

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

**CGK INC. DBA PREMIER STEEL
FABRICATION**

8229 Mabel Avenue
El Monte, CA 91733-1424

Employer

**DOCKETS 13-R4D4-518
and 519**

DECISION

STATEMENT OF THE CASE

CGK Inc., dba Premier Steel Fabrication (Employer) is a contractor engaged in steel fabrication. On August 17, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer, Jerry Young conducted an accident inspection at a place of employment maintained by Employer at 10811 Rush Street, South El Monte, California (the site). On January 31, 2013, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in California Code of Regulations, title 8¹: Citation 1, missing elements of Employer's Injury and Illness Prevention Program (IIPP)²; and Citation 2, willful

¹ Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8.

² The parties resolved Citation 1, item 1 by the following stipulation:

Employer does not admit that it has violated any statute, standard, order, or regulation in connection with any of the matters alleged in the citations, except as provided in this stipulation and Order pertaining to Citation 1, Item 1, section 3203, subdivision (a).

The parties further stipulate that Employer has entered into this agreement in order to avoid protracted litigation and costs associated thereto.

failure to ensure that any of Employer's six press brakes were guarded at the point of operation.

The Employer filed an appeal for both violations, contesting the existence of the violation of the safety order, the classification, and the unreasonableness of the abatement requirements and the reasonableness of the proposed penalties. Employer pleads affirmative defenses as indicated in Employer's Appeal filed with the Occupational Safety and Health Appeals Board (Exhibit 1).

The matter came on regularly for hearing before Clara Hill-Williams, administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on July 24, 2014 and July 25, 2014. Employer was represented by Consultant William Knocke. The Division was represented by Staff Counsel David Pies. The ALJ extended the submission date to July 8, 2015.

ISSUES

1. Was Employer's failure to ensure that six press brakes were guarded at the point of operation correctly classified as a serious violation of section 4214, subdivision (a)³?
2. If the Division correctly classified the violation of section 4214, subdivision (a) as a serious violation, did employer rebut a presumption of a serious violation?
3. Was Employer's violation of safety order section 4214, subdivision (a), willful?⁴

FINDINGS OF FACT

1. Employer failed to guard the press brakes at the point of operation, in violation of section 4214.⁵

³ The parties stipulated that Employer violated section 4214, subdivision (a) resulting in employee, Ricardo Fortanel's (Fortanel) right dorsal fingertip injury.

⁴ Pursuant to the parties' stipulation, abatement and the reasonableness of the penalty are not at issue (See "Findings of Fact" #2).

⁵ The parties stipulated that Employee, Ricardo Fortanel's (Fortanel) suffered an injury to the right dorsal fingertip as a result of Employer's failure to ensure that the press brakes were guarded at the point of operation, in violation of section 4214. Employer's stipulation for violating section 4214 was also made on the record at the Hearing.

2. Fortanel's medical documentation indicated a soft tissue defect and laceration without any evidence of "bony fracture" of his right dorsal fingertip (Exhibit 2B).
3. Young observed several unguarded press brakes in operation.
4. After observing several unguarded press brakes in operation at the work site Young issued an OPU (Order prohibiting use) (Exhibit A).
5. The Division correctly classified the violation as serious.
6. Employer failed to rebut the presumption of a serious violation.
7. Employer had actual knowledge of the hazard of allowing employees to operate press brakes without a guard.⁶
8. Employer's violation of safety order section 4214, subdivision (a), was correctly classified as willful.

ANALYSIS

1. Was Employer's failure to ensure that six press brakes were guarded at the point of operation correctly classified as a serious violation of section 4214, subdivision (a)?

Section 4214, subdivision (a) provides:

- (a) Press brakes, mechanically or hydraulically powered, shall be guarded in a manner that will accomplish the following:
 - (1) Restrain the operator(s) from inadvertently reaching into the point of operation, or
 - (2) Inhibit machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or
 - (3) Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

The Division alleged:

⁶ On December 9, 2009 for violation of CCR Title 8, 4214(a) from an inspection (IMIS-312314693) at the employer's former location 9220 Mabel Ave. in South El Monte, California. The violation was classified as Serious and was resolved per order of the Occupational Safety and Health Appeals Board on September 30, 2010.

On August 2, 2012, an employee, while working at a job site located [at] 10811 Rust Street, South El Monte, California, sustained a right index finger amputation while operating an unguarded Heim press brake machine (Model No: 45-8; Serial No: 3456). The employee was operating the press brake to bend 1000 pieces of 10 gage galvanized steel that was approximately 3.75" x 5.75 when his finger made contact with the die.

