

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

NEW ENGLAND SHEET METAL WORKS
P. O. Box 11158
Fresno, CA 92771

Employer

Docket No. 02-R2D5-2091

**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 New England Sheet Metal Works (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Employer installs and maintains heating ventilation and air conditioning systems. From February 28, 2002 through April 24, 2002, the Division of Occupational Safety and Health (the Division), through Safety Engineer Michael Miller, conducted an accident investigation at a place of employment maintained by Employer at 2731 South Cherry Avenue, Fresno, California (the site). On April 25, 2002, the Division issued a citation to Employer for a serious, accident-related violation of section 4214(a) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹

Employer filed a timely appeal contesting the existence and classification of the violation and the reasonableness of the proposed civil penalty, and asserting the independent employee act defense.

A hearing was held before Bref French, Administrative Law Judge (ALJ) of the Board, at Fresno, California, on May 26, 2004. At the hearing, Employer limited the issues on appeal to the existence of the violation. Employer stipulated that the civil penalty was correctly proposed and calculated in

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

accordance with the Division's policies and procedures notwithstanding that the amount of the civil penalty is unreasonable. Employer also stipulated that there is a substantial probability of serious physical harm if someone were to place a hand or finger between the dies of the press brake when it was in operation; and that a serious injury occurred to the injured employee.

On August 3, 2004, the ALJ issued a decision which determined that a serious violation was established because the evidence showed that there was no guard to prevent the operator's hands from inadvertently entering the point of operation or being in the point of operation during the die-closing portion of the press stroke. The ALJ held that Employer, with the exercise of reasonable diligence, could have discovered the violative condition since the unguarded dies on the press brake were in plain sight. Absent evidence that the proposed civil penalty, calculated in accordance with the Director's penalty-setting regulations, was otherwise unreasonable, the ALJ held that the proposed civil penalty of \$22,000 was reasonable.

Employer filed a petition for reconsideration on September 3, 2004 and the Division filed an answer on September 30, 2004. On October 22, 2004, the Board took the matter under submission and stayed the ALJ's decision pending reconsideration.

EVIDENCE

Employer was cited for an alleged violation of section 4214(a) for failing to provide appropriate guarding to prevent an employee's hand (or hands) from being inadvertently placed within the point of operation of a Cincinnati 50-ton press brake.

Michael Miller (Miller) testified for the Division that as an associate safety engineer he investigated an accident that occurred on December 12, 2001, where employee Brian Franz (Franz) was seriously injured when his hand was crushed in a Cincinnati 50-ton, mechanically powered press brake.

During the on-site inspection, Miller observed an employee operate the machine. He saw a worker hold both ends of a piece of sheet metal stock, put the sheet metal between the dies, and activate the dies with a guarded foot pedal while holding the stock in place. The worker could stop the upper movement of the die by taking his foot off the pedal. The upper die moved "in a steady, slow operation – not quickly," according to Miller's testimony.

Miller observed that the point of operation—the point where the actual operation occurs between the upper and lower dies—was not guarded. The lower die of the machine was fixed in place, while the upper die moved up and down and pressed the stock material into a gap in the lower die to shape a piece of sheet metal.

Franz testified that on December 12, 2001, he was working with a piece of metal in the press brake, which was operated with a foot pedal. When the die or ram (the slide attached to the die) went up, a piece of metal slipped out and fell towards the back of the machine. As a “natural reaction,” Franz stuck his hand in between the dies “very quickly” to try to retrieve the material—without taking his foot off the pedal. The die came down on his hand, resulting in severe injuries to his wrist.

Franz had been told never to put his hand in the gap between the dies. To his knowledge, the onsite shop foreman never saw him reach between the dies when he was injured or at any other time.

ISSUES

1. Was an employee exposed to an unguarded hazard at the point of operation, in violation of section 4214(a)?
2. Was the violation of section 4214(a) properly classified as serious?
3. Was the violation accident-related, pursuant to Labor Code section 6319(d)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. An Employee Was Exposed To An Unguarded Hazard At The Point Of Operation, In Violation Of Section 4214(a).

Section 4214(a) states:

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

Section 4188(a) states, in pertinent part:

Point of Operation. That part of a machine which performs an operation on the stock or material and/or that point or location where stock or material is fed to the machine. A machine may have more than one point of operation.

The concept of “inadvertence” is fundamental to the meaning of section 4214(a). “Inadvertently” appears in all three elements of the section, and there

is a specific reference to inadvertent placement of a hand or hands within the point of operation.

