BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: BAY AREA SYSTEMS & SOLUTIONS dba BASS ELECTRIC 860 Innes Avenue San Francisco, CA 94124-2903 Employer	Docket No. 01-R1D3-106 **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 Bay Area Systems & Solutions dba BASS Electric (Employer) under submission, makes the following Decision After Reconsideration.

JURISDICTION

Between August 7 and September 14, 2000, a representative of the Division of Occupational Safety and Health (Division) conducted an accident investigation at a place of employment maintained by Employer at the New IT 2nd Level Decline Baggage Area, San Francisco International Airport, San Francisco, California.

On September 15, 2000, the Division issued a citation to Employer, classified as serious, accident related, alleging a violation of section 2340.4(a)(2) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1]

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

This matter was heard on June 18 and November 5, 2002, and August 14, 2003 by an Administrative Law Judge (ALJ) for the Board. The ALJ's decision upheld the citation, the classification, and the $16,200 proposed penalty.

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

Employer timely filed a petition for reconsideration, which was taken under submission by the Board on June 10, 2004. The Division filed an answer to the petition.

EVIDENCE

Employer was an electrical subcontractor hired to work on the renovation of the San Francisco International Airport. David Moser, a journeyman electrician with over thirty years of experience, worked for Employer on this job. On August 3, 2000, Moser died after he was electrocuted while working on an energized wire. No one saw the accident. A colleague found Moser "in a tough state" after it happened. During the Division's investigation, burn marks and a pair of wire strippers attached to a wire were found in the ceiling space above where Moser was found. Lock-out, tag-out (LOTO) procedures were not in use at the time of Moser's accident.

The day before the accident, Moser had been transferred to a new crew under the direction of Neil Postel. Employer wanted Moser to work with a partner because he had suffered a prior heart attack, and, until Employer found a suitable partner, Moser was placed on the code compliance crew, which, according to one witness was a "light duty crew" and which another witness described as the "safest option" for Moser.

The parties believed that Moser was trying to install a light fixture at the time he was electrocuted, which Employer maintained was outside the scope of Employer's and Moser's scope of work. Another subcontractor was responsible for installing the lights.

The parties' belief about Moser's activities was based largely on the fact that Moser had asked Postel for permission to install the fixture on two occasions,[2] and he was found on the floor underneath where the light was to be installed next to a ladder. Although no one remembered seeing the light fixture to be installed in the room where Moser was working, Employer offered testimony that the subcontractor responsible for installing the lights had possession of the fixtures.

Employer argued that Moser exceeded the scope of his work assignment and asserted the Independent Employee Action Defense (IEAD). The Division asserted that installing the light fixture was within the scope of Moser's work duties based on the Division inspector's understanding of a statement made by Postel. Postel asserted that the inspector misunderstood the statement.

The decision below concluded that Moser was not installing a light fixture at the time he was electrocuted, but was instead placing a scotch lock

[2] The foreman told him on at least two occasions not to install it, because it was not part of Employer's work.

(also called by some a "wire nut," i.e., a thimble or cap that is placed on the ends of two separate wires to create a circuit) on some wires. There was no testimony to this effect. The conclusion was drawn from a photograph in evidence and a suggestion (one of several in a series) made in the Division's post hearing brief.

Although the decision concluded that Moser's crew was not assigned to install scotch locks, it found that the scope of the work explained to Moser lacked sufficient specificity for him to know that installing scotch locks exceeded the scope of his duties. The decision noted that Postel did not testify in detail about what he told Moser regarding the scope of his responsibilities. As a result, the decision asserted that Moser *unknowingly* exceeded the scope of his work assignment by installing the scotch lock. The decision stated that Moser could have considered it to be "fixing a code violation or doing code compliance work."

The decision upheld the violation and classification. The decision found that Employer could have known about the violation had it exercised reasonable diligence. In addition, the decision held that Employer failed to prove the IEAD because Employer did not have a well devised safety program, among other things.

