

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

ACTION METAL RECYCLING, INC.
320 Pittsburg Avenue
Richmond, CA 94801

Employer

Dockets 13-R2D2-1125 and 1126

**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 the petition for reconsideration filed by Action Metal Recycling, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on December 17, 2012, the Division of Occupational Safety and Health (the Division) conducted an accident inspection at a place of employment controlled by Employer in Richmond, California. On March 21, 2013, the Division cited employer for one general violation containing two items, and one serious violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on July 7, 2015.

The Board granted the Employer's timely filed petition for reconsideration of the ALJ's Decision on August 7, 2015. The Division filed a response to the Order of Reconsideration on September 14, 2015.

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

ISSUES

1. Did the ALJ violate Labor Code section 6608 by issuing the Decision in this matter two months after the matter was submitted?
2. Was a violation of section 3668 subdivision (a)(1) demonstrated by a preponderance of the evidence by the Division?
3. Was a violation of section 3664 subdivision (e) demonstrated by a preponderance of the evidence by the Division?

FINDINGS OF FACT

1. Jose Perez (Perez) and Jose Rodriguez (Rodriguez) were operators of the yellow tractor trailer truck (or “goat”).
2. The goat and the excavator are “industrial trucks” as defined by the safety orders.
3. Rodriguez did not have the necessary knowledge, training, and experience to act as a trainer to other employees under the industrial truck training and operation safety order.
4. Perez and Rodriguez were not provided with the training required to operate the goat under the relevant safety order. Their skills and competency were not evaluated and they were not certified as required by the relevant safety order.
5. Perez did not perform the required check of the goat prior to operating the goat on December 17, 2012.
6. The hydraulic rod of the cab became bent, and the cab would not close by using the hydraulic lever system.
7. No arrangements were made to prevent the sudden movement of equipment when Rodriguez attempted to close the cab by force.
8. Rodriguez stood between the back of the cab and the roll bar mast when the cab slammed down, pinning his head and fracturing his skull. Rodriguez was killed by the injury.
9. The failure to prevent sudden movement of the cab of the goat caused the employee’s skull to be crushed between the cab and the roll bar.
10. The penalties were properly calculated in accordance with the Division’s policies and procedures.

DECISION AFTER RECONSIDERATION

Did the ALJ violate Labor Code section 6608 by issuing the Decision in this matter two months after the matter was submitted?

Employer argues that the ALJ inappropriately extended the submission date, and that because of this extension, a new hearing should be held. The Board has addressed the issue of Decisions issued after the period described in Labor Code section 6608, most recently in *Treasure Island Media, Inc.*, Cal/OSHA App. 10-1093, Decision After Reconsideration (Aug. 13, 2015):

First, the ALJ exercised her authority under our regulations to extend the date of submission. (§ 385, subd. (a).) Second, the thirty day time period stated in Labor Code section 6608 for issuing a decision is directory, not mandatory. (*CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 08, 2013) citing *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145; *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007), writ denied Imperial County Superior Court (Apr. 2008).) Third, it follows, therefore, that the Board did not act in excess of its powers in issuing the Decision. More to the point, there is no logical or causal connection between the time when the ALJ's Decision was issued and the question of whether, given the record of this proceeding, the Division met its burden of proof. The administrative record remains unchanged, and its contents are the basis on which we decide whether the Division met its burden.

The logic of *Treasure Island Media, Inc.*, holds in this instance, as well. The Board again makes its decision based upon the administrative record, including the official hearing recording. The Board's ability to do so is unimpeded by an ALJ using his or her discretion to extend a submission date for issuing a decision. We decline to order a rehearing.

Was a violation of section 3668 subdivision (a)(1) demonstrated by a preponderance of the evidence by the Division?

Citation 1 Item 1 alleges a violation of section 3668 subdivision (a)(1):

(a) Safe Operation.

(1) The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely, as demonstrated by the successful completion of the training and evaluation specified in this section.

The alleged violative description (AVD) reads as follows:

On and before 12/17/12, the employer did not ensure its powered industrial truck operators are competent to operate power industrial truck safely [sic], as demonstrated by successful completion of the training and evaluation specified in this section. An employee (EE1) was fatally injured when his head was crushed between the fixed 4 "X4" [sic] metal bar/metal guard and the upper portion of the cab of a yard tractor trailer also called "goat".

