

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

In the Matter of the Appeal of:

**USA WASTE OF CALIFORNIA, INC.
dba BLUE BARREL DISPOSAL SERVICES**

Employer

Inspection No.

1384029

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it renders the following decision after reconsideration.

Jurisdiction

On July 17, 2019, the Division of Occupational Safety and Health (Division) issued two citations to USA Waste of California, Inc, dba Blue Barrel Disposal Services (Employer) alleging violations of California Code of Regulations, title 8, only one of which citation remains at issue.¹ Citation 2, Item 1, alleges a Serious violation of section 4184, subdivision (b) [failure to guard machinery's point of operation].

On March 12, 2020, an Administrative Law Judge (ALJ) issued a Decision after a one-day hearing, vacating Citation 2, Item 1 (Citation 2).

The Division subsequently petitioned for reconsideration of the ALJ's Decision, arguing the ALJ erred by vacating Citation 2. (Division's Petition, p. 2; Lab. Code, § 6617, subs. (a), (c), (e).) Employer Answered. The Board took the Division's petition under submission.

On April 27, 2021, the Board issued a Decision After Reconsideration (DAR) overturning the ALJ's findings and affirmed Citation 2, a Serious violation of California Code of Regulations, title 8, section 4184, subdivision (b).

On May 24, 2021, pursuant to authority set forth in *Ventura Coastal, LLC. v. Occupational Safety and Health Appeals Board* (2020) 58 Cal.App.5th 1 (*Ventura Coastal*), Employer, being newly aggrieved by the April 27 DAR, timely petitioned for reconsideration, arguing that the Board erred when it affirmed Citation 2 and by failing to address the issue of abatement. The Board took Employer's petition under submission. The Division responded.

The Board has fully reviewed the record in this case, including all pleadings. The Board

¹ Unless otherwise specified all references will be to California Code of Regulations, title 8.

has taken no new evidence.² Based on further independent review of the record, we affirm the Decision of the ALJ vacating Citation 2, and set aside our DAR issued on April 27, 2021 concerning Citation 2.

Issues

- 1) Does the Board have authority to entertain Employer's petition?
- 2) Did the Board err when it affirmed a violation of Citation 2?

Findings of Fact

- 1) Employer operates a refuse collection company.
- 2) Employer utilizes trucks to collect the waste. Many of the functions of these trucks are operated, in part, by various types of hydraulic hoses.
- 3) The employees need to periodically replace the hydraulic hoses of the collection trucks.
- 4) The replacement procedure requires measuring and cutting a proper hose and securing a metal fitting to both ends. Proper securement of the fitting to the hose is essential as the hoses withstand significant pressure.
- 5) To secure the fittings to the hose, Employer utilizes a crimping machine, which securely fastens fittings to hydraulic hoses via a crimping action.
- 6) There was no employee exposure to any danger zone created by the point of operation of the crimping machine.

Analysis

1) Does the Board have authority to entertain the second petition for reconsideration from Employer?

After the ALJ issued the Decision vacating Citation 2, the Division petitioned for reconsideration. The Board took the Division's petition under reconsideration and subsequently issued a DAR overturning the ALJ's Decision. The DAR affirmed Citation 2 and its Serious classification. Employer then filed its own petition for reconsideration asking the Board to reconsider its DAR. The issue presented is whether the Board has authority to entertain Employer's petition for reconsideration.

The *Ventura Coastal* decision provides guidance as to whether the Board has discretion to entertain Employer's own petition for reconsideration. In *Ventura Coastal*, the appellate court

² It is noted that Employer's petition for reconsideration, and accompanying documents, include and reference evidence that was not included in the hearing record. The Board does not rely on such material.

found that statutes governing petitions for reconsideration before the Board were analogous, and generally similar, to those within the workers' compensation scheme, and indicated they should be interpreted in a similar fashion. (*Ventura Coastal, supra*, 58 Cal.App.5th at 18-24.) Under the workers' compensation scheme, parties are entitled to file a second petition for reconsideration in several circumstances. As noted in *Ventura Coastal*,