The employer did not ensure that any of the six press brakes in the production area were guarded at the point of operation.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Clap. 4th 472, 483, review denied.)

Young classified the violation as serious. The legal standard for a serious violation is expressed in Labor Code section 6432, subdivision (a) which states:

There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

- (1) A serious exposure exceeding an established permissible exposure limit.
- (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

Restated, the elements of a serious violation necessary to establish a rebuttable presumption are: (1) whether a violation exists in a place of employment; (2) a demonstration of realistic possibility of death or serious physical harm; and (3) employee exposure to an actual hazard; and (4) if elements 1, 2, and 3 are established, there exists a rebuttable presumption of a serious violation. The Division must first show that “a violation exists in a place of employment”, as noted in FN5 above.

The second element requires a demonstration of a “realistic possibility” of death or serious physical harm. A “realistic possibility” is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.”

Young testified that the press brake Fortanel operated when the accident occurred was not guarded. During his August 17, 2012 inspection Young observed unguarded press brakes at the work site. Young testified that he learned employees removed the yellow guards from the press breaks because they could not see the material they were cutting. Young stated that based upon his prior 17 years of experience evaluating employee injury claims with SCIF⁷ and five years as an associate safety engineer with the Division totaling 22 years, he had numerous opportunities to observe unguarded machines, saws and moving parts of machines. Based upon his experience Young stated that if a 50 ton machine makes contact with a human body the most likely injury is one or more crushed fingers or broken bones. On the day of the accident, according to Young’s investigation, Fortanel, operated the press brake to bend 1,000 small pieces of material without a guard, which created a realistic possibility that serious physical harm could occur.

The third element, serious physical harm as used in section 6432, subdivision (e)⁸ is harm that could result from the actual hazard created by the

⁷ State Compensation Insurance Fund.

⁸ Section 6432, subdivision (e) states: “Serious physical harm,” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

- (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 the severity, second-degree or worse burns, crushing injuries including

violation. The demonstration of a violation by the Division is not sufficient by itself to establish that the violation is serious.

Young gave credible testimony that Fortanel operated an unguarded press brake without the use of hand tools. Young also observed other unguarded press brakes. Furthermore, Angel Torres' (Torres), Employer's president and manager, Mario Dena's (Dena) admissions that employees were allowed to operate press brakes without guards, establishes unsafe work practices that created an actual hazard at Employer's worksite of a fracture and or amputation. Thus, the third element of serious physical harm is established by allowing employees to operate the press brakes without hand tools at the worksite. Therefore, the Division has produced sufficient evidence to establish that a rebuttable presumption of a serious violation exists.

2. Did employer rebut the presumption that a serious violation existed?

Labor Code sections 6432, subdivision (c) provides that if the division establishes a presumption that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating that reasonable steps were taken before the violation occurred and that the employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the hazard was discovered.

The Division alleged:

The employer had knowledge of the standard and that unguarded press brakes were an unsafe and hazardous condition from having been cited by the Division on December 9, 2009 for violation of CCR Title 8, 4214(a) from an inspection (IMIS-312314693) at the employer's former location 9220 Mabel Ave. in South El Monte, California. The violation was classified as Serious and was resolved per order of the Occupational Safety and Health Appeals Board on September 30, 2010.

Employer's manager, Dena testified at the hearing stating he required Fortenal and other operators to use hand tools when working on small pieces when not using a guard on the press brake., Dena stated Fortenal was using hand tools on the day he was injured while using the press brake, which was

internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

an acceptable method to operate the press brake without a guard if the material was too small. However, Young's investigation and credible testimony revealed that Employer had knowledge of Fortenal not using hand tools on the day he was injured while using the press brakes. Based upon this controverting evidence that hand tools were not used on the day of the accident, Employer failed to present evidence rebutting the presumption that a serious violation occurred.

Thus, the Division has established that a serious violation occurred because all of the elements of a serious violation are present: a rebuttable presumption of a serious violation because a violation existed at Employer's work site; Young demonstrated a realistic possibility of death or serious injury; and the employees' exposure to an actual hazard has been established. Employer failed to present evidence rebutting the presumption that a serious violation occurred.

