

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

In the Matter of the Appeal of:

**MONTBLEAU & ASSOCIATES, INC
dba MONTBLEAU & ASSOCIATES
555 RAVEN STREET
SAN DIEGO, CA 92102**

Employer

Inspection No.
1366119

DECISION

Statement of the Case

Montbleau and Associates, Inc., (Employer) is a commercial architectural mill work company. Beginning December 13, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Michael Zimmerman (Zimmerman), conducted an inspection of the business site (shop) located at 555 Raven Street, in San Diego, California (the job site.)

On May 9, 2019, the Division cited Employer for two violations, one of which was appealed and remains at issue. The Division alleges that Employer failed to provide a comb (feather board) or suitable jig, for employees to use when cutting material. As a result, on or about November 12, 2018, an employee using the table saw suffered an amputation injury. Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification of the citation, and the reasonableness of the proposed penalty. Employer also raised a series of affirmative defenses.¹ The parties entered into several stipulations.²

This matter was heard by Leslie E. Murad, II, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, on September 22, 2021, February 24, 22, 2022, May 20, 2022, and on May 26, 2022. ALJ Murad conducted the video hearing with all

¹ Except where discussed in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

² The parties stipulate as follows: That the injuries that were sustained by Joel Gonzales that gave rise to this inspection meets the definition of serious injury under Section 338 of title 8 as well as the definition of serious harm under the Labor Code. The apparatus being used that resulted in the accident was a table saw. The citations were issued timely. The appeal was filed timely. Joel Gonzales was an employee of Employer at the time of the injury. The Division has jurisdiction over the job site to issue the citations. That at the time which the injury occurred, Employer was not engaged in any activity or agreement for consultation by the Division's consultation unit.

participants appearing remotely via the Zoom video platform. Attorneys Kevin Bland and Jennifer Yanni of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Manuel Arambula, Staff Counsel, represented the Division. The matter was submitted on September 28, 2022.

Issue

1. Did Employer fail to provide a comb (feather board) or suitable jig for an employee to use when he was cutting wood stock material where a standard guard could not be used?

Findings of Fact

1. Employer owned and had their employees use at their shop a Powermatic table saw (table saw) equipped with a hood to guard the operator from the saw blade.
2. The injured employee, Joel Gonzalez (Gonzalez) was an experienced operator of the table saw.
3. On November 12, 2018, (injury date/date of accident), Gonzalez was making moulding by cutting wood stock on the table saw. The wood stock was of such a size and configuration that in order to make the cuts on the wood stock, the table saw guard could not be used and was removed.
4. When Gonzalez was injured he was pushing the wood stock through the table saw blade by use of a push stick which he also called a jig.
5. Employer provided and had available for use by employees at the table saw combs (feather boards), and suitable jigs.
6. Gonzalez did not elect to use any suitable jig other than the push stick.

Analysis

1. **Did Employer fail to provide a comb (feather board) or suitable jig for Employee to use when he was cutting the material?**

California Code of Regulations, title 8, section 4296, subdivision (a) , provides:

- (a) Combs (feather boards) or suitable jigs shall be provided at the workplace for use when a standard guard cannot be used, as in dadoing, grooving, jointing, moulding, and rabbeting.

In Citation 2, Item 1, the Division alleges:

Prior to and during the course of the inspection, the Powermatic table saw used at the employer's facility, the employer did not provide a comb (feather board) or suitable jig, for the employee to use when he was cutting the material. As a result, on or about November 12, 2018, the employee using the table saw suffered serious amputation injuries.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) As part of its burden, the Division also bears the burden of proving employee exposure to the violative condition addressed by the safety order. (*Home Depot, USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).)

a. Applicability of the Safety Order

The Division bears an evidentiary burden of proving that a safety standard which is referred to in a citation applies to the specific factual circumstances in which a citation is issued. (See e.g. *Travenol Laboratories, Highland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration, (Oct. 16, 1980), and *Carris Reels of California*, Cal/OSHA App. 95-1456, Decision After Reconsideration, (Dec. 6, 2000).) Where the Division's case presents a factual situation not within the contemplation of the cited safety order, the alleged violation must be set aside. (See also *Carver Construction Co.*, OSHAB 77-378, Decision After Reconsideration, (Mar. 27, 1980), citing *Johnson Aluminum Foundry*, OSHAB 78-593, Decision After Reconsideration (Aug. 28, 1979).

