teichert & Son, Inc.*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015).)

Pneumatically-driven Nailer

On November 11, 2021, while working a construction project, a nail gun Gonzalez was using discharged a nail into Gonzalez's knee, injuring him. As Employer's Report of Injury states, "While nailing panel blocks, [Gonzalez] got careless with his hose positioning and it got caught on a brace, when the [employee] went to nail again, the caught hose caused him to redirect the gun and shoot a nail through his right knee." (Exh. 22a.) There is no argument from Employer that the "gun" referenced in the report is not a pneumatically-driven nailer. It is therefore found Gonzalez was using a pneumatically-driven nailer at the time of the accident. The Division has met its burden as to element one.

Manufacturer's Operating Instructions

At the hearing, Santiago Arreguin (Arreguin) testified that he worked as a supervisor for Employer for three years, had nearly thirty years of experience supervising carpenters, and was Employer's foreman at the work site on the date of the accident. Arreguin testified that the nail gun being used by Gonzalez at the time of the accident was a Hitachi brand. The Hitachi Instruction and Safety Manual reads, in relevant part:

4. DO NOT PLACE FINGER ON TRIGGER AND KEEP FINGERS AWAY FROM TRIGGER WHEN NOT DRIVING FASTENERS TO AVOID ACCIDENTAL DISCHARGE.

Never carry the Nailer with finger on Trigger since you could drive a fastener unintentionally and injure yourself or someone else.

(Exh. 16, p.4) If the Division is able to show (1) a nail gun was used with the finger on the trigger, (2) when not driving fasteners, then it has shown the nail gun was not used in accordance with the manufacturer's safety instructions.

Finger on the Trigger

Arreguin testified that he did not see what happened at the time of the accident. However, on direct and cross examination, Arreguin testified as to what Gonzalez told him immediately after the accident.⁴ Gonzalez told Arreguin that he was walking from one side of the work area to the other with the nail gun in his hand when the hose supplying air to the nail gun became

⁴ Employer's objection on the ground of hearsay is overruled and the testimony of Arreguin as to what Gonzalez said happened in the moments prior to the accident are admitted as Spontaneous Statements under California Rule of Evidence section 1290.

stuck. (Hearing Transcript (Hrg. Tr.), May 2, 2024, pp. 54, 93, 95, 106.) Arreguin testified that Gonzalez told him that Gonzalez pulled on the nail gun in order to free it and a nail fired into his knee. (Hrg. Tr., May 2, 2024, p. 54.) Arreguin inspected Gonzalez's nail gun after the accident and did not find any abnormality. (Hrg. Tr., May 2, 2024, p. 104.)

Arreguin further testified that the nail gun has two trigger operations: a.) Single Sequential Actuation Mechanism, and b.) Contact Actuation Mechanism or "bump fire." Arreguin explained that under Single Sequential Actuation Mechanism, the operator must press the nail gun on the workpiece and pull the trigger to drive a nail. After nailing once, nailing will not be possible again until the trigger is released and pressed again. Whereas, under Contact Actuation Mechanism, also known as "bump fire," the operator may either press the nail gun on the workpiece, then press the trigger, or hold the trigger back and press the nail gun on the workpiece. In bump fire, if the trigger is held back, the nail gun would drive a nail each time the nail gun lever is pushed against a workpiece. Arreguin testified that carpenters generally use bump fire when framing trusses. In whichever mode Gonzalez's nail gun was being operated, the trigger must be depressed for a nail to discharge. (Hrg. Tr., May 2, 2024, pp. 38, 49, 86, 87, 192.)

Victor Herrera (Herrera) was a carpenter working with Gonzalez on the date of the accident. Herrera testified that, on the day of the accident, he was building a roof with Gonzalez. He and Gonzalez were working on opposite sides of the roof, so, like Arreguin, Herrera did not see the accident. When Gonzalez became injured, he called out verbally to Herrera, who was 25 to 30 feet away. Herrera immediately walked toward Gonzalez, saw he had been injured, then called the supervisor, Arreguin. Gonzalez told Herrera what happened:

He told me that he grabbed a block – a panel block and he was going to nail...at the time when he grabbed the block where he was going to nail, the gun got stuck. Since he was walking, and the hose got stuck, his hand went back and the gun hit his knee. In that moment when the hose gets stuck and the gun goes back and with his hand and that hits on the knee, it was the hand – the hand activated the trigger. That's what he told me.

