

BEFORE THE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
DEPARTMENT OF INDUSTRIAL RELATIONS
STATE OF CALIFORNIA

In the Matter of the Appeal)	
of:)	DOCKET NO. 77-R4D1-1133
)	
MERCURY SERVICE, INC.)	GRANT OF PETITION FOR
6851 W. Imperial Hwy.)	RECONSIDERATION AND DECISION
Los Angeles, California 90045)	AFTER RECONSIDERATION
)	
)	

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code, hereby grants the Petition for Reconsideration filed in the above-entitled matter by Mercury Service, Inc. (Employer) and makes the following Decision After Reconsideration.

JURISDICTION

On October 11, 1977, a representative of the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment maintained by Employer. On October 19, 1977, the Division issued to Employer a citation alleging a serious violation of Title 8, California Administrative Code.¹ A civil penalty was proposed.

Employer filed a timely appeal from the citation contesting the existence of a serious violation of section 3314(d) and from assessment of \$425 in total penalties. After a hearing before an Administrative Law Judge of the Appeals Board, the appeal was denied in a Decision dated March 24, 1978.

On April 14, 1978, a timely Petition for Reconsideration was filed by Employer. The matter was taken under submission by the Appeals Board on May 1, 1978. The Division did not file an answer to the Petition.

1. Unless otherwise specified, all references are to sections of Title 8, California Administrative Code.

Citation No. 2
Serious
8 Cal. Adm. Code 3314(d)

ISSUE

Is the evidence sufficient to establish a serious violation of section 3314(d) and is the amount of the proposed civil penalty reasonable and appropriate?

REASONS FOR DECISION AFTER RECONSIDERATION

Employer employed a mechanic for approximately two months. On the day of the alleged violation, the shop foreperson assigned the mechanic to check relay switches under a conveyor bed on a mobile conveyor. In order to inspect the relays the mechanic placed his upper body under the uplifted end of the conveyor bed. During this operation, the mechanic apparently accidentally actuated a nearby hydraulic pressure release lever which caused the conveyor bed to descend on him. The mechanic had not installed any of the available wooden blocks that could have prevented accidental downward movement of the conveyor bed.

It was established that Employer's mechanic had several years experience as an auto mechanic but was still being trained by Employer at the time of the accident. The shop foreperson testified that the mechanic was not given specific instructions to use the blocks, but was expected to pick up this practice by word of mouth. No specific repair procedure was produced for the job the mechanic started on the mobile conveyor.

The record established that the use of blocks to prevent mechanical objects from collapsing is a standard shop procedure and generally accepted industry practice. Employer's lead mechanic testified that he had observed or helped the mechanic work on another mobile conveyor before the accident and on two of these times, the mechanic had used a block to prop up the conveyor bed. The third time he had to be reminded to use a block.

That the Division established a serious violation of section 3314(d) is not disputed. Employer's mechanic did not block a mobile conveyor during repair so as to prevent inadvertent movement which could cause injury. The issue is whether Employer established the defense the Appeals Board has recognized as the independent employee action test.

The Appeals Board has developed a test for this employer defense as it recognizes that some employees may act against their employer's best safety efforts. In order to establish the defense of independent employee action an employer must show all of the following elements:

1. The employee was experienced in the job being performed,
2. Employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments,
3. Employer effectively enforces the safety program,
4. Employer has a policy which it enforces of sanctions against employees who violate the safety program, and
5. The employee caused a safety infraction which he or she knew was contra to the Employer's safety requirement.

In this case, the evidence did not establish that Employer maintained an effective safety program that includes training employees in safety matters when repairing mobile conveyors. Assuming that the mechanic knew he should use a block while working under the conveyor bed, Employer has not shown that it created such a safety-oriented atmosphere in its workplace that the employee was strongly discouraged from using unsafe procedures. Not only must an employee know safety responsibilities, an employer must enforce safety procedures so that safety becomes a vital part of any work task. Employer did not comply with this requirement, nor did Employer use sanctions when the mechanic failed in the past to use blocks to prevent mechanical objects from collapsing. The mechanic was merely reminded to use a block. As Employer has not established elements two, three, or four of the independent employee action test, it cannot rely on this defense.

With respect to whether the amount of the proposed civil penalty is reasonable and appropriate, Employer contends that the penalty assessment procedure set forth in the Division's regulations should yield a penalty of \$200, not \$425. Upon independent review of the nature and scope of the safety hazard established by the facts of this case, the proposed civil penalty is determined to be reasonable and appropriate.

DECISION AFTER RECONSIDERATION

The Decision issued in this matter dated March 24, 1978, is affirmed. The appeal from a serious violation of section 3314(d) and from the penalty of \$425 is denied.


HAROLD MITCHELL, Chairman


CHARLES MANFRED, Member


MARK K. BOWERS, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DATED:

OCT 16 1980