

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

In the Matter of the Appeal of:

LANGER FARMS, LLC
16195 Stephen Street
City of Industry, CA 91745

Employer

Dockets. 13-R4D7-0231 through 0233

**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 ordered reconsideration in the matter of the appeal of Langer Farms, LLC (Employer) on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 12, 2012, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Bakersfield, California maintained by Employer. On January 3, 2013, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The only citation at issue here, Citation 3, alleged a Serious Accident Related violation of section 3314(g)(2)(A) [failure to have specific written hazardous energy control procedures].²

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ

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

² Employer also filed timely appeals of Citation 1, a regulatory violation of section 342(a), and Citation 2, a serious violation of Section 3314(j). Citations 1 and 2 are not at issue in this Decision After Reconsideration.

issued a Decision on September 9, 2014. The Decision denied Employer's appeal but reclassified Citation 3 as a general violation, imposing a civil penalty of \$135. Total penalties for all three citations were \$5,460 in the ALJ's Decision.

The Board ordered reconsideration of the ALJ's Decision on its own motion. The Division and Employer both filed an answer to the order of reconsideration.

ISSUE

Was the ALJ's Decision regarding Citation 3 correct?

EVIDENCE

The Decision makes findings of facts related to the case. The Board makes following findings of fact, consistent with the record:

1. Employer processes apples into juice through a process that includes creation of a substance described as "apple mash." Apple mash is a mixture of apple liquids and soft apple solids, and is heated in the juice-making process.
2. Carl Stark (Stark) was an employee of Langer Farms, LLC, on July 13, 2013.
3. On July 13, 2013, Stark was at work alone in room containing equipment which processes apple mash when he was sprayed with hot apple mash while attempting to repair a pump which was a component of the processing equipment.
4. Stark failed to open one of two valves on the machinery, described as "butterfly valves".
5. On July 17, 2012, Stark reported to the San Joaquin Community Hospital for treatment for burns related to contact with the apple mash. He was discharged on July 26, 2012.
6. Employer did not have a written hazardous energy control procedure for cleaning, adjusting or repairing the machinery involved in the incident.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has reviewed and considered both Employer and the Division's answer to the Board's order of reconsideration.

The Division cited Employer for a serious, accident-related violation of section 3314(g)(2)(A), The Control of Hazardous Energy for the Cleaning, Repairing, Servicing, Setting-Up, and Adjusting Operations of Prime Movers, Machinery and Equipment, Including Lockout/Tagout. The pertinent language of the safety order is as follows:

(g) Hazardous Energy Control Procedures. A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.

[...]

(2) The employer's hazardous energy control procedures shall be documented in writing.

(A) The employer's hazardous energy control procedure shall include separate procedural steps for the safe lockout/tagout of each machine or piece of equipment affected by the hazardous energy control procedure.

The Division's citation specifically alleges that:

On or about July 13, 2012, at approximately 0430 hours, an employee received serious injuries when he was sprayed with a hot mixture of apple pieces and apple juice at a temperature of approximately 120 degrees F. The employer did not have machine specific written hazardous energy control procedures in place for relieving pressure in the pump, lines and hoses in building #1 prior to disconnecting the hose from the pump and lines.

Section 3314(g)(2)(A) requires an employer to have a hazardous energy control procedure documented in writing, that includes the separate procedural steps for safe lockout/tagout of each machine or piece of equipment. There is no dispute that at the time of the incident, Employer did not have a written hazardous energy control procedure with separate procedural steps for the safe lockout/tagout of the machine involved in the accident. The plain language of the safety order requires, and the Board has found, that failure to have written lockout/tagout procedures available in writing constitutes a violation of the safety order: “[m]oreover, we have held that section 3314(g)(2)(A) requires employers to have a plan for each machine, or for each group of similar machines at their places of employment. (*All American Asphalt*, Cal/OSHA App. 09-3871, Denial of Petition for Reconsideration (Jan. 11, 2011).)” (*Newman Flange and Fitting Co.*, Cal/OSHA App. 07-2581, Decision After Reconsideration (Oct. 5, 2011).)

Accordingly, the Board finds that the Division was able to establish a violation of the safety order by a preponderance of the evidence.

Classification of the Citation

Employer also appealed the classification of the citation. In order to classify a violation as serious, the Division must establish that there is “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.”³ (Labor Code section 6432(a).) The Board must look to the record to discern what constitutes the “actual hazard” created by Employer’s failure to provide written lockout/tagout procedures for each machine. In this instance, the “actual hazard” caused by the failure to have the written hazardous energy control procedure for the apple mash machine is employee exposure to stored energy, including heated contents under pressure.

