

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

In the Matter of the Appeal of:

**GOLDEN STATE BORING & PIPE JACKING, INC
7000 Merrill Avenue, Box 40
Chino, CA 91710**

Employer

Inspection No.
1308948

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Golden State Boring & Pipe Jacking, Inc. (Employer) is a tunneling and boring contractor. On April 13, 2018, Billy McCray (McCray), an employee of Employer, was seriously injured while operating an Akkerman 308A boring machine at Employer's work site at 11201 Limonite Avenue in Mira Loma, California. The Division of Occupational Safety and Health (Division) opened an accident investigation on April 16, 2018.

On September 6, 2018, the Division cited Employer with three alleged violations of title 8 health and safety standards. Citation 1, Item 1 alleges a General violation of section 1509, subdivision (a), referencing section 3203, subdivision (a)(7)(C), failure to provide training on a new job assignment. Citation 1, Item 2, is an alleged General violation of section 3328, failure to keep safety decals in good condition. Citation 2 is an alleged Serious violation of section 3314, subdivision (c), hazardous energy control.

The matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the Board, in Riverside, California on February 28, 2019. Lisa Baiocchi, Attorney of Walter & Prince, LLP, represented Employer. Martha Casillas, Staff Counsel, represented the Division. On October 8, 2019, the ALJ issued a Decision affirming all three violations, but modifying the penalty in each.

Employer timely filed a Petition for Reconsideration of the ALJ's Decision on November 6, 2019, and the Division filed a timely response. The Board took the ALJ's decision under reconsideration. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the Division establish by a preponderance of the evidence that employee McCray was not trained on use of the Akkerman boring machine?
2. Did the Division establish by a preponderance of the evidence that section 3314, subdivision (c) applied to the accident at issue? Assuming applicability, did the Division establish that the Employer failed to follow section 3314, subdivision (c)?

FINDINGS OF FACT

1. Employer specializes in tunneling, boring, and jack and bore operations.
2. McCray had been an employee of Employer for 22 years at the time of the accident.
3. McCray held an Operator Foreman position with Employer, and was experienced in tunneling, boring, and related operations.
4. On April 13, 2018, McCray suffered a serious injury while operating the Akkerman 308A guided boring machine.
5. The auger boring machine operates to bore horizontally through soil, in order to install pipe casings. Employer was boring a small diameter tunnel to install clay sewer pipes under a roadway at the time of the accident.
6. McCray was working with another employee, Tom Ray (Ray), the day of the accident. McCray was working on the operator side of the machine, while Ray was on the non-operator side. McCray was the employee with access to the machine's controls.
7. While the machine was idle and immobile, Ray used an air hammer to remove his casing joint keeper and pin. This is a procedure that was repeated multiple times during the course of the tunneling work. McCray leaned over to remove his wedge, and had both his hand and his head in the area where the operation occurs, in order to better see what was happening.
8. The sleeve of McCray caught on the machine's controls, which moved the boring machine forward, crushing McCray's head.
9. McCray's injuries were serious, requiring hospitalization for over 24 hours.
10. McCray had not been trained in the task of removing steel wedges from casings, the operation he was engaged in at the time of the accident.

DISCUSSION

- 1. Did the Division establish by a preponderance of the evidence that employee McCray was not trained on use of the Akkerman boring machine?**

Citation 1, Item 1 alleges a violation of section 1509, subdivision (a):

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

Section 3203, Subdivision (a)(7)(C) states:

- (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program. The Program shall be in writing and, shall, at a minimum:
 - [...]
 - (7) Provide training and instruction
 - [...]
- (C) To all employees given new job assignments for which training has not previously been received[.]

The Division’s alleged violative description includes three instances:

At the 11201 Limonite Avenue job site a serious injury accident occurred on April 13, 2018 at approximately 1:30pm when an employee was attempting to remove a steel keeper wedge from a connection to the Akkerman 308A boring machine and the boring machine thrust cylinders were inadvertently activated resulting in boring machine movement.

