BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BRYANT RUBBER CORP. 1112 Lomita Boulevard Harbor City, California 90710 Employer	Docket Nos. 01-R3D5-1358 and 1360 **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 in the above-entitled matter by Bryant Rubber Corp. [Employer] under submission, makes the following decision after reconsideration.

JURISDICTION

From February 13 through March 20, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 1112 Lomita Blvd., Harbor City, California (the site). On March 21, 2001, the Division issued to Employer a citation alleging a serious violation of section[1] 3314(b) [Citation No. 3; lock-out controls], with a proposed civil penalty of $18,000 and a citation alleging a general violation of section 3314(f) [Citation No. 1, Item 4; energy control procedures] with a proposed civil penalty of $185.

Employer filed a timely appeal contesting the existence and classification of the alleged violations and the reasonableness of both the abatement requirements and the proposed civil penalties.

On February 6, 2002, a hearing was held before Barbara J. Ferguson, Administrative Law Judge (ALJ), in Torrance, California. Kenneth Ehrlich, Attorney, represented Employer. Albert Cardenas, Staff Counsel, represented the Division.

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

On March 8, 2002, the ALJ issued a decision denying Employer's appeal.

On April 4, 2002, Employer filed a petition for reconsideration. The Division filed an answer to the petition on April 24, 2002. The Board took Employer's petition under submission on May 23, 2002[2].

Docket No. 01-R3D5-1360
Citation 3, Section 3314(b), Serious
LAW AND MOTION

Employer's hearing brief raised the defense of independent employee action. The appeals filed with the Board did not assert this defense. The defense as raised in the hearing brief was deemed a motion to amend the appeal and inquiry was made prior to the taking of evidence as to when Employer first informed the Division that it intended to assert the independent employee action defense [IEAD] at the hearing. Employer's counsel represented that the defense was discussed with the Division ten days prior to the hearing. Counsel for the Division objected to any amendment of the appeal to add the IEAD.

The ALJ determined that allowing Employer to present the IEAD with only ten days notice to the Division would be prejudicial to the Division. The ALJ also determined that the fact that Employer retained legal counsel shortly before the hearing on these appeal is not a valid ground to grant a late amendment to an appeal for purposes of asserting a new affirmative defense. Employer's motion to amend its appeals to include the affirmative defense of independent employee action was denied and evidence directly bearing on that defense was excluded at the hearing.

SUMMARY OF EVIDENCE

Employer utilizes a hydraulic press machine [Hyco press] that molds raw rubber into squeegees through the use of compression and heat. There are dies at the bottom and top of the machine, with a suspended die in the middle. Two white plates, or platens, are located at the top and at the bottom.[3] Fasteners for the lower and upper dies are bolted to the platens. Blocks are placed between the dies when the dies need to be changed.

Operations Manager Rita Delgadillo [Delgadillo] explained the set-up process: During the set-up process the Hyco press has to be energized so the

[2] The docket number on the Order Taking Petition Under Submission inadvertently shows 01-R3D5-1358 through 1360 rather than 01-R3D5-1358 **and** 1360, which is correct.
[3] At the hearing the parties used the terms platen and plate interchangeably. A platen is a flat plate against which something rests or is pressed. *McGraw-Hill Dictionary of Scientific and Technical Terms*, (4th ed. 1989) p.1445.

mold man can raise the bottom of the tool up to the safety blocks in order to put pressure against the top part of the tool to sustain it while removing the fasteners.[4] The lower die is then raised up, the screws removed from the fastener, and the press opens up to bring the tool down. Valves located behind the machine close during the loading process to prevent hydraulic fluid from flowing in either direction. These valves are de-energized during the set-up operation by selecting the manual setting on the control panel of the press.

