

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

SCHINDLER ELEVATOR CORPORATION
9810 Summers Ridge Road Suite 140
San Diego, CA 92121

Employer

DOCKETS 12-R3D2-2916
and 2917

DECISION

Statement of the Case

Schindler Elevator Corporation (Employer) manufactures and services elevators. Beginning April 4, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer William Moffett conducted an accident inspection at a place of employment maintained by Employer at 183 Third Avenue, Chula Vista, California¹ (the site). On September 18, 2012, the Division cited Employer for failing to timely report a serious injury, slipping hazards on the floor, no written steps for control of hazardous energy, and for failure to fully implement its Illness and Injury Prevention Program (IIPP).

Employer filed timely appeals contesting the violations on every possible ground and alleging multiple affirmative defenses. The Division withdrew Citation 1, Item 3, without objection, on the grounds that the wrong safety order was cited.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on January 23 and 24, 2014. Paul J. Waters, Esq. represented Employer. Melissa Peters, Staff Counsel, represented the Division. Frank A. Belio, Jr. represented the International Union of Elevator Constructors, Local 18 AFL-CIO. The parties presented oral

¹ The site is also known as Frederica Manor.

and documentary evidence. The parties requested, and were granted, leave to file briefs. The ALJ extended the submission date on her own motion to April 9, 2014.

Issues

1. Should the penalty be reduced where Employer was late reporting a serious injury to the Division?²
2. Was there employee exposure to slipping hazards from hydraulic fluid on the floor in the elevator machine room?
3. Did the modification of the piston and clamp assembly for elevator number three create a new hazard?

Findings of Fact

1. Employer had an effective safety program.
2. Employer did not have a history of violations with the Division.
3. Employer employed over 100 employees.
4. The Division failed to prove that any of Employer's employees were exposed to the hazards created by hydraulic fluid on the floor of the elevator machine room.
5. The modifications to the piston and clamp assembly for elevator number three did not create a new hazard.

Analysis³

1. The proposed \$5,000 penalty for § 342(a)⁴ should be reduced.

Employer contested the reasonableness of the \$5,000 proposed penalty for Citation 1, Item 1, a § 342(a)⁵ violation.

² On its appeal form, Employer contested the violations' existence and classification as well as the reasonableness of the penalty. In its brief, Employer limited the contested issues to the reasonableness of the proposed penalty, thereby waiving the other issues. (See *Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012), fn. 3, citing *Mangini v. Aerojet-General Corp.* (1991) 230 Cal.App.3d 1125, 1152, citing *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn.3, and *Monzon v. Schaefer Ambulance Service, Inc.* (1990) 224 Cal.App.3d 16, 23, fn. 1.)

³ Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

⁴ Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

⁵ The Division cited Employer for a violation of § 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

The Division takes the position that it is compelled to assess a \$5,000 penalty. (§ 336(a)(6)) The Division argued that the \$5,000 penalty should not be reduced.

The Board recently held that where a serious injury is reported late, the penalty may be reduced by the penalty reduction factors applicable to all regulatory violations. (*Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration and Remand (Dec. 4, 2012); *SDCCD – Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012).) The penalty adjustment factors available for regulatory violations are good faith, size, and history.

The Division rated good faith as poor (Exhibit 16), resulting in a 0% penalty adjustment. Under § 336((3)(c), “good faith” is defined as follows:

The Good Faith of the Employer—is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer’s awareness of CAL/OSHA, and any indications of the employer’s desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:

- GOOD—Effective safety program.
- FAIR—Average safety program.
- POOR—No effective safety program

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 8 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.

Section 330(h) provides as follows:

“Serious injury or illness” means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

This Employer was very aware of Cal/OSHA and had written programs in place for California. Employer conducted regular health and safety training and conducted regular audits of the health and safety trainers. Written materials were extensive. Employer is very large, with 4,000 to 5,000 employees in the United States. It spends 10 to 12 million dollars per year on health and safety training. In this case, a site safety inspection and job hazard analysis was conducted before work began. Employer was fully cooperative with the Division. There was no intent to hide the injury. Susan Sutton, the Area Health and Safety Manager, credibly testified that she thought the local area operations manager reported the injury to the Division within eight hours. As soon as she found out differently, she called the Division.

Based on Employer's awareness of Cal/OSHA and its extensive safety program, it is found that Employer has an effective safety program. Good faith is rated at the maximum of 30%. (§ 336(d)(2))

The Division rated Employer's history as poor. (Exhibit 16) Under § 335(d), history is rated as follows:

GOOD – Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.

