

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CORREA PALLET, INC.

13036 Avenue 76

Pixley, CA 93256

Employer

**DOCKETS 12-R2D5-2157
and 2158**

DECISION

Background and Jurisdictional Information

Correa Pallet, Inc., (Employer) is a company that refurbishes pallets. Beginning April 24, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer, Ronald Chun conducted an accident inspection at a place of employment maintained by Employer at 13036 Avenue 76, Pixley, California (work site). On July 12, 2012, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹:

<u>Citation Item</u>	<u>Alleged Violation</u>	<u>Type</u>	<u>Penalty</u>
1-1	342(a) [Failure to report a serious Injury]	Regulatory	\$5,000
2-1	4184(a) [Failure to ensure band saw was guarded at the point of operation]	Serious	\$16,200

This matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on November 6, 2013. Martin Correa, Sr., Employer's owner, represented Employer. William Cregar, Staff Counsel, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on November 6, 2013. ALJ Hill-Williams extended the submission date to January 12, 2014.

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

Law and Motion

At the hearing, the Division moved, without objection, to amend Citation 2.1 to correct the alleged "Violative Condition" which incorrectly dated the alleged violation to have occurred on "03/09/2012" rather than "03/19/12" due to a clerical error. The motion to amend the date to "03/19/2012" was granted by ALJ Hill-Williams.

Employer limited its appeal to the specific grounds that abatement changes were unreasonable for Citations 1 and 2. Employer did not appeal any other grounds.

ALJ Hill-Williams further explained that Employer could make a plea of financial hardship and request a monthly payment plan if any violations were sustained and penalties were assessed.

Docket 12-R2D5-2157

Citation 1, Item 1, Section 342(a), Regulatory

Summary of Evidence

Employer was cited by the Division for failing to immediately report a serious injury of an employee that occurred at the work site to the Fresno District Office of the Division. The Division further alleged that an employee sustained partial amputations of his third and fourth right finger digits as he was operating the Lenox horizontal band saw pallet dismantler.

Testimony of Carlos Hernandez

Carlos Hernandez (Hernandez), a former employee, testified that he was employed by Employer when he was injured at the work site on March 19, 2012. Hernandez was working on a pallet dismantler, when he was injured. Hernandez had worked on the dismantler at the work site for approximately six months before the accident occurred. Hernandez was trained to operate the pallet dismantler. He testified that the pallet dismantling process is initiated by placing the pallet/board (2 by 4)² on a metal surface with an operator's hands within an inch of the blade. When the pallet is cut, the operator's hand is on the pallet to position the pallet close to the band saw's blade. Hernandez was instructed to place the pallet on the metal table and to make certain the pallet and the blade were pulled toward him. The procedure he followed in operating the band saw on the day of the accident was the only procedure he was taught by Employer.

On March 19, 2012, Hernandez's work day started at 7:00 a.m. Hernandez testified that Employer did not conduct a prior inspection of the machine and does not make prior inspections before the workers begin

² A plank commonly used in construction measures two feet by four feet in diameter.

working; workers must notify someone in maintenance if there is a problem with a machine.

Hernandez testified that the accident occurred when a pallet flipped over his hand, which was close to the blade and became caught in the machine, amputating his third and fourth fingers. Hernandez knew the dismantler had a start and stop button, but he did not know if the dismantler had a “kill” (emergency) switch. As a result of his injuries, Hernandez was hospitalized for two to three days.

Testimony of Ronald Chun

Ronald Chun (Chun) has been employed by the Division for seven years as an associate safety engineer. Chun conducted an accident investigation at the work site on April 24, 2012. Since beginning employment with the Division, Chun has conducted numerous complaint inspections and accident investigations for injuries occurring to employees at work sites. Chun has a Bachelor of Science Degree in information technology. He has worked for a safety company in Madera, California for six and a half years as a safety coordinator. Chun has also worked for Georgia Pacific as a safety coordinator from May 2000 to January 2007, where he was responsible for all of the company’s safety concerns. Georgia Pacific used band saws in its maintenance department to cut metal parts to be fabricated onto machines. Chun testified that he is current with the Division’s required training. During his employment with the Division he has conducted accident investigations that resulted in employee finger amputations as a result of band saw operations.

At the hearing Chun identified Exhibit 2, an accident report that was called into the Division’s office regarding the injury accident that occurred at the work site. The accident report was transcribed onto the Division’s “Form 36”. The accident report indicated the accident was called in on March 20, 2012³, by Employer reporting an accident that occurred on March 19, 2012. Chun also identified Exhibit 3, the Employer’s supervisor’s report of the March 19, 2012 accident that Chun requested from Employer during his investigation.

