BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of:	DOCKETS 11-R6D4-1463 and 1464
CHEVRON PRODUCTS CO. EL SEGUNDO REFINERY dba CHEVRON 232 Main Street El Segundo, CA 90245, Employer.	**DECISION**

Background and Jurisdictional Information

Chevron El Segundo Refinery dba Chevron (hereinafter sometimes referred to as Employer) is an oil refinery. During the period January 13, 2011, through March 17, 2011, the Division of Occupational Safety and Health (Division) through its compliance officer[1], Harris Tran, conducted an inspection of Employer at 232 Main Street, El Segundo, California (site). On May 27, 2011, the Division cited Employer for the following alleged violations of the California Code of Regulations[2].

Cit/Item	Alleged Violation	Type	Penalty
2	§ 5162(a) [Plumbed eyewash unit had nozzles unprotected by covers]	General	$700
3	§ 3999(d) [Unguarded conveyor belt support pulleys or metal rollers]	Serious	$6,300

Employer filed a timely appeal asserting that the safety orders were not violated, the classifications were incorrect, the penalties were unreasonable, the abatement requirements were unreasonable, and raising various affirmative defenses, including lack of employer knowledge and the Independent Employee Act Defense (IEAD).

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[1] The terms inspector, safety engineer, investigator and compliance officer are used interchangeably herein.

[2] Unless otherwise specified, all references are to sections of Title 8, California Code of Regulations.

A formal evidentiary hearing was convened on November 29, 2012, at Van Nuys, California, before Administrative Law Judge (ALJ) Sandra L. Hitt. Ronald Medeiros, Esq., represented Employer. James Ryel, District Manager, Process Safety Management, Southern California, represented the Division. The matter was argued and evidence was received on the hearing date. The ALJ, on her own motion, extended the date for submission for Decision to January 24, 2012.

Law and Motion

At the hearing, the Division moved to amend Citation 3 to change the cited subsection from (d) to (b). Employer did not object to this amendment, and the motion was granted for good cause. At hearing, the Division also moved to reduce citation 2 to a Notice, as there was no direct or immediate relation to employee safety and health. There being no objection, the motion was granted for good cause. Employer withdrew its appeal of Citation 2, as modified. Therefore, the only citation remaining at issue was Citation 3, an alleged serious violation of § 3999(b).

Summary of Evidence

Harris Tran (Tran) is the Associate Safety Engineer who performed the inspection at issue in this matter. He has worked for the Division for approximately four years and has conducted some 71 inspections. Tran conducted the opening conference with Chris Larson, Employer's Process Safety Manager and John Casey, Employer's Safety Director, who gave him permission to conduct the inspection.

Tran testified that he visited the site multiple times. On March 10, 2011, Tran took photographs outside of Building 5105 (the transfer building); however, these photographs did not turn out well, so Tran returned on March 17, 2011, with a different camera, to retake the photographs. Tran testified that the conditions he observed and photographed on March 10, 2011, were the same when he returned on March 17, 2011. Exhibits 3, 4, and 5 are photographs taken by Tran. Exhibit 3 shows the conveyor belt outside of the transfer building. Exhibit 4 is a photograph showing what Tran called a drum pulley[3] located on the lower conveyor belt, approximately 2 and ½ feet from the catwalk depicted in exhibits 3 and 4. The drum pulley is circled on Exhibit 4. Tran testified that the approximate diameter of the roller was 4 inches, and its length was approximately 24 inches. Tran stated that the engineering term for the device is "elongated pulley," but it can also be called a drum pulley. Exhibit 5 is a close-up of the pulley. Tran stated that he has previously conducted an investigation involving conveyors, but not with these particular rollers. He stated that if someone came into contact with the unguarded nip point, "it could pull fingers through," and that is why he issued Citation 3.

[3] Both the Division and Employer used the terms "drum" and "roller" fairly interchangeably.

Tran stated that the angle arm railing depicted in Exhibits 4 and 5 is inadequate as a guard rail because it is missing a middle rail.

The Division introduced into evidence Exhibit 6, a printout of a three-page document which Tran found on the Internet. Exhibit 6 is titled "OSHA Regional News Release" and dated August 30, 2011. Tran testified that he found this document by doing a search for conveyor belt accidents. Exhibit 6 describes three accidents: (1) where an employer was charged with two serious violations when an employee's hand was caught in an ingoing nip point on a conveyor belt and the employee suffered contusions, abrasions, and friction burns, (2) where an employee suffered severe lacerations on his arm when it became caught in a conveyor belt that activated while he was trying to clear a paper jam; and (3) where an employee had his right arm amputated at the elbow after he was trapped in a machine, apparently due to failure of employees to utilize lock-out/tag-out procedures.

On cross examination, Tran stated that the pulley in question was neither a head pulley nor a tail pulley, and he was not sure of the definition of a single tension pulley. He classified the roller at issue as a dip take-up pulley, reasoning that since it supports the belt in its return path, it performs the function of a dip take-up pulley. He derived his definition of the dip take-up pulley from the name itself. Tran conceded that he did not know if any of the accidents described in Exhibit 6 involved a support roller, nor did he know what machine was involved in example number 3 of Exhibit 6.

