

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

In the Matter of the Appeal of:

A TEICHERT & SON INC.
dba TEICHERT AGGREGATES
35030 County Road 20
Woodland, CA 95695

Employer

Docket 10-R5D1-3029

**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 this matter under submission hereby renders the following decision after reconsideration.

JURISDICTION

On April 23, 2010, the Division of Occupational Safety and Health (Division) commenced an accident inspection at a place of employment in Woodland, California maintained by Teichert Aggregates (Employer). On September 14, 2010, the Division issued one citation to Employer alleging a Serious, Willful violation of Title 8, California Code of Regulations, section 3329(d) [failure to release pressure when opening closed pressurized system].¹

Employer timely appealed the citation, and an evidentiary hearing was held on December 8, 2011, before an Administrative Law Judge (ALJ) of the Board. The ALJ issued a Decision on June 15, 2012, upholding the violation and its Serious classification, but did not find that Employer acted willfully. The penalty was correspondingly reduced from \$58,500 to \$11,700 by removing the willful multiplication factor of five.²

On July 20, 2012, Employer filed a petition for reconsideration contesting both the existence of the violation and its Serious classification. The Division answered the petition. The Board took Employer's petition under submission on August 16, 2012.

¹ All references are to California Code of Regulations, Title 8.

² The proposed penalty is multiplied by five for a willful violation. (§ 336(h).)

On August 31, 2012, Employer filed a motion for sanctions against Division counsel.

ISSUES

Does the record support the ALJ's finding that Employer violated the safety order?

Are sanctions warranted against Division's counsel?

EVIDENCE

Employer operates an aggregate plant which, among other processes, washes rocks. Dirty rocks are sprayed with water and the resulting fine silt and water mixture (known as slurry) is transported to a collection tank. The bottom of the collection tank is connected to the intake (or suction) line of a centrifugal pump (pump). The pump's suction draws the slurry from the tank and discharges it through a pipeline to a settling pond approximately 1000 feet downstream. (See Ex. 3.) Once at the pond, the silt in the slurry settles out, allowing Employer to reuse the water for its operations.

Under normal conditions, only slurry is supplied to the collection tank and removed by the pump. However, on the day of the accident, a foreign material (3/8th inch pea gravel) also made its way into the tank. The pea gravel was considerably larger and coarser than the normal fine slurry, and eventually clogged both intake and discharge lines of the pump. After becoming clogged, the pump was no longer able to pump the slurry from the tank at a rate equal to the supply of slurry, resulting in water pouring out of the overflow line. (See overflow line on top of tank, Ex. 3.)

Mr. Ray Prawl (Prawl) was the plant superintendent on the day of the accident and testified at the hearing. The overflow of water was his first indication that something was wrong with the pump. (Ex. 5, p. 1.) He and his team began shutting down the entire plant using a controlled procedure that required a sequential shutdown of the plant's equipment. Because of this procedure, the pump continued to run in a blocked state for a total of 10 to 15 minutes before Prawl was able to shut it down.

Prawl and his team then began trying to unplug the pump. During this time he discovered that the pump's inlet piping and outer casing were "hot to the touch" or "one potato," meaning that someone could only touch the object for about one second before feeling the need to let go. Regardless, Prawl directed employee Jaxsen Sikorski (Sikorski) to enter the tank and remove the pea gravel which had accumulated to nearly the top of the tank.

Sikorski managed to shovel all the pea gravel out of the tank, and then focused on removing the pea gravel which remained in the intake line. Since he could not physically reach down and into the pipe to remove the material, he inserted a water hose into the pipe with the idea that he could flush away the clog. However, after water was supplied to the hose, a mixture of steam and hot water came out of the pipe and blew back onto Sikorski, resulting in non-serious burns to his arms.³

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.

Employer asserts that the ALJ acted in excess of his powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision. (Petition, p. 2.)

The Board has independently reviewed the entire evidentiary record and considered the briefs and arguments of the parties. For the following reasons, we find that the record does not establish a violation of the safety order.

1.) The Alleged Violation

The Division cited Employer under section 3329(d) which states as follows: “When dismantling or opening closed pressurized or gravity fed systems, internal pressure shall be relieved or other methods utilized to prevent sudden release of pressure or spraying of liquid.” The safety order thus requires an Employer to relieve internal pressure when it is “dismantling or opening” either a “closed pressurized” or “gravity fed” system.⁴

³ Sikorski was wearing bib overalls that protected the rest of his body from the steam. The parties agreed that his burns were non-serious.