Chun testified that a violation of section 342(a) could have been abated by Employer implementing procedures and training employees to report serious injuries that occur at the work site within eight hours.

Findings and Reasons for Decision

The Division established a violation of Section 342(a) by operation of law.

The abatement required changes are reasonable.

³ Pursuant to Exhibit 2- showing Employer reported the serious accident on March 20, 2012, one day after the injury occurred on March 19, 2012, the violation of section 342(a) is deemed a late report and not a failure to report.

ALJ determined Employer made a late report of a serious injury and reduced the penalty based upon size, good faith and history credits.

Employer was cited under section 342(a) which reads as follows:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but not longer than eight hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

Normally, the Division has the burden of proving each element of its case by a preponderance of the evidence. (*Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) However, an issue may be waived (See section 361.3 (“Issues on Appeal”) and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) Here, Employer’s appeal of Citation 1 challenges only the specific ground that abatement changes were unreasonable. Employer did not contest the existence of the violation, classification or reasonableness of the penalty at the hearing. Hence, those issues are waived and the violation alleged in Citation 1 is established by operation of law and the employer is precluded from contesting the violation thereafter. (*Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (July 19, 2000); *Closets Unlimited*, (Cal/OSHA App. 92-427, Decision After Reconsideration (Nov. 2, 1994); and *Lloyd W. Aubry Engineer Co., Inc.*, Cal/OSHA App. 79-251, Decision After Reconsideration (May 28, 1982).)

Here the abatement requirement is clear. In abating Employer’s late report of the serious accident, Employer must implement procedures and train employees to report serious injuries that occur at the work site within eight hours. Employer did not present any evidence regarding the abatement of the violation at the hearing.

In *Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012) the Board held that where a serious injury is reported late under section 342(a) the Board has the authority

pursuant to Labor Code section 6602⁴ to modify the \$5,000 penalty proposed by the Division for size, good faith and history. Pursuant to *Central Valley Engineering & Asphalt*, the \$5,000 penalty originally proposed exceeds the levels necessary to accomplish the objectives of the Cal/OSHA Act and to encourage future Employer compliance, under the principles enunciated in *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006), *Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012) and *Distribution Center Management Group*, Cal/OSHA 11-2896, Decision After Reconsideration (Dec. 26, 2012).

The Employer called into the Division on March 20, 2012 reporting (See Exhibit 2) Hernandez's serious injury which occurred on March 19, 2012. The accident report reflects that Employer had 70 employees. The Division gave Employer 10 percent size credit, 15 percent good faith, and 10 percent history credit in its penalty worksheet (See Exhibit 1). A reasonable penalty, considering Employer's size, good faith and history, hereby assessed, is \$3,250.

Docket 12-R2D5-2158

Citation 2, Section 4184(a), Serious, Accident Related

Testimony of Ronald Chun

Before beginning the inspection Chun held an opening conference with Employer's manager. Employer's management staff showed him where the accident occurred. Chun took photos of the machine, a "Lenox Pallet Dismantling Horizontal Band Saw" that the employee was operating when the accident occurred on March 19, 2012 (See Exhibit 4A and 4B). The dismantler, also known as a pallet dismantler, has a band saw that cuts parts of pallets. The blade of the band saw is toward the front of the machine on top of a metal table with a metallic white strip across the table⁵. The teeth on the blade face away from the viewer/operator. When the machine is engaged the force of the blade is pulled toward the operator. The operator stands in front of the machine, which is the blue section depicted in photo exhibits 4A and 4B.

Chun identified Exhibit 5, which is a video that demonstrated how the dismantler operates. Chun is familiar with the dismantler operated by the injured employee and was present when the operation of the dismantler was recorded at the work site. Chun testified that an operator is depicted in the video cutting off the damaged parts of the pallet. Chun testified that damaged parts are cut off so the good parts of the pallets can be recycled.

The video recording showed a pallet positioned on a table. In positioning the pallet, the operator's fingers came within inches of the blade. Chun did not

⁴ Labor Code 6602 gives the Board broad equitable powers to assess a penalty of less than \$5,000 for failure to report a serious injury within eight hours.

⁵ Exhibit 4B – also taken by Chun, which is a closer view the machine depicted in Exhibit 4A.

see anything that separated the operator's hand from the blade. Chun acknowledged that a guard would prevent the pallet from passing through the blade. Chun also testified that an extension tool would allow an operator to place the pallet on top of the table and pull the pallet through the blade without jeopardizing the operators' hands.