[I]n the analogous workers' compensation scheme, an aggrieved party is generally entitled to only one petition for reconsideration. However, if a party prevails initially and, on petition for reconsideration by the other party, the decision is reversed, the party who initially prevailed becomes an aggrieved party for the first time and may petition for reconsideration. Alternatively, if reconsideration is granted and new evidence is taken, a second petition for reconsideration may be filed to challenge that decision and its new evidentiary basis. Further, if the decision after the first reconsideration includes matters not raised by the parties, or not appropriate to include in such a decision, a petition for reconsideration may be used to challenge those matters because they could not have been challenged in the first petition for reconsideration. However, if the party who did not prevail initially loses again after reconsideration, and no new evidence was presented on reconsideration, that party cannot petition for reconsideration a second time.

(*Ventura Coastal, supra*, 58 Cal.App.5th at 23.)

Following the analysis in *Ventura Coastal*, and interpreting the Board's statutes concerning reconsideration in a similar fashion to cases under the workers' compensation scheme, Employer may file a second petition for reconsideration. Employer prevailed initially before the ALJ. After a petition for reconsideration by the other party, the decision was reversed. Employer therefore became an aggrieved party for the first time and may petition for reconsideration. (*Ventura Coastal, supra*, 58 Cal.App.5th at 23.)

The Division asserts the Board should disregard the aforementioned portion of the *Ventura Coastal* decision, arguing its discussion pertaining to second petitions "is both dicta and erroneous." (Opposition to Motion for Reconsideration, p. 3-4.) The Division argues the *Ventura Coastal* court erred by relying on workers' compensation precedent. (*Ibid.*) However, the Board is not inclined to disregard a published appellate court decision. As such, the Board may consider, and will consider, the second petition for reconsideration filed by Employer.

2) Did the Board err when it affirmed a violation of Citation 2?

Employer utilizes a crimping machine in its workplace to secure metal fittings to the end of hydraulic hoses.³ Within the April 27 DAR, the Board found a violation of section 4184, subdivision (b), related to Employer's usage of this crimping machine, and affirmed the citation's Serious classification. Employer's Petition for Reconsideration challenges the Board's DAR on multiple grounds.⁴ Although the bulk of Employer's arguments generally pertain to the classification of the citation and abatement, Employer argues that the DARs' affirmation of the citation is unnecessary and erroneous. Employer specifically contends the DAR erred when it concluded a point of operation hazard existed. (Motion for Reconsideration, p. 1.) Employer argues that the ALJ's Decision found there was no exposure to the zone of danger and the Board erred when it overturned that finding absent substantial⁵ contrary evidence. (Employer's Memorandum of Points and Authorities, pp. 1-2.) In short, Employer asks us to consider whether we erred by overturning the ALJ's findings. Employer argues the DAR's findings do not support the decision upholding the citation's elements. (*Id.* at p. 4.) Therefore, we first reconsider whether the DAR erred when it found exposure and affirmed the violation, overturning the ALJ.

Citation 2 alleges a violation of section 4184, subdivision (b). That section states,

(b) All machines or parts of machines, used in any industry or type of work not specifically covered in Group 8, which present similar hazards as the machines covered under these point of operation orders, shall be guarded at their point of operation as required by the regulations contained in Group 8.

The Division's alleged violation description states,

Prior to and during the course of the inspection, including, but not limited to, on March 7, 2019, employees were utilizing MATCHMATE PLUS Crimp System (located in the shop) that had unguarded point of operation (unguarded crimp die). The unguarded crimp die had grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing and/or similar action while in operation.

³ Employer stipulated that the machine was being used. (NCCR Transcript ("TR") 12:2-9.)

⁴ Employer contends the DAR erred when: (1) it found a point of operation hazard exists and concluded that the hazard must be abated (2) failed to consider the issue of feasibility and reasonableness of abatement; (3) failed to conclude that Employer rebutted the presumption of a Serious violation; and (4) failed to consider lack of feasibility, practicality, and unreasonable expenses associated with abatement. (Motion for Reconsideration, pp. 2-3.) The Board limits its review to those issues raised by the petitions for reconsideration. "The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (Lab. Code, § 6618.)