Arnold Ramirez (Ramirez) was called to testify by the Division. He is employed by Chevron as a coke handler. As such, he walks the catwalk two to three times per day. It is his job to attend to the clean-up for the conveyor belt and report any problems to maintenance. He said that the circled item in Exhibit 5 is called a return roller. He stated that the roller is within arms length of the catwalk and there is nothing to protect him from coming into contact with the roller. Ramirez stated that there are four different shifts and four different crews with a "belt man" on each crew. He stated that the other belt men also walk the catwalk two or three times per shift.

Don Mrla (Mrla) was called to testify by Employer. He is employed by Chevron as Senior Mechanical Engineer. He has been employed by Chevron for 19 years, and was previously a "Turn-around Team Leader." He has a BSME degree from the California Maritime Institute and a MS degree in organizational leadership from Biola University. He was Senior Mechanical Engineer at the time of the inspection. As Senior Mechanical Engineer, he trains new engineers. He is familiar with conveyors and his staff is responsible for specifying new conveyors when the need arises. He is familiar with the conveyor depicted in Exhibit 4; he has seen it on "job walks." Mrla explained that a head pulley provides energy to move the belt. On this conveyor, the head pulley is inside the transfer building.[4] Mrla also explained that the tail

[4] A structure shown in Exhibit 3.

pulley returns the belt. It is not in the picture (Exhibit 4) but it would be out of the picture to the left. Mrla testified that the conveyor system depicted in Exhibit 4 does not have a single tension pulley. Mrla went on to describe the function of a single tension pulley as keeping the belt or chain at the proper tension, and stated that single tension pulleys are common in car engines.

Finally, Mrla explained that dip take-up pulleys take up slack in the conveyor to insure proper tension. He stated that the conveyor belt at issue does have a dip take-up pulley but it is not shown in the Division's photographs because it is in the transfer building. Employer introduced Exhibit A, which was described as a conveyor diagram, showing both rollers and a dip take-up pulley. He stated that rollers are not dip take-up pulleys; although the rollers keep the belt from sagging, a true dip take-up pulley has some ability to keep the tension even. Mrla opined that it was approximately 2 and ½ feet from the catwalk to the railing next to the roller, that the roller was at approximately knee height, and that based on the photographic exhibits, the roller did not have a guard.

Employer did not put on any evidence of any affirmative defense, nor did it put on any evidence regarding the unreasonableness of the penalty or the abatement requirements (with the exception of the evidence in support of its position that the safety order was not violated, which contention, if correct, would render any penalty or abatement requirement moot).

Docket 11-R6D4-1464

Citation 3, Serious, § 3999(b)

Findings and Reasons For Decision

The Division did not establish a violation of § 3999(b).

The Occupational Safety and Health Act (Cal. Labor Code §§ 6300 et. seq. (the Act)) was enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, and assisting and encouraging employers to maintain safe and healthful working conditions. Under the Act, the Division has the burden of proving a violation, including the applicability of the safety order and employee exposure to the violative condition, by a preponderance of the evidence. (See, e.g., *Ja Con Construction*, Cal/OSHA App. 03-441, DAR (March 27, 2006); *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, DAR (Oct. 16, 1980), at pp. 2-3; and *Howard J. White*, Cal/OSHA App. 78-741, DAR (June 16, 1983).)"

Section § 3999(b) provides, in pertinent part, "Belt conveyor head pulleys, tail pulleys, single tension pulleys, chain conveyor head drums or

sprockets and dip take-up drums and sprockets shall be guarded. The guard shall be such that a person cannot reach behind it and become caught in the nip point between the belt, chain, drum pulley or sprocket." A note to the safety order reads "NOTE: Normally, conveyor belt support rollers need not be guarded unless they create a potential hazard for serious injury." The note is not dispositive (*Reese Construction Co.* Cal/OSHA App. 78-1037 (November 7, 1980). Nevertheless, while notes cannot be used by the Division or the employer as the basis for a violation or an exception, they are helpful to explain the safety order and the intent of the Standards Board. Here, the Division argued that the unguarded roller created a potential for serious injury.

There is no dispute that the support roller was not guarded so as to prevent someone from reaching behind it to the nip point.[5] Employer argued that (1) Section 3999(b) does not apply to the support roller in question and even if it did, (2) the Division established neither exposure nor a serious violation. Employer also argued that to the extent that Labor Code § 6432 requires the Division to show that it served Employer with the YB-1 form as a condition precedent to establishing a serious violation, the Division failed to meet that burden.

