BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: C.A. RASMUSSEN, INC. 28548 Livingston Avenue Simi Valley, CA 93063 Employer	Docket No(s). 08-R4D5-0219 and 0220 **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 taken this matter under reconsideration, renders the following decision after reconsideration.

JURISDICTION

On January 8, 2008, the Division of Occupational Safety and Health (Division) issued two citations to C.A. Rasmussen, Inc., (Employer) alleging two violations of the Occupational Safety and Health Standards contained in Title 8 of the California Code of Regulations[1]. Citation 1, Item 1, alleged a violation of section 3314(g)(2)(A) [inadequate hazardous energy control procedures] and Citation 2, Item 1, alleged a violation of section 4002(a) [failure to guard moving parts of machinery from accidental contact]. Employer timely appealed both citations, and a hearing was held on September 25, 2008, before an Administrative Law Judge (ALJ) of the Appeals Board.

The Division evidence consisted of various documents and the testimony of the Division inspector. Employer neither cross-examined the witness nor provided any evidence in support of its various defenses, or to refute the evidence presented by the Division. The ALJ asked no questions of the witness during the hearing. A Decision was issued affirming the violation in Citation 1, Item 1, but imposing a penalty of $50.00 rather than the proposed penalty of $750.00. Regarding Citation 2, the Decision summarily concluded no competent evidence was presented by the Division to show the safety order applied, or how the accident occurred, or the injured employee's regular job

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

duties. The Decision states "most of the evidence was hearsay" and on these grounds granted Employer's appeal as to Citation 2.

The Division filed a timely Petition for Reconsideration addressing the penalty calculation for Citation 1, and the finding of no violation regarding Citation 2. Employer answered, and did not raise the issue of whether the violation alleged in citation one was properly upheld. Thus, the propriety of upholding the violation alleged in Citation 1 is not before us.

The penalty calculation for Citation 1, however, has been properly raised by the Division. The record contains sufficient evident to support a penalty of $260.00 after recalculation, and we thus affirm the decision in so far as it concludes the Division established the violation of section 3314(g)(2)(A), and impose the penalty of $260.00.

We also conclude there is sufficient competent evidence on all elements of the violation alleged in Citation 2, including the classification of Serious, and we thus reverse the ALJ and deny Employer's appeal.

EVIDENCE

Associate Safety Engineer Arsen Sanasaryan testified for the Division. He explained he contacted Employer and was put in touch with Mr. Ptolomy, the maintenance supervisor for Employer. Mr. Ptolomy explained to Sanasaryan that the accident occurred when a maintenance employee, Mr. Holguin, was assigned to replace a non-working starter mechanism on a crane owned and operated by Employer. This crane was identified by Mr. Ptolomy, and Mr. Ptolomy directed Mr. Sanasaryan to present himself at the yard where the equipment was stored and to inspect the equipment personally, which Mr. Sanasaryan later did.

Mr. Ptolomy explained employee Holguin suffered an amputation of part of his middle finger when he reached in to the engine compartment of the crane and manually started the engine in the course of performing the assigned starter repair. Mr. Sanasaryan referred to this maneuver by Mr. Holguin as "jump starting" the engine. In the course of reaching in to the engine compartment and starting the engine in this fashion, the fan blades began turning. They were not guarded, and Mr. Holguin's hand came in contact with the blade.

Mr. Sanasaryan took photographs of the crane Mr. Ptolomy indicated was the crane involved in the injury. Mr. Sanasaryan stated the photographs and the configuration of the engine compartment corroborated, for him, the explanation of events relayed by supervisor Ptolomy.

Mr. Sanasaryan also testified that he asked Mr. Ptolomy whether the crane had a specific lock out / tag out plan, or a hazardous energy control

plan. Mr. Ptolomy stated Employer had no such plan. Later, Mr. Sanasaryan requested documents, including the hazardous energy control plan or lock out / tag out plan specific to the crane involved in the accident, and none was received, which confirmed the previous statement of Mr. Ptolomy that none existed. A generic lock out / tag out procedure was submitted to the Division, but not any equipment-specific plans.

