

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

In the Matter of the Appeal of:

**INTERNATIONAL LINE BUILDERS, INC.
2520 RUBIDOUX BOULEVARD
RIVERSIDE, CA 92509**

Employer

Inspection No.
1278237

DECISION

Statement of the Case

International Line Builders, Inc. (Employer), is an electrical contractor for underground and overhead electrical utilities. On November 1, 2017, the Division of Occupational Safety and Health (the Division), through Assistant Safety Engineer Muhammad Zubair (Zubair), commenced an accident investigation of a project at 1255 Via Del Rey in South Pasadena, California in response to an accident report.

On February 23, 2018, the Division cited Employer for failing to provide handtools to prevent employees from placing their hands in the danger zone. Employer timely appealed the citation, contesting the existence of the violation, the classification of the violation, and the reasonableness of the proposed penalty. Additionally, Employer asserted a series of affirmative defenses.

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in West Covina, California, on January 28, 2020. Julie Pace, Attorney, of Gammage & Burnham, PLC, represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. The matter was submitted on July 8, 2020.

Issues

1. Was Employer required to provide special handtools for placing and removing nuts and bolts on the trench box?

Findings of Fact

1. Employer did not provide handtools for employees to use while placing and removing nuts and bolts on the trench box.
2. The cited safety order does not require Employers to provide special handtools for employees to use while placing and removing material. It places conditions on the the types of handtools that may be used when an Employer requires or permits the use of handtools in placing and removing material.

Analysis

1. Was Employer required to provide special handtools for placing and removing nuts and bolts on the trench box?

The Division cited Employer for a violation of California Code of Regulations, title 8, section 3330, subdivision (a),¹ which provides:

Special handtools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by these orders, but can only be used to supplement protection provided.

The Alleged Violation Description alleges:

Prior to and during the course of inspection, handtools for placing and removing connecting nuts were not provided to prevent the operator from placing their hands in the danger zone. As a result, on 08/30/2017, an employee suffered an amputation injury when his finger was caught between the connecting sleeve and the connecting nut.

The Division has the burden of proving a violation 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. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

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

The Division must prove the applicability of the cited safety order. When the Division has cited an inapplicable safety order, the appeal must be granted. (*Stacy & Witbeck*, Cal/OSHA App. 05-1142, Decision After Reconsideration (May12, 2011).)

In the present case, Employer was working in an excavation on a residential street. Employer installed a trench box (also known as a trench shield) to prevent the dirt walls of the excavation from collapsing. The distance between the walls of the trench box and the excavation walls measured approximately two inches.

The trench box was seven feet wide, fourteen feet long, and eight feet deep. It consisted of upper and lower halves. Four 10-inch bolts secured the upper half to the lower half. The bolts were inserted into metal “sleeves.” There is one sleeve at each of the bottom corners of the upper half of the trench box, and one sleeve at each of the upper corners of the bottom half of the trench box. At each corner of the trench box, where the upper and lower halves meet, a 10-inch bolt goes down through the connecting sleeve on the upper trench box and through the connecting sleeve on the lower trench box. The bolt extends through the bottom of the connecting sleeves by approximately four inches. A nut is fastened to the bottom of the bolt to keep the bolt in place. Employees installed the nuts and bolts by hand because there was not enough space between the trench box and the excavation walls to use a tool. Zubair testified that he is not aware of a tool in existence at the time of the accident that could have been used between the trench box and the excavation walls to remove the nut.

On the day of the accident, Employer was preparing to remove the trench box from the excavation. Villarreal was inside the trench box, unfastening the nut on one of the connecting bolts. Before the nut was off of the bolt, the lower half of the trench box unexpectedly sank in the ground soil. Because the lower trench box sank, its connecting sleeve lowered as well—sliding down the bolt and crushing Villarreal’s fingers on top of the nut that he was unfastening. The weight prevented Villarreal from removing his fingers. Ultimately, Villarreal removed his fingers when fellow employees were able to move the trench box enough to release the pressure on his fingers. Villarreal underwent multiple surgeries, and was hospitalized for a total of 28 days. His right index finger was amputated, and he suffered permanent damage to his hand.

The Division contends Employer violated section 3330, subdivision (a), by failing to provide handtools to prevent Villarreal from placing his hand in the danger zone. There is no dispute that Employer did not provide a handtool for the task.

a. The Plain Language of Section 3330, Subdivision (a)

The Appeals Board has not addressed section 3330, subdivision (a), in any Decisions After Reconsideration or Denials of Decision After Reconsideration. Nor have Administrative Law Judges for the Appeals Board issued Decisions interpreting the safety order.

Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (Jun. 12, 2013).) The Appeals Board has consistently interpreted the word “shall” to be mandatory. (*See, e.g., Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 14, 2012).)

Where a statutory or regulatory term is not defined, “it can be assumed that the Legislature was referring to the conventional definition of that term.” (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).) To obtain the ordinary meaning of a word the Appeals Board may refer to its dictionary definition. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

The first sentence of section 3330, subdivision (a), states: “Special handtools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone.” The subject of the sentence is “special handtools for placing and removing material.” With respect to that subject, the safety order uses the word “shall” to impose a mandatory condition. The mandatory condition is that the special handtools “be such as to permit easy handling of material without the operator placing a hand in the danger zone.”

