

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

In the Matter of the Appeal of:

NABISCO, INC.
7301 Artesia Boulevard
Buena Park, CA 90621

Employer

Docket No. 01-R3D1-722

**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 Nabisco, Inc. [Employer] under submission, makes the following decision after reconsideration.

JURISDICTION

On December 7, 2000, 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 7301 East Artesia Boulevard, Buena Park, California (the site). On December 21, 2000, the Division issued a citation to Employer alleging a serious accident-related violation of section¹ 4187(a) [in-running roll guard], with a proposed civil penalty of \$18,000.

Employer filed a timely appeal contesting the existence and classification of the alleged violation and the reasonableness of the proposed civil penalty.

On January 14, 2003, a hearing was held before Dale A. Raymond, Administrative Law Judge (ALJ), in West Covina, California. Adam Grant, Attorney, represented Employer. Albert Cardenas, Staff Counsel, represented the Division.

On February 18, 2003, the ALJ issued a decision denying Employer's appeal.

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

On March 24, 2003, Employer filed a petition for reconsideration. The Division filed an answer on April 28, 2003. The Board took Employer's petition under submission on May 9, 2003.

BACKGROUND

Employer makes cookies for retail sales and in the course of their production employs machines with large (jumbo) rollers. While cleaning one of the machines an operator, Maria Hernandez [Hernandez], had four fingers of her hand crushed by the jumbo rollers. The case on appeal was before the ALJ on the sole issue of whether the citation was accident-related. The parties stipulated to the evidence before the ALJ as the injured employee's deposition testimony [EXH A] and the Division's investigative documents [EXH B].

ISSUE

Was the violation of section 4187(a) properly classified as accident-related?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Appeals Board has considered the decision of the ALJ and the record in light of Employer's petition for reconsideration and affirms the ALJ's summary of evidence, rulings, findings, and conclusions and adopts the decision in its entirety. Accordingly, the ALJ's decision is attached hereto and incorporated herein by reference.

The citation alleged "[t]he in-running rolls of the laminator on line #3 were not guarded from accidental contact with said rollers." The thrust of Employer's argument in its petition for reconsideration is fourfold: First, it asserts that the factual basis for the decision contradicts the Division's findings; second, that the employee's deposition testimony contradicts the factual findings; third, that the decision is fatally flawed as it relies on incomplete evidence; and fourth, that the employee's failure to follow the lock out/tag out procedure caused the accident.

1. The factual basis of the decision

Employer argues that the "factual crux of the decision rests on findings completely contradicted by the Division's report." Its argument is essentially that the dough which Hernandez sought to remove just prior to the accident was found by the ALJ to be on the frame or enclosure for the rolls not on the rolls themselves as the Division's report described the accident. It avers that because the Division's report concluded that the employee reached into the rollers to retrieve the dough, such action was intentional thus negating the

conclusion that the employee *accidentally* touched the rollers.²

In making her findings the ALJ need not rely on evidence presented by the Division underlying an element of a violation if there is other competent evidence in the record establishing the element.

Hernandez' testimony established that the dough she attempted to remove was on the enclosure of the jumbo rolls, but she denied reaching down into the rollers. The Board finds that this testimony of Hernandez amounts to other competent evidence in the record which the ALJ properly relied upon to find that the dough was on the enclosure and not on the rollers.

The Board also finds that Employer's argument of the intentional reaching into the rollers by the employee bears no merit. Even if Hernandez' action was a deliberate and intentional act in violation of Employer's rules, such misconduct is not a basis for setting aside this violation³ with the concomitant fall of the serious, accident-related classification.

The Board concludes, therefore, that the factual findings made by the ALJ were appropriately based upon a preponderance of the evidence.⁴

2. The employee's deposition testimony

Employer contends that the employee's deposition testimony contradicts the decision's factual findings. Employer asserts that the employee "never testified she reached across the jumbo rolls with her right hand as stated in the decision." She *did*, however, testify: "I saw, I think it was a piece of dough *across the jumbo rolls*, and I tried to pick it up." [Emphasis added]⁵ Hernandez went on to explain what she meant: "[a]cross – it's to the other side of the rolls or from the other side of the rolls ... [f]rom west to east."⁶

The ALJ found that "[w]hile the rolls were running she reached across the jumbo rolls with her right hand ... [and] [h]er right hand accidentally got pulled into the jumbo rolls" The Board finds that this is a reasonable inference which can be drawn from Hernandez' testimony and thus concludes that Hernandez' testimony does not contradict the ALJ's factual findings.

Employer further asserts that "there is no evidence that supports the factual conclusion the employee's right hand was accidentally pulled into the jumbo rolls." There is no doubt that Hernandez' hand was injured by the

² See *A.L.L. Roofing & Building Materials Corp.*, Cal/OSHA App. 92-290, Decision After Reconsideration (Sep. 12, 1994).

³ See *Metalclad Insulation Corp.*, Cal/OSHA App. 96-130, Decision After Reconsideration (Oct. 4, 2000).

⁴ By a preponderance of evidence is meant that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but on the effect on those to whom it is addressed. *People v. Miller* (1916) 171 Cal. 649, 652.

⁵ Transcript 84: 24-25.

⁶ Transcript 85: 8-11

jumbo rollers. The Board does not believe that Hernandez intentionally reached into the jumbo rollers and so finds. The reasonable inference that she reached across the rollers supports the conclusion that her hand was *accidentally* pulled into the rollers. Therefore, the Board rejects Employer's assertion that there is no evidence that supports the factual conclusion that Hernandez' right hand was accidentally pulled into the jumbo rollers.

3. Consideration of the evidence

Employer's petition for reconsideration also claims the decision of the ALJ is fatally flawed as it rests on incomplete consideration of the evidence presented. Employer argues that the Division's investigative report includes evidence that the dough was not above the later-installed guard.⁷ It contends, therefore, that if the guard had been in place it would have prevented Hernandez from seeing the dough. Employer has admitted that the machine had been operated for some time without the guard and the Board finds that it is speculation as to what would or would not have been seen had the guard been in place.

Employer further argues "... based on her own statement to the Division, she would not have been able to reach the dough if the guard had been in place... ." Employer does not point to where in the record, and we find no such reference, that Hernandez made such a statement to the Division. In addition, Employer claims Hernandez could not have cleaned the rollers if the guard had been in place, but does not explain why this is so.

Employer has not demonstrated that the ALJ's decision is fatally flawed as resting on incomplete consideration of all the evidence presented. We find no merit in this claim because Employer's contentions are speculative and conclusory and not supported by the limited available evidence in this case.

4. Failure to follow procedure

Employer argues that the sole cause of the accident was Hernandez' failure to follow the lock out/tag out procedure, not the lack of a guard. The Board disagrees.

Employer's argument is predicated on certain assumptions. Employer asks the Board to assume that if the machine had a point of operation guard as required by section 4187(a), removal of the guard would be necessary in order to clean the machine. The Board need not reach the question of whether that theory would present a valid defense. Employer presented no evidence to suggest a guard could not be in place during the final stages of cleaning the rolls. Indeed, the record reflects that when Hernandez cleaned a similar machine, she did not remove the guard. In any event, if the guard had been in

⁷ The machine guard was installed after the accident.

place when Hernandez went to remove the dough from the frame of the machine her hand could not have been drawn into the rolls. Thus a lack of guarding was the cause of the accident.

DECISION AFTER RECONSIDERATION

A serious, accident-related violation of section 4187(a) is established and a civil penalty of \$18,000 is assessed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: November 7, 2003