

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

In the Matter of the Appeal of:

BICKERTON IRON WORKS, INC.  
22118 South Vermont Avenue  
Torrance, CA 90502

Employer

Docket No. 01-R4D3-4978

**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 Bickerton Iron Works, Inc. (Employer) under submission, makes the following decision after reconsideration.

**JURISDICTION**

From August 1, 2001 through October 26, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 1760 W. Skyline Road, McKittrick, California (the site).

On November 21, 2001, the Division issued a citation to Employer alleging a serious violation of section 1669(a) [safety belts and nets] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup>. Employer filed a timely appeal contesting the existence of the alleged violation, the classification of the violation, and the reasonableness of the proposed penalty.

On March 13, 2003, a hearing was held before Jack L. Hesson, Administrative Law Judge (ALJ) for the Board, in Bakersfield, California. Gary Rubell, Safety Consultant, represented Employer. Lyle Garratt, Compliance Officer, represented the Division.

On May 21, 2003, the ALJ issued a decision denying Employer's appeal. On August 13, 2003, Employer filed a petition for reconsideration<sup>2</sup>. The Division filed an answer on September 15, 2003, and on October 2, 2003, the

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

<sup>2</sup> The decision was inadvertently not served by the Board to Employer until July 10, 2003.

Board issued an "Order Taking Petition for Reconsideration Under Submission".

### **EVIDENCE**

On July 12, 2001, Ron Hutchenson (Hutchenson), an employee of Employer, sustained injuries when he fell 25 feet to the floor as he was putting "gingerbread" iron together while working on a 4-inch I-beam 25 feet above the floor.

Lyle Garratt (Garratt), Cal/OSHA Safety Engineer, testified that, on August 1, 2001, he went to the site and began his investigation. He photographed the site of the accident. After interviewing Hutchenson and reviewing accident reports, Garratt concluded that Hutchenson had not been tied off while working at a height of 25 feet in violation of section 1669(a). Based upon his extensive experience, including over 1,400 inspections, Garratt classified the violation as serious because falls from 25 feet or more are likely to result in serious injury.

Hutchenson testified that he had 21 years of experience and is a journeyman ironworker. On the day of the accident, he was working for Employer at the direction of Employer's supervisor. He had two lanyards with him and had been tied off at times, but was not tied off at the time of the accident because there was nowhere to tie off at that location. As he attempted to remove a "come along" it broke and he lost his balance and fell 25 feet to the floor below. As a result of his fall, he had a lacerated scalp, injury to his ribs and 3 broken vertebrae. He was hospitalized for one week and spent another week in rehabilitation.

David Bickerton (Bickerton) testified that Employer has a Safety Procedures Manual and an active safety program. Iron workers are trained by the Union and are provided by the Union as needed. Employer assumes that the Union sends only trained and qualified workers. Employer provides fall protection devices as needed, and sanctions employees that fail to comply with its fall protection standards. Employer had never used the injured employee before.

### **ISSUE**

Did Employer establish its lack of knowledge of the violative condition sufficient to avoid the "serious" classification of its violation of section 1669(a)?

### **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

In its petition for reconsideration, Employer seeks reconsideration of the classification of the violation of section 1669(a) as a serious violation. Employer maintains that the injured worker testified that he knew of Employer's 100% tie-off policy, that he had the equipment to do so, and was not directed to perform the activity without fall protection. Based upon these facts and regardless of employer's safety program, training or inspections, Employer maintains that it could not have reasonably anticipated the worker's decision not to tie off, nor could Employer have anticipated that the "come along" would have broken during its removal.

A serious violation exists if there is a substantial probability that death or serious physical harm could result from a violation. (Labor Code § 6432(a))<sup>3</sup> Division safety engineer Garratt's testimony that serious injuries or death were substantially probable in the event of an accident caused by the violation was unrefuted by Employer and credited by the ALJ. Pursuant to Labor Code section 6432(b), "a serious violation shall not be deemed to exist *if the employer can demonstrate* that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." (Italics added)

The ALJ found that Employer failed to carry its burden of proof to establish that it could not have known of the violation with the exercise of reasonable diligence. In this case, Employer did not call the injured worker's supervisor as a witness; but, the supervisor's accident report was admitted into evidence. The accident report indicated that the supervisor did not know exactly what occurred and that a broken "come along" may have contributed to the accident.