Employer's mold man, Jamie Cardenas [Cardenas] lost part of a finger on his right hand on October 30, 2000, while removing dies from a Hyco rubber molding machine. On February 13, 2001, Compliance Office Barry Blodgett [Blodgett] visited the site to commence an investigation of the accident. Blodgett met with Employer's Vice President, Tracy Hunter [Hunter] and Operations Managers Delgadillo and Mark Thompson [Thompson].[5]

Delgadillo described Cardenas' duties as mold man to include setting-up the tooling, installing and removing the dies, and maintenance of the tools. Safety blocks are part of Cardenas' tooling kit. According to Delgadillo, safety blocks are inserted between the center-suspended plate and the top plate. The safety blocks must be used during the set-up operation or damage can result to the fasteners, platens or tools. Delgadillo stated that the tool cannot be loaded or mounted to the press top or bottom without using the safety blocks.

Cardenas was injured when he attempted to remove the top die from the Hyco press. Cardenas started to loosen the fasteners in the upper corner of the machine that held the die to the platen without using the safety blocks; the fastener came down on the suspended die and caught his right hand in between. He lost the tip of the ring finer of his right hand as a result of the mishap.

Delgadillo testified that he learned from his investigation that Cardenas had failed to use the safety blocks when he attempted to remove the tool. Cardenas had loosened all four (4) fasteners, but "over did it" on the upper southwest corner, causing the corner of the plate to come down on his right hand. The other top fasteners held in place. Cardenas told Delgadillo that the reason he did not use the safety blocks was because he wanted to use the weight of the tool to make it easier to unscrew the fasteners.

Blodgett issued a serious, accident-related citation to Employer for failure to take whatever action necessary to prevent inadvertent movement of the Hyco press during the set-up process as required pursuant to section 3314(b). Blodgett testified that the falling of the die onto an employee's hand is

[4] The parties also used the terms die and tool interchangeably. A die is defined as a tool or mold used to impart shapes to, or to form impressions on, materials. *Id, p.530.*

[5] Hunter, Delgadillo and Thompson are referred to collectively as "management."

an undesirable inadvertent movement of the die that could have been prevented if safety blocks had been used. It was just the type of amputation injury Cardenas sustained that most likely would occur from working with the dies without the use of safety blocks. Hunter was also of the opinion that a crushing injury would likely occur during the set-up process, which is why safety blocks should be used.

ISSUES

1. Was Employer's motion to amend its appeal to assert an affirmative defense properly denied?
2. Did the Division properly cite Employer for violating section 3314(b)?
3. Was the violation properly classified as serious?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Employer's Assertion of the IEAD was Properly Denied.

Our leading case on this issue is *California Erectors, Bay Area, Inc.*[6] which we will follow here. Employer has not persuaded us to deviate from the holding in that case. A party seeking to amend its appeal prior to hearing shall serve and file a motion or request 20 days before the hearing pursuant to section 371(c)(1); after 20 days the request or motion shall be granted if accompanied by a declaration showing good cause for the late filing.[7] Where the amendment would prejudice the non-moving party, the ALJ has two options: (1) grant a continuance to allow the non-moving party to prepare a rebuttal to the amendment; or (2) deny the amendment as untimely. These provisions confer discretion on the ALJ to allow or deny amendments in all cases where the amendment is sought other than by motion filed and served 20 or more days before the hearing.[8]

We find that Employer failed to comply with the prescribed procedure under section 371(c)(1) and made no showing of good cause for not doing so. Consequently, we find that the ALJ did not abuse her discretion and that the IEAD was properly disallowed. Thus, we deny that portion of Employer's petition for reconsideration concerning the IEAD.

2. The Division Properly Cited Employer for Violating Section 3314(b).

---

[6] Cal/OSHA App. 93-503, Decision After Reconsideration (Jul. 31, 1998).
[7] Section 371(d).
[8] *California Erectors, Bay Area, Inc., supra*; see also section 350.1.

