

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

In the Matter of the Appeal of:

KINETIC SYSTEMS, INC.
33225 Western Avenue
Union City, CA 94587

Employer

Docket No. 06-R2D2-3627

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby issues the following decision after reconsideration in response to the two petitions for reconsideration filed in the above entitled matter respectively by Kinetic Systems, Inc. (Employer) and the Division of Occupational Safety and Health (the Division).¹ For the reasons explained in detail following, we deny Employer's petition and grant the Division's petition.

JURISDICTION

The Division issued a citation to Employer alleging a violation of section 3328(e) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations, which was classified as serious, accident related. The Division proposed a civil penalty of \$22,500.

Employer submitted a timely appeal and an administrative hearing was held. On January 12, 2010, an Administrative Law Judge of the Board issued a decision upholding the violation and classification, but assessing a reduced penalty of \$10,800.

On February 15, 2010, Employer filed a petition for reconsideration contesting the ALJ's finding that the safety order was violated, which the Division answered. On February 16, 2010, the Division filed a petition for

¹ To avoid the potential confusion created by writing multiple decisions pertaining to the same appeal, the Board has consolidated its response to both petitions in one decision.

reconsideration challenging the penalty assessed and preserving an evidentiary issue.²

ISSUES

1. Did the ALJ properly find a violation of the safety order?
2. Was the penalty properly assessed?

REASONS FOR DECISION AFTER RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Both the Division and Employer petition for reconsideration of the ALJ's decision pursuant to subsections (a), (c), and (e).

The Division cited Employer for failing to secure a metal box tube to a pipe chase used as part of a rigging set-up to lift a steel pipe into position. The box tube was 3 to 3 ½-feet in length and rested like a bridge over the rectangular opening of the pipe chase. Gussets or cleats on the box tube set down into the pipe chase's rectangular opening, and rested against both sides of the opening, but were not secured in any other fashion to the pipe chase.

While performing a pipe pick, the box tube pulled out of the pipe chase opening, fell, and hit one of Employer's employees on his hard hat, which resulted in the worker suffering a crushed eye socket and cheekbone.

Section 3328(e) states,

Machinery and equipment components shall be designed, secured, or covered to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and falling.

² We decline to address the evidentiary issue, because we find it unnecessary to do so.

1. The violation was properly sustained.

We first address Employer's contention that the Division failed to prove the safety order was violated. In its petition, Employer concedes that it was using equipment and/or machinery when the accident occurred, but contends that the Division failed to meet its burden to show the box tube rigging system was neither designed nor secured to minimize hazards caused by loosening and falling. More specifically, Employer maintains that the Division focused exclusively on whether the box tube was secured to the pipe chase and asserts that the record is devoid of evidence demonstrating that the rigging was not designed to minimize the hazards. Employer, in fact, states that the decision ignores the issue of whether the box tube was designed to minimize hazards. Employer further contends that, if the box tube was not secured to the pipe chase, it could not have loosened and fallen. We disagree.

Contrary to Employer's assertion, the ALJ's decision explicitly finds that the box tube system was not designed to minimize hazards on page 11. The ALJ, among other things, quotes from Employer's accident report, which itself states that the "equipment utilized may have had issues with design." The ALJ concluded that it did.

The evidence on this issue further reflects that the system design did not minimize hazards as required by the safety order. One witness testified that the system design in use was appropriate only to lift objects up and down; the movement involved here, however, was not simply vertical. Another witness testified that he assumed the box tube was welded to the pipe chase, and the evidence showed that it was not. It is proper to infer³ that this was a design flaw. The Division inspector also testified that the rigging design was inadequate because it did not provide for securing the box tube to the pipe chase. Collectively, this evidence amply supports the ALJ's finding that the design failed to meet the safety order's requirements.

Neither we nor the ALJ relied simply on the box tube falling to conclude that it was not designed to minimize the relevant hazards. While the record supports Employer's assertion that its worker, Mel DeCarli, designed the system, and that the system in use was the one designed, there is no evidence that DeCarli's design served to minimize hazards as required by section 3328(e). We find that it did not.

³ The Board is to consider reasonable inferences in determining whether the preponderance of the evidence supports a violation. *Paradiso Mechanical, Inc.*, Cal/OSHA App. 06-5033, Denial of Petition for Reconsideration (July 22, 2009); *Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).

Employer does not contest the ALJ's finding that the box tube was not properly secured to the pipe chase and does not contend that it was covered to minimize hazards as required by the safety order. Rather, Employer argues the evidence fails to demonstrate that the box tube "loosened." Employer states that, if the box tube was not secured to the pipe chase, it could not have loosened. Again, we disagree. The rigging system was designed so that the box tube cleats descended into the pipe chase opening to hold the tube in place. Equally clear is that the tube came out of its intended position, or "loosened," and fell during the pipe pick in question. The Board rejects any reading of the safety order that requires an item to be found to be "secured" before it can be found to have "loosened." Indeed, items that are inadequately or not secured are more likely to become loose and fall. We find that this is the precise type of hazard the safety order was intended to protect against and affirm the violation's existence and classification.

2. The penalty was not properly assessed.

We now turn to the Division's assertion that the ALJ improperly reduced the proposed penalty. The Division notes that the ALJ accepted the parties' stipulation acknowledging the correct calculation of the proposed penalty, yet then reduced the penalty because the Division failed to produce evidence supporting the calculations.

The ALJ found the stipulation constituted a rebuttable presumption of the penalty's accuracy, and maintained that the Division must still present evidence proving it to be so. We conclude otherwise.

We have found that party stipulations, if accepted by an ALJ, are binding on the Board to the extent they are legal, and consistent with Board rules and public policy. *Safeway #951*, Cal/OSHA App. 05-1410, Decision After Reconsideration (July 6, 2007), citing, *Salazar v. Upland Police Dept.* 116 Cal. App. 4th 934, 11 Cal. Rptr. 3d 22 (4th Dist 2004), review denied, (June 23, 2004). The stipulation at issue here is legal and consistent with Board rules and public policy.

A stipulation serves as a substitute for the evidence that might otherwise be submitted as proof. See, *Estate of Burson*, (1975) 51 Cal. App. 3d 300, 306. Where the parties enter into a binding stipulation, it ends the matter (*Times Mirror Company v. Franchise Tax Board* (1980) 102 Cal. App. 3d 872, 877), because the stipulation serves to remove an item that is not in dispute from contention. *County of Sacramento v. Workers' Compensation Appeals Board* (2000) 77 Cal App. 4th 1114, 1119. Therefore, we cannot agree that the parties' stipulation allowing that the Division's penalty was properly calculated constituted a rebuttable presumption of accuracy. Rather, it put an end to the

matter and the Division was not required to present evidence to substantiate what Employer had already agreed was true.

Given the foregoing, we find the Division was not required to substantiate its “high” likelihood rating or present evidence regarding Employer’s size. Because the Division permissibly relied on the parties’ stipulation, the penalty reductions were improper.

DECISION

For the reasons stated above, the Employer’s petition for reconsideration is denied. The Division’s petition for reconsideration is granted. The civil penalty of \$10,800 assessed by the Administrative Law Judge is vacated. A civil penalty of \$22,500 is assessed.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APR 8, 2010