The Merriam-Webster Dictionary defines the word “be” to mean “to have a specified qualification or characterization.”² This definition matches the usage in section 3330, subdivision (a), because the first sentence of the safety order goes on to specify a qualification or characterization. Specifically, the sentence specifies that the subject tools must have the quality or character of permitting easy handling of material without the operator placing a hand in the danger zone. Thus, the first sentence of section 3330, subdivision (a), places an obligation on employers. The obligation is not that employers must provide their employees with special handtools. Rather, the obligation is that special handtools must have the quality of permitting easy handling of material without placing a hand in the danger zone. Therefore, the first sentence of the safety order does not support the citation.

Similarly, the second sentence of section 3330, subdivision (a), does not create an obligation to use special handtools. It states: “Such tools shall not be in lieu of other guarding required by these orders, but can only be used to supplement protection provided.” This sentence references guarding required by other safety orders, and ensures that such guarding remain in

² <https://www.merriam-webster.com/dictionary/be>

place even if the employer uses special handtools that do not allow the operator to place a hand in the danger zone. This provision can be important because an employer using such handtools might decide that guarding is not needed since the handtool prevents the operator from placing a hand in the danger zone. But guarding protects more than just operators. It protects other employees, who may be working in the area or walking by, from inadvertently entering the danger zone, such as the result of a collision or a stumble. Also, this second sentence of the safety order protects operators who misuse a handtool. Therefore, there is good reason for the safety order to preemptively clarify that use of handtools with the specified quality does not affect other guarding requirements. As with the first sentence of the safety order, the second sentence does not require employers to provide special handtools for placing and removing material.

Notably, where the safety order comes close to addressing whether special handtools are mandatory or permissive, it states such tools “can only be used to supplement” other required guarding. The Merriam-Webster Dictionary defines the term “can” to mean “have permission to—used interchangeably with ‘may.’”³ Therefore, this clause of the safety order addresses a permitted use of special handtools, but does not require employers to use special handtools.

In sum, the safety order places conditions on special handtools when an employer provides handtools for placing and removing material.

b. Federal Safety Orders and the Machine Guarding Context

California’s occupational safety and health regulations are required to be at least as effective as federal standards covering the same subject matter. (*See* 29 U.S.C. §667(c).)

There are two federal safety orders with language nearly identical to the cited safety order: 29 Code of Federal Regulations part 1910.212(a)(3)(iii) and 29 Code of Federal Regulations part 1926.300(b)(4)(iii). These federal regulations are identical to each other.⁴

The context of these two federal orders supports the plain language interpretation, discussed above, of section 3330, subdivision (a). The first federal order, 29 Code of Federal Regulations part 1910.212, is titled “General requirements for all machines.” It consists of multiple subparts. Subpart (a)(3)(iii) appears after six consecutive subdivisions that address machine guarding. The second federal order, 29 Code of Federal Regulations part 1926.300, is titled “Tools – Hand and Power.” It consists of multiple subparts. Subpart (b)(4)(iii) appears after seven consecutive subdivisions on guarding. Thus, these two federal standards show the machine

³ <https://www.merriam-webster.com/dictionary/can>

⁴ “Special handtools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.”

guarding context in which the subpart regarding special handtools appears. Given this context, it is understandable that special handtools are not required since they would supplement the protection already provided by the machine guarding.

Section 3330, subdivision (a), uses the words “these orders” where the federal regulations use “this section.” Section 3330 does not contain other requirements on guarding. Therefore, it would not make sense for section 3330 to refer to other guarding required by “this section,” as the federal regulations do. However, other orders within title 8 contain requirements on guarding. Thus, section 3330’s reference to “these orders” adapts the federal order to the structure of California’s occupational safety and health regulations. Since California’s occupational safety and health regulations must be at least as effective as federal law, it stands to reason that the California Occupational Safety and Health Standards Board adopted section 3330, subdivision (a), to meet the safety and health standards set by these federal regulations.

Federal interpretation and precedential opinions may provide guidance, although they are not controlling on the Appeals Board. (*Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) “The Board is not bound by the Secretary of Labor’s interpretation, but finds it helpful in this case in identifying the concerns that guided the extent of the inclusion of [particular language in the regulation at issue].” (*Big Valley Dental Center*, Cal/OSHA App. 94-288, Decision After Reconsideration (July 14, 1999).)

One Decision by an ALJ with the Fed/OSHA Review Commission addressed the intent of 29 Code of Federal Regulations part 1910.212(a)(3)(iii). (*See General Electric Company*, OSHARC LEXIS 619 (Feb. 26, 1979).) Although the Decision states the intent of the safety order “is to require the use of tools” to place and remove materials in and out of the point of operation, this assertion is not persuasive because the Decision does not analyze the language of the subpart or cite any authority. The issue in the case was whether the employer was required to provide handtools where a wire mesh guard covered the point of operation on a powder press machine. The citation was dismissed because the wire mesh guard prevented employees from placing a hand in the point of operation while the machine was operating. Accordingly, *General Electric Company* does not provide persuasive guidance for interpreting section 3330.

In sum, the federal safety orders are consistent with the conclusion that section 3330 does not require employers to provide handtools for placing and removing material because they explicitly show the machine guarding context and the supplemental nature of the special handtools.

For the reasons set forth, the Division did not prove a violation of the safety order by a preponderance of the evidence. Accordingly, the citation must be dismissed.

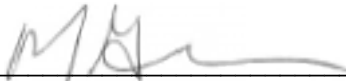
Conclusion

For the reasons set forth above, section 3330, subdivision (a), did not require Employer to provide special handtools for placing and removing nuts and bolts. Therefore, the Division did not establish Employer violated the cited safety order.

Order

It is hereby ordered that Citation 1, Item 1, is dismissed and the penalty is vacated.

Dated: 08/03/2020



MARIO L. GRIMM
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**