BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: PDM STEEL SERVICE CENTERS, INC. 3500 Bassett Street Santa Clara, CA 95054 Employer	Dockets. 13-R1D3-2446 through 2448 **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 PDM Steel Service Centers, Inc. (Employer).

JURISDICTION

Commencing on May 5, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On July 3, 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 March 23, 2015 the ALJ issued a Decision (Decision) which held Employer had committed the alleged violations and imposed civil penalties.

Employer timely filed a petition for reconsideration. The Division answered the petition.

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

ISSUES

Is there constitutionally adequate notice of the definition of a supervisor in the context of occupational safety and health regulations? If not, does that lack of notice preclude the Board from refusing to apply the IEAD? Was there sufficient evidence to support the ALJ's finding that the worker involved in the accident was a supervisor? Was the Decision issued late?

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 evidence does not justify the findings of fact 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 and the Division's answer to the petition. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer receives structural steel shapes at its facility in Santa Clara and uses them to fabricate steel components for use in construction. One of Employer's employees, a foreman named Luis Villafan (Villafan), was injured while using an overhead crane to unload a shipment of steel beams from the trailer on which they had been delivered. The beams weighed about 1,800 each. After he placed a pair of beams which were wired together for shipping purposes in a stack, Villafan noticed they were not lying flat and wanted them to be even or level to make the stack more secure. One of the tie wires prevented the two beams in question from lying flat on the beam or beams on which they rested.

Villafan used a hook attached to the crane to lift one end of the pair of beams far enough up so that he could pull the interfering wire out of the way.

Villafan did not otherwise secure the beams to the crane or its hook. After the beams were raised Villafan went to the spot where the wire was and while trying to pull it the beams fell off the hook and struck his thumb, crushing it between the beams he had raised and the one or ones under them. The injury was such that the thumb had to be amputated. (See Employer's accident report, Division Exhibit 12.)

The Division issued three citations to Employer. Citation 1 alleged a general violation of section 5049 [failure to use hooks as recommended by manufacturer when lifting a load by crane]. Citation 2 alleged a serious accident-related violation of section 4999(c)(1) [failure to attach load with slings or other effective means]. Citation 3 alleged a serious accident-related violation of section 4999(d)(2) [failure to ensure load was secured and properly balanced before lifting].

Employer argues that Villafan was not a foreman at the time of his injury; that Employer had inadequate notice of the meaning or definition of "supervisor" in the context of Board proceedings and therefore the Board cannot hold the "independent employee action defense" (IEAD) does not apply when a supervisor is the employee violating a safety order; and that the Decision was not timely issued.

1. Evidence showing Villafan was foreman or supervisor.

Employer contends the evidence was insufficient to show that Villafan was a supervisor with responsibility for other workers' safety. Villafan testified that he was a warehouse foreman and he supervised others. Employer also provided documents to the Division showing the "training done" by the injured worker, i.e. training he gave other employees on at least four occasions within one year of the accident. The training involved topics such as crane operation, crane safety, lifting loads and landing loads. (Division exhibit 4.) The document states, in a hand-written note: "Luis Villafan does this each year with 6-8 employees."

In the context of the Board's jurisprudence, "supervisor" has been given the meaning of someone who has authority or responsibility for the safety of other employees. (*City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998).) Villafan therefore has both the titular indicia of a supervisor and has responsibility for the safety of other workers. There is more than sufficient evidence in the record to support the ALJ's finding that Villafan was a supervisor.