The parties stipulated that "if an employee were to stick his hand in to a moving fan blade there would be a substantial probability of serious injury." Mr. Sanasaryan also testified that he had investigated one other incident where a hand was struck by similar circular moving blades as existed on the crane, and the result was also amputation. In his training and education he has studied and reviewed the injurious effects of unguarded fan blades, and he was of the opinion that the likely result of injury caused by contact with unguarded fan blades would be amputation.

The employee involved in this accident, Mr. Holguin, suffered a partial amputation of a finger, according to information relayed by Mr. Ptolomy, which was corroborated by the employee, with whom Mr. Sanasaryan also spoke during the course of the investigation of this incident.

Regarding penalty considerations, Mr. Sanasaryan testified he rated the severity of Citation 1 as high, and the extent and likelihood as medium. There was no evidence presented regarding employer's history, or whether Employer had an effective Injury and Illness Prevention Program other than the penalty worksheet, which was submitted in to evidence after Mr. Sanasaryan identified the document as being prepared by him, which he believed it to be accurate. It reflects that Employer had over 100 employees.

ISSUES

1. What is the correct penalty calculation for Citation 1, Item 1?

2. Does the record contain sufficient evidence to establish the violation and penalty assessed in Citation 2, Item 1?

DECISION

1. <u>The correct penalty for the violation of section 3314(g)(2)(a) is $260.00.</u>

The Director's regulations implement the penalty scheme of the OSH Act contained in Labor Code sections 6319 and 6317, sections 6427 through 6430, and other sections not relevant here. Section 336(b) of the Director's regulations describes the appropriate considerations for assessing the gravity portion of the penalty for a violation classified as General. Section 336(d) then

provides that this gravity-based penalty shall be further adjusted depending on the size, good faith and history of the employer. In sum, the gravity-based penalty considers, for the most part, the specific violation. The section 336(d) adjustments consider, for the most part, other aspects of an employer's operation.

First, we determine the proper amount for the gravity-base of the penalty. The gravity-base of a General violation is determined by considering the severity, extent and likelihood of the particular violation. (§ 336(b).) The severity is determined by the amount of medical treatment required as a result of an accident or likely accident resulting from the violation. (§ 335(a)(1)(A).) Here, the division inspector rated the severity as high, which is defined as "Requiring more than 24 hours of hospitalization." However, there was no evidence in the record as to the length of time the employee spent in the hospital for these wounds. Previously, the Board has concluded that if the Division fails to prove up all of the facts supporting the implementation of the penalty calculation, the employer is to be given maximum credit. (*Gal Concrete Construction Inc.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sep. 27, 1990); *Puritan Ice Company*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003).)

Here, the Division has failed to show the Severity is properly determined to be "High." Recalculating the severity to "Low" in this case is also inappropriate given the evidence. The Low severity rating is only proper when the injury or likely injury results in a need for "first-aid only." However, the occurrence of an amputated portion of the middle finger supports the reasonable inference that treatment beyond first aid was required. Thus, the record supports the conclusion that the Severity portion of the gravity based penalty is "Medium-requiring medical attention but not more than 24 hour hospitalization." (§335(a)(1)(A)(ii).)

The Medium severity penalty is $1500.00. (§336(b).)

The severity-based penalty is then modified for the factors of Extent and Likelihood. (§336(b).) The Division inspector rated both at medium for the failure to have a hazardous energy control plan specific to the crane. Medium Extent is defined as follows:

> When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as: LOW- When an isolated violation of the standard occurs, or less than 15% of the units are in violation. MEDIUM – When an

> occasional violation of the standard occurs or 15-50% of the units are in violation. HIGH-When numerous violations of the standard occur, or more than 50% of the units are in violation.