Inadvertent movement is any movement which is not intended. (*Simpson Timber Co.*, Cal/OSHA App. 77-1038, Decision After Reconsideration (June 9, 1980).) “Inadvertent” is ordinarily defined as 1) not attentive or observant; heedless; and 2) due to oversight; unintentional. *California Box II*, Cal/OSHA App 01-924, Decision After Reconsideration (July 21, 2003).²

In *California Box II*, *supra*, a machine’s movement was inadvertent when a roller on a press machine made an unexpected motion (due to a malfunctioning on/off switch) which crushed the hand of a worker who was cleaning ink from the press surface. In *Stockton Steel Corp.*, Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002), the Board found that a machine drill bit made an inadvertent movement when it injured a nearby worker who was performing a cleaning operation.

In this case, Franz testified that he stuck his hand between the dies “very quickly” to try to retrieve material that had slipped down in back of a die and that he did not realize that his foot was still on the pedal, which controlled the movement of the upper die.

Franz’s action in putting his hand into the gap between the dies is within the accepted definition of “inadvertent” as referenced in section 4214(a). The employee’s movement was a “natural reaction” and the employee was not attentive to the risks of a hand being located within the point of operation. The Board reads section 4214(a) as addressing this type of occupational injury.

Employer contends that the sheet metal bending operation involved two distinct phases: 1) a setting-up/adjusting phase and 2) the pressing phase. In Employer’s view, the worker’s hands were not within the point of operation during the two phases while the press was in regular operation. Therefore, he was not exposed to a point of operation hazard, i.e., when the injury occurred he was not gripping the outside edge of the sheet metal as he fed the sheet into the machine. Employer argues that when an injury involves a press brake, but is unrelated to use or operation of the press brake to bend sheet metal, the failure to provide a point of operation guard is not the “cause” of any injury.

Employer essentially argues that point of operation is a temporal concept, i.e., it refers to a given point in time within a normal operating cycle. In this interpretation, a machine that is not within the time period of its

² The Board in *California Box II*, *supra*, cited Webster’s New World Dictionary, Third College Edition, Fourth Printing 1989, pg. 680.

intended usage ceases to have a point of operation. Employer does not cite authority for its temporal interpretation of “point of operation.”

The Board interprets the ALJ’s analysis as defining “point of operation” as a physical location, rather than as a point of time during an operation. The Board finds that the ALJ’s analysis is consistent with the special definition provided in section 4188(a). There is well-settled precedent for the ALJ’s analysis. The Board has held that the point of operation of an unguarded power press is “where the two dies come together in the process of punching metal stock.” (*Acuronex, Inc.*, Cal/OSHA App. 81-0307, Denial of Petition for Reconsideration (July 17, 1981).) More recently, the Board ruled in a case involving trimmer knives that removed excess plastic from nursery pots. An employee reached into the trimmer machine to adjust a misaligned pot on a conveyor and suffered the amputation of a thumb and partial amputation of another finger. The Board held that the point of operation was at the knives that performed the trimming inside the machine: “This was the point where the point of operation guard was required and not provided.” (*Nursery Supplies, Inc.*, Cal/OSHA App. 99-2731, Decision After Reconsideration (Aug. 2, 2002).)

In *Nabisco*, Cal/OSHA App. 01-722, Decision After Reconsideration (Nov. 7, 2003), the Board denied an employer’s appeal regarding an employee whose fingers were crushed by an unguarded jumbo roller while she was attempting to clean a baking machine. The Board held that if the guard had been in place, the employee’s hand could not have been drawn into the rolls. It is well-settled that the point of operation, as defined in section 4188(a), refers to a location and not a point in time during a regular operational cycle of the machine.

In regard to the requirement of “exposure,” Employer states that the Division is required to prove, by a preponderance of evidence, that the employee was “exposed to the hazard which the safety order is designed to abate.” (*Ford Motor Co.*, Cal/OSHA App. 76-706, Decision After Reconsideration (July 20, 1979).) To find “exposure” there must be reliable proof that employees are endangered by an existing hazardous condition or circumstance. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA 75-1182, Decision After Reconsideration (July 26, 1977).) “There must be some evidence that employees came within the zone of danger while performing work related duties...” (*Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision after Reconsideration (Dec. 20, 1979).)³

Employer contends that the Division failed to prove any employee exposure to a point of operation hazard. Employer attempts to narrow the meaning of “exposed” to include *only* the two phases of the sheet metal bending operation, i.e., the set-up phase and the pressing phase. An injury occurring at any other time would not constitute exposure.

³ “Zone of danger” is defined in section 4188(a) as: “Danger Zone. Any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.”

In contending that the Division failed to prove that the employee was exposed to any hazard, Employer uses the same argument as it did in disputing “point of operation.” This argument contends that an employee is only exposed to hazards during specified times during an operating cycle. Employer presents no authority for this interpretation.