2. Applicability of the IEAD.

The IEAD is an affirmative defense established by the Board, which has its source in an analogous affirmative defense which applies in federal occupational safety and health proceedings. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) The IEAD establishes a five element test and an employer asserting the defense must prove it satisfies all five elements. (*Id.*)

Where the employee causing the safety infraction is a foreman or supervisor, however, the defense is inapplicable. (*Davey Tree v. Occupational Safety and Health Appeals Bd.* (1985) Cal.App.3d 1232, 1241.) The issue in *Davey Tree, supra*, was whether the Board's "supervisor" exception to the IEAD was appropriate. The court held it was, and further stated that the exception could be viewed as not an exception at all, but rather as showing employer had failed to meet the third element of the IEAD test ("the employer effectively enforces its safety program"), because the violation of a safety rule by a supervisor meant the employer, through its representative, had itself failed to enforce its safety program. As the court in *Davey Tree, supra*, explained, supervisors and foremen are management's representatives at worksites, and when they violate a safety standard their behavior is attributed to management. (*Id.*)

The foregoing summary of the exception to the IEAD is the background underlying Employer's contention that it did not have adequate notice of what "supervisor" means in the context of the IEAD. We now examine that argument.

As noted above, "supervisor" means someone who has authority or responsibility for the safety of other employees. (*City of Sacramento, Dept. of Public Works, supra.*) There the Board noted that the court in *Davey Tree* had recognized that there was no regulatory definition of supervisor but the Board had articulated a "working definition of the term" as "[employees who] are responsible for the safety of workers under their supervision." (*City of Sacramento, supra*, citing *Davey Tree v. Occupational Safety and Health Appeals Bd.* (1985) Cal.App.3d 1232, 1241.)

Given the acceptance by the Court of Appeal of the IEAD and the so-called supervisor exception to it, Employer was on adequate constitutional notice of the meaning of "supervisor," its applicability in cases where the IEAD is asserted, and the "supervisor" exception to the defense.[2] The foregoing answers in the negative Employer's second contention – the Board is not precluded from applying the IEAD and its supervisor exception in this proceeding. We hold Employer had adequate notice of the meaning of "supervisor" and the word's applicability in the context of the IEAD.

[2] Meaning of a word may be established by judicial decisions. (See Pierce v. San Mateo County Sheriff's Dept. (2014) 232 Cal.App.4th 995, 1006.)

Moreover, even if the term "supervisor" had not been construed by the Court of Appeal 30 years ago, and while it is true that there is no statutory or regulatory definition of "supervisor" in the California OSHA context, it is also true that when a term is not defined in a statute or regulation it is given its usual meaning. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 808; *D. Robert Schwartz dba Alameda Metal Recycling and Alameda Street Metals*, Cal/OSHA App. 96-3553, Decision After Reconsideration (Mar. 15, 2001).) The ordinary meaning of "supervisor" is "a person who supervises a person or an activity." (New Oxford American Dictionary.) Employer is thus presumed to know that "supervisor" has its usual meaning.

3. Lateness of Decision

Employer contends that the Decision was issued beyond the 30-day period stated in Board regulation "section 380" [sic; Petition, p. 8] subdivision (a), which reflects the language of Labor Code section 6608. It is true that Board regulation *section 385*, subdivision (a), does set that time period, although Employer seems to ignore its provision that an ALJ "may extend the submission date," and characterizes the ALJ's having done so as "bureaucratic gobbledygook[.]"[3]

Not only did the ALJ exercise her authority to extend the time to issue the Decision, but we also note that Labor Code section 6609 establishes a directory, not mandatory, time in which a decision must be issued. (*CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 8, 2013), citing *California Correctional Peace Officers' Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145 and *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007), (writ denied, Imperial County Superior Court.)) And here, as in *CA Prison Industry Authority, supra*, the ALJ decided the case on the record established in the hearing. The passage of time does not result in a loss of information. Moreover, contrary to Employer's contention, the additional time provides more opportunity to discover evidence which could not have been discovered earlier in the exercise of reasonable diligence. (See Labor Code § 6617, subd. (d).) Where, as here, the ultimate decision is against the cited employer, it is even economically benefitted by the delay between submission of the case and time when penalties must be paid.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

[3] We believe we are not unreasonable in maintaining the hope that a member of the State Bar would accept and appreciate that a California regulation duly promulgated in accordance with applicable provisions of the Administrative Procedures Act (Govt. Code section 11340 and following) and our adherence to same is not "goobledygook" but application of valid law of the State.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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