

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

In the Matter of the Appeal of:

THYSSENKRUPP ELEVATOR CORPORATION
940 Riverside Parkway, Suite 20
West Sacramento, CA 95605

Employer

Dockets. 11-R2D1-2217
through 2219

**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 in part and grants in part the petition for reconsideration filed in the above entitled matter by Thyssenkrupp Elevator Corporation (Employer).

JURISDICTION

Commencing on April 14, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On August 12, 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

Employer timely appealed.

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

On December 28, 2012, the ALJ issued a Decision which affirmed the violations alleged in the citations and imposed civil penalties.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

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

ISSUE(S)

Whether the Decision was correct in sustaining the alleged violations.

Whether the Decision was correct in assessing a civil penalty for all three violations.

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's petition contends the Decision was issued in excess of the ALJ's powers, 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 Decision was based on substantial evidence in the record as a whole and appropriate under the circumstances as to the existence of the violations. We also find that the ALJ erred in assessing penalties for both Citation 2 and Citation 3.

EVIDENCE

Two of Employer's employees were sent to a commercial office building in Sacramento, California to troubleshoot an escalator. In the course of their work they removed a step from the escalator and started it to diagnose the problem, then stopped again. One of the pair repaired the escalator by working through the gap created by the missing step. At the first worker's request, the other then walked up the escalator from the bottom to the upper landing to start the escalator. When he reached the top and leaned over to use the start switch his foot dropped into the gap formed by the removed step and when the escalator began moving a rising step amputated his foot.

DISCUSSION

Employer's petition makes arguments regarding each of the citations in sequence, beginning with Citation 1. For convenience we follow the petition's sequence.

Citation 1, section 3314(g)(2)(A).

Citation 1 alleged a General violation of section 3314(g)(2)(A), which states:

(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 procedure 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.

EXCEPTION to subsection (g)(2)(A): The procedural steps for the safe lockout/tagout of prime movers, machinery or equipment may be used for a group or type of machinery or equipment, when either of the following two conditions exist:

(1) Condition 1:

(A) The operational controls named in the procedural steps are configured in a similar manner, and

(B) The locations of disconnect points (energy isolating devices) are identified, and

(C) The sequence of steps to safely lockout or tagout the machinery or equipment are similar

(2) Condition 2: The machinery or equipment has a single energy supply that is readily identified and isolated and has no stored or residual hazardous energy.

Employer argues that its appeal should have been granted because (1) all escalators have the same layout of power switches – cutoffs and emergency stops at top and bottom – and location of motors – in a pit at the upper landing; and (2) the ALJ ignored the training Employer gives its repair technicians on how to perform lockout/tagout (LO/TO) on escalators.

Regarding the first of the two above contentions, Employer is attempting to show it falls within an exception to the safety order. Section 3314(g)(2)(A) states an exception which allows employers to have a single procedure for “a group or type of machinery” if they are sufficiently similar, or if they have a single, readily identifiable and isolated energy source. (Decision, p. 12.) Board precedent holds that such exceptions to safety orders are affirmative defenses and the cited employer has the burden of showing it satisfied their conditions. (*Guardsmark*, Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011).)

Employer did not meet its burden. Employer introduced into evidence its hazardous energy procedure (Exhibit F) which does not refer to escalators, but only elevators. The Decision stated the procedure is one for both elevators and escalators, that is, for two different types of machines. (Decision, p. 13.) Elevators and escalators were not shown to have sufficient similarity to fall within the Exception. Also, as the ALJ noted (Decision, p. 14) any two machines with a single power source would fall within the Exception under Employer’s argument, including such disparate machines as a diesel-powered truck and an escalator. Such an exception would consume the rule, an absurd interpretation which is to be disfavored. (*Cal Energy Operating Corp.*, Cal/OSHA App. 09-3675, Denial of Petition for Reconsideration (Nov. 12, 2010) citing *Barnes v. Chamberlain* (1983) 147 Cal. App. 3d 762 [construction of statutes leading to absurd results is to be avoided].)

