BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **KEY ENERGY** **5080 California Avenue, Suite 150** **Bakersfield, CA 93309** **Employer**	Inspection No. **1004280** **DECISION AFTER REMAND FROM SUPERIOR COURT**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and in accordance with the September 1, 2022 Order by the Sacramento County Superior Court, issues the following revised Decision After Remand From Superior Court.

JURISDICTION

Commencing on October 15, 2014 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Key Energy (Employer).

On March 20, 2015, the Division issued one citation to Employer alleging two general 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 contested evidentiary hearing. At the hearing the parties stipulated to the withdrawal of Item 1 of the citation. Item 2 remained at issue and was the subject of the hearing.

On November 10, 2016 the ALJ issued a Decision (Decision) which upheld the alleged violation and imposed a civil penalty.

Employer timely filed a petition for reconsideration, challenging the ALJ's findings as to whether the Division met its burden of proving the citations, as well as the ALJ's rejection of Employer's Independent Employee Action defense (IEAD).

The Division did not answer the petition.

On January 27, 2017, the Board issued a Decision denying Employer's Petition for Reconsideration (the Denial). In its Denial, the Board affirmed the ALJ's Decision on each issue of liability. However, the Denial did not address Employer's IEAD.

Employer timely petitioned the Sacramento County Superior Court for a writ of mandamus, asking the Court to set aside the Board's Denial. Employer argued that the Board's Denial erred in affirming the ALJ's Decision, and further erred by failing to address Employer's IEAD.

The Division and the Board opposed Employer's writ petition.

In September 2022, following briefing and oral argument, the Sacramento Superior Court entered an order that generally upheld the Board's denial, and denied Employer's writ petition in all but one respect. Specifically, the Court granted that portion of Key Energy's writ petition regarding Employer's IEAD, ordering the Board to issue a revised decision that addresses Key Energy's IEAD arguments.

ISSUES

1. Does the record support the ALJ's Decision finding Employer failed to establish the IEAD?

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 asserts that the Decision was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision. (Petition, p. 5.)

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 a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

FINDINGS OF FACT

1. One of Employer's employees suffered a serious injury while working for Employer on an oil well service rig in California.
2. The injured employee's hand was drawn into a rotating gear that was part of a device called a "rod tong" which the employee was using at the time. The injury resulted in amputation of one of the employee's fingertips.

3. The rod tong had two guards which were intended to close automatically and thereby protect the employee using the tong from coming into contact with the rotating gear.
4. The accident at issue occurred because one of the guards did not close automatically, and the employee's hand was drawn into the mechanism when he attempted to close it manually.
5. Subsequent inspection showed that a bolt had fallen out of the bottom of the guard, causing it to malfunction.
6. Employer did not inspect the tong after transporting it to the accident site or during the employee's use prior to the accident.
7. Although a search for it was made at the accident site, the bolt was not found.
8. Employer did not establish that it "has a well-devised safety program" with respect to employees' use of rod tongs.
9. Employer did not establish that it enforces a policy of sanctions against employees who violate the safety program.
10. Employer did not establish that its employee (Mendoza) caused the safety infraction in question—i.e., the failure to *maintain* the rod tong guard doors—by violating Employer's policy against *touching* the rod tongs guard doors.

DISCUSSION

1. Did Key Energy meet its burden to establish all five elements of the IEAD?

The IEAD is an affirmative defense that requires the employer to prove five elements:

> (1) The employee was experienced in the job being performed;
> (2) The employer has a well-devised safety program;
> (3) The employer effectively enforces the safety program;
> (4) The employer has a policy of sanctions which it enforces against employees who violate the safety program; and
> (5) The employee caused the safety violation which he knew was contrary to employer's safety rules.

(*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

In his Decision, ALJ Chernin rejected Employer's IEAD. However, rather than reviewing whether Employer established each element of the IEAD, ALJ Chernin held that the IEAD does not apply to this case, noting that "[w]here positive guarding is required, the Board has held the [IEAD] does not excuse an employer's failure to provide required guarding." (Decision, p. 10 [citing *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002)], *City of Los Angeles Department of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986), and *Kaiser Aluminum and Chemical Corp*., Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985)].) While acknowledging that section 3328, subdivision (g), does not specifically mention guarding, the ALJ noted that the rod tongs are not safe unless its guard doors are functioning properly. (*Id.*, pp. 10-11.) However, the guard doors

were not functioning properly here, and Employer failed to prevent Mendoza from using the rod tong with a broken guard door. (*Id*., p. 11.) To attribute that failure to Mendoza would be tantamount to delegating to Mendoza responsibility for the safety of rod tongs. (*Id*.) Therefore, the ALJ found, the IEAD was unavailable to Employer.

