

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

In the Matter of the Appeal of:

**WASHINGTON ORNAMENTAL IRON WORKS
INC. dba WASHINGTON IRON WORKS
17926 S. BROADWAY
GARDENIA, CA 90248**

Employer

Inspection No.

1226666

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Washington Ornamental Iron Works Inc. (Employer) is a metal work subcontractor. On April 25, 2017, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Rosalind Dimenstein (Dimenstein), opened an accident inspection at a construction site located at 900 Wilshire Boulevard, Los Angeles.

On July 20, 2017, the Division cited Employer with three alleged violations of title 8 health and safety standards. Citation 1, Item 1 alleges a General violation of section 1509, subdivision (a). Citation 1, Item 2, is an alleged General violation of section 14300.32, and is not at issue here. Citation 2 is an alleged Serious violation of section 3328.

The matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the Board, in West Covina, California on September 4, 2019. Lisa Baiocchi, Attorney, represented Employer and Martha Casillas, Staff Counsel, represented the Division. On January 6, 2020, the ALJ issued a Decision affirming Citation 1, Item 1, reclassifying Citation 1, Item 2 to a regulatory violation, and affirming Citation 2.

The Employer timely filed a Petition for Reconsideration of the ALJ's Decision on February 3, 2020, and the Division filed a timely response. The Board took the ALJ's decision under reconsideration. Issues not raised in the Employer's Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

In making this Decision After Reconsideration, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Was a violation of section 1509, subdivision (a) established by a preponderance of the evidence by the Division?
2. Was a violation of section 3328 established by a preponderance of the evidence by the Division?

FINDINGS OF FACT

1. Employee Roberto Salazar (Salazar) suffered a broken arm and was hospitalized for four days when the gang box he was using as a working surface exploded, and the lid flew up and hit his arm.
2. Salazar is an experienced employee who was using the Victor Technologies oxy-acetylene torch to cut a piece of metal at the time of the accident.
3. Salazar was removing portions of an angle iron that was five inches wide by ten inches in height, and five feet long.
4. Employees of employer regularly used the gang box lid as a working surface.

DISCUSSION

1. Was a violation of section 1509, subdivision (a) established by a preponderance of the evidence by the Division?

Citation 1, Item 1 alleges a violation of the Illness and Injury Prevention (IIPP) standard, found at section 1509, subdivision (a):

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

Section 3203, Subdivisions (a)(4) and (a)(6) state:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program. The Program shall be in writing and, shall, at a minimum:

[...]

(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: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(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.

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

(A) When observed or discovered; and,

(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The Division's alleged violative description is as follows:

Prior to and/or during the course of the investigation, including, but not limited to, 4/25/17, the employer had not identified and corrected the unsafe work practice of welding and/or torch cutting on top of closed gang boxes, using them as working surfaces.

Section 3203, subdivision (a)(4), requires "Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include 'scheduled periodic inspections.' (Section 3203(a)(4).)" (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) Employer successfully demonstrated at hearing that its IIPP includes periodic inspections, leaving only section 3203, subdivision (a)(6) at issue.

The Division does not argue that Employer's IIPP was defective or lacked procedures for identifying and evaluating workplace hazards, but contends that the procedures in the program were not properly implemented by Employer. An IIPP may be satisfactory as written on paper, but failure to implement the plan, through failure to correct hazards, may constitute a violation of section 3203, subdivision (a)(6). (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).)

According to the Division, Employer failed to implement its IIPP by failing to identify and correct the hazard of using the lid of the gang box as a work surface when engaged in cutting an angle iron with the oxy-acetylene torch. In its defense, Employer presented testimony and evidence demonstrating that it did have appropriate procedures in place to identify workplace hazards, and

that the procedures were regularly followed. Employer's witnesses testified that they were unaware that there was any hazard involved in using the gang box as a working surface, and that they had engaged in said practice without incident a number of times in the past.

The ALJ found that the Employer failed to identify and correct a hazard that was identified in the oxy-acetylene torch manufacturer's guide. The guide states, "Never perform welding, cutting, and heating operations on a closed container or vessel, which may explode when heated." (Ex. 11, Victor Cutting, Heating and Welding Guide.) The parties dispute what the rule actually means. According to the Division, the rule forbids using a closed container, such as a gang box, as a working surface where welding and cutting operations are completed. Employer interprets the rule as instructing users not to use the torch on a closed container, such as a propane tank or a compressed gas cylinder, since a closed containers contents can become heated and can cause the closed container to explode. Neither interpretation is unreasonable on its face.

The ALJ acknowledges in footnote 2 on page 5 that the meaning and intent of this rule is ambiguous:

There may be ambiguity with respect to the manufacturer's recommendation. In one sense, "never perform... operations on a closed container" might pertain to a working surface, such as a table or saw horse. In this sense, the closed container is a separate object from the object being cut or welded. The parties presented evidence and argument that accepts this interpretation. In a different sense, "never perform... operations on a closed container" might pertain to the object to which the cutting torch is applied. In this sense, the guide would prohibit cutting or welding a closed container. A review of additional items listed in the Fire Prevention section suggests similar ambiguities with the word "on." Nevertheless, the parties did not present evidence and argument regarding the second interpretation. Therefore, the first interpretation will be accepted for purposes of this Decision.

Testimony and evidence at hearing fell short of explaining what caused the gang box lid to fly up, injuring the employee who was making the cut with the torch. Employer presented testimony from injured employee and experienced journeyman welder Salazar, as well as supervisors Steve Sartain (Sartain) and Scott Allee (Allee); neither could recall either seeing or hearing of a gang box exploding in this manner. Employer's managers and supervisors all testified that there was nothing in the interior of the box that would potentially explode. Salazar testified that he had never been warned of the possibility of such an occurrence, either in welding school, or in training from the union. The Division's associate safety engineer, Dimenstein, who had also taken welding courses and had some experience welding prior to working for the Division, also could not recall ever having seen an accident like the one that occurred here.