⁵ In response to Employer's contention that the Board should not overturn an ALJ's decision absent substantial evidence, we note that the Board engages in an independent review of the record. The Board has the authority to affirm, rescind, alter or amend the decision of the ALJ. (Lab. Code, §§ 6620, 6621, 6622.) The Board, not the ALJ, is the ultimate fact finder. (See Lab. Code, §§ 6602, 6604, 6605, 6609, 6614, 6620, 6621, 6623, 6629, and 6630.)

Addressing the merits, the Division has the burden of proving all elements of a violation by a preponderance of evidence. (*Home Depot, USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017) [other citations omitted].) Parsing the cited safety order, to establish a violation of section 4184, subdivision (b), the Division must establish three elements: (1) a machine, or part of a machine, exists which is not specifically covered in Group 8; (2) the machine presents similar hazards as the machines covered under the point of operation safety orders; and, (3) the machine was not guarded at its point of operation as required by the regulations contained in Group 8.

To determine whether the Division established each element, it is first necessary to understand the crimping machine and its operation. The crimping machine utilized by Employer in its shop secures fittings to hydraulic hoses. The crimping machine was identified in several photographs. (E.g., Exhibits 5-9.⁶) There are three components of the machine relevant to our inquiry:⁷ the spring-activated switch, the crimp ring, and the crimping cage (otherwise known as a die cage). The spring activated switch is located on the front of the machine. The machine performs no movement or function unless the switch is pressed, thus activating its function. (TR 52:24-53:7, 65:24-66:18, 155:12-19.)

The crimp ring is a cylindrical metal piece of the machine held by two metal arms; it has an interior opening measuring 4 ½ inches in diameter. (TR 40:6-15, 40:24-41:18, 53:11-54:1, 56:2-19, 193:4-15; Exhibits 7, 14, 16.) The height of the ring is approximately 2 ½ inches. (TR 193:4-23.) The crimp ring has two resting positions: full retract, meaning at its lowest point, and soft retract. (Exhibit 16, p. 4.) The crimp ring goes up and down when actuated by the switch. (TR 41:9-18 [“[T]his piece is going to go up and down...”], 64:4-15; Exhibit 16.) As noted above, the crimping ring will not move absent contemporaneous pressing of the switch.

The die cages are similar to a circular cartridge that can be changed on the machine. (TR 47:8-24; Exhibit 10.) There are different die cages used for different hoses and fittings. (TR 47:8-24, 151:21-153:7, 192:22-193:3.) The height of the die cage is close to approximately 2 ½ inches. (TR 193:16-23.) When the crimp ring is in the full retract position, meaning at its lowest point, there is approximately a 1/2 inch between the crimp ring and the die cage, which permits the operator sufficient space to change the die cage. (TR 62:5-63:20; Exhibit 16.) There are slots on the machine where the die cage is inserted, which hold the die cage in place. (Exhibit 16, p. 6 [“Slide the die cage into the cage holder slots.”].) Each die cage holds several die segments. (TR 40:6-15, 40:24-41:8; Exhibits 7, 10.) As noted from the upward view of the crimping machine in Exhibit 7, an interior opening exists in each die cage sufficient to permit a hose and fitting to be threaded into that opening. (Exhibits 7, 10.) The interior diameter of the die cage varies with different die cages; measurements were taken ranging from 1 ½ to 2 ¼ inches. (TR 56:12-57:17; Exhibit 15.)

⁶ Throughout this decision, we include citations to the record. These citations illustrate some of the evidence supporting the stated propositions, but they are not necessarily exhaustive of evidence relied upon by the Board. The Board issues this decision based on a review of the entire record.

⁷ There are other components and processes involved with this machine that we do not here discuss, as they are largely irrelevant to our specific inquiry. For example, the operator must enter numerical settings on the machine.