3. Was Employer's violation of the safety of order willful?

In classifying Employer's violation as willful, section 334, subdivision (e), states a "willful" classification may be established if the evidence shows that: (1) an employer intentionally violated a safety law; or (2) an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it. Both tests require the Division to prove that the employer had a particular state of mind. Under the first requirement, the Division must prove that the employer intentionally violated a worker safety law. (*MCM Construction, Inc.*, Cal/OSHA App. 92-436, DAR (May 23, 1995), citing *Gal Concrete Construction Co.*, Cal./OSHA App. 87-264, DAR (Apr. 7, 1993), p. 5.)

In establishing Employer intentionally violated a safety order, at the July 24, 2014 hearing, Young stated Torres admitted the press brakes were not guarded because the guards got in the way. Young also spoke with Dena, Fortenal's supervisor during his August 17, 2012 investigation, who stated he was only six to eight feet away from Fortenal when the accident occurred. Dena also acknowledged that employees never used guards on the press brakes when working with small pieces⁹. Thus the Division established Employer intentionally violated section 4214, subdivision (a) by allowing employees to use the press brakes without guards. Employer's express action in taking the guards off the press brakes and not prohibiting the employees from operating the press brakes without the guard establishes Employer's intent to violate the safety order.

⁹ Admission - Statement of co-owner Angel Torres and supervisor, Mario Dena are party admissions. Pursuant to Evidence Code section 1220, evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity.

Although not required, in addition to the Division showing Employer's "intent" as one of the tests in establishing willfulness, the Division also established the second requirement of "actual knowledge" by submitting a prior Order affirming a violation of section 4214, subdivision (a). A September 30, 2010 Order affirmed a violation of section 4214, subdivision (a), which demonstrates Employer had actual knowledge of the hazard of allowing employees to operate the press brakes without a guard. The Division demonstrated that Employer intentionally failed to guard the machine and had actual knowledge of the safety order requirements based upon the previous Order issued for the same violation proving Employer's state of mind was to intentionally disregard the guarding requirements of the safety order.

Employer asserted an exemption to section 4214, subdivision (a) guarding requirements provided in section 4214, subdivisions (b)(9) as follows:

When the nature of the work or size and/or shape of material being worked are such that compliance with the provisions of Section 4214(b)(1) through (8)¹⁰ is not practical, the employer shall ensure compliance with the following:

- (A) The operator shall be qualified and;
- (B) The operator shall maintain a safe distance from the point of operation through the use of hand tools or the size and shape of the material being worked so the operator's hands never enter the point of operation, and
- (C) Only general-purpose press brakes with general purpose dies are used.

¹⁰ Section 4214, subdivision (b) provides:

Devices that will accomplish (1)(1), (2) and (3) above include but are not restricted to those listed below:

- (1) Presence-sensing device.
- (2) Holdout or Restraint Device.
- (3) Pullout Device.
- (4) Two-Hand Control Device
- (5) Type A or B Gate or Movable Barrier Device.).
- (6) Fixed Barrier Guard (see 4207).
- (7) An arrangement of stops and holding devices such as a feed table or other material support, which will assist in positioning and supporting the material being worked so that the controls can be remotely located. When such stops and material supports are used, the controls shall be so located that the operator(s) cannot activate the control(s) and reach into the point of operation.

Torres testified that on September 28, 2010, before the September 30, 2010 citation was issued, he met with Senior Safety Engineer, Joel Foss (Foss) and was told that an experienced operator could operate a press brake as an exemption under 4214(b)(9) if it was impracticable to comply with 4214(a). In the instant matter, both Torres and Dena believed Fortenal qualified as an experienced operator, capable of operating a press brake as an exemption under 4214(b)(9) if it was impracticable to comply with 4214(a).

To the contrary, at the hearing Foss testified that pursuant to section 4214(a), an employer cannot apply the section 4214, subdivision (b)(9) exemption of having a qualified operator unless Employer can show the other eight requirements under section of 4214(b)(1) through (8) are impracticable to comply with. Foss also recalled meeting informally with Employer before the September 30, 2010 Order was issued. Foss testified that he gave Employer different options in complying with the guarding requirement of section 4214(a). Employer could apply for a permanent variance with the State's Standards' Board; and Employer could use a light curtain. Foss also acknowledged previously telling Employer that one of Employer's six press brakes could be operated by a "designated" qualified operator without a guard, if the eight requirements could not be met.

