

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

AMERICAN FRAME MANUFACTURING
COMPANY, INC.
3025 Beyer Boulevard, Suite E-105
San Diego, CA 92154

Employer

Docket Nos. 00-R6D2-3172
and 3173

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by American Frame Manufacturing Company, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

On May 11, 2000, a representative of the Division of Occupational Safety and Health (the Division) conducted a planned programmed high hazard inspection at a place of employment maintained by Employer at 3025 Beyer Boulevard, E-105, San Diego, California (the site).

On August 17, 2000, the Division issued to Employer the following citations for serious violations of section 3273(b) [permanent roadway maintenance] and section 3661(b) [no operational parking brake] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ The civil penalties proposed for the violations totaled \$8,100.

Employer filed timely appeals contesting the existence of the alleged violation of section 3273(b) and the reasonableness of the proposed penalties for both violations.

On August 7, 2001, a hearing was held before Ashaki A. Hesson, Administrative Law Judge (ALJ) for the Board, in San Diego, California. Geza Hambalko, President, represented Employer. Phil Valenti, Senior Safety Engineer, represented the Division.

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

On April 23, 2002, the ALJ issued a decision denying Employer's appeal. On May 20, 2002, Employer filed a timely petition for reconsideration. The Division answered the petition on July 8, 2002. The Board took Employer's petition under submission on July 9, 2002.

EVIDENCE

On May 11, 2000, Barry Burgess (Burgess), the inspecting officer for the Division, conducted an inspection at the site. He held an opening conference with Office Manager Irma Rubi. Burgess testified that he issued a citation alleging a violation of section 3273(b), because there were deep depressions in the parking lot behind the building where forklift operations were being conducted. He measured a dry pothole which was oval-shaped, approximately "5 x 8 ² and was about 8 inches deep".

Burgess classified the violation as serious because had a forklift fallen into a depression such as the one described above, an employee could have sustained fractures or been hospitalized for more than 24 hours.

Using the proposed penalty worksheet, Burgess explained that Employer was given a total of 55% in adjustments for the following factors: Good Faith (15%), history (10%) and size (30%) and a 50% abatement credit. Extent was rated as moderate and there was no adjustment to the penalty for that because there were two holes in the pavement and two forklifts being operated. Likewise, there was no adjustment for likelihood due to the extent of operations in the parking lot, how busy the area was and the number of employees exposed. As a result, the \$18,000 penalty for each of the serious violations was reduced to \$4,050.

Burgess testified that the forklift operator he interviewed told him the holes had been referred to the property owner. Burgess had no doubt that the industrial forklifts being used by employees of Employer could have tipped over had they gone into one of the holes. He did not know why the May 11, 2000 repair estimate indicated only one and a half inches of asphalt was to be scrapped since the hole was 8 inches deep. The parking lot did not belong to Employer, the employee driving the forklift at the time of the inspection worked for Employer.

² In the ALJ's decision, the summary of evidence indicated that the measurement of the pothole shown in Division's Exhibit 4 was 5x8 *inches* and 8 inches deep. Upon our review of the record, including the allegation in the citation and the Exhibit 4 photograph, we believe this is a mistake and that the pothole measured approximately 5x8 *feet*. Exhibit 4 shows a large pothole with stacked pallets of materials in the background which renders the size of the pothole much larger in dimension than 5x8 inches relative to the five pallets located near the pothole. Additionally, Exhibit 3 is a photograph of another large pothole filled with water similar in dimension to the pothole in Exhibit 4 with pallets of wrapped material located nearby. Accordingly, we find that the potholes measured by the inspector were much larger than 5x8 inches and closer to 5x8 feet and 8 inches deep.

Geza Hambalko (Hambalko), Employer's President, testified that the asphalt in the parking lot has always had a tendency to crumble because the compaction was not properly done. He rents space in the industrial complex. All of the renters belong to an association that fixes outside problems, such as the parking lot. They meet every two months to discuss issues and make recommendations to the management company in charge of the complex.

He and the other tenants knew there were holes in the parking lot. The management company was trying to get it fixed. In his opinion, he should not have been cited because he was not directly responsible for the upkeep and repair of the area and his employees only have limited use of it.