To crimp a hose, an operator will first select the correct hydraulic hose, cut it to size, and then put the desired fitting on the end of the hose. (TR 51:13-21, 151:21-152:14, 157:23-159:2, 162:2-5; Exhibit L.) The operator will then go to the machine and, while the crimp ring is in the full retract position, insert the correct die cage into the slot, and enter the correct setting on the machine. (TR 63:6-20, 151:21-152:20, 159:3-159:25, 162:2-5; Exhibits 16, L.) The operator will then thread the hose and fitting through the opening of the crimp ring and then through the opening of the die cage, thereafter aligning the fitting within the die cage to ensure a proper crimp. (TR 151:21-152:23 [“Then we insert the hydraulic hose into the die...”], 159:25-160:5 [“Insert the hose and hose end into the die cage from the bottom.”], 162:2-5; Exhibits 16, L.) The distance between the bottom of the crimp ring to the die cage is approximately 2 ¼ inches. (TR 53:11-20, 56:11-57:17, 84:16-24.) After the fitting is threaded through the die cage, the distance between the fitting and the dies is less than half an inch; “you only have less than a half inch per side.” (TR 184:1-15 [“[T]hey’re all less than a half an inch between the side of the socket and the crimp die itself.”], 197:4-198:8.)

After threading of the hose, the operator holds the hose with one hand below the crimp ring. With the other hand, the operator must press the spring activated switch. (TR 52:8-53:7, 64:4-65:1; Exhibit 16 [Figure 6].) In short, one hand is holding the hose under the bottom of the crimp ring below the machine’s point of operation and the other is activating the switch. (TR 207:7-14) The hoses do not flop over in this process. Even the small hoses, made of multiple layers, are stiff enough that they will not fall over during this process. (TR 151:6-13, 187:8-24.) When the switch is activated it causes the crimp ring to ascend upwards, which thereafter interacts with the die cage and the die segments whereupon the crimping ring presses and squeezes the dies with thousands of pounds of hydraulic pressure, which, in turn, exert secondary pressure on the fitting and crimp it. (TR 41:9-42:1, 207:19-208:11.) Employer’s witnesses credibly testified that they “jogged,” or paused the activating switch to ensure the fitting is properly aligned, slowly contracting the jaws on the die, and only doing a full crimp when sure it is properly aligned.⁸ (TR 151:21-153:7, 164:14-167:7, 184:16-185:12.)

With the foregoing understanding of the crimping machine, we now return to an evaluation of whether the Division established all three elements necessary to assert a violation of section 4184, subdivision (b).

Addressing the first element, the Division must demonstrate a machine, or part of a machine, exists which is not specifically covered in Group 8. (See, e.g. *Nursery Supplies, Inc.*, Cal/OSHA App. 99-2731, Decision After Reconsideration (August 2, 2002).) Ramin Behani (Behani), Division Associate Safety Engineer, testified that the crimping machine was not specifically covered by Group 8, and no contrary evidence or argument was introduced, nor have we independently discovered any provision of Group 8 that would specifically cover the machine. (TR 34:24-35:17, 87:3-24.) Therefore, the Division established the first element.

Turning to the second element, the Division must demonstrate that the subject machine, regardless of the industry or type of work for which it is used, “present[s] similar hazards as the

⁸ While Behani testified that he did not believe that Employer utilized jogging in their procedures, he admitted that he never asked Employer to start the machine while a hose was in position. (TR 65-66). Therefore, his testimony carries less weight than those of Employer’s witnesses on this issue.

machines covered under the[] point of operation orders....” (§ 4184, subd. (b).) The point of operation safety orders, in general, address hazards presented or created by the point of operation of machines. (See, e.g., *Rialto Concrete Products, Inc.*, Cal/OSHA App. 96-1217, Decision After Reconsideration (April 30, 2002) [“These provisions manifest a broader intent to cover *an employee* exposed to a point of operation hazard.”].)