Employer is a commercial architectural millwork company. They make custom cabinetry, and perform custom mill works for clients such as hotels and hospitals. One of their employees was Gonzalez, who first starting working for Employer in October, 2009. He has been a cabinet maker since 2011. He had been trained to operate and had operated the table saw for about seven years before the accident.

There is no dispute that Gonzalez suffered an amputation injury. The evidence supports that Gonzalez was provided with and had available for his use at the table saw on the day of the accident, combs (feather boards) and other suitable jigs. It is found that the safety order applies. Employer was in compliance with the safety order. The following is an analysis of the evidence

presented.

b. Availability of combs (feather boards) or suitable jigs for Gonzalez

Gonzalez testified that he was using the table saw without the guard due to the wood stock he was cutting. He was aware of a comb and a feather board and how to use them. Gonzalez further testified that on the day he was hurt, a feather board would not work on the wood he was cutting due to its size. He used a push stick. On the particular job he was performing, there was nothing else he could have used other than the push stick. He is familiar with combs and feather boards and how they are used.

On the day of the accident, Gonzalez was running a piece of wood through the saw. It was about three-sixteenths wide by three-quarters tall. He was cutting strips of wood. On his last strip of wood, he was about a foot away from finishing then the accident happened. He does not remember how the amputation happened. There were no witnesses to the accident.

Gonzalez was shown Exhibit 9, which is Employer's response to the 1BY, the Division's notice of intent to cite Employer with a serious citation. On page six of Exhibit 9 is a photograph that depicts the saw and a cabinet/drawer also called a "cubby," to the right and below the table top of the saw table. Gonzalez recognized the cubby below the table saw as a place where feather boards and different jigs are kept. Gonzales further testified that these different jigs and feather boards were available to him to use on the day of the accident. Gonzalez testified that a push stick is also called a jig, and was the only jig he needed to use.

Zimmerman testified that he was the Associate Safety Engineer who investigated this incident. Zimmerman was retired by the time he testified at hearing but was still active at the time he conducted the inspection in this case. He was given the assignment by his District Manager to investigate the woodworking accident that occurred on November 12, 2018, at Employer's shop.

Zimmerman testified he asked Joseph Vargas (Vargas), the Safety Director for Employer, as to how the accident happened. Vargas told him that Gonzalez was using the table saw using a push stick making moulding when the accident happened. Vargas did not witness the accident. Vargas did perform a post-accident investigation which was prepared in Exhibit 6. Zimmerman testified that he relied upon Employer's accident report of what happened. As to how the accident occurred, Exhibit 6 states:

Joel Gonzalez removed the saw guard that was in place in order to make the 5/16th-inch by 3/4-inch by 96-inch rips. Due to the smaller size of the rip cuts being made, the saw guard would interfere with the use of the push stick to feed the thin or narrow pieced of wood through the saw making it more difficult to control the

wood while cutting. Joel had completed ripping multiple pieces through the saw. He was running his last piece during the last 12 inches of the wood. The wood set against the fence must have lost pressure against the fence causing the wood to get caught on the back side of the blade causing the kickback which pulled Joel's hand into the blade.

Zimmerman confirmed there were no witnesses to the accident. The accident report further confirmed that due to certain cuts the saw guard was removed. Once that cut is done, the saw guard is to be immediately placed back on the saw. The saw guard was not used by Gonzalez when he made his cut that resulted in the accident.

Zimmerman further testified that he issued, Citation 2, Item 1, because Employer did not provide a comb, (feather board) or suitable jig for the employee to use when he was cutting the material. Zimmerman thought Gonzales should have been using a comb at the time he was making the cuts. Zimmerman also testified that a push stick is an appropriate implement to safely use on this table saw if the push stick and a comb or feather board are used at the same time.