On cross-examination, Hambalko testified that he showed the estimate for the parking lot repairs to the Acting District Manager Hank Rivera during the informal conference with the Division. He could not show it to the inspecting officer on May 11, 2000, because he was not at the site during the inspection.

ISSUES

1. Does Employer's petition properly establish a basis for considering new evidence not presented at the hearing regarding the violation of section 3273(b)?
2. Did Employer properly contest the classification of the violation of section 3661(b)?
3. Does the evidence in the record establish a basis for penalty relief based upon financial hardship for the violation of section 3661(b)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

Employer contends that the findings of fact do not support the decision and that the evidence does not justify the findings of fact made by the ALJ. In support of its contentions, Employer submits that "... we know that our forklift with tires 12 inches wide could not have fallen into a depression that is smaller than half a sheet of paper, we would kindly like to point out, ... that repairs were in process on the day of the inspection and the reason for the depth of the hole was simply because it had to be scraped out to the depth of 8 inches in order to be repaired. I would also like to point out that the Paul Miller Management Co. initiated repairs long before the inspection and not due to safety reasons but because repairs are done on regular basis before it becomes a hazard, as our evidence shows."

Employer also argues that testimony it provided at the hearing that it had to sublease part of its 10,000 square foot warehouse in order to pay rent and the statement of Geza Hambalko, president of the company, that he

worked a second job to make payroll, are facts sufficient to establish financial hardship relief.

The Board finds that Employer's evidence supporting relief based upon financial hardship is insufficient and conclusionary, and further, its petition improperly introduces new evidence that is not in the record.

1. Employer's Petition Improperly Presents New Evidence Regarding the Violation of Section 3273(b)

Labor Code section 6617(d) provides that a petition for reconsideration may only be based on discovery of new evidence which "could not, with reasonable diligence, have been discovered and produced at the hearing" (See also section 390.1(a)(4)) Thus, new evidence may not be considered on reconsideration unless the petitioner could not, with reasonable diligence, have discovered and produced it at the hearing. (*PDM Strocal, Inc.*, Cal/OSHA App. 97-3436, Decision After Reconsideration (Nov. 18, 1988)).

In the instant case, Employer seeks to introduce new evidence regarding the violation of section 3273(b) [permanent roadway maintenance]. Employer contends that the violation was not a serious one. Specifically, Employer states in its petition that "the dry pothole shown in Division Exhibit 4 ... was ...approximately 5 x 8 inches wide and ... about 8 inches deep"³ and does not present a serious danger to an employee operating a forklift with 12 inch tires, as the tires were too big to fall into the pothole. However, the evidence regarding the violation was raised and thoroughly developed at the hearing; at no point during the hearing was the matter of the 12 inch tires discussed. This information was available to Employer and could have been produced at the hearing.

"Employer is responsible for presenting all relevant evidence at the hearing" (*PDM Strocal, Inc.*, *supra p.*) As in *PDM Strocal, Inc.*, Employer in this case "has provided no legal basis for reopening the record on reconsideration. At no time during the hearing did Employer seek to continue the hearing, request additional time for submission of evidence or exhibits, or notify the ALJ and the Division that it wished to submit a post-hearing brief" (*Id.*)

Since Employer makes no showing that the evidence is newly discovered and that such evidence could not have been discovered or produced at the hearing, the new evidence cannot be considered by the Board on reconsideration.

2. Employer Contested the Reasonableness of the Penalty for the Violation of Section 3661(b) which Raised both the Classification of the Violation as well as the Penalty Amount.

³ See footnote 2 for dimensional size of the dry pothole depicted in Exhibit 4.

Employer also asserts with respect to the violation of section 3661(b) that the ALJ stated that Employer "did not believe the parking brakes were tested according to acceptable Cal/OSHA standards and she states no evidence that the inspector Berry Burgess testified otherwise." Further, the inspector who has vast knowledge of the operation of forklifts had a duty pursuant to Labor Code section 6300 to show the driver the easy adjustment to remedy the problem. Since the inspector failed to provide such instruction to the driver, "he obviously did not feel that the violation was serious." The Board notes that Employer only appealed the reasonableness of the penalty for the violation of section 3661(b) as indicated on the appeal form.