To determine whether a machine creates similar hazards as the machines covered under the point of operation safety orders, the Board must initially consider what hazards are covered by the point of operation safety orders, reviewing the regulation in context.⁹ The Board looks to section 4184, subdivision (a), to determine the hazards specifically covered or addressed under the point of operation orders. (*Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985); *National Steel & Shipbuilding Co.*, Cal/OSHA App. 78-1488, Decision After Reconsideration (October 18, 1979).) Section 4184, subdivision (a), states:

(a) Machines as specifically covered hereafter in Group 8, having a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, in which an employee comes within the danger zone shall be guarded at the point of operation (Underline added.)

Based on the plain text of section 4184, subdivision (a), a relevant hazard exists when the point of operation engages in a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, and an employee comes within the danger zone. (*Kaiser Aluminum and Chemical Corp.*, *supra*, Cal/OSHA App. 80-1014.) In short, a hazard exists when two criteria are established. First, the point of operation must engage in a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action. Second, an employee must come within the danger zone of the point of operation.¹⁰ (*PCC Rollmet, Inc.*, Cal/OSHA App. 1079636, Decision After Reconsideration (August 15, 2017) [The “question is whether the machine creates a ‘grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, in which an employee comes within the danger zone [.]’”].)

Reading section 4184, subdivisions (a) and (b) together, and harmonizing them, a machine not specifically covered in Group 8, will present similar hazards as those machines that are covered if the aforementioned two criteria exist: (1) the point of operation of the machine engages in a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action; and (2) an employee comes within the danger zone. (See, e.g., *Kaiser Aluminum and*

⁹ We do not construe a regulation in isolation, but instead read it with reference to the scheme of law of which it is a part, so that the whole may be harmonized and retain effectiveness. (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 100-101. [other citations omitted]) Fundamental rules of construction require that the regulation read as a whole, and that the parts of a regulation be read together and harmonized, when possible, to give effect to the legislative intent. (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 759.)

¹⁰ Under the plain text of section 4184, subdivision (a), for an actionable hazard to exist, an employee must also come within the danger zone of the point of operation. Every word, phrase, sentence and part of an act should be effectuated with the resulting interpretation giving effect to the legislative intent. (See *County of Sacramento v. Superior Court* (1971) 20 Cal.App.3d 469, 472.)

Chemical Corp., supra, Cal/OSHA App. 80-1014; *PCC Rollmet, Inc., supra*, Cal/OSHA App. 1079636; *McDonnell Douglas Aerospace*, Cal/OSHA App. 94-2331, Decision After Reconsideration (Oct. 14, 1999).)

To determine whether these two criteria are met in the instant case, i.e. whether the point of operation of the machine engages in a covered action and whether an employee comes within the danger zone of the point of operation, it is necessary to delineate the relevant point of operation and danger zone. The Standards Board has defined “point of operation” as “That part of a machine which performs an operation on the stock or material and/or that point or location where stock or material is fed to the machine. A machine may have more than one point of operation.” (§ 4188.) “Danger zone” is defined more broadly as “Any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.” (§ 4188.) Based on the definitions utilized, the danger zone of the point of operation is not necessarily coterminous with the point of operation itself and may encompass a larger area surrounding the point of operation. (See *PCC Rollmet, Inc., supra*, Cal/OSHA App. 1079636; *Nursery Supplies, Inc., supra*, Cal/OSHA App. 99-2731.)

With the foregoing factual discussion in mind concerning the crimping machine’s operation, it is undisputed that the point of operation of the machine, as that term has been defined (§ 4188), is the place where the die segments squeeze the fitting onto the hose, i.e., the part of the machine that performs an operation on material. The Division states, “The die is the point of operation for the crimping machine because this is where the die opens and closes and actually crimps and squeezes the metal fixture onto the hose.” (Petition for Reconsideration, p. 4.) Next, the Division has aptly identified the danger zone. The Division’s Petition for Reconsideration states, “The zone of danger here is the area around the point of operation that is not guarded. That would be the area around the die.” (Division Petition for Reconsideration, p. 7-8 [Underline added].) We agree and limit our review to the identified danger zone; we do not consider points not addressed by the parties. (Lab. Code, § 6618.) The relevant danger zone is where the die segments are compressed to contact the fitting and perform the crimping operation.

