BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1279492**
ARRIAGA USA, LLC. **dba STONELAND** **12000 SHERMAN WAY** **NORTH HOLLYWOOD, CA 91605** **Employer**	**DECISION**

Statement of the Case

Arriaga USA, LLC. (Employer) manufactures and installs marble and stone countertops. On November 28, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Bao Nguyen (Nguyen), commenced an inspection of a job site located at 7124 Radford Avenue, North Hollywood, California (job site), after receiving a report of an injury at the site on October 12, 2017. On April 6, 2018, the Division cited Employer for four violations[1], one of which remains at issue: failure to guard moving parts of machinery by frame or location.

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated and that the classification is incorrect. Employer asserted the affirmative defenses of Independent Employee Action and lack of Employer knowledge.[2]

This matter was heard by Jacqueline Jones, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, on April 14, 2021. The parties and witnesses attended the hearing remotely via the Zoom video platform. Keren Rubin, Office Manager and Shalom Rubin, Owner, represented Employer. Martha Casillas, Staff Counsel, represented the Division. At hearing, the Division withdrew Citation 2, Item 1. The matter was submitted on May 18, 2021.

Issues

1. Did Employer fail to ensure that the sides of the GMM Techna 36A sawing bridge (bridge saw) was guarded by the frame or by location?

[1] Only Citations 2 and 3 were appealed.
[2] Except where discussed in this 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. Was the bridge saw guarded by location?

3. Did Employer establish that it was not responsible for the failure to guard violation based on the Independent Employee Action Defense?

4. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?

5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

6. Did the Division establish that the Citation was properly characterized as Accident-Related?

Findings of Fact

1. While working as a machine operator cutting limestone using the bridge saw on October 12, 2017, Andres Garcia (Garcia) sustained multiple fractures to his skull and face when his head was crushed in the machine.

2. Garcia placed his head behind the operating head as he was cutting limestone. Garcia's head was crushed between the operating head and the wall.

3. Garcia sustained serious physical harm when his head came into contact with the unguarded bridge saw. The injury resulted in inpatient medical treatment at the hospital for more than 24 hours.

4. The operating head of the bridge saw was not guarded by location, in that an employee can position himself between the operating head and the wall.

5. The bridge saw created a hazardous cutting and crushing action that results in a pinch point.

6. Employees can walk or stand adjacent to the bridge saw without anything preventing accidental contact with the stonecutting machinery.

7. Garcia worked in an area where each day he was exposed to the dangers associated with a bridge saw which was not guarded by location.

8. The Independent Employee Action Defense is not available because the cited safety order requires protection against a particular hazard by means of positive guarding.

9. Failure to guard the bridge saw was the primary cause of Garcia's injury.

Analysis

1. Did Employer fail to ensure that the sides of the GMM Techna 36A sawing bridge (bridge saw) was guarded by the frame or by location?

California Code of Regulations, title 8, section 4002, subdivision (a),[3] provides:

> 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.

In Citation 3, Item 1, the Division alleges:

> Prior to and during the course of the investigation, the employer did not have the sides of the bridge saw guarded by the frame or by location. As a result, on or about October 12, 2017, an employee was seriously injured when he was crushed by the operating head.

a. Applicability of the Safety Order

To establish a violation of section 4002, subdivision (a), the Division needs to establish: the applicability of the safety order by showing that the machine parts at issue created hazardous revolving, cutting, rolling, mixing or similar actions; that employees were exposed to the hazard; and that the hazardous area was not guarded by the frame of the machine, location, or some other way.

Ofer Rubin testified regarding the incident with Garcia and the bridge saw. Ofer Rubin told Nguyen that the bridge saw is a stonecutter machine and that Garcia was injured while using the bridge saw to cut limestone. Garcia placed his head behind the operating head of the machine as he was cutting limestone. As the operating head was moving closer to the end of the cut, Garcia's head was crushed between the operating head and the wall. Nguyen reviewed a video of the incident, (Exhibit I).