As stated by the ALJ, where an employer appeals only the reasonableness of the civil penalty, the violation's existence is established by operation of law. (*Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999).) However, section 361.3(a)(5), in relevant part, provides:

...

If the appeal contests only the reasonableness of the proposed penalty, the issues on appeal shall be limited to *the classification of the violation and the reasonableness of the proposed penalty*, ... (italics added)

Thus, Employer's contest of the reasonableness of the penalty also raised the serious classification of the violation. The Board's independent review of the record reveals that Employer sufficiently raised the classification of the violation of section 3661(b) at the hearing. The Division, however, failed to produce evidence that the violation was serious within the meaning of Labor Code section 6432(a); and specifically, the types of injuries which can occur as a result of parking brake failures.⁴ Accordingly, the penalty must be re-calculated based upon a general violation using the criteria and adjustments applied by the Division, which Employer did not contest at the hearing.

The violation is re-classified as a general violation and the penalty is reduced to \$225.

3. Evidence in the Record did not Establish a Basis for Penalty Relief Based Upon Financial Hardship

Employer's petition for reconsideration also seeks to introduce "new" financial evidence to mitigate the amount of the penalties. The ALJ found that Employer offered no financial evidence regarding the company's financial

⁴ Labor Code section 6432(a) provides: "As used in this part, a "serious violation" shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation,"

condition or ability to pay the proposed penalties.⁵ Employer now introduces “new” evidence that Employer's president has held a second job because there were occasions where the company was unable to meet its payroll. Employer had an opportunity to bring this fact to the ALJ's attention or request additional time for submittal of additional evidence but failed to follow either course of action. As with Employer's attempt to introduce new evidence concerning the forklift's tire size, this new evidence concerning the company's financial condition fails to meet the criterion set forth under Labor Code section 6617(d) regarding “new” evidence.

Upon our independent review of the evidence in the record, Employer fails to meet the financial hardship criteria set forth in *Dye & Wash Technology*, Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration (July 11, 2001) that “[i]f an employer can demonstrate that it cannot pay the proposed penalties without jeopardizing its ability to continue to operate, reduction of the proposed penalties may be warranted” (*Id at pp. 3-4*).

Here, Employer merely testified that “it (job) doesn't bring in enough money” and “we're trying to survive” without introducing adequate supporting financial statements. Where an employer merely asserts financial hardship without providing sufficient evidence, “... the petition is predicated on the vague assertion that employer ‘will have difficulties’ paying the penalties ordered. The Board has held that such an assertion does not state a ground for reconsideration ‘specifically’ and in ‘full detail’ as required by Labor Code section 6616” (*Dye & Wash Technology, supra*, citing Labor Code section 6616).

An examination of the hearing tapes in this matter supports the appealed citations and undermines the reasoning behind Employer's petition. Employer's president did not mention that he has held a second job for the past few years because the company has not been able to meet its payroll. The record also fails to show any type of financial statement that Employer offered to establish financial hardship.

We note that there is not a clear delineation between Geza Hambalko, president of the corporation, and the corporation itself contained in the record. The record is devoid of any evidence that would allow us to make an informed decision regarding Employer's ability to pay the penalties.

It is incumbent upon the parties to present all relevant evidence to the Board at the time of the hearing so that it is subject to thorough examination which allows the Board to decide facts and issues after a full and fair opportunity to present evidence has been provided. It appears from the record

⁵ Penalty elimination or reduction based upon financial hardship is a form of extraordinary relief (*DPS Plastering, Inc.*, Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003)) and the employer must provide credible convincing evidence to support relief from the proposed penalties (*Paige Cleaners*, Cal/OSHA App. 96-1144, Decision After Reconsideration (Oct. 15, 1997)).

in this case that the ALJ's decision was appropriate based upon the evidence presented at the hearing.

DECISION

The Board affirms the ALJ's decision finding a serious violation of section 3273(b), reclassifies the violation of section 3661(b) to a general violation and assesses civil penalties in the amount of \$4,050 for the serious violation of section 3273(b) and \$225 for the general violation of section 3661(b).

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: February 19, 2004