With the operation of the machine articulated, and its point of operation and relevant danger zone defined, we now return to the question of whether the machine presents similar hazards as those machines that are covered, through consideration of the two identified criteria, pertaining to the action of the machine and whether an employee comes within the danger zone.

We can dispense with the first criteria, whether the machine engages in a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, without significant discussion. The photographic, video, and testimonial evidence, particularly the testimony of Behani and Juan Lara (Lara), overwhelmingly demonstrate that the crimping machine performs a pressing or squeezing action.

Turning to the second criteria, to determine if an employee comes within the danger zone, the Board utilizes its typical employee exposure analysis. The Division may establish exposure under either of two methods. The Division may establish exposure by showing that an employee

was actually exposed to the zone of danger¹¹ created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [other citations omitted]; *Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017).) The Division may also establish exposure by “showing the area of the hazard was ‘accessible’ to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger.” (*Ibid.* [other citations omitted].)

However, before determining whether exposure exists, it is important to note the boundaries of our analysis, which have been limned by the parties’ arguments and testimony. Per the arguments and testimony of the parties, our exposure inquiry is a narrow one. We are asked whether employee exposure to the danger zone exists when an operator holds the hose below the crimp ring, and thus under the die, during the crimping process. In particular, we are asked whether the operator’s hand and fingers are exposed to being caught in the area around the die when holding the hose from underneath. (Division Petition for Reconsideration, pp. 6-8.) The Division argues, “the crimp ring’s diameter is large enough for a hand to go through and the operator can access the point of operation and stick their fingers and/or hand into the die area while the crimping machine is in operation.” (*Id.* at p. 4.) It argues, “An employee’s hand can fit through the crimp ring into the die.” (*Id.* at p. 7.) The Division further argues, “The operator’s hand is within the zone of danger when they hold the hose directly under the die.” (*Id.* at p. 7.) We do not consider other avenues of potential exposure, as they are not argued by the Division. Further, Behani expressly testified that exposure from the front of the machine was not an issue, noting that he did not “think there is exposure from the front...” (TR 96:10-25.)

In our previous DAR, after considering the Division’s arguments, we found exposure to the danger zone, overturning our ALJ on the point. More specifically, we found actual exposure to the zone of danger. The DAR stated,

[T]he record establishes an employee’s hand was within inches of the point of operation and the zone of danger: the part of the machine that presents the squeezing or pressing hazard. The Division’s inspector testified it is possible for an employee who is holding the hose with one hand to inadvertently have a finger caught up in the crimping machine, resulting in amputation or crushing injuries. There is no dispute in the record that the machine was in operation at the time of the inspection.

Thus, the Board finds this record preponderates to a finding that the employees using the machine were actually exposed to the zone of danger or the hazard created by the violative condition. (DAR, p. 5.)

¹¹ "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [citations omitted].) The scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. (*Ibid.*) Here, the regulations define the zone of danger. For purposes of analyzing the safety order, the “danger zone” identified in the safety order (§4188) is the equivalent of the zone of danger under the Board’s typical exposure analysis.

As noted above, Employer being newly aggrieved by this holding, requested the Board reconsider its ruling, arguing the Board erred by failing to follow the findings of the ALJ. (Employer's Memorandum of Points and Authorities, pp. 1-2.) We have done so. After engaging in further review of the record and the decision of the ALJ, we now reverse our previous DAR. We affirm the ALJ to the extent the Decision concluded the Division failed to establish exposure under either of the Board's two exposure standards.

Actual exposure may be found when the Division demonstrates an employee has been or is in the zone of danger. (*Dynamic Construction, supra*, Cal/OSHA App. 14-1471.) In reevaluating whether actual exposure exists, we begin the discussion by acknowledging two important findings, which initially led us to erroneously conclude the Division had established exposure. First, when a worker holds the hose beneath the dies, their hand and fingers are in relatively close proximity to the danger zone. The worker holds the hose close to where the die segments are compressed to contact the fitting and perform the crimping operation. Second, as both Ryan Ellerbrock (Ellerbrock), Employer's expert witness, and Behani noted, it is theoretically possible for an operator holding the hose to get his hand into the point of operation where the dies are located. However, after further consideration, notwithstanding these points, the Division failed to prove actual exposure.