The Board has recognized that each employer has an affirmative duty to anticipate hazards within a reasonable degree of foreseeability. (*Tri-Valley Growers, Inc.*, Cal/OSHA App. 81-1547, Decision After Reconsideration (July 25, 1985).) "...[A]dequate supervision of employees is an important consideration in determining whether an employer could have reasonably detected a violation, which must be determined in a case-by-case basis." (*Sunrise Window Cleaners*, Cal/OSHA App. 00-3220, Decision After Reconsideration (Jan. 23, 2003) p.5.)

To prove that Employer could not have known of the violative condition by exercising reasonable diligence, Employer must establish that the violation occurred at a time and under the circumstances which could not provide

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<sup>3</sup> Labor Code section 6432(a) provides that 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, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury:

(1) A serious exposure exceeding an established permissible exposure limit or  
(2) The existence of one or more practices, means, methods operations, or processes which have been adopted or are in use, in the place of employment. ..." The test is the probability of a serious injury *assuming* that an accident occurs.

Employer with a reasonable opportunity to have detected it. (*Sunrise Window Cleaners, supra*; *C.C. Meyers Incorporated*, Cal/OSHA App. 95-4063, Decision After Reconsideration (June 7, 2000).)<sup>4</sup> In *Roof Structures, Inc.*, Cal/OSHA App. 91-316, Decision After Reconsideration (Oct. 29, 1992), the Board stated at p. 5, “[i]t is clear that employers may not ignore hazards in the workplace, and then claim lack of knowledge as a defense to a serious violation.” Several factors affect a determination of reasonably adequate supervision, including (1) the hazardousness of the work being performed, (2) the number of employees involved, (3) prior indications that violations might occur, and (4) the frequency and length of periods employees work unsupervised. (*Id.*)

There was no evidence regarding the extent of supervision of the injured worker on the day of the accident.<sup>5</sup> The hazardousness of the work being performed at a height of 25 feet on a 4-inch I-beam with changing conditions as the worker moved around is clearly apparent. Employer did not establish that it exercised adequate supervision commensurate with the severity and proximity of the hazard for purposes of determining that the violation was not serious. (See, *Kenko, Inc.*, Cal/OSHA App. 90-1101, Decision After Reconsideration (Jan. 6, 1992))

Instead of affirmatively establishing that it could not have known of the violation in the exercise of reasonable diligence, Employer relies simply on the conduct (and testimony) of the injured worker to establish that the violation could not have been anticipated. Employee misconduct, however, is not the issue in determining the seriousness of the violation under the above stated standards.<sup>6</sup>

Additionally, Employer suggests that an employer can satisfy its burden of establishing that it could not, with the exercise of reasonable diligence, have known of the violation because employees who are brought in from a union pool are “presumed” to be trained and qualified for the tasks they are hired to perform.

Employer has cited no authority and we are aware of none which supports the position that an employer can blindly rely on a worker’s training and experience obtained elsewhere to satisfy the employer’s statutory obligations to provide and insure a safe workplace, or to provide a basis for an

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<sup>4</sup> At the time of the Board’s decision in *C.C. Meyers, Incorporated*, the Division had the burden of proving the knowledge (actual or constructive) requirement for a serious violation. As stated above, since January 1, 2000 the burden is now on the employer to show that it did not know, and could not have known in the exercise of reasonable diligence, of the presence of the violation.

<sup>5</sup> Employer asserts that the fact Employer was put on notice the previous day for lack of fall protection goes to show that Employer was more vigilant the following day, not less. Employer appears to refer to photographs taken the day before the accident (Exhibits 7 and 8) which showed an employee of Employer violating Employer’s 100% tie-off policy. For purposes of the knowledge requirement under Labor Code section 6432(b), the incident the previous day supports the lack of supervision of employees who were permitted to violate Employer’s tie off policy.

<sup>6</sup> In its petition for reconsideration, Employer acknowledges that it “cannot meet all the elements of an independent employee action defense.

employer to defeat a serious classification of a violation under section 6432(b) by relying on the fact the worker was obtained from a union pool. To the contrary, we find such a position in direct contravention of the purposes of the Act.

**DECISION AFTER RECONSIDERATION**

The Board affirms the ALJ's decision. A serious violation of section 1669(a) is established and a civil penalty of \$18,000 is assessed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: February 25, 2004