⁴ The Division alleged that a violation occurred because Employer opened a closed pressurized system. It does not contend that Employer “dismantled” the system or that the system was “gravity fed,” and there is no evidence in the record that would support such a finding.

In order to prove the violation, the Division presented the testimony of Senior Safety Engineer Douglas Patterson (Patterson). Patterson alleged that the clogs in the intake and discharge lines resulted in a loss of flow through the pump. This loss of flow correspondingly led to an increase in temperature within the pump, which eventually reached boiling temperature (at standard atmospheric pressure) of 212 degrees Fahrenheit. The water contained in the pump's volute⁵ then vaporized to steam.

At this point, Patterson claimed that the clogs, the small sections of intake and discharge piping between the clogs and the pump, and the pump itself, all combined to form a closed "system." He further alleged that this system was pressurized because the clogs at both ends functioned as pressure barriers, which allowed the system to increase in pressure as the pump continued to heat up beyond 212 degrees Fahrenheit. He described the system as a "pressure cooker," wherein an increase in temperature results in a corresponding rise in pressure.

Finally, Patterson alleged that Employer opened the pressurized system by allowing Sikorski to insert the hose and spray water up into the suction line. The spray then either removed or penetrated the intake-side clog thereby releasing the pressurized steam onto Sikorski and causing his injuries.

a.) Lack of Evidence That System Was Pressurized

The ALJ concluded that the system became pressurized "by the action of the pump becoming hotter when closed, with the resulting increase of pressure in the set volume of the system." (Decision, p. 10.) Other than referring to the overall general testimony of Patterson, the ALJ does not cite to any specific evidence that was relied upon in making this finding.

After a thorough review of the entire record, we do not find evidentiary support for the ALJ's determination. It is undisputed that direct evidence of a pressurized system did not exist.⁶ In fact, the only evidence that possibly supports the formation of pressurized steam within the pump's volute was the fact that water changes to steam at 212 degrees Fahrenheit, and that the pump's outer casing was "hot to the touch." Based on this evidence, the Division alleged that the steam that burned Sikorsky came from a pressurized steam source within the pump. (Petition, p. 4, middle.)

While this evidence could be seen as circumstantial evidence to support the Division's theory, it relies on the assumptions that 1.) a sufficient quantity of water existed in the pump's volute to begin with that would support such a

⁵ The volute is shown in Exhibit 3 as the blue, round casing that is connected to the suction line. It is a chamber within the pump that collects fluid after it is discharged by the impeller.

⁶ Direct evidence of a pressurized system could include a pressure gauge that indicated pressure above normal atmospheric, or a temperature gauge that indicated temperature above 212 degrees Fahrenheit.

pressure buildup, and 2.) that the clogs acted as pressure barriers that fixed the system to a set volume. The record is void of evidence that would support the former assumption, and contains significant testimony discrediting the latter.⁷

Moreover, even if the above assumptions were valid, the evidence in the record supports equally, if not more plausible scenarios that do not rely on the truth of such assumptions. For instance, Prawl and Sikorski both testified that the inlet pipe, in addition to the pump casing itself, was “hot to the touch.” Inspector Patterson further expanded by testifying that Prawl told him the pipe was hot due to friction caused by the pea gravel. The evidence thus supports multiple plausible scenarios: the steam might have formed from the water spray hitting the side of the hot inlet pipe and flashing to steam, or from contacting the hot pea gravel within the pipe, or from hitting a hot impeller blade or another part of the pump connected to the inlet pipe. Since the evidence supports multiple objects being hot, and no evidence distinguishes that any one object was less than 212 degrees Fahrenheit, all scenarios are equally plausible. For this reason, the Division has not met its burden of proof and has failed to establish that steam emanated from a pressurized source within the pump. (See *Hensel Phelps Construction Co.*, Cal/OSHA App. 01-1618, Decision After Reconsideration (Jul. 6, 2007) citing *People v. Miller* (1916) 171 Cal. 649, 654, and *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal. App.3d 1, 45 [when evidence leads to two equally likely interpretations, Division has not met its burden of proof].)

In conclusion, although the Division states that Employer has not proven that the system was not pressurized, (Answer, p. 6), it is not Employer’s burden to disprove an assumed violative condition. Rather, it is the Division’s burden to prove each element of the alleged violation by a preponderance of the evidence. (*Howard J. White*, Cal/OSHA App. 78-741, Decision After

⁷ It is important to note that the Division’s allegations regarding how pressure built up within the pump is entirely based on Patterson’s “pressure cooker” theory. This theory, by Patterson’s own admission, is dependent upon the clogs acting as solid pressure boundaries. Therefore, the Division needed to establish that no flow existed in order to show that the clogs were actually functioning as pressure barriers at the time of the alleged pressure buildup. Otherwise, the Division’s theory would just be another possibility without evidentiary support. (See *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012), citing *CA Transportation*, Cal/OSHA App. 08-2173, Denial of Petition for Reconsideration (Dec. 21, 2011) [Board would be speculating without evidence in the record]; *People v. Ramos* (1997) 15 Cal.4th 1133, 1157 [errant speculation of improper alteration when no evidence of actual alteration].)