Instance #1- The employer failed to provide safety training for the injured employee that had been given a new job assignment of operating the Akkerman 308A Guided Boring Machine by advancing thrust casings along a pilot tube path.

Instance #2- The employer failed to provide safety training records showing that the injured employee who had been given the new job assignment of operating the Akkerman 308A guided Boring Machine by advancing thrust casings (cans) along a pilot tube path received safety training/instruction.

Instance #3- The employer failed to provide safety training records for the injured employee indicating current compliance with Title 8 Sections 3395, 1510 and 3314.

The cited regulation requires that an employer provide training and instruction on new job assignments for which previous instruction has not been provided. The ALJ upheld Instance 1, based on McCray’s testimony that although he had used this particular model of boring machine some 20 times in the past, he had not been provided training on the operation that he was conducting at the time the accident occurred.¹ That work— removing a steel keeper wedge from a connection to the boring machine—was, according to his testimony, new to McCray, and he had been provided no training in the task.

¹ The Employer’s petition raises the issue of an error in the ALJ’s Decision; Employer correctly points out that the ALJ’s statement on page 7 of the Decision is inaccurate. The ALJ incorrectly found that the invoice for the Akkerman machine states that the model is a “308T” rather than the “308A”, and that the distinction or error was not addressed by the parties. The parties did address the discrepancy at hearing. Through testimony, Employer established that the Model 308A boring machine was the only Akkerman Employer had purchased. Employer’s assertion that the invoice contains a typo, and should have read “308A” rather than “308T” is accepted by the Board, but the issue does not impact the outcome.

Employer attempted to rebut McCray's testimony through testimony from Ray, a foreman with Employer, and Employer's President, Jeff Johnson (Johnson), who both stated that when the Akkerman boring machine was purchased, the manufacturer sent a representative out to provide training to McCray on use of the machine. Employer offered into evidence an invoice showing that Employer paid \$3,000 for a representative to provide training on the machine's use. Employer also provided two short, identical statements from two employees who stated they had seen McCray being trained by the Akkerman representative.

The employee statements, even if admitted as hearsay subject to the Board's hearsay exception under section 376.2, do not establish that McCray was provided training related to the new operation that he was conducting at the time of the accident. The evidence offered provides no insight into the content of the training provided by the company representative. Moreover, Employer provided no reason why it could not bring its two employees to hearing to testify and be subject to cross-examination. Accordingly, where weaker and less satisfactory evidence is offered when it was within the power of a party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evid. Code, § 412.)

The Board concludes that the ALJ correctly determined that a violation of section 1509, subdivision (a), was proven by the Division. A citation may be upheld on the basis of a single instance. (*Barrett Business Services, Inc.*, Cal/OSHA App. 315526582 Decision After Reconsideration (Dec. 14, 2016).) The Division established by a preponderance of the evidence a violation in instance 1 of Citation 1, Item 1.

2. Did the Division establish that section 3314, subdivision (c) applied to the accident at issue? Assuming applicability, did the Division prove by a preponderance of the evidence that the Employer failed to follow section 3314, subdivision (c)?

Citation 2 alleges a Serious violation of section 3314, subdivision (c). The section includes the following application subdivision, which is useful in understanding the overall purpose of the regulation:

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

(3) Requirements for working on energized electrical systems are prescribed in Sections 2320.1 through 2320.9 or 2940 through 2945.

The following is the Division's alleged violative description:

At the 11201 Limonite Avenue job site, a serious injury accident occurred on April 13, 2018 at approximately 1:30pm when an employee was attempting to remove a steel keeper wedge from a connection to the Akkerman 308A boring machine and the boring machine thrust cylinders were inadvertently activated resulting in

boring machine movement. The movement of the boring machine caused crushing injury to the employee's face and jaw area. The Akkerman 308A boring machine was not mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during the time the employee was attempting removal of the steel keeper wedge.