The Division must next demonstrate that there is a realistic possibility for death or serious physical harm that is created by this actual hazard described above. The term “realistic possibility” has not been defined by the legislature. As the Board has discussed in prior Decisions After Reconsideration, the Board interprets the phrase using the ordinary meaning of the words, and finds a “realistic possibility” to be one that is within the bounds of reason, and which is not purely speculative. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), citing, *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) The Division’s inspector testified that with a checklist, or written lockout tagout procedures, the risk of an employee being injured is minimized—the checklist ensures that the employee has a roadmap of the required tasks, and minimizes the possibility of missing a step. The Board therefore finds that Ricker’s testimony, and the evidence on the record, is enough to establish that there is a “realistic possibility” of exposure to stored energy and/or contents under pressure.

Finally, the evidence establishes that this realistic possibility an accident or injury created by the actual hard could result in “death or serious physical harm”. While the parties stipulated that at its normal temperature of 120 degrees Fahrenheit the Employer’s apple mash would not be dangerous, the only evidence on the record regarding the temperature of the mash at the time of Stark’s accident is the Division’s record of Employer’s telephone report, made on July 20, 2012. In that report, Employer’s Human Resources manager

³ The term “serious physical harm” is defined by the Labor Code section 6432(e): “Serious physical harm,” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

describes the “hot product” as being at about 150 degrees. (Ex. 5). The record also reflects that the employee who was sprayed with the apple mash suffered second degree burns of the face, neck, torso, and upper left extremity, and required hospitalization, surgery and skin grafting procedures as a result of the incident. (Ex. 2). The accident that has occurred as a result of the violation of the safety order is evidence that may be weighed by the Board in considering the appropriate classification. (See, *Home Depot, USA, Inc.*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).)

In sum, the testimony and evidence establish that there is a realistic possibility for death or serious physical harm to occur as a result of this violation of the safety order. The violation is therefore properly classified as serious.

The Division also classifies the citation as accident related, which Employer refutes. In order for a citation to be classified as accident related, there must be a showing by the Division of a “causal nexus between the violation and the serious injury”. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) (writ denied, Dec. 5, 2014, 4th Dist. Ct of App.) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) The Division has failed to make the necessary showing in this instance, and the Board declines to categorize the citation as accident related.

The Board reinstates the serious classification, with low extent and likelihood as modified by the ALJ, and a 45% adjustment factor based upon size, history and good faith also as modified by the ALJ, resulting in a penalty of \$4950 for Citation 3 using the calculations called for in section 336.⁴

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 24, 2015

⁴ The ALJ found, and the Board is in agreement, that Langer Farms, LLC, had 43 employees working in its employ at the time of the accident. (Decision, p. 5). In un rebutted testimony it was disclosed, that “Langer” has several different corporate entities. It appears that when the Division made inquiries as to how many employees were in the employ of Langer, employees working for various separate Langer corporate bodies were counted. The injured employee was an employee of Langer Farms, LLC.

SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

LANGER FARMS, LLC
Docket No(s). 2013-R4D7-0231 through 0233

| | |
|-------------------|----------------|
| Abbreviation Key: | Reg=Regulatory |
| G=General | W=Willful |
| S=Serious | R=Repeat |
| Er=Employer | DOSH=Division |

IMIS No. 313387649

Site: 19300 Copus Road, Bakersfield, CA 93313
Date of Inspection: 09/12/2012 ~ 12/28/2012

Date of Citation: 01/03/2013

| DOCKET | CITATION | ITEM | SECTION | TYPE | ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON | AFFIRMED | VOIDED | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY ASSESSED BY ALJ | FINAL PENALTY ASSESSED BY BOARD |
|------------------|----------|------|---------------|------|--|----------|--------|---|-------------------------------|--|
| 13-R4D7-0231 | 1 | 1 | 342(a) | Reg | ALJ modified penalty for a finding of late reporting. | x | | \$5,000 | \$2,750 | \$2,750 |
| 13-R4D7-0232 | 2 | 1 | 3314(j) | S | ALJ affirmed violation and modified penalty adjustment increasing size to 20%. | x | | \$3,375 | \$2,475 | \$2,475 |
| 13-R4D7-3093 | 3 | 1 | 3314(g)(2)(A) | SAR | ALJ reclassified the citation as a general violation. The proposed penalty is modified and further reduced by the ALJ. Board reinstates the Serious classification and modified the penalty based on size, history and good faith. | x | | \$18,000 | \$135 | \$4,950 |
| Sub-Total | | | | | | | | \$26,375 | \$5,360 | \$10,175 |

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$10,175

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

POS: 4/24/2015