Here, although Prawl testified that the pump was “plugged” at both ends, he also testified that flow still existed yet at a reduced rate. Prawl confirmed the presence of flow when Division’s counsel asked the leading question, “In this particular case, was the flow of the pump very low...?” Prawl responded, “Yes.” The Division additionally highlights the existence of flow by stating that “flow had essentially stopped,” and was “severely restricted.” (Answer, pp. 4, 6.)

Because the Division did not discredit the testimony as to the existence of flow, or otherwise produce evidence that flow had stopped, the Division failed to prove that the clogs acted as pressure boundaries. The Division’s theory is thereby not supported by the record. (See *Sherwood Mechanical, supra* [possibilities do not exist without evidence to substantiate such possibilities].)

Reconsideration (Jun. 16, 1983).) Here, the evidence revealed multiple possible objects downstream of the water hose that were capable of converting water to steam, none of which are more suspect than the other. The Division thus failed to prove that the source of the steam was from a pressurized system, which alone is sufficient to grant the appeal.⁸

b.) Lack of Evidence that System was Opened

The ALJ also concluded that the system was “opened” by generally referring to the testimony of Prawl and Sikorski. (Decision, p. 10, top.) No further analysis or specific evidence is mentioned by the ALJ in making this determination. (*Id.*)

After a full review of the record, we conclude that the evidence does not support a finding that the system was opened by water spraying from the hose. Neither Prawl nor Sikorski admitted to opening anything, and Prawl specifically testified that he had no idea where the steam came from.

The Division’s theory is that the water spray removed the suction-side clog that was sealing in the “pressure cooker,” and that this “opened” the system and allowed for the steam to hit Sikorski. However, the evidence does not show that the only possible source – or even the more likely source of the steam – was from opening a pressurized steam system. Rather, multiple possible objects downstream of the water hose existed that were similarly “hot to the touch” and all were equally capable of changing water to steam. The Division therefore did not establish that Employer opened the system. (See *Hensel Phelps Construction Co., supra.*)

c.) Employer’s Motion for Sanctions

Employer’s motion alleges that Division counsel performed certain research activities and inappropriately referred to such research in her Answer.

⁸ The Division cites to Exhibit 7 in both its Post-Hearing Brief and its Answer to Petition for Reconsideration. (Brief, p. 4; Answer, p. 5.) The Board takes notice that this exhibit was specifically *not admitted* into evidence by the ALJ during the hearing. (See Exhibit Log marking Ex. 7 as “rejected.”) We also note that at the hearing, Division’s counsel made a second request for the exhibit to be admitted, which was denied by the ALJ on the record. The Division did not contest the ALJ’s ruling to exclude the exhibit in either its post-hearing brief or Answer to Petition. As such, any issue regarding the propriety of the ALJ’s ruling to exclude the exhibit was waived (Lab. Code § 6618), and reference to the excluded exhibit was improper.

Furthermore, even if we were to consider Exhibit 7, that exhibit specifically and directly contradicts the Division’s position that the water within the pump’s volute reached 212 degrees Fahrenheit. Exhibit 7 is a technical bulletin released by the pump’s manufacturer. It contains data detailing the temperature and pressure rise within the pump when it was half-filled with water and allowed to run in a zero-flow state. It was determined that for the first 25 minutes, the temperature within the pump never reached 212 degrees Fahrenheit. (Ex. 7, p. 2 [emphasis added].) Therefore, the Division would have us refer to an exhibit that directly contradicts the Division’s entire theory that the pump had already reached 212 degrees Fahrenheit and began building up pressure after running for only 10-15 minutes. (Answer to Petition, p. 3, fn.2, and Patterson testimony.)

(Employer's Motion, pp. 2-3.) Division counsel was merely researching the regulatory history for the safety order and trying to find an initial or final statement of reasons. Such actions are not inappropriate before the Board. Employer's motion for sanctions is denied.

DECISION

For the above reasons, the Division did not establish a violation of section 3329(d). We reverse the ALJ's Decision and Employer's appeal is granted. Employer's motion for sanctions is denied.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 15, 2012