Nguyen credibly testified that Garcia was hospitalized for crushing injuries to his head for a period of one week. Nguyen photographed the bridge saw (Exhibit 9). Nguyen testified that the machine and its component parts created cutting movement. Here, the injured worker was cutting limestone with the bridge saw at the time of the incident. This use of the bridge saw

[3] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

created a hazardous cutting action that creates a pinch point. Accordingly, the safety order applied to the task being performed at the time of the accident.

b. Employee exposure

The Appeals Board has articulated tests for determining employee exposure. In *RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), the Appeals Board states:

> The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent. (*Benicia Foundry & Iron Works, Inc.,* Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)
>
> The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition (*Benicia Foundry & Iron Works, Inc., supra,* Cal/OSHA App. 00-2976.) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.,* Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016), citing *Gilles & Cotting, Inc.,* 3 O.S.H. Cas (BNA) 2002, 1975-76 O.S.H. Dec. (CCH) P20448, 1976 OSAHRC LEXIS 705 (Feb. 20, 1976) fn 4.)

In addition to demonstrating actual employee exposure to the hazard, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc., supra,* (Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*Id.* [citations omitted].)

Here, Garcia was seen for three months daily in the zone of danger per the testimony of owners, Ofer Rubin and Shalom Rubin, Production Manager Oscar Morales (Morales), and Machine Operator Juan Zamarripa (Zamarripa). At the time of the incident, Zamarripa was working in the same area as Garcia. On cross examination, Zamarripa testified that Garcia was

making a 45-degree cut on the machine at the time of the incident, and that there was nothing to stop an employee from putting his head in the path of the machine.

The Appeals Board has long held that if the Standards Board, by safety order, has decreed that employee protection against a particular hazard must be provided by means of positive guarding, then administrative policies do not substitute for mechanical protection. (*Bethlehem Steel Corp.,* Cal/OSHA App. 78-723, Decision After Reconsideration (Aug. 17, 1984); *City of Los Angeles, Dept. of Public Works,* Cal/OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986).) Operating the bridge saw requires the fabricator to stand in an area where there is nothing in place to physically prevent employees from coming closer to the point where they can be crushed and/or pinched. Employer argued that employees were told to stay away from the machine and that a sign near the machine said "do not come close to the machine". Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).)

Garcia's job required him to operate the machinery and he operated the machinery resulting in actual exposure to the hazard. (*Dynamic Construction Services, Inc., supra,* Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc., supra,* Cal/OSHA App. 00-2976.) There is employee exposure to the hazards created by the bridge saw with regard to crushing. The Division has met its burden of proof with regard to employee exposure due to the fact that at least one employee was exposed to the zone of danger, i.e., the area surrounding the ineffectively guarded bridge saw. Employer's argument fails because there is nothing preventing the employee from the exposure to injury. Employer did not provide any evidence to refute the Division's assertion that Garcia was exposed to the bridge saw.

c. Guarding

*"*Guarded*" is* defined in section 3941 as: "Shielded, fenced, enclosed or otherwise protected according to these orders, by means of suitable, enclosure guards, covers or casing guards, trough or "U" guards, standard railings or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact."

Here, employees can walk or stand adjacent to the bridge saw. There is nothing preventing accidental contact. This area is easily accessible, as depicted in the video (Exhibit I). Ofer Rubin testified that there is no way to guard the machine and this is well known in the industry. Employer's claim that it is industry practice not to guard the machines is not a defense. (*Ekedal Concrete Inc.,* Cal/OSHA App. 13-0131, Decision After Reconsideration (Mar. 28, 2016).) An Employer's recourse, if it believes it has a better, or at least as effective means of protection, or even if it believes compliance with a standard is impossible, is to seek a variance

from the California Occupational Safety and Health Standards Board. (*Ibid; Spencer & Son, Inc.,* Cal/OSHA App. 94-407, Decision After Reconsideration (May 10, 1999).)

2. Was the bridge saw guarded by location?

Nguyen testified that the bridge saw was not guarded by location or by the frame of the machine. Employer argued that the bridge saw was guarded by location.

"Guarded by location" is defined in section 3941 as: "The moving parts are so located by their remoteness from floor, platform, walkway, or other working level or by their location with reference to frame, foundation or structure as to remove the likelihood of accidental contact." For a machine to be guarded by location, the "likelihood of accidental contact with moving parts is removed by their remoteness," and decreasing the likeliness of accidental contact is not enough. (*EZ-Mix, Inc.,* Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013).) "Accidental contact" is defined in section 3941 as: "Inadvertent physical contact with power transmission equipment, prime movers, machines or machine parts which could result from slipping, falling, sliding, tripping or any other unplanned action or movement."