Labor Code § 6432 was modified effective January 1, 2011, to allow the Division to cite a violation as serious when there is a realistic possibility that if an accident were to occur as a result of the violation, serious physical harm or death would occur. Aside from the inspector's testimony that if someone were to slip and fall, coming into contact with the unguarded roller, "it could pull fingers through", the only evidence in support of the serious classification was Exhibit 6. Exhibit 6 consists of three regional news releases from Federal OSHA. Tran testified that he obtained these documents from the Internet, using a word search for conveyor belt accidents. Three accidents are described in Exhibit 6. In two out of the three, it is unclear whether the accidents resulted in serious physical harm as defined under California law in Labor Code 6432(e).[6] The first example involved an employee who had his hand caught in an ingoing nip-point and suffered "contusions, abrasions and friction burns." The Second example involved an employee whose arm was "severely lacerated" when it became caught in a conveyor belt that activated while he

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[5] Although it would require a certain unusual chain of events for someone to slip and fall on the catwalk in such a manner that his arm would slip through the angle arm system depicted in Exhibits 4 and 5, and reach two and ½ feet or more to the knee high nip point.

[6] Serious physical harm is defined in Labor Code § 6432(e) as injury or illness occurring in connection with employment that results in:

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including but not limited to, depending on severity, second-degree or sores burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses , or broken bones.

was trying to clear a jam. In the third example, we know only that an employee lost an arm when he was trapped in a machine, apparently due to failure of employees to utilize lock-out/tag-out procedures. That example did not specify what kind of machine or what caused the injury.[7] Moreover, there is no evidence that any of the accidents involved a support roller. The Division's evidence, without more, is insufficient to support the serious classification in the instant matter. The Division failed in its argument that the roller created a potential for serious injury.

The Division established exposure to the unguarded roller. Ramirez stated that he and three other "belt men" walk the catwalk (within 2 and ½ feet of the unguarded roller) two or three times a shift. However, the Division did not establish that § 3999(b) applied to the type of roller at issue. Section 3999(b) specifies that conveyor head pulleys, tail pulleys, single tension pulleys, chain conveyor head drums or sprockets, and dip take-up drums and sprockets shall be guarded. Section 3999(b) does not specify that support rollers must be guarded. The Division's argument that the support roller classifies as a dip take-up pulley was unsuccessful. The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, DAR (June 16, 1983).)

Tran testified that he classified the roller in question as a dip take-up pulley based on the name, as the support roller would prevent the belt from sagging. However, Tran's testimony was refuted by Employer's witness, Senior Mechanical Engineer Mrla. Mrla testified that there was a dip take-up pulley on the conveyor belt, but that it was not depicted in the Division's Exhibits 3, 4, and 5, because it was inside the transfer building. Mrla also testified that a true dip take-up pulley has some ability to keep the tension on the belt even. A Westlaw search of the Cal/OSHA database was unhelpful in distinguishing between a support roller and a dip take-up pulley for purposes of § 3999(b). In any event, the Division did not rebut Mrla's testimony with any evidence that the support roller in question had the ability to keep the tension on the belt even, or that a conveyor system like the one at issue would have more than one dip take-up pulley. Employer's Exhibit A depicted both support rollers and a dip take-up pulley. The two were quite different in appearance. The support roller in Exhibits 3, 4 and 5 more closely resembles the rollers depicted in Exhibit A than the dip take-up pulley (also depicted in Exhibit A). Mrla's testimony regarding the dip take-up pulley, supplemented by Exhibit A, was more persuasive than the Division's evidence on this point. The Division Failed to establish the applicability of the safety order to the alleged violation. For that reason, citation 3 must be dismissed.

As the Division did not establish the violation in Citation 3, it is not necessary to consider whether it is the Division's burden to show, as a

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[7] Although we may infer that a conveyor belt was involved somehow, as Tran testified that he found this information using a search for conveyor belt accidents on the Internet.

condition precedent to establishing a serious violation, that it served an employer with the letter (YB-1) specified in Labor Code § 6432, or whether a failure to do so is an affirmative defense to be raised by the employer, and the ALJ does not reach that issue. Likewise it is not necessary to discuss the reasonableness of the abatement requirements or the applicability of any affirmative defenses[8].

Decision

Citation 3 is dismissed and the matter is resolved as set forth in the attached summary table.

SANDRA L. HITT
Administrative Law Judge

Dated: February 10, 2012
SLH:ml

[8] Which in any event, Employer appeared to have abandoned at hearing.

SUMMARY TABLE
DECISION

Abbreviation Key:	Reg=Regulatory
G=General	W=Willful
S=Serious	R=Repeat
ER=Employer	DOSH=Division
EE=employee	w/d= withdrew

In the Matter of the Appeal of:

CHEVRON PRODUCTS CO. EL SEGUNDO REFINERY DBA CHEVRON
Dockets 11-R6D4-1463 and 1464

IMIS No. 313642209

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	**FINAL PENALTY ASSESSED BY BOARD**
11-R6D4-1463	2		5162(a)	G	**DOSH reduced Citation to Notice**. ER w/d appeal.	X		$700	$0	**$0**
11-R6D4-1464	3		3999(d)	S	DOSH amended subsection from (d) to (b). ALJ dismissed Citation.		X	$6,300	$6,300	**$0**
					Sub-Total			$7,000	$6,300	**$0**
					Total Amount Due*					**$0**

(INCLUDES APPEALED CITATIONS ONLY)

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.

ALJ: SLH/ml
POS: 02/10/12