(Hrg. Tr., June 27, 2024, pp. 238-239.)⁵ This version very closely matches what Gonzalez told Arreguin.

This testimony also aligns closely to the statement recorded by the Division during its interview with Herrera. (Exh. 8.)⁶ The Division's investigation reveals this summary of the interview with Herrera regarding the accident:

⁵ Employer's objection on the ground of hearsay is overruled and the testimony of Herrera as to what Gonzalez said happened in the moments prior to the accident is admitted as Spontaneous Statements under California Rule of Evidence section 1290.

I didn't see what happened because I was at the other end of the building, [Gonzalez] told me he just nailed himself. I was about 35 ft. from Juan when it happened....[Gonzalez] told me he picked up the gun and started walking, then the hose got stuck and it pulled the gun back with his hand to the knee, and that's when the accident happened. When walking with the nail gun, you hold the gun by the handle but don't put your finger on the trigger. [Gonzalez] never mentioned how he was carrying the gun.

(*Id.*)

Further, in the Division's interview with Gonzalez, conducted about five months after the accident, the inspector records that Gonzalez reports having his finger on the trigger at the time of the accident. (Exh. 7.) "I had my finger on the trigger and when the hose got stuck, it pulled." (Exh. 8.) This version of events is also generally accepted by Employer:

On or around November 11, 2021, United Production Framing employees were working at a residential construction site. They were installing wood framing and joists. One of the employees was walking on scaffolding while holding a pneumatically-powered nail gun when the air hose became caught on trusses. The employee tugged on the hose in order to make it uncaught. In the process of doing so, the nail gun made contact with the employee's knee and a nail was discharged into it.

(Employer's Closing Brief, p. 2.)

The testimony of Arreguin and Herrera is given great weight, and is corroborated by their statements to the Division during the investigation, which are themselves supported by the statements made by Gonzalez during his interview with the Division. Together, the evidence shows that a nail discharged from the nail gun used by Gonzalez as he was attempting to free the nail gun's hose after the hose became entangled while he was walking from one work area to another. It is further found that a nail cannot discharge from the nail gun without the trigger being depressed in some way. There is no evidence that the nail gun was defective, even after being inspected afterward by the supervisor, Arreguin. There is no evidence that any other mechanism depressed the trigger other than a finger. Considering all the testimony and documentary evidence in their totality, there is credible evidence to support an inference that the nail gun was engaged because Gonzalez's finger accidentally pulled the trigger of the gun. Therefore, it is found that Gonzalez had his finger on the trigger of the nail gun at the time of the accident.

⁶ Employer's objection on the ground of hearsay is overruled and Exhibit 8 is admitted as a Business Record and as a Record by public employee under California Rule of Evidence sections 1270 and 1280, respectively.

Not Driving Fasteners

As discussed above, the evidence shows that a nail discharged from the nail gun as Gonzalez was attempting to free the nail gun's hose after the hose became entangled while he was walking from one work area to another. Taken together, the evidence supports a conclusion that the hose of Gonzalez's nail gun became stuck, and Gonzalez was either walking or attempting to free the hose when a nail from the gun was accidentally discharged into his knee. In sum, Gonzalez was not in the process of driving fasteners when the accident occurred.

Therefore, the evidence demonstrates that Gonzalez, more likely than not, had his finger on the trigger when not in the process of driving fasteners. This represents actions that were not in accordance with the manufacturer's operating instructions. Consequently, the Division has met its burden as to element two.

The Division has shown by a preponderance of the evidence that Employer failed to ensure that (1) a pneumatically-driven nailer (2) was operated in accordance with the manufacturer's safety instructions. The citation is affirmed.

Conclusion

The evidence supports a finding that Employer violated section 1704, subdivision (b)(2), for failure to ensure Employee operate pneumatically-driven nailers in accordance with the Safety Manual. Accordingly, Citation 1, Item 1, is affirmed.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is sustained.⁷

It is further ordered that Employer's motion to withdraw its appeal of Citation 1, Item 2, is granted. The citation is affirmed and the proposed penalty is sustained.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: 12/20/2024

/s/ Sam E. Lucas

Sam E. Lucas

Presiding Administrative Law Judge

⁷ Although Employer did not appeal on the ground that the penalty was unreasonable, the parties nonetheless stipulated that if the Division established all elements of Citation 1, Item 1, then the proposed penalty was properly calculated in accordance with the applicable provisions of the Labor Code and the California Code of Regulations. Title 8.

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**