Pursuant to the rules of statutory construction, the Board reads section 3668 subdivision (a)(1) in the context of the larger regulatory scheme, rather than in isolation. (*Key Energy Services, LLC*, Cal/OSHA App. 13-2239, Denial of Petition for Reconsideration (Dec. 24, 2014), citing *People ex rel. Younger v. Superior Court*, (1976) 16 Cal.3d 30, 41.) Section 3668, entitled "Powered Industrial Truck Operator Training," contains a detailed list of requirements for training and evaluation of industrial truck operators.²

The Division alleges that the deceased employee, Rodriguez (Rodriguez), and the truck's operator, Jose Perez (Perez), were not provided with the training and evaluation required by section 3668 subdivision (a)(1). Employer contends that Rodriguez had been trained by a prior employer, and was able to provide training to Perez on the truck involved in the accident, a yellow tractor trailer truck used in the yard (also referred to as a "goat"). The evidence and testimony preponderates to a finding that neither Rodriguez nor Perez had the training required by the safety order.

Section 3364 subdivision (d)(1)(D) requires refresher training and evaluation when "the operator is assigned to drive a different type of truck." Although Employer had had the goat for less than a year, it had no records of any refresher training having been conducted for those drivers who were

² For example, section 3664 subdivision (d), which covers only refresher training, rather than training for new drivers, is quite detailed and includes the following requirements:

(d) Refresher training and evaluation. Refresher training, including an evaluation of the effectiveness of that training, shall be conducted as required by subsection (d)(1) to ensure that the operator has the knowledge and skills needed to operate the powered industrial truck safely.

(1) Refresher training in relevant topics shall be provided to the operator when:

(A) The operator has been observed to operate the vehicle in an unsafe manner;

(B) The operator has been involved in an accident or near-miss incident;

(C) The operator has received an evaluation that reveals that the operator is not operating the truck safely;

(D) The operator is assigned to drive a different type of truck; or

(E) A condition in the workplace changes in a manner that could affect safe operation of the truck.

(2) An evaluation of each powered industrial truck operator's performance shall be conducted at least once every three years.

assigned to drive this new, and different, kind of truck.³ Even assuming Employer had provided some form of training on the goat, that training would have necessarily been deficient, as Employer admittedly did not have a copy of the operating manual for the vehicle, which it had bought used. Section 3668 subdivision (c)(1)(M) specifically calls for training on “Any other operating instructions, warnings, or precautions listed in the operator's manual for the types of vehicle that the employee is being trained to operate.”

In testimony, employee Perez, whom Employer claims was trained by Rodriguez, admitted that the training he received was not adequate, stating, “it wasn’t training that it was safe because you see, Jose [Rodriguez] as well, he didn’t have enough training.” Section 3668 subdivision (b)(4) requires training to be conducted by “persons who have the knowledge, training and experience to train powered industrial truck operators and evaluate their competence.” Finally, Employer failed to provide certification of training for either employee, leading to the reasonable conclusion that neither employee was provided training pursuant to the safety order.⁴

A General violation of the safety order is found.

**Was a violation of section 3650 subdivision (t)(7)
demonstrated by a preponderance of the evidence by the Division?**

Citation 1, Item 2 alleges a general violation of section 3650(t)(7):

(t) Industrial trucks and tow tractors shall be operated in a safe manner in accordance with the following operating rules:

[...]

(7) Drivers shall check the vehicle at the beginning of each shift, and if it is found to be unsafe, the matter shall be reported immediately to a foreman or mechanic, and the vehicle shall not be put in service again until it has been made safe. Attention shall be given to the proper functioning of tires, horn, lights, battery, controller, brakes, steering mechanism, cooling system, and the lift system for fork lifts (forks, chains, cable, and limit switches).

The AVD states:

On and before 12/17/12, employees of Action Metal Recycling Inc., did not perform the required check prior to operating a Hitachi Hydraulic Excavator model number EX220LC and a “yard mover”

³ Testimony of Associate Safety Engineer, Ronald Aruejo.

⁴ 3668(f) Certification. The employer shall certify that each operator has been trained and evaluated as required by this section. The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

or “goat” manufactured by SISU USA INC vehicle # [VIN] with a number 32 marking on the front and right side door of the cab at its worksite located at 320 Pittsburg Ave, Richmond CA 94801.

Under the cited safety order, required checks should give particular attention to “proper functioning of tires, horn, lights, battery, controller, brakes, steering mechanism, cooling system...” The Division alleges that those checks were not made on the day of the accident. The driver of the goat, Perez, testified that he did not do a check on that day, because Rodriguez asked him to bring the truck quickly, and he did not have time to make the check.