However, even if we assume the ALJ erred in finding that the IEAD does not apply here—a question we do not reach, as it is unnecessary—the IEAD would remain unavailable to Employer. For reasons set forth below, Employer failed to establish four of five elements of the IEAD.

Element 1: Was the employee experienced in the job being performed?

The first element of the IEAD is typically satisfied when an employer shows that the employee in question had sufficient experience performing the work involved in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 11-2801, Decision After Reconsideration (February 4, 2011.)) Generally, the Board has found this element to be satisfied upon proof that the worker had done the specific task "enough times in the past to become reasonably proficient." (*Solar Turbines, Inc.*, Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).) Employer argued that Mendoza had nine years of experience operating rod tongs. Employer also noted that Mendoza used the rod tongs in question nearly every day that he worked. (Petition for Reconsideration, p. 12.) The Division did not dispute, and therefore concedes, that Employer established this element.

Element 2: Did Employer have a well devised safety program in place?

In support of this element, Employer presented evidence that: (i) it has a well-devised safety program generally; (ii) its safety program specifically includes training on the safe use of rod tongs, including the prohibition on touching rod tong doors while they are in operation and ceasing operations if the rod tong doors malfunction; and (iii) Mendoza received that rod tong safety training. (Petition for Reconsideration, pp. 12-13.)

In response, the Division argues that Employer's approach to inspecting the rod tongs was ineffective, because that approach did not identify the issue (the missing bolt) that resulted in the malfunction and caused Mendoza's injury. (Post-hearing Brief, pp. 6-7.)

The Board finds that Employer failed to establish the second element. The crux of this case, and the basis for the Board's affirming a violation under section 3328, subdivision (g), is that Employer's safety policies and procedures did not require ongoing inspection of rod tongs throughout each shift. Employer's own witnesses admitted such ongoing inspections were necessary to ensure safe operation of the rod tongs. (*See* Hearing Transcript (Tr.), 220:6-19; 264:2-10; Tr., 266:4-267:3 [rod tongs should be inspected not just at the beginning of the shift, but "[e]very time you use them"].) Since compliance with Employer's safety policies could not ensure the safe operation of the rod tongs, the Board declines to find that Employer established that it "has a well-devised safety program" for purposes of the IEAD's second element.

Element 3: Did Key Energy effectively enforce its safety program?

Under the third element, Employer has the burden to show that it effectively enforces its safety programs. "Enforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), quoting *Martinez Steel Corp*., Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) The Board has found that where there is lax enforcement of safety polices, an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010).)

Here, Employer argues that it effectively enforces its safety program through regular safety audits and employee monitoring for compliance with Employer's safety policies. (Petition for Reconsideration, pp. 12-13.) Employer also asserts that its safety engineers regularly observe employees in the field, and correct employees who perform a task incorrectly or unsafely. (*Ibid*.) In response, the Division states that Employer's safety program was "not properly designed to identify unsafe rod tongs." (Post-hearing Brief, p. 7.)

However, even assuming that Employer's safety program was adequate, it was not effectively enforced. Employer's Rig Supervisor testified that daily inspections of rod tongs would be insufficient, and that they should be inspected not just at the beginning of the shift, but "[e]very time you use them." (Tr., 264:2-10; 266:4-267:3.) Yet Employer offered no written documentation that it required employees to conduct such regular inspection. Despite knowing that even daily inspections were inadequate, Employer introduced no evidence that it trained or required employees to continue inspecting the rod tongs while in use. Indeed, Mendoza testified that he was not trained or encouraged to comply with any daily inspection requirement, much less an inspection prior to each use of the tongs. (*See* Tr., 183:22-184:2 [Mendoza: "if I don't want to check it I don't inspect it" and, when he did, he was "not looking for bolts"].)

Accordingly, Employer failed to establish the third element of the IEAD.