In its Petition for Reconsideration, Employer argues section 3314 does not apply to this case. Specifically, Employer argues that the Division failed to establish that the injured employee was engaged in a "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." (§ 3314, subd. (a)(1).) Rather, Employer states that the operation taking place at the time of McCray's injury was a regular activity taking place in accordance with the Akkerman's manual:

Ray had just removed his keeper with an air hammer, and McCray was in the process of doing the same. This activity is just one step in the multi-step process of 'Installing Auger Casings With Reaming Head' as outlined in the Akkerman Manual. (Petition, pp. 9-10.)

Employer cites to Exhibit E, which describes the three-step method for installing auger casings.

Section 3314 only applies to certain operations: "cleaning, repairing, servicing, setting-up and adjusting of machines and equipment." (§ 3314, subd. (a).) The question for the Board is whether the work that McCray was engaged in at the time of the accident falls into one of these categories. The Board has previously interpreted the term "adjusting" as follows:

"adjustment" implies changing or regulating machinery to assure optimal performance. Section 5034(d) demonstrates that the Standards Board intended the term "adjustments" to apply only to operations designed to accomplish such purposes:

Adjustments shall be maintained to assure correct functioning of the following components:

- (1) All functional operating mechanisms.
- (2) Safety devices.
- (3) Control systems.
- (4) Power plants.
- (5) Brakes."

(*Macco Constructors*, Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993).)

Similarly, “set up” is defined by the Merriam-Webster Dictionary as

a: the assembly and arrangement of the tools and apparatus required for the performance of an operation

b: the preparation and adjustment of machines for an assigned task. (Merriam-Webster, <https://www.merriam-webster.com/> [last accessed July 13, 2020].)

McCray’s task can be categorized as a machine set up and adjustment, necessary for the boring machine to function properly.

Employer also argues that lockout/tagout was not applicable to the operation, and that the machine’s operating manual supports this conclusion. Although the machine’s operating manual did not include a lockout/tagout procedure applicable during machine operation, as the ALJ discusses in her Decision, it is ultimately the employer’s duty to ensure that the machine is operated in compliance with California’s safety regulations. (Decision, p. 10, citing *Crescent Metal Products*, Cal/OSHA app. 92-629, Decision After Reconsideration (Dec. 6, 1994.) The manufacturer’s failure to include such a process does not relieve Employer of its requirement to ensure that the machine is operated in a safe manner that is consistent with California’s safety orders. As explained above, the Board concludes section 3314 is applicable to this case.

Here, there is no dispute that the machine was not de-energized and locked out when McCray was engaged in this work. (Decision, p. 10.) Therefore, unless an exception applies, a violation of the safety order exists. Section 3314, subdivision (c)(1), enumerates an exception to the safety order. That exception reads:

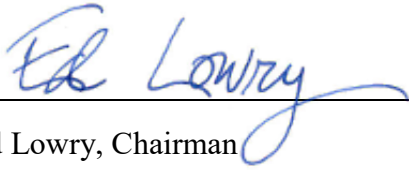
1. Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

As to the exception, the Board cannot agree that the operation at issue constitutes a “minor adjustment performed using alternative measures providing effective protection to the operator. (*FedEx Ground Package System, Inc., dba FedEx Ground*, Decision After Reconsideration, Cal/OSHA App. 1199473 (Aug. 30, 2019).) Even if the operation did fit the exception, Employer had no measures in place to protect the operator, leading to the accident at issue. The exception requires an employer to demonstrate that it engaged “alternative measures” that provided effective protection. No such measures were shown here. The ALJ properly upheld Citation 2.

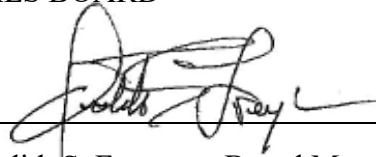
DECISION

The Decision of the ALJ is upheld.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chairman



Judith S. Freyman, Board Member



Marvin Kropke, Board Member



FILED ON: **07/24/2020**