

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

In the Matter of the Appeal of:

BIG LOTS
300 Phillipi Road
Columbus, OH 43228

Employer

Dockets 11-R3D2-1929 through 1931

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Big Lots (Employer).

JURISDICTION

Commencing on May 25, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On July 6, 2011, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹ Citation 1 alleged 18 Regulatory and General violations. Citation 2 alleged a Serious violation of section 2340.17(a) [unguarded energized parts]. Citation 3 alleged a Serious violation of section 5162(a) [no emergency eyewash].

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On January 7, 2013, the ALJ issued a Decision (Decision). The ALJ sustained all of the alleged violations with the exception of Citation 1, Item 12, which appeal she granted. As to Citation 2, the ALJ found Employer to have violated section 2340.17(a) but reduced the classification to General from Serious.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration. Employer contends it is not required to provide an emergency eyewash station (Citation 3, § 5162(a)) or eye protection (Citation 1, Item 11, § 3382(a)) for its employees.

The Division did not answer the petition.

ISSUE(S)

Whether violations of sections 3382(a) and 5162(a) were established.

REASON FOR DENIAL OF PETITION FOR 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 petitions on the grounds that the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer operates retail stores which sell household cleaning products, among many other items. Goods and products which are sold in the store in question are delivered by truck, in cases containing 6 or 12 retail-size containers of a given item. Employer's employees unload the trucks, unbox the various products, and place them on retail shelves for sale to the public. Although normally those products when delivered and handled are in intact packaging, Employer admits that on occasion the packaging is damaged in transit or during the unloading/unboxing process.

Citation 3 alleged that Employer violated section 5162(a) because it did not have an emergency eyewash station available to its employees. Employer argues that section 5162(a) does not apply because the chemicals to which its employees are exposed in the unloading, unboxing and shelving process are received in sealed containers. This argument ignores the evidence that leaks and spills sometimes occur because packages are damaged in transit or containers are damaged when employees unpack the shipping cases. The evidence showed that employees conducting routine operations such as unloading and opening of delivery cases would be exposed to the cleaning products because of damage to the containers that had occurred during transit or during the unpacking process. Also, at least one employee had gotten a powdered cleanser in his eyes.

Employer also argues that section 5162(a) does not apply because the cleanser is a “standard and common household cleaning product.” Employer misses the purpose of the safety order. Section 5162 is part of Article 109 of the safety orders which applies to “the use, handling and storage of hazardous substances in all places of employment.” (§ 5160.) “Hazardous substance” is defined as “A substance, material, or mixture which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, an irritant, or otherwise harmful, is likely to cause injury or illness.” (§ 5161.) Section 5162(a) states an emergency eyewash “shall be provided at all work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption.”

The evidence established that the Big Lots store in question received, handled, and sold products that are hazardous substances as defined in section 5161. That such products are common household cleaning products does not change their chemical composition or the hazards they pose to employees (or final consumers). The Division introduced into evidence the material safety data sheets of several products sold at the store which state they are corrosive and/or severe eye irritants. Thus, the Decision correctly held that section 5162(a) applies, even though the products involved are common household cleaning products.

Employer argues that in so holding the Decision “ignores contrary interpretations of both federal and state law.” Employer incompletely cites to what are apparently federal OSHA interpretive letters, and cites no California or other state authority. First, federal OSHA interpretive letters are not specific to the person seeking guidance and the particular circumstances in question; nor are federal rules and interpretations binding on the Board. (See *United Airlines, Inc. v. Occupational Safety and Health Appeals Bd.* (1982) 32 Cal.3d 762.) Second, even though the products in question are normally in sealed containers, the record establishes that on occasion the containers are broken or leaking and employees are exposed to their contents. Third, section 5162(a) requires an eyewash station be available “where, during routine operations or

foreseeable emergencies, the eyes of an employee may come into contact” with a corrosive substance or severe irritant. The record shows that such contingencies are not only foreseeable but have occurred. Under the circumstances shown to exist at the store at issue, we reject Employer’s argument.

Employer also argues that the Decision dealt with the allegations of Citation 1, Item 11 relating to eye protection and Citation 1, Item 12 relating to hand protection from chemicals inconsistently. The Decision sustained the General violation of section 3382(a) [eye protection] alleged in Citation 1, Item 11, and granted Employer’s appeal of Citation 1, Item 12, which alleged a General violation of section 3384(a) [hand protection]. It was appropriate for the ALJ to do so.

Section 3382(a), in pertinent part, required employers to furnish eye protection to employees who may be exposed to “eye injuries such as . . . burns as a result of contact with . . . hazardous substances . . . which are inherent in the work environment[.]” The evidence showed that hazardous substances presenting the risk of eye injuries were common in the Big Lots store and that employees were exposed to them, thus supporting the Decision. In contrast, section 3384(a) requires employees be provided with hand protection when the exposure to hand injuries from harmful chemicals is “unusual and excessive[.]” The ALJ found that the evidence fell short of proving the exposure to employees was unusual and excessive, and therefore granted Employer’s appeal. The key difference between the two safety orders is that section 3382(a) does not require exposure to eye hazards to be unusual and excessive, while section 3384(a) does. There was no inconsistency in the Decision; the ALJ merely applied the text of each safety order to the facts and found a violation of section 3382(a) and no proof of a violation of section 3384(a).

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman
ED LOWRY, Member

NOT PRESENT
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MARCH 25, 2013