Employer was cited for violation of section 3314(b) which provides in relevant part:

> Prime movers, equipment, or power driven machines equipped with lockable controls or readily adaptable to lockable controls shall be locked out or positively sealed in the "off" position during repair work and ***setting-up operations.*** Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with Section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will prevent the equipment**,** prime mover or machine from inadvertent movement. [Emphasis added]

Section 3314(b) is a General Industrial Safety Order [GISO] that applies to all places of employment. (§ 3202) Employer asserts that section 3314 does not relate to die-setting whereas section 4199 does, and thus Citation 3 cannot stand since the Division cited an irrelevant safety order. Employer alleges in its petition that "Section 3314 is a general safety order that *only* applies to cleaning, repairing, servicing and adjusting prime movers, machinery and equipment. 8 C.C.R. § 3314." [Italics added; underline in original.] Employer's quoted language is the heading of section 3314. The Board has long held that "[i]t is a general rule of statutory construction that section headings or titles may not be used for the purpose of controlling, restraining, or enlarging the positive provisions in the body of the regulation. [Citations omitted] If the language of the regulation is vague and ambiguous, however, the title can be considered in interpreting the regulation." *Central Coast Pipeline*[9] *at p. 2.* Section 3314 is not vague or ambiguous and the title of the section shall not be used to govern or limit the meaning of the regulation. Employer was cited for violation of subsection (b) which contains specific language of its applicability to *setting-up* operations.[10]

Section 4199 provides, in relevant part:

> (a) The employer shall establish a diesetting procedure that will ensure compliance with this section.
> . . .
> (3) The employer shall provide and enforce the use of safety blocks for use whenever dies are being adjusted or repaired in the power operated press.

[9] Cal/OSHA App. 76-1342, Decision After Reconsideration (Jul. 16, 1980).

[10] Employer admits Cardenas was engaged in changing the die in the press to make the next mold. We have previously defined "set-up" under section 3314(b) as the preparation (the process of making some thing ready for use or service) of a machine for a specific work method, activity, or process. *Wallace Computer Services*, Cal/OSHA App. 98-2159, Decision After Reconsideration (Jul. 9, 2001).

We interpret section 3314(b) liberally to require blocking or equivalent means (*e.g.*, die stops or other means to prevent losing control of the die) during set-up operations. The Board has held that in arguing that another safety order more closely addresses the facts, an employer must demonstrate the defense to the cited safety order by complying with the safety order the employer claims is better suited to the actual circumstances.[11] Here, because Employer has not established that it was in compliance with section 4199 and because section 3314(b) is applicable to the violative condition we find that the Division properly cited Employer for a violation of section 3314(b).

3. The Violation Was Properly Classified As Serious.

Employer finally asserts its lack of knowledge as a challenge to the serious classification of Citation 3. Employer has the burden of demonstrating that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.[12]

Employer did not meet its burden in this regard. We have previously held that adequate supervision of employees is an important consideration in determining whether an employer could have reasonably detected a violation.[13] In *Roof Structures, Inc. at p. 5*, we stated "[i]t is clear that employers may not ignore hazards in the workplace, and then claim lack of knowledge as a defense to a serious violation." To prove that Employer could not have known of the violative condition by exercising reasonable diligence, Employer must establish that the violation occurred at a time and under circumstances which could not provide Employer with a reasonable opportunity to have detected it.[14] That was not done here. We find that there was a lack of adequate supervision of Cardenas as evidenced by the unexplained absence of Lopez, the supervisor charged with responsibility for the set-up procedure. We also find that there was a lack of instructions with respect to the use of safety blocks for the purpose of changing the dies. Employer's die-setting procedure merely requires blocks to be used between the plates of the mold and commands that they "not [be] removed until the plates are correctly positioned and securely fastened." By its failure to ensure supervision of the die changing operation and its failure to implement specific written instructions concerning the use of safety blocks when the dies are changed or removed, Employer did not exercise reasonable diligence. Conversely, had Employer exercised reasonable diligence, *i.e.*, adequate supervision and instructions, Employer could have learned that

---

[11] *Wetsel-Oviatt Lumber Co.*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000). Here, Employer has not established that it was in compliance with section 4199.