Even if one accepts Employer’s arguments at face value, they are not persuasive. As the Decision itself noted, section 3314(g)(2)(A) requires employers to have a written LO/TO procedure for each machine its employees service. Employer’s procedure covered both elevators and escalators, and there was no showing that both types of machines have the same layouts of power sources, cutoffs, and so on. Thus, even if all escalators are the same, Employer’s procedure was faulty because it applied to mechanisms other than escalators.

Employer’s second contention is that the ALJ did not give proper weight to its evidence about the training it gives its employees on lockout/tagout procedures. That argument is not viable. There is no mention in the safety order of training as a means of complying with or as a substitute for having lockout/tagout procedures. The Board cannot read terms into a safety order. (*E.L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) .) “Nor may an employer substitute its own safety measures for those required by the applicable safety order. (*Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012).)”

Citation 2, section 3314(c).

Section 3314(c) provides:

(c) Cleaning, Servicing and Adjusting Operations

Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags both shall be placed on the controls or the power source of the machinery or equipment.

Employer argues that the escalator was required to be in motion in order to conduct the maintenance/repair work being done, and that therefore section 3314(c)(1) applies. Section 3314(c)(1) states:

If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

Even assuming the movement of the escalator in this matter was intentional and necessary, there was no evidence that Employer provided extension tools or other means to protect its employees. Further, despite the training claims Employer made, the injured employee was positioned above the gap created by the removed step, rather than below it, as was the appropriate practice.

Employer further argues that there is an inconsistency in the terms of subsections 3314(a) and 3314(c). Employer's argument does not hold up. Section 3314(c) is itself internally consistent in view of section 3314(c)(1), and one need not refer to 3314(a) to apply section 3314(c). If a machine must be in motion for the work to be done, additional tools or "other methods or means to protect employees from injury" must be provided. (§ 3314(c)(1).) No tools were provided. The evidence did not provide sufficient detail about Employer's training of its escalator servicing personnel to conclude that such training amounted to "other method or means to protect employees from injury". And even if the injured employee had been trained about where to stand in relation to the gap created by the removed stair, he did not heed that training. Accordingly, we affirm the violation and penalty proposed in the citation.

Citation 3, section 4002(a)

Section 4002(a) states:

All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

Here Employer argues that the safety order is inapplicable because its guarding requirement pertains to the operation of machinery, not to repairs. Employer's contention ignores the point that the escalator was operating at the time of the injury, and was set in motion deliberately. Thus, this argument is rejected.

Employer argues that it could not know of the violation in the exercise of reasonable diligence, and therefore the serious classifications should be reduced to general. That argument is flawed because Employer's failure to provide an adequate lockout/tagout procedure, by itself, created the hazard of injury. Thus, Employer was on at least constructive notice of the danger to which its employees were exposed because it chose not to have the required separate procedure. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).)

A final point raised by Employer is that the hazards addressed by sections 3314(c) and 4002(a) are the same, namely that an employee may be injured by the movement of the machinery he is working on, as in fact occurred. This argument is well taken. The Board has long recognized that it is proper to assess one penalty for multiple violations involving the same hazard, where a single means of abatement is needed. (See *A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010).) In this matter, the hazard could have been abated by making certain both employees were out of harm's way before re-starting the escalator, a procedure or step consistent with lockout/tagout.² Thus, we eliminate the penalty for Citation 3 first because it is duplicative, and second because it is the violation less directly related to the overall circumstances involved in this matter, namely the failure to have and apply lockout/tagout procedures to escalator repairs and servicing. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) [multiple citations for single hazard appropriate, not duplicative penalties].)

² Employer's evidence that there is no means to guard the gap created by removing a stair is credited for purposes of penalty correction.

DECISION

For the reasons stated above, the petition for reconsideration is denied in part and granted in part, as follows:

Docket 11-R2D1-2217, Citation 1: General violation sustained, appeal denied, penalty of \$560.00 affirmed.

Docket 11-R2D1-2218, Citation 2: Serious violation sustained, appeal denied, penalty of \$5,400.00 affirmed.

Docket 11-R2D1-2219, Citation 3: Serious violation sustained, appeal denied, and penalty reduced to zero (\$0) as duplicative of the hazard addressed in Citation 2.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: March 11, 2013