Salazar was aware of the contents of the gang box before he began welding. It was holding rigging supplies, some small hand tools, and an empty bucket. The gang box was not airtight and was not storing anything that could potentially create a flammable gas. Salazar's supervisors testified that Salazar is fastidious in checking his equipment before working, and is an experienced and careful welder. They were adamant in their testimony that Salazar would not have cut with a tool that was leaking gas. Moreover, Salazar testified that he was cutting away from, rather than

towards the box, merely using the gang box as a platform to steady his arm. When asked if he noticed the gang box becoming hot, he responded “no”, he did not. Unrebutted testimony also established that it would be apparent very quickly if a hose or tool was leaking, as it would lose pressure and not work properly. There would also be an odor.

The Board agrees with the Employer that the manufacturer’s recommendation is ambiguous and can reasonably be read in more than one way. Moreover, Employer demonstrated through evidence and testimony that it had procedures in place to identify and correct workplace hazards, as required by section 3203, subdivisions (a)(4) and (6). Once the accident occurred, the Employer took appropriate steps to eliminate the previously unrecognized hazard, by bringing in sawhorses to create working surfaces, rather than using the gang boxes. Without evidence from the Division establishing what the hazard was, or what the source of the explosion was, it cannot fairly be said that Employer failed to recognize and correct the hazard.

The citation is dismissed.

2. Was a violation of section 3328 established by a preponderance of the evidence by the Division?

Citation 2 is an alleged violation of section 3328, the language of which is as follows:

(a) All machinery and equipment:

(1) shall be designed or engineered to safely sustain all reasonably anticipated loads in accordance with recognized engineering principles; and

(2) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design.

The alleged violative description states:

Prior to and/or during the course of the investigation, including, but not limited to, 4/25/17, the employer did not ensure that all machinery and equipment was only used under conditions of speeds, stresses, loads and environmental conditions recommended by the manufacturer.

The ALJ upheld the citation, finding that the Division established that Salazar used the cutting torch under “environmental conditions that are contrary to the manufacturer’s recommendations.” (Decision, p. 8.) The ALJ correctly notes that the regulation does not define what constitutes “environmental conditions,” and the Board has not interpreted this phrase before. The ALJ turns to the dictionary for a definition of environment: “the circumstances, objects, or conditions by which one is surrounded.” (Decision, p. 8.) The ALJ thus concludes that performing a cutting operation on the closed gang box constituted use of the machinery under an environmental condition contrary to the manufacturer’s recommendations. The manufacturer’s guide states, “Never perform welding, cutting, and heating operations on a closed container or vessel, which may explode when heated.” As discussed above, the language in the manufacturer’s

guide is ambiguous, and can reasonably be interpreted in several ways, and the Division has failed to persuade us, in this instance, that its interpretation is correct.

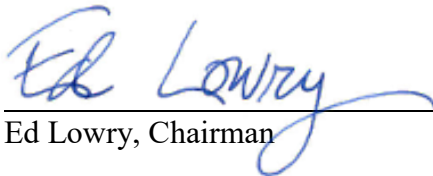
The Division has failed to establish that the torch was used under an environmental condition contrary to manufacturer's recommendations. At the time of the accident, Salazar was not performing a welding activity to the gang box, but was using the top of the box as a working surface, while cutting a piece of metal off of an angle iron. The Division has the burden of proving that the tool was used in environmental conditions that run contrary to the manufacturer's recommendations, and has failed to do so here.

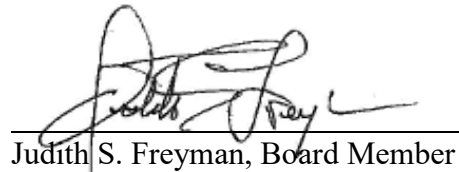
Citation 2 is vacated.

DECISION

The Board vacates Citation 1, Item 1, and Citation 2, Item 1, and the associated penalties.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD


Ed Lowry, Chairman


Judith S. Freyman, Board Member


Marvin Kropke, Board Member



FILED ON: **12/28/2020**

SUMMARY TABLE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: WASHINGTON ORNAMENTAL IRON WORKS INC. dba WASHINGTON IRON WORKS	Inspection No. 1226666
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Citation Issuance Date: **07/20/2017**

CITATION	ITEM	SECTION	TYPE	CITATION/ITEM RESOLUTION	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED
1	1	1509 (a)	G	DAR issued. Violation vacated.		V	\$560.00	\$0.00
1	2	14300.32 (b) (6)	G	ALJ affirmed. Reclass to R penalty recalculated.	A		\$280.00	\$300.00
2	1	3328 (a) (2)	S	DAR issued. Violation vacated.		V	\$18,000.00	\$0.00
Sub-Total							\$18,840.00	\$300.00

Total Amount Due* **\$300.00**

**You may 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.*

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:
Department of Industrial Relations

2. Write the **Inspection No.** on your payment

3. If sending via US Mail:
 CAL-OSHA Penalties
 PO Box 516547
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:
 US Bank Wholesale Lockbox
 c/o 516547 CAL-OSHA Penalties
 16420 Valley View Ave.
 La Mirada, CA 90638-5821

Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

-DO NOT send payments to the California Occupational Safety and Health Appeals Board-

Abbreviation Key:

G=General	R=Regulatory	Er=Employer
S=Serious	W=Willful	Ee=Employee
RG=Repeat General	RR=Repeat Regulatory	A/R=Accident Related
		RS=Repeat Serious