On cross examination, Zimmerman testified that he had only investigated one prior table saw accident in his career and never used a table saw regularly in his own personal experience or in the context of his profession.

Zimmerman further testified that he had examined Employer's 1BY response, Exhibit 9. He did not recall seeing any of the feather boards and pressure boards at the shop as depicted in the photographs in Exhibit 9. He did not recall seeing the cubby or drawer next to the table saw with the combs, feather boards and pressure boards.

Zimmerman acknowledged that if the combs (feather boards) or suitable jig were present and could be used by an employee, Employer would have been in compliance. Finally, Zimmerman then admitted that the combs (feather boards) and suitable jigs were available at the table saw but Gonzales did not use them.

Darcy Murphine (Murphine) is a Senior Safety Engineer with the Division with 35 years of experience. She testified as the Division's expert witness. She did not visit the shop. She did not assist Zimmerman in any way with his investigation but to review his work and give advice on the issuance of the citation. She confirmed that Gonzalez could not use the standard saw guard due to the size of the wood stock and the type of cut that was being performed.

It was her opinion that a kickback of the wood stock occurred due to the curve in the push stick (Exhibit 13), that Gonzalez used and that this push stick was not suitable for the cut being attempted. If Gonzalez had used a proper jig he would use the guard and this would have prevented the injury. A feather board should have been used. As was disclosed in the evidence,

Exhibit 13 was not the push stick used by Gonzalez, so her opinion was flawed. When a standard guard cannot be used, combs (feather boards) and suitable jigs are to be provided pursuant to the regulation. In this case, the suitable jig, a push stick, was provided by the Employer and was used by Gonzalez.

Vargas testified he was a short distance away from the office when the accident occurred but returned within minutes of it occurring. When he returned to the shop he saw Gonzalez being treated by medical personnel. Vargas confirmed there were no witnesses to the accident. He also viewed the scene and took photographs of the aftermath of the accident, including the push stick used by Gonzalez and the table saw area. The push stick used by Gonzalez was found on the table one and one half to two feet behind the saw blade to the left. He also observed the push stick had blood on it and was a bio-hazard. As a result, after he took photographs of the push stick used by Gonzalez and the area, he disposed of the push stick.

The accident report (Exhibit 6), further confirmed that due to the nature of the cuts to be made and the wood stock being cut that the standard table saw blade guard had to be removed.

Vargas further testified that on the day of the accident he observed and also took photographs of the drawer/cubby that was off to the right and below the top of the table saw. He further testified that the combs (feather boards) and jigs were present and available for Gonzalez to use on the day of the accident. Vargas testified that all of the photographs taken on the day of the accident were given to the Division.

c. Employer was in compliance with the regulation

Vargas and Gonzalez both confirmed that on the day of the accident, due to the type of wood stock and cut to be done, the standard saw guard could not be used and was removed. Both also further confirmed that on the day of the accident, combs (feather boards) and suitable jigs were also provided and available at the table saw for Gonzalez's use as required by section 4296, subdivision (a). Zimmerman also testified that if combs, (feather boards) and suitable jigs were present for use by employees with the guard off, then Employer would be in compliance with the regulation. Zimmerman further testified that combs (feather boards) and suitable jigs were present based the evidence presented at the hearing. Availability is all that is needed for compliance with the regulation, not use.

Based on the above, it is found that Employer was in compliance with the regulation. Therefore, the Division failed to establish a violation by a preponderance of the evidence.

Conclusion

The preponderance of evidence demonstrates the fact that Employer was in compliance with section 4296, subdivision (a) in that when a standard saw guard is removed, combs, (feather boards) and suitable jigs were provided and available for use by Employee. The Division did not show by a preponderance of the evidence that Employer violated the safety order. Employer's appeal as to Citation 2, Item 1, is granted.

Order

Citation 2, Item 1, and the associated penalty is vacated.

A handwritten signature in blue ink, appearing to read 'Leslie E. Murad, II', is written over a horizontal line. The signature is stylized and somewhat cursive.

Dated: 10/26/2022

Leslie E. Murad, II
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**