Perez testified that he usually checked the truck’s fluids, tires, brakes, and lights, although he also testified that he had only lifted the cab of the goat three times. In order to check fluids and meet other requirements of the safety order, the cab would regularly need to be lifted. When Perez realized the goat needed steering fluid, he had to consult with Carlos Seja (Seja), an independent contractor mechanic on site, because he did not know where the steering fluid went, which also suggests that Perez was not regularly looking under the cab. Employer provided no records or other evidence to counter Perez’s testimony.

The Board upholds the ALJ’s finding of a General violation of section 3650 subdivision (t)(7).

Did the Division establish by a preponderance of the evidence a violation of section 3664 subdivision (e)?

Citation 2 alleges a Serious Accident-Related violation of section 3664(e):

(e) No repairs shall be performed on any agricultural or industrial trucks or tractors until arrangements have been made to reduce the probability of injury to repairmen or others caused by sudden movement or operation of such equipment or its parts.

The Division’s AVD asserts the following:

On 12/17/12, repairs were performed on an industrial truck referred to as a “Yard Goat”, and an employee (EE1) was attempting to pull the cab closed [sic] was fatally crushed between the cab and the back guard of the industrial truck referred to as a “Yard Goat”. The employer failed to provide arrangements to prevent the probability of injury to the employee or to prevent movement of the parts.

Employer argues that Rodriguez was not involved in a repair activity, but was engaged in a routine maintenance task. The Division argues Rodriguez was engaged in a repair activity, albeit an unusual one, because the rod that lifts

and lowers the cab had bent, and he was attempting to find an alternative means of lowering the cab. The Board has previously interpreted section 3664 subdivision (e), in a somewhat similar instance where an employee engaged in an activity that the Employer argued was not a “repair” as contemplated by the safety order. The Board’s logic in that Decision After Reconsideration, in which a forklift fork came loose, is instructive here:

Though the exact nature of the problem which caused the fork to become loose was not ascertained, it was clear that rather than drifting slightly out of adjustment or needing cleaning, the forklift had become nonfunctional until the fork was secured. The efforts of the injured employee to restore the forklift to operating condition were, therefore, "repairs". (*Star-Kist Foods, Inc.*, Cal/OSHA App. 83-781, Decision After Reconsideration (Oct. 16, 1987).)

As in the *Star-Kist Foods* Decision After Reconsideration, we find the action of the employee constituted a repair. The employee’s attempts to pull or force the cab closed constituted a measure taken to correct the bent rod, and restore the goat to an operating condition. The record establishes that no arrangements were made-- such as installing blocks or other devices-- to reduce the probability of injury caused by sudden movement or operation of the goat or its parts.

Employer’s petition also raises what the Board commonly refers to as the *Newbery* defense. That defense is defined as follows:

A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist: (1) that the employer knew or should have known of the potential danger to employees; (2) that the employer failed to exercise supervision adequate to assure safety; (3) that the employer failed to ensure employee compliance with its safety rules; and (4) that the violation was foreseeable. (*Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.) (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).)

Employer failed to establish that it was unaware of the potential danger, that it had adequate supervision in the yard, that it had a program of compliance regarding safety rules, or that the violation was unforeseeable. The defense is not met.

Classification of Citation 2

Labor Code section 6432 subdivision (a) creates 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.” In support of the serious classification, the Division’s engineer testified that the sudden movement of the cab that killed Rodriguez could also have seriously injured or killed the two other men that were in close proximity to the goat, examining the rod. The Division’s testimony establishes that there was a realistic possibility of death or serious injury from the actual hazard of crushing created by the violation of the safety order. Employer made little attempt to rebut the presumption pursuant to Labor Code section 6432 subdivision (c) and did not introduce testimony or evidence related to its “exercise of reasonable diligence.”

As to the accident-related classification, to find a violation as accident related, the Division must make a “showing [that] the violation more likely than not was a cause of the injury. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2013); *Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration [24] (Oct. 4, 2002).)” *Duininck Bros., Inc.*, Cal/OSHA App. 06-2870 Decision After Reconsideration & Order of Remand (Apr. 13, 2012.) The ALJ found, and the Board agrees, that there was a causal nexus between the failure to prevent sudden movement and the employee’s death.

The serious, accident-related citation is upheld, and the Division’s proposed penalty of \$18,000 is affirmed for Citation 3. Total penalties of \$19,700 are upheld.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JAN 29, 2016