Chun testified that Employer was cited for a violation of section 4184(a), which applies to machines that must be guarded in "Group 8" that have a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action that places an employee within the danger zone of a serious injury. The "Group 8" machines are defined in section 4188 as Class "A" and "B" machines⁶. Chun distinguished the difference between Class A and Class B machines. Class A is a machine in which material can pass through the band saw component if guarding is installed. Class B equipment is equipment that material cannot pass through the band saw if guarding is installed. Chun testified that section 4310 requires that band saws be guarded⁷. If not designated as Class B standards the machines are Class A standards, which are required to be guarded pursuant to section 4310 (a)(1).

Chun classified the dismantler at the work site as a Class A machine, which must be guarded. Chun testified that the dismantler he observed at the work site had a band saw component that meets the definition of a band saw, which is a power saw with a blade consisting of a toothed metal band running around the circumference of two wheels (See Exhibit 4A and 4B).⁸ The dismantler operated by Hernandez on March 19, 2012 was not guarded. During Chun's inspection Employer did not show or suggest a procedure for safeguarding an operator's hands and fingers.

Chun testified that the hazard of operating the dismantler could be abated by using a "fish graveling hook", which is shaped like an "L" hook in guarding the dismantler procedures. Chun testified that a "fish graveling hook" is a type of mechanism that would allow pulling the pallet toward an operator without exposing the operator's fingers. Chun also stated that a light curtain could be used as a guard which would satisfy the guarding requirement of section 4184. A "light curtain" is a light that acts as a guard by stopping the blade if the pallet crosses a certain distance of the blade.

⁶ Section 4188 defines Class A and Class B machines as follows: The designation "Class-A" with an order means that the rule applies for all kinds of work. The designation "Class-B" means that the order applies unless the nature of the work, type of machinery, or size and shape of material being worked will not permit.

⁷ Section 4310 - (a) Band knives and band saws (including band resaws having saw blades less than 7 inches in width or band wheels less than 5 feet in diameter) shall be guarded as follows: (1) All portions of the saw or knife blade shall be enclosed or guarded except that portion between the bottom of the guide rolls and the table. The guard shall be kept adjusted as close as possible to the table without interfering with the movement of stock. The down travel guard from the upper wheel to the guide rolls shall be so adjusted that the blade will travel within the angle or channel.

⁸ See Section 4297

Whenever the light is broken or interrupted it would stop the machine. He testified that a light curtain would keep the area clear of an operator's hand or fingers getting too close to the band saw. The light curtain would extend across the band saw in the front of the cutting edge blade. Chun stated that the light curtain's beam would stop the pallet/material to protect the operator's hands and fingers, which would instantly shut the machine off.

Testimony of Martin Correa, Sr.

Martin Correa, Sr. (Correa) Employer's owner testified that in an effort to abate the violation, section 4184, Employer contacted companies that manufactured dismantling horizontal band saws. Correa testified that Employer could not find a dismantling horizontal band saw with guards over the blades. Correa also conducted a survey among Employer's employees in looking for suggestions for guarding the dismantler at the work site. Correa acknowledged that he did not contact the California State Standards Board to request a variance. Correa also indicated that Employer has not had any other accidents other than the injury accident suffered by Hernandez. Correa identified the dismantler machine that was taken by his workers compensation carrier (See Exhibit A, Photo #1 and photo #6)⁹.

Testimony of Martin Correa Jr.

Martin Correa Jr., (Correa Jr.) the son of Correa and an employee of Employer, testified that he also made calls to other manufacturers in an attempt to obtain a guard for Employer's dismantler without any success.

Rebuttal Witness - Carlos Hernandez

The Division recalled Hernandez as a rebuttal witness. Hernandez testified that two subsequent accidents occurred after his March 19, 2012 accident. Two employees were injured while operating the dismantler at the work site. He observed the scars the employees suffered as a result of their injuries when using the dismantler. Hernandez could not identify the employees who were injured in subsequent injuries by name. Nor could Hernandez indicate when the subsequent injuries on the dismantler occurred, other than testifying that the subsequent accidents occurred during the time he was disabled from the injury he sustained on March 19, 2012.

Findings and Reasons for Decision

The Division established a violation of Section 4184(a) by operation of law.

The abatement required changes are reasonable.

⁹ Exhibit A photos #2 through #5 were photos of other manufacturer's dismantlers, which were excluded from evidence as irrelevant.

The Administrative Law Judge is without authority to permit noncompliance.

Employer was also cited under section 4184(a) which reads as follows:

Machines as specifically covered hereafter in Group 8, having a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, in which an employee comes within the danger zone shall be guarded at the point of operation in one or a combination of the ways specified in the following orders, or by other means or methods which will provide equivalent protection for the employee.