Initially, we note that close proximity to the danger zone will often be enough to prove actual exposure. Indeed, that was a primary reason the Board found exposure here. However, there are rare instances where proximity alone may not be dispositive. In the immediate matter, after further evaluation and consideration (including of the ALJ's Decision), we conclude the operator's close proximity to the danger zone in this matter is insufficient to prove actual exposure to the danger zone of this particular machine.

Here, the danger zone identified by the Division is the area around the die and the only relevant means of access addressed by the parties is from underneath. In general, for an operator's hand to actually enter the identified danger zone from underneath during the employee's operation of the machine an unlikely convergence of events would have to unfold. First, the employee, while holding the hose, must thread the hose and fitting through crimp ring, which is only 4 ½ inches in diameter, and then into the die cage, which is located more than two inches above the bottom of the crimp ring. (TR 49:25-50:22, 53:11-20, 56:11-57:17, 84:16-24, 151:21-152:23.) Second, during the crimping process, the employee must also somehow simultaneously insert their fingers past the crimp ring, into the small space between the fittings and the die cage, or other similarly small space, while simultaneously holding the hose in place. Before the crimp ring even contacts the die cage, there is less than 1/2 inch distance between the dies and the fitting on all sides, and a half inch in other nearby areas. (TR 62:17-63:20, 184:1-15, 197:4-198:8.) While holding their hand and the hose in an awkward position, using the operator's other hand, they would have to simultaneously press the spring activated switch, compressing their own fingers.

After further examination of the record, we agree that such exposure is not unfathomable. However, as Employer's expert witness, Ellerbrock credibly stated, we also agree that due to the specific nature of this machine, and manner of operation, "it's extremely, extremely difficult." (TR 208:20-209:9.) As Ellerbrock testified, "[Y]ou would have to have your hand completely out of

position when you're holding the hose. And it's very awkward to try to get a finger past the base of the machine up into where these crimp die sit on the socket.” (TR 182:22-183:25.) Ultimately, although there is sufficient evidence that exposure is a distant theoretical possibility, for the reasons stated herein, the Division did not demonstrate actual exposure by a preponderance of the evidence. The demonstrated improbability of actual exposure to the relevant danger zone, when considering the nature of this specific machine and the manner of operation, is more compelling than the speculative theoretical possibilities raised by the Division.

Nor do we see exposure under the Board's alternate standard. Exposure may be demonstrated, without proof of actual exposure, by showing that “the area of the hazard was ‘accessible’ to employees” such that “it is ‘reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.’” (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003); see also *Dynamic Construction, supra*, Cal/OSHA App. 14-1471.) However, the inquiry is not merely whether something is theoretically possible. (*Dynamic Construction, supra*, Cal/OSHA App. 14-1471.) We reiterate that the reasonable predictability standard requires some consideration of the “likelihood” of employee access to make sure that exposure determinations were not made solely on tenuous theoretical or hypothetical possibilities. (*Ibid.*) For reasons, we have already explained the Division also failed to demonstrate exposure under this alternate standard. The Division therefore failed to demonstrate that this machine presents similar hazards as the machines under the point of operation safety orders.¹²

Because we find that Division failed to demonstrate the second element, we need not reach the third element, nor the other arguments raised by the parties. It is also unnecessary to address the pending motions for intervention.

Decision

The Board vacates Citation 2. The Decision of the ALJ is reaffirmed for the reason stated herein, and the April 27, 2021 DAR is overruled.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 02/10/2022



¹² To be clear, however, our finding here is narrow one. First, it relates only to the nature of this specific machine and the manner of operation, and it relates only to the arguments advanced by the parties in this specific matter. Therefore, parties should be cautious not to cite this decision for overbroad propositions.