When the Division inspector asked Mr. Ptolomy for the hazardous energy control plan for the crane, he was told there was not a specific plan for the crane. In a document request, a general lockout-tagout plan was provided, which was not specific to this crane or any other piece of equipment. When the Division inspector arrived at the yard, as instructed by Mr. Ptolomy, he observed many pieces of heavy equipment in a large yard. This is the only evidence in the record relevant to the Extent considerations regarding how widespread the violation is of failing to have a machine-specific hazardous energy control plan in place. For this piece of equipment, not having a plan constitutes a violation for 100% of employees working on the equipment. There is no evidence of how many other pieces of equipment also lacked a hazardous energy control plan. The inference that Employer implements a one-size-fits-all approach to hazardous energy control arises from the submission of a generic plan in response to the Division's request for the equipment-specific plan. Thus there is some evidence that the number of violations resulting from use of a generic plan in lieu of equipment-specific plans is more than an isolated violation. The extent was rated by the Inspector as Medium. Since there is some evidence in the record that supports that estimate, and none to refute it, we affirm the inspector's estimate that the Extent of the violation is Medium.

The Inspector also rated Likelihood as Medium.

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics, or records. Depending on the above two criteria, Likelihood is rated as: LOW, MEDIUM OR HIGH.

Likelihood requires some evidence of the number of employees exposed to the hazard of non-machine-specific hazardous energy control plans. The record shows one employee was exposed, and supports the inference that more were, since the yard observed by the inspector has many pieces of equipment in it. But selecting any number of employees other than one, to show the number actually exposed, would be speculation given the scant record.

The other required component of Likelihood is the extent to which this violation has caused injury at either this employer, or in industry in general given the inspector's experience, available statistics, or records. There is no evidence in the record regarding prior similar injury events at Employer, so the

scope or extent thereof is not in evidence. In terms of the extent, or scope or range of injuries throughout industry generally, resulting from this violation, the inspector testified he has studied the effects of unguarded fan blades on human body parts that make contact with such moving parts. He has investigated one such injury in the past, and the injury was an amputation. The record supports the conclusion that amputations result, but "extent" here does not mean result. It refers to the scope or prevalence or frequency or pervasiveness of injuries as a result of failing to have a machine-specific hazardous energy control plan. Some statistical information regarding the frequency of injuries associated with this violation needs to be in the evidence. We infer violations throughout the industry are sufficiently prevalent to require a rule, but this does not inform whether the rate of occurrence of injury is of high, medium, or low likelihood. Thus, we assign the Low Likelihood rating.

When the Likelihood factor of the penalty calculation is low, 25% of the base penalty is subtracted.

The gravity-based penalty is achieved here by modifying the $1500.00 Severity rating by the Medium Extent rating, which results in no modification of the Severity penalty, and modifying for LOW Likelihood, which requires a reduction of 25% of the base penalty. $1500.00 less $375.00 gives a gravity based penalty of $1125.00. The size of the Employer is large, and no adjustment for size is thus allowed. (§ 336(d).) However, there is no evidence of Employer's history or good faith, and thus Employer is given maximum credit. (*Gal Concrete Contractors*, *supra*.) In accordance with section 336(d)(2) and (3), additional 40% reduction is appropriate. (Reduction of an additional $600.) The resulting $525.00 penalty receives an automatic 50% reduction for the abatement credit. (§ 336(e).) The penalty is $260.00.[2]

2. <u>There is sufficient evidence in the record to establish the violation of section 4002(a) as well as the serious classification.</u>

For Citation 2, Employer was charged with a violation of California Code of Regulations, Title 8, Section 4002(a). This safety order 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."

The citation charged the following facts established a violation: "On September 24, 2007 an employee's right middle finger was amputated by

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[2] 50% of 575.00 is $262.50. Division practice is to round down to the next five dollar increment, and we do so here to align this penalty with practices of the Division and its accounting procedures.

unguarded fan blades of the Lorain LRT 2300M crane while employee was jump starting the engine of the crane."