Employer disregarded the prior Order issued on September 30, 2010, which was the identical citation issued on January 21, 2013. Employer failed to implement other alternative means of guarding, by using a light curtain or other permissible guarding method. Nor did Employer follow safe practices in using hand tools when not using a guard. Thus, the Division has clearly established Employer's actual knowledge and that Employer intended to violate the safety order, thereby establishing a willful classification.

Based upon the parties stipulating that a violation and injury occurred and limiting the appeal to whether the classification is a serious and willful violation, above, Young calculated the penalties pursuant to the Division's policies and procedures and the California Code of Regulations as indicated on the Penalty Worksheet (Exhibit 4). Because of the willful classification Employer was not given good faith credit, nor credit for size and history since there was evidence of a violation within the past three years with the identical citation issued against Employer in 2010 (See Exhibit 3). When a willful violation is established the penalty is multiplied by five resulting in a penalty of \$70,000.

Conclusion

In conclusion, the Division established a serious violation of section 4214, subsection (a). The Division further established that Employer willfully failed to guard the press brake. Thus, the assessed penalty is \$70,000.

Order

It is hereby ordered that Docket 13-R4D4-518, Citation 1, Item 1 is affirmed as stipulated by the parties and Docket 13-R4D4-519, Citation 2 is affirmed as issued by the Division, as indicated above and as set forth in the attached Summary Table.

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

Pursuant to Employer's request for 24 monthly payments if penalties are imposed, Employer may pay the total penalty of \$71,200 in 24 monthly payments if Employer waives the statute of limitations for commencement of the collection of any civil penalty pursuant to Labor Code section 6651(a). The first payment of \$2,982, will begin on October 1, 2015 and \$2,966 for all subsequent payments. Failure to pay an installment by the 15th day of any month will result in the entire balance becoming immediately due and payable without further Order.

Dated: August 6, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW:ao

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

CGK INC. DBA PREMIER STEEL FABRICATION Dockets 13-R4D4-0518 and 0519

Date of Hearing: July 24 and 25, 2014

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	X
2A	Medical Records	X
2B	Radiation Report	X
3	September 30, 2010 Order, Issued by ALJ Hill Williams	X
4	C-10 Penalty Worksheet	X
5	"Note Taking" – September 28, 2010	X
6	Abatement form, August 9, 2010	X
7	Field Documentation - Victor Lopez"	X
8	Field Documentation – "Conducting"	X
9A	Employer's Accident Report	X
9B	Photo – Heime Press Brake	X
10	Photo of Various Press Brakes at Employer's Worksite	X

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Photo – Heime Press	X
B	Field Documentation, Dated January 10, 2013	X
C	Field Documentation, Dated August 30, 2013	X
D	Photos taken by Employer	X
E	Conference Documentation Sheet, August 16, 2010	X
F	Email from Peter Riley, dated August 16, 2010	X
G	Photo – Dena using hand tool	X
H	Field Documentation, Dated August 23, 2012	X
I	New Employee General Safety Orientation – Feb. 14, 2011	X
J	Photo – yellow guard and tool rack	X
K	Graph – "Special Shapes"	X
L	New Employee General Safety Orientation -March 4, 2010	X
M	Notice of Safety Violation – September 20, 2012	X

Witnesses Testifying at Hearing

1. Ricard Fortanel
2. Jerry Young
3. Patrick McDonagh
4. Mario Dena
5. Victor Torres
6. Jose Juan Navarro
7. Angel Torres

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

CGK INC. DBA PREMIER STEEL FAB
Dockets 13-R4D4-0518 /0519

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 316344746

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E		A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R4D4-0518	1	1	3203(a)(2)	G	Citation affirmed as issued and the terms stipulated by the parties, above (See FN2).	X		\$1,200	\$1,200	\$1,200
13-R4D4-0519	2	1	4214(a)	SW	Citation affirmed as issued	X		\$70,000	\$70,000	\$70,000
Sub-Total								\$71,200	\$71,200	\$71,200

Total Amount Due*

****\$71,200**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must 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.

Employer may pay the total penalty of \$71,200 in 24 monthly payments if Employer waives the statute of limitations for commencement of the collection of any civil penalty pursuant to Labor Code section 6651(a). The first payment of \$2,982, will begin on October 1, 2015 and \$2,966 for all subsequent payments. Failure to pay an installment by the 15th day of any month will result in the entire balance becoming immediately due and payable without further Order.

ALJ: CHW/ao
POS: 08/06/2015