[12] Labor Code section 6432(b)

[13] Cal/OSHA App. 91-316, Decision After Reconsideration (Oct. 29, 1992).

[14] See *C.C. Meyers, Incorporated*, Cal/OSHA App. 95-4063, Decision After Reconsideration (Jun. 7, 2000). At the time of our decision in *C.C. Meyers, Incorporated*, the Division had the burden of proving the knowledge (actual or constructive) requirement for a serious violation; since January 1, 2000 the burden is now on the employer to show that it did not know, and with the exercise of reasonable diligence could not know, of the violation.

Cardenas was not using safety blocks prior to the occurrence of the accident. Thus, we sustain the serious, accident-related violation of section 3314(b).

Docket No. 01-R3D5-1358
Citation 1, Item 4, Section 3314(f), General
SUMMARY OF EVIDENCE

At the time of his initial inspection at the site, Blodgett requested from management written procedures for removal of dies from the Hyco press; management could not locate the requested documentation. Blodgett issued a general citation for violation of section 3314(f). Subsequently, he made a discovery request for such documentation and Employer provided him with a copy of its procedures for Press Set-Up. Shortly before the hearing, Employer provided to Blodgett, a copy of a document entitled Lockout/Blockout/Tagout.

Blodgett determined that Employer was not in compliance with section 3314(f) because there were not specific written instructions as to how to lock-out or tag-out the Hyco press, who was authorized to do so, and how to utilize the safety blocks. Delgadillo testified that the written "Lockout/Blockout/Tagout" document and written "Press Set-Up Procedures" were in existences at the time of Cardenas' accident.

ISSUE

Has the Division established a violation of section 3314(f)?

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

Section 3314(f) requires that:

> An energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing or adjusting of prime movers, machinery and equipment. The procedure shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including but not limited to, the following:
> (1) A statement of the intended use of the procedure;
> (2) The procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
> (3) The procedural steps for the placement, removal and transfer of lockout devices or tagout devices and the responsibility for them; and,

(4) The requirements for testing a machine or equipment, to determine and verify the effectiveness of lockout devices, tagout devices and other energy control devices.

The citation issued to Employer alleged: "On October 30, 2000, the company's written mold or tool removal procedure, part of Procedure No. 9.44, titled Press Set Up, did not cover means to enforce compliance with the procedure nor the subjects mentioned in paragraphs 2, 3, and 4 above."

Employer contends that "Citation 1, Item 4 lacks a basis" and therefore should be dismissed because, it argues, "the Division did not request Bryant's Lock out/Tag out procedure upon its investigation of Mr. Cardenas' injury at Bryant or in its subsequent document request. Moreover," it asserts, "the Division never requested and was not provided with Bryant's specific Lock out/Tag out procedure for the Hyco press involved with Mr. Cardenas' injury."

Blodgett testified that "[he] sent out a document request asking the company, among other things, … for whatever written procedures they had for how Jaime Cardenas was supposed to be removing those dies from the Hyco press, and this is what I got," referring to Employer's press set-up procedure. Blodgett further testified that Employer's press set-up procedure, Procedure No.: 9.44, was the basis for his issuance of Citation 1, Item 4.

Based on our independent review of the entire record in this case, including the tape recordings of the hearing, we find that both Employer's "Press Set-Up Procedure" document and its "Lockout/Blockout/Tagout" document lack the specificity requirements of section 3314(f). The hydraulic molding press is not included in Employer's written procedures; nor is the identification of personnel authorized to lockout or tagout Employer's machines. Absent also are rules and techniques to be used by employees to lockout or tagout the hydraulic press machines. Consequently, we find that the Division has established a violation of section 3314(f).

DECISION AFTER RECONSIDERATION

A serious violation of section 3314(b) is established and a civil penalty of $18,000 is assessed; a general violation of section 3314(f) is established and a civil penalty of $185 is assessed.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: August 21, 2003