The evidence presented was that a part of a machine, specifically the fan of the motor of the LRT 2300M crane, struck the employee's fingers as he withdrew his hand from the motor compartment of the crane after manually starting the engine. The injured employee was assigned to repair the starter mechanism on the crane. Reaching in to the engine compartment to start the motor was part of the assigned work. No guard surrounded the fan portion of the machinery so as to prevent inadvertent contact of an employee's hand. The starter override mechanism was located inside the engine compartment, and its use necessarily brought anyone using it in to the zone of danger of the unguarded fan.

This evidence was provided by the testimony of the safety inspector. He obtained his information from Mr. Ptolomy. Mr. Ptolomy was put in contact with the inspector by Employer, and provided nearly all the information Employer gave the Division in the course of the investigation. The inspector testified he obtained information from the injured worker, and another employee of employer. Specifically, an unnamed individual was at the storage yard where Mr. Ptolomy instructed the inspector go in order to inspect the subject crane. This other employee showed the inspector the crane identified by Mr. Ptolomy.

The inspector has a duty to identify the supervisor or management representative at the outset of the inspection. (Labor Code § 6314.) Evidence Code section 664 creates a presumption that an official duty has been done or undertaken correctly, though this presumption may be overcome with evidence of error or impropriety in fulfilling that duty. Here, the record shows inspector Sanarayan contacted the Employer and was put in touch with Mr. Ptolomy who identified himself as the maintenance supervisor. In the absence of any evidence to the contrary, we presume the duty to identify the supervisor was properly fulfilled, and that Mr. Ptolomy was the supervisor authorized by Employer to speak on its behalf. As such, the statements received from Mr. Ptolomy are considered admissions by the Employer, through its representative, and fall within a well establish exception to the hearsay rule. (Evidence Code § 1222[authorized admissions].)

Our rules allow hearsay evidence to be admitted in to the record, and only proscribe the use of such evidence in circumstances not applicable here. Specifically, section 376.2 states:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statute that might make

> improper the admission of such evidence over objection in civil action. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

All of the information relayed to the inspector by Mr. Ptolomy falls within the authorized admission exception, and is sufficient to establish the violation. That evidence establishes an employee was assigned work that required reaching in to the engine compartment of a crane where he came in to contact with moving fan blades that were not guarded, and suffered an amputation injury. Such evidence is not made inadmissible by the hearsay rule, and establishes the violation. Adding to the reliability of this evidence, Mr. Ptolomy's statements were corroborated by the statements made by the injured worker to the inspector, which, though hearsay, are relevant and thus admissible. (§376.2.) Employer did not rebut the evidence and the violation is therefore established. (See Evidence Code § 413 [failure of a party to testify and defend against evidence entered against him may be used to support inference against party]; *Gaehwiler v. Occupational safety and Health Appeals board* (1983) 141 Cal.App.3d 1041 [where no contrary evidence is offered, mere fact that power line was marked "high voltage" was sufficient to sustain finding that line was energized]; *Joseph v. Drew* (1950) 36 Cal.2d 575, 579.)

The Decision did not include this necessary analysis. It states "most of the evidence submitted was hearsay." This is true, except that most of it also falls within the recognized exception to the hearsay rule and should have been considered.[3]

The Decision further misconstrues the requirements of the safety order by requiring the Division to show how the rotating part of the machine was not "guarded by location." The Decision concludes a person would have to climb up on a wheel to access the engine compartment, and that an employee may