Employer argues that the bridge saw is "guarded by location" as defined in section 3941 and referenced in 4002, subdivision (a), so that Employer is in compliance with 4002(a). This argument fails because, for a machine to be guarded by location, the "likelihood of accidental contact with moving parts is removed by their remoteness," and decreasing the likeliness of accidental contact is not enough. (*Ray Products, Inc., supra,* Cal/OSHA App. 99-3169.)

Zamarripa testified that Garcia worked near the stone cutter all day for three months. On cross examination, Zamarripa testified that there is nothing to prevent employees such as Garcia from getting in the path between the machine and the wall. This testimony is credited.

Employer contends that the machine is guarded by location because employees are told to stay away from the machine and that employees are to be careful. When even a single employee has been assigned to work in an area that contains a hazard which the employee can make contact with, the employer cannot be said to be guarding by location; at the least, one employee is being assigned to regularly be exposed to the danger. (*American Microsystems, Inc.,* Cal/OSHA App. 76-858, Granting of Petition for Reconsideration and Decision After Reconsideration (Jun. 9, 1980); *Ray Products, Inc.* Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 20, 2002).) Garcia was not "removed from the likelihood of accidental contact" with the moving parts of the machine, given his daily work near the machine. Here, Garcia was in an area wherein he was daily exposed to danger and the area was not guarded by location.

Accordingly, because employees were exposed to the unguarded bridge saw, the Division has established a violation of section 4002 (a).

3. Did Employer establish that it was not responsible for the failure to guard violation based on the Independent Employee Action Defense?

Employer asserted that it is not liable for the violation alleged in Citation 3 based on the Independent Employee Action Defense (IEAD).

The IEAD is unavailable where the cited safety order requires protection against a particular hazard by means of positive guarding, since the purpose of a guard is to prevent inadvertent or accidental contact. (*Pierce Enterprises,* Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) Accordingly, the affirmative defense of independent employee action is not available to Employer, and Citation 3 is hereby sustained.

4. Did the Division establish a rebuttable presumption that the Citation was properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

Nguyen testified that failure to guard the bridge saw resulted in a realistic possibility that an employee may sustain serious physical harm, including broken bones and death. In the instant matter, Garcia suffered a head fracture and required inpatient hospitalization for treatment of the injuries. Garcia's injuries demonstrate that there was not only a realistic possibility of serious physical harm, but the violation resulted in actual serious physical harm.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 3 was properly classified as Serious.

5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

The violation at issue is the failure to guard the bridge saw. Zamarripa and Morales established that Garcia operated the bridge saw on a regular, consistent basis for approximately three months before the accident. This indicates a lack of procedures for discovering and correcting the hazard and lack of supervision of the employees to ensure that the bridge saw was appropriately guarded. At the time of the incident, Morales was Garcia's supervisor. Morales testified that his office was approximately 100 feet from where Garcia worked. The proximity of supervisory personnel to the bridge saw created a reasonable expectation that Employer would observe the machine's unsafe condition.

"Additionally, the Appeals Board has long held that unguarded machine parts in plain view constitute a serious hazard. A machine is in plain view if it is located in an employer's facility and is of sufficient size to be easily detectable and recognizable. (*Nolte Sheet Metal,* Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016). See also *National Steel and Shipbuilding Company,* Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014) ["hazardous conditions, plainly visible to the naked eye, constitute serious violations since the employer could have discovered them through reasonable diligence."].)" Here, Employer knew, or should have known with reasonable diligence, that employees worked in a manner that violated this safety order.

Accordingly, Employer cannot rebut the presumption that Citation 3 was properly classified as Serious based on a claim that it lacked knowledge of the violation that was regularly occurring.

6. Did the Division establish that Citation 3 was properly characterized as Accident-Related?

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." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The accident occurred because Garcia placed his head in the path of the operating head of the bridge saw as it was moving. If the area was guarded, Garcia would not have been able to put his head in the area and the injury would not have occurred.

Therefore, the failure to guard the bridge saw was more likely than not the cause of Garcia's injuries. Citation 3 was properly characterized as Accident-Related.

Conclusion

Employer violated section 4002, subdivision (a), because it failed to guard the bridge saw. The violation was properly classified as Serious and the Accident-Related characterization was appropriate.

Order

It is hereby ordered that Citation 3, Item 1, is affirmed and the penalty of $18,000 is sustained.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Jacqueline Jones

Dated: 06/16/2021

Jacqueline Jones
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.**