Element 4: Did Key Energy enforce a policy of sanctions against employees who violate its safety program rules?

The fourth element of the IEAD requires the employer to show that it enforces a policy of sanctions against employees who violate its safety program (including verbal coaching, retraining efforts, or positive recognition of employees who follow safe and healthful work practices) to ensure compliance, rather than simple written discipline or other punitive measures. (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.)

Here, Employer argues that it maintains a discipline policy for employees who violate its safety rules. (Petition for Reconsideration, pp. 12-13.) Employer notes that Mendoza confirmed receipt of that policy, and had previously been disciplined for an unrelated violation (hammering without a face shield) in 2013. (*Id*.)

However, as the Division notes, Employer's incident investigation found that Mendoza was at fault for the accident because he failed to stop working as soon as he determined the rod tong doors were broken, in violation of the "Stop Work Authority" provisions of the Key Employee Safety Handbook. (Post-hearing Brief, p. 7.) Despite this, Employer did not impose any sanctions or other discipline against Mendoza, nor is there any evidence Employer provided him with verbal

coaching or retraining efforts, following his apparent violation of Employer's rules. (Tr., 111:21-23; 192:9-12.) Further, Employer did not offer any evidence or argument that it could not discipline or coach Mendoza for his apparent violation of Employer's rules. (*See*, *e.g.*, *Jafec USA, Inc*., Cal/OSHA App. 1290383, Decision After Reconsideration (June 2, 2021) [the Board "assume[d] without deciding that the fourth element is satisfied" because the employer justified its failure to discipline an employee because it "would have been accused of retaliation."].)

The Board does not mean to suggest that the IEAD requires an employer to punish an employee injured by a workplace accident caused by the employee's rule violation. However, in the absence of evidence that Employer did anything to address Mendoza's apparent rule violation, the Board cannot find that Employer established that it "has a policy of sanctions which it enforces against employees who violate the safety program." (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.)

Element 5: Did Employer show that Mendoza caused the safety violation that he knew was contrary to Employer's safety rules?

To satisfy the fifth element, Employer must show that Mendoza's actions were "intentional and knowing, as opposed to inadvertent." (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.) Employer argues that Mendoza "knew that he was not supposed to touch the door of the tongs." (Petition for Reconsideration, pp. 13-14.) Further, Employer argues that Mendoza knew touching the doors after seeing they were not closing automatically was against Employer's safety rules (specifically, the "Stop Work Authority" provisions of the Key Employee Safety Handbook). As Employer notes, Mendoza testified that under Employer's policy, he was not supposed to touch the doors if they appear to be malfunctioning. (Tr., 191:11-13.)

However, Mendoza also testified that he did not think he was doing anything wrong, because he was trying to hit the side of the rod tongs to cause the door to close. (Tr., 192:16-25.) Further, Mendoza testified that he did not know if any documented rule prohibited him from attempting to close the doors on the rod tongs. (*Id*., 112:13-16.) Additionally, during the inspection, Mendoza told the Division inspector that he did not believe his actions were against Employer's safety policy, and that his actions were "more of a reaction to the [rod tongs'] door being open and an attempt to close the door." (Post-hearing Brief, p. 7.) While Mendoza later testified that Key Energy's policy was that "you're not supposed to touch the [guard] doors," the Division emphasizes that Mendoza's actions and words, at the time of the accident, "were not consistent with [knowing] he was acting contra to the employer's safety requirement." (*Ibid*.) For this reason alone, the Board finds that Employer failed to establish the fifth element.

Separately, Employer's argument misses the point of the IEAD. Even if Mendoza deliberately violated a specific policy against touching the rod tongs' guard doors, he still did not "cause the safety infraction" in question. Here, the Division cited Employer for its failure to maintain the rod tongs in safe operating condition while in use, in violation of section 3328, subdivision (g). The citation did not allege an "Accident-Related" violation, and Employer does not argue that Mendoza somehow caused a maintenance failure by attempting to close the guard door. Even if Mendoza willfully disregarded Employer's policy regarding touching the rod tong doors, Employer still failed to maintain the rod tongs in safe operating condition.

Thus, Employer also failed to establish the fifth element of the IEAD.

DECISION

For the reasons stated, Employer's Petition for Reconsideration is denied.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

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