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[3] The Decision states: "Exhibit 5-2 shows that the fan blades were unguarded. Nonetheless, insufficient competent evidence was adduced at hearing to demonstrate the applicability of the § 4002(a) to this regrettable situation. There was no competent evidence to demonstrate how the accident occurred, or indeed what Holguin's regular job duties encompassed. Most of the evidence adduced at trial was hearsay. There is no medical report, no accident report, no Employer's first report of injury, not even an investigation report or the investigator's notes." These statements are each either incorrect or irrelevant to the analysis. The ALJ asked no clarifying questions of the division witness, though she could have if she felt Holguin's job duties or an investigation report were relevant to the factual matters before her, or if there was any question as to the competency of the Division inspector's description of the injury and the extent of those injuries as told him by Employer's representative. Medical reports, job descriptions, investigation reports, and first reports of injury are only supplementary evidence, and the Division's case does not fail because they are omitted. Such "missing" items certainly provide no basis to justify failing to address the competent evidence which was provided, most of which fell in to a well-recognized exception to the hearsay rule, and described how the accident occurred, and how the rotating parts of a machine were unguarded, which contravened of the safety order which applies to all rotating parts of machines.

have to use a pair of pliers to reach the starter. Neither of these have any relevance to whether or not a rotating part of a machine is 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." Remoteness is determined by examining the moving part with reference to the frame. Here, although the moving fan blades may have been reached by a worker only if he climbed the machine and reached in to it, he had to reach in to it to perform his repair work. The moving parts were not remote from the working level.

Here, the height of the work area being off the ground appears to have confused the ALJ, but the height of the work area alone does not determine whether a rotating machine part is guarded by location. (See *All American Asphalt*, Cal/OSHA App. 09-3872, Denial of Petition for Reconsideration (Jan. 11, 2011).) The violation of section 4002(a) is established.

The violation of section 4002(a) was classified as serious. A serious classification is established by evidence showing a substantial probability of serious physical harm resulting from an accident assumed to occur as a result of the violation. (Labor Code § 6432[4]; *Abatti Farms/Produce,* Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985).) The parties stipulated that "if an employee were to stick his hand in to a moving fan blade there would be a substantial probability of serious injury." A stipulation satisfies the evidentiary burden and establishes the facts contained therein. (*Jaguar Farm Labor Contracting, Inc.*, Cal/OSHA App. 09-1136, Denial of Petition for Reconsideration (Oct. 6, 2010).) We assume the accident resulting from lack of guarding is contact with the unguarded component, which here was a fan blade. The substantially probable result of such accident is stipulated to be serious injury. Thus, the classification of the violation as serious is established.

The Division proposed a penalty of $18,000.00 for the violation of section 4002(a). (Labor Code § 6319(c); § 336(c).) When a serious violation causes a serious injury, the only adjustment to the penalty may be for size. Here, employer had 100-plus employees, according to the penalty calculation worksheet entered in to evidence and authenticated by the inspector. Subsection (c)(3) of section 336 does not prohibit increasing the base penalty of $18,000 when a serious violation causes serious injury. Subsection 336(c) allows an increase of the base penalty for Extent and Likelihood. If Extent is HIGH, "25% of the Base Penalty shall be added." Extent is determined by the degree to which a safety order is violated. (§ 335(A)(2).)

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[4] We apply the Labor Code provision in effect at the time of the violation.

The record contains evidence that at least one employee was exposed to this hazard, and we can reasonably infer that starter motors or other mechanical components of engines may fail and necessitate reaching in to an engine compartment where fan blades lack a guard. However, we would have to speculate on the number of such instances that have occurred in the past, and how many employees have been exposed there to, which we may not do. (*Trimm's Scaffolding*, Cal/OSHA App. 00-4146, Decision After Reconsideration (Dec. 3, 2004).) Thus, no evidence supports an increase in the base penalty due to Extent.

Penalties may be increased if the Likelihood of the injury is high. Subsection (a)(3) of section 335 defines Likelihood as a function of both the number of exposed employees, as well as the number of prior incidents at this employer or in industry in general. Here, we know of the total number of employees (over 100) but we have no information on how many of them encounter the hazard shown in Citation 2, Item 1, or have sustained similar injury. Thus, no increases in the penalty are supported by the record for either Extent or Likelihood. The proposed penalty of $18,000 is appropriate under the operative regulations and is affirmed.

ART R. CARTER, Chairman
ED LOWRY, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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