FAIR – Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.

POOR – Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory per 100 employees at the establishment.

The only other violations considered by the Division were the citations in another inspection Moffett conducted which were issued at about the same time as the instant citations. Those citations were appealed (Dockets 12-R3D2-2380 through 2385), and were not final when the instant hearing began⁶. Appealed violations are not counted against Employer's history until they are final because they may be withdrawn, dismissed, reclassified, or otherwise modified before they become final.

⁶ An Order in 12-R3D2-2380/2385 issued on February 4, 2014 and did not become final until March 6, 2014.

Therefore, Employer's history warrants a rating of "good," which gives a 10% penalty adjustment. (§336(d)(3))

No adjustment is available for size because Employer is a large employer with over 100 employees.

Conclusion

Accordingly, pursuant to *Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration and Remand (Dec. 4, 2012) and *SDCCD – Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012), the \$5,000 penalty is reduced by 40% to \$3,000.

2. The Division did not establish employee exposure to the slipping hazards created by hydraulic oil on the floor of the elevator machine room.

The Division has the burden to establish employee exposure to the slipping hazard created by hydraulic fluid on the concrete floor of the elevator machine room. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division cited Employer for a violation of § 3273(a), which provides as follows:

Permanent floors and platforms shall be free of dangerous projections or obstructions, maintained in good repair, and reasonably free of oil, grease, or water. Where the type of operation necessitates working on slippery floors, such surfaces shall be protected against slipping by using mats, grates, cleats, or other methods which provide equivalent protections.

It was not contested that hydraulic fluid was on the concrete floor of the elevator machine room on April 5, 2012, (Exhibits 12, 13) or that the machine room had a door that could be locked. There were rags or other absorbent cloths on the floor and a bucket with hydraulic fluid in it. The fluid presented a potential slipping hazard.

Employee exposure may be inferred from circumstantial evidence, but it cannot be based on speculation alone. (*Stockton Steel Corp.* Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002), citing *Ford Motor Company*, Cal/OSHA App. 76-706, Decision After Reconsideration (July 20,

1979).) The Division may establish employee exposure 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. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

The machine room was normally locked, although it was not locked on April 5, 2012 when Moffett made his observations. The rags and bucket in the machine room on April 5, 2012, are circumstantial evidence someone had been in the machine room when the oil was leaking prior to April 5. There was no evidence that any activity other than cleaning had occurred in the machine room. The rags were laid out in a manner so as to absorb oil that was expected to continue leaking. Assuming, for the sake of argument, that an employee of Employer did the clean-up, it is not logical to cite Employer for exposure to a hazard when the employee is present for the purpose of abating the hazard. (See *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) There is no evidence that the injured employee⁷ or the other mechanic on his crew⁸ ever entered the machine room where the oil was observed on the floor.

Conclusion

Therefore, the Division failed in its burden to establish that Employer's employees were exposed to the cited hazard. Accordingly, Employer's appeal to Citation 1, Item 2, is granted. Citation 1, Item 2 is dismissed and the penalty is vacated.

3. The modification of the piston and clamp assembly for elevator number three did not create hazards new to hydraulic repack operations.

The Division alleged that Employer's IIPP was not implemented because it failed to identify and evaluate new hazards created by modification of the piston and clamp assembly on elevator number three.

Section 3203(a)(4) provides, in relevant part, as follows:

- (a) Effective July 1, 1991, every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program

⁷ Jason Thomas, who suffered an amputation injury from exposure to a pinch point hazard.

⁸ Karl Barr

(Program). The Program shall be in writing and, shall, at a minimum:

(1) ...

(2) ...

(3) ...

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

(A) When the program is first established; [Exception omitted]

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Occurrence of an accident alone is not proof that an employer has failed to identify and evaluate hazards. (See *Michigan-California Lumber Co.*, Cal/OSHA App. 91-759, Decision After Reconsideration (May 20, 1993).) Hazard avoidance training is always subject to human error, negligence, or forgetfulness, and is not “fool-proof” protection. (*Morrison Building Materials*, Cal/OSHA App. 94-0278, Decision After Reconsideration, (Nov. 19, 1998).)

On March 30, 2012, before work started, elevator mechanic Karl Barr (Barr) and elevator mechanic assistant Jason Thomas (Thomas) observed the piston and clamp⁹ assembly on elevator number three, conducted a job hazard analysis, discussed the job hazards, and completed a written job hazard analysis form. The piston and clamp assembly on elevator number three had been modified from the manufacturer’s original configuration¹⁰, but the modification was a common configuration that Thomas had seen many times. A repack was a routine maintenance operation that both had performed hundreds of times. Both were fully trained by the union and by Employer to do repacks.