The Board disagrees with Employer’s assertion. The Board finds that exposure existed during the entire time the machine was being operated. Where the exposure occurred in relation to the machine’s operating cycle is irrelevant. The Board finds that the ALJ’s decision was properly based on accepted definitions of point of operation and exposure. The ALJ properly construed the lack of guarding on the press brake as a violation of section 4214(a).

2. The Violation Was Properly Classified As Serious.

Under Labor Code section 6432(a), a serious violation exists if there is a substantial probability that death or serious physical harm could result from a violation. This includes, but is not limited to, circumstances where one or more practices, means, methods, operations, or processes, which have been adopted or are in use in the place of employment could result in death or great bodily harm.

As noted previously, Employer stipulated that there is a substantial probability of serious physical harm if someone were to place a hand or finger between the dies of the press brake when it was in operation. Employer further stipulated that a serious injury occurred to the injured employee. However, 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. (Lab. Code § 6432(b).) Pursuant to Labor Code section 6432(b), Employer states that it lacked actual or constructive knowledge of the presence of the violation, that it trained the employee to keep his hands out of the gap between the dies, and that it had no reason to believe that the employee would act as he did when the accident occurred.

The burden is on Employer to demonstrate that it did not know, and with the exercise of reasonable diligence, could not have known, of the presence of the violative condition. (*Bragg Crane & Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (June 28, 2004); *Bickerton Iron Works, Inc.*, Cal/OSHA App. 01-4978, Decision After Reconsideration (Feb. 25, 2004). Lab. Code § 6432(b).)

The Board has long held that unguarded machine parts in plain view constitute a serious hazard. A machine is in plain view if it is located in an employer’s facility and is of sufficient size to be easily detectable and

recognizable (*Chicken of the Sea International*, Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 28, 2003).)

In the present case, photographic evidence as well as testimony before the ALJ is consistent with the conclusion that the unguarded press brake was in plain view. Employer did not contend that the unguarded machine was not in plain view.

Regarding Employer's contention that the injured employee was instructed not to insert his hand into the point of operation, the Board has repeatedly held that an Employer's instructions or admonitions are insufficient for compliance with positive guarding requirements. (*Puritan Inc. Co.*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003).) Where protection against a particular hazard must be provided by means of positive guarding, an employer's instructions, admonitions, or warnings are not an adequate substitute. (*Nursery Supplies*, *supra*, citing *Bethlehem Steel Corporation*, Cal/OSHA App. 78-723, Decision After Reconsideration (Aug. 17, 1984).) The Board has held that if mere instructions were enough to fulfill an employer's responsibility, "such instruction would impermissibly allow an employer to avoid liability simply by instructing safety one way but permitting a practice another way." (*Puritan Ice Co.*, *supra*.) The ALJ correctly held that the unguarded machine was in plain view and that Employer could have discovered the violation with the exercise of reasonable diligence. In addition, the ALJ correctly held that training, warnings, and other administrative controls are no substitute for guarding. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration, (April 5, 2002).)

3. The Violation Was Accident-Related.

Labor Code section 6319(d), in pertinent part, reads:

[I]f serious injury, illness, exposure, or death is *caused* by any serious, willful, or repeated violation, or by any failure to correct a serious violation within the time permitted for its correction, the penalty shall not be reduced for any reason other than the size of the business of the employer being charged. (*italics added*)

Employer contends that the ALJ's affirmation of the "accident-related" classification of the violation was improper and should be overturned. Employer argues that point of operation guarding on a press brake is only required while the machine "is being used as a press brake (to form sheet metal)." Because the injury was unrelated to any use of the press brake to bend sheet metal during its regular operation, failure to provide a point of operation guard was not the "cause" of the injury, in Employer's argument. Employer fails to provide any causation analysis. Instead, it extends the same

point of operation argument it raised regarding the existence of the violation to demonstrate that the violation did not cause the serious injury.

In the Board's view, this injury would not have occurred had a guard been in place that prevented the inadvertent movement into the point of operation.

It is undisputed that there was no guard to prevent Franz's hand from entering the gap between the dies. Lack of guarding is not contingent on whether the press brake was being used to bend sheet metal. On the contrary, the Board has found violations for lack of guarding when machines were being cleaned or jams were being cleared, as discussed above. Since the injury resulted from lack of guarding, it is an accident-related violation.

DECISION AFTER RECONSIDERATION

The ALJ's decision is affirmed. Employer's appeal is denied. A serious accident-related violation of section 4214(a) is found and a civil penalty of \$22,500 is assessed.

CANDICE A. TRAEGER, Chairwoman
MARCY V. SAUNDERS, Member
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 6, 2005