Here, Employer's appeal of Citation 2 challenges only the specific ground that the abatement changes were unreasonable. Employer did not contest the existence of the violation, classification or reasonableness of the penalty at the hearing. Hence, those issues are waived and the violations alleged in Citation 2 are established by operation of law and the employer is precluded from contesting the violation thereafter (See *Cambro Manufacturing Co., Western Paper Box Co., Pacific Cast Products, Inc., Closets Unlimited, and Lloyd W. Aubry Engineer Co., Inc.*, supra).

In *Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration, (Nov. 17, 2004), the employer contended that the abatement requirement was unreasonable. The employer appealed the abatement requirements and the time allowed to abate on the basis that abatement was not feasible. Employer argued that widening aisles to 24 inches would result in rows of boxes being unaligned with the associated flow rack section giving each picker too much area to cover while the conveyor went by at 75 feet per minute. The Board found employer's argument unpersuasive, stating that although the Division suggested one means of abatement (widening the aisles to 24 inches); it did not mandate any specific means of abatement. The Board noted that the Division has only required compliance with the minimum requirements of the safety order, and the employer could choose the least burdensome means of abatement.

The Board in *Starcrest* noted that the employer might not be able to operate at its present rate of 75 feet per minute if all it did was to widen the aisles. "However, Employer gave no reason why it could not slow down the conveyor, add more employees to the line, make the rows of the boxes narrower and longer, reconfigure the metal racks, or take other measures." Presumably, adding more employees to the line and/or slowing down the conveyor (thus reducing productivity) would be expensive measures to implement. Nonetheless, the Board found the abatement requirements reasonable. As in *Starcrest*, Employer can choose the least burdensome means to abate. Whether Employer takes the suggestion of Chun, the Division's Associate Engineer, by abating the hazard of operating the dismantler by using a "fish graveling hook"

or a light curtain in guarding the dismantler procedures are options for Employer to explore.

The Occupational Safety and Health Act of 1973 [Cal. Labor Code § 6300 et. seq. (the Act)] was enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health. (Cal. Labor Code § 6300). The safety orders are to be broadly interpreted to further the purposes of the act. (*Carmona v. Division of Industrial Safety*, (1975) 13 Cal.3d 303.) Abatement of hazardous conditions is essential to protect California workers.

In this matter, the hazard to be abated (unguarded band saw) is serious. In *Paso Robles Public Schools*, Cal/OSHA App. 96-1722, DAR, (Oct. 4, 2000), the Board upheld the ALJ's Decision that the regulations were clear and provided no exception. *Paso Robles Public Schools* held the Division's abatement requirements were reasonable, that the ALJ had no authority to allow noncompliance with clear regulations, and that Employer had to apply to the Standards Board for a variance if there was to be an exception to the safety orders. Further, if Employer cannot successfully abate, it may seek a permanent variance from the Occupational Safety and Health Standards Board. (See, Labor Code section 143.) The Board, however, is not authorized to "vacate a violation or citation," nor may it conclude that abatement is unnecessary where violations have been accepted by the employer. (See *Primary Steel*, Cal/OSHA App. 04-4105, DAR (March 14, 2007).)

To abate Citation 2, section 4184(a), Employer must comply with guarding the dismantling horizontal band saw at the point of operation and not expose employees to the cutting action of the machine. If Employer cannot meet these standards, Employer can seek a variance.

Employer's owner, Martin Correa, Sr., testified that Employer could not find any means to guard the dismantler in seeking information from dismantler manufacturers and from surveys conducted among Employer's employees. Therefore Correa Sr. did not believe the violation could be abated.

For all the foregoing reasons, and because Employer did not present any evidence (other than its inability to obtain guards from dismantler manufacturers) to demonstrate that the abatement change requirement is unreasonable; the required change is found to be reasonable.

Decision

It is hereby ordered that the citations are established as indicated above and as set forth in the attached Summary Table.

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

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

Dated: February 11, 2014

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

CORREA PALLET, INC.
Dockets 12-R2D5-2157/2158

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 315074666

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VOIDED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R2D5-2157	1	1	342(a)	Reg	ALJ affirmed violation ALJ modified penalty based upon a finding of a late report, Employer is given 15 percent good faith credit, 10 percent history and 10 percent size credit.	X		\$5,000	\$5,000	\$3,250
12-R2D5-2158	2	1	4184(a)	SAR	ALJ affirmed violation	X		16,200	16,200	16,200
Sub-Total								\$21,200	\$21,200	\$19,450

Total Amount Due*

\$19,450

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: CHW/ao
POS: 02/11/2014