The particular configuration on elevator number three was different from the standard configuration¹¹. The evidence did not support a finding that any of these differences contributed to the accident or that any of these differences created a new hazard. Thomas credibly testified that these

⁹ The clamps were sometimes referred to as hold down bars.

¹⁰ The Division referred to the reconfiguration as the “Novel Configuration.”

¹¹ Exhibit 3 shows the configuration in question. Exhibit 9 shows a standard configuration. The differences were that the platen plate was large, the “C” channel on top of the platen plate was upside down, the platen plate curved slightly, and the entire assembly was rotated 90 degrees.

differences did not change the hazards. Thomas's testimony on this point was corroborated by the Division's expert witness from the elevator unit, Associate Safety Engineer Steven Smith (Smith). Thomas made a mistake¹², but his mistake was not the result of Employer's failure to identify and evaluate the hazard caused by the reconfiguration.

Conclusion

Therefore, it is found that the Division did not carry its burden of proof to establish that the modification of the piston and clamp assembly for elevator number three created hazards new to hydraulic repack operations. Citation 2 is vacated and the penalty is set aside.

Decision

It is hereby ordered that the citations are established, modified, or withdrawn 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.

Dated: May 1, 2014

DALE A. RAYMOND
Administrative Law Judge

DAR: ml

¹² As part of the process of lowering the elevator car, Thomas loosened the nuts holding the rods, grabbed the rods, and slid the rods further out. Thomas and Smith testified that this was a proper and safe work practice. As the car descended, Thomas watched the right hand side to ensure clearance, but he lost track of the left hand side. As a result, two fingers on his left hand were caught in a pinch point which caused partial amputations of two fingers.

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
Schindler Elevator Corporation
Dockets 13-R3D2-2916/2917**

Dates of Hearing: January 23-24, 2014

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Cal/OSHA Form 36—Accident Report	Yes
3	Photograph – top of elevator pit showing piston, platen, C channel, bolster channel, all thread rods, strike plates and jack stands	Yes
4	Photograph - elevator pit bottom	Yes
5	Job Hazard Analysis 3-30-12	Yes
6	Photograph – Frederica Manor outside view	Yes
7	Photograph –Frederica Manor elevator #3 outside	Yes
8	Photograph – Elevator #3 inside	Yes
9	Photograph – Elevator pit next to elevator #3	Yes
10	Document request	Yes
11	Supervisor Incident Report from Employer	Yes
12	Photograph – machine room	Yes
13	Photograph – machine room close up of fluid on floor	Yes
14	Form 1BY-Notice of Intent to Issue Serious Violation	Yes

15	Employer response to document request	Yes
16	Form C-10 Penalty Calculation Worksheet	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	RX1: Thomas - job safety evaluations	Yes
B	RX2: Thomas – Field Employee Safety Evaluation	Yes
C	RX3: Routine Task Manual	Yes
D	RX6: IIPP for all California job sites	Yes
E	RX7: 2012 Annual Area SH&E Plan	Yes
F	RX8: Field Safety, Health and Environmental Manual—Employee Safety Training	Yes
G	RX19: Elevator Equipment Evaluation	Yes
H	RX11: Field Safety, Health and Environmental Manual—Table of Contents	Yes
I	RX4: Safety, Health and Environmental Policies and Practices – 3.2 Job Hazard Analysis	Yes
J	RX13: Field Safety, Health and Environmental Manual – Employee Safety Training	Yes
K	RX14: Safety, Health and Environmental Manual, Part II – Administration 2.4	Yes
L	RX15: Safety, Health and Environmental Manual, Part II – Administration 2.5 Responsibilities	Yes
M	RX16: Safety Walk Appraisal Tool	Yes
N	RX17: Guideline for Completing a Safety Walk Form	Yes

O	RX21: Jason Thomas record of safety classes taken	Yes
P	RX20: Safety, Health and Environmental Manual, Part 1 – Safety Policies and Procedures: 1.7 Enforcement of Safety Rules	Yes
Q	RX24: Documentation of Discipline	Yes

Witnesses Testifying at Hearing

1. Melissa Brittan
2. Jason Thomas
3. William Moffett
4. Steven Smith
5. Susan Sutton

CERTIFICATION OF RECORDING

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