ISSUES

1. Did Employer violate section 2320.4(a)(2)?
2. Did Employer prove the Independent Employee Action Defense?
3. Did the Division prove the serious, accident related classification of the citation?
4. What is the proper penalty?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Employer violated section 2320.4(a)(2).

Section 2320.4(a)(2) states as follows:

> a) An authorized person shall be responsible for the following before working on de-energized electrical equipment or systems unless the equipment is physically removed from the wiring system:
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> ***
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> (2) Locking the disconnecting means in the "open" position with the use of lockable devices, such as padlocks, combination locks or disconnecting of the conductor(s) or other positive methods or

procedures which will effectively prevent unexpected or inadvertent energizing of a designated circuit, equipment or appliance. Note: See also Section 3314 of the General Industry Safety Orders (GISO) for lock-out requirements pertaining to the cleaning, repairing, servicing and adjusting of prime movers, machinery and equipment.

Because the evidence well supports a finding that Moser was electrocuted while stripping an energized wire, and that LOTO procedures were not in place, we affirm the finding that a violation occurred.

The Board has suggested that an Employer may be relieved of liability for a violation where a violation is unforeseeable because an employee performed work outside the scope of his assigned duties and the unassigned work is an "extreme departure" from the work he was assigned to do. *Andersen Tile Company,* Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000). More frequently, however, the Board has recognized this argument as a defense to the serious classification of a citation. *Id; Napa Pipe Corporation*, Cal/OSHA App. 90-143, Decision After Reconsideration (April 18, 1991); *Lift Truck Services Corp.,* Cal/OSHA App. 93-384, Decision After Reconsideration (Mar. 14, 1996). Because we find that Moser's actions did not constitute an "extreme departure" from his assignment, we will discuss whether Moser exceeded the scope of his assignment in conjunction with the violation's classification.

We next examine Employer's defense that Moser was working outside the scope of his assigned work when the accident occurred and its assertion of the IEAD.

2. Employer did not prove the Independent Employee Action Defense.

To prevail on the IEAD, an employer bears the burden of demonstrating each of the following five elements by a preponderance of the evidence:

1) The employee was experienced in the job being performed.
2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments.
3) The employer effectively enforces the safety program.
4) The employer has a policy of sanctions against employees who violated the safety program.
5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980); *Gal Concrete Construction, Inc.* Cal/OSHA App. 89-317, Decision After Reconsideration (Sept.

27, 1990); *Central Coast Pipeline Construction Company, Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980)).

Failure to prove any one element of the defense precludes its application. *Gal Concrete, supra; Central Coast Pipeline Construction Company, Inc., supra.*

We affirm the decision's finding that Employer failed to demonstrate that it had a well-devised safety program. As reflected in the decision, we find the safety documents in evidence to be brief, general in nature, generic in some instances, and lacking key information, including with respect to LOTO. We further agree that the testimony regarding the safety program was insufficient to overcome the gaps contained in the documents.

Because we find that Employer failed to demonstrate it had a well devised safety program, we affirm that Employer failed to prove the IEAD and decline to consider the evidence pertaining to the remaining four elements.

3. The Division failed to prove the serious, accident related classification of the citation.

We now turn to the violation's serious, accident related classification. A violation is properly classified as serious if there is substantial probability that death or serious physical harm could result from a violation and the employer fails to show that it did not know of the violation and could not have known of the violation through the exercise of reasonable diligence. Labor Code section 6432.

In upholding the serious, accident related classification of the violation, the decision below quoted from Board precedent, and stated, "[r]easonable diligence requires reasonable supervision of employees and appropriate 'instruction' regarding the hazards an employee is likely to encounter during the performance of his/her work assignment." *Bryant Rubber Corp.,* Cal/OSHA App. 01-1358, Decision After Reconsideration (Aug. 21, 2002)." (emphasis in ALJ decision). The decision found the serious classification was warranted because it concluded that Postel was remiss in failing to investigate a possible safety hazard involving the circuitry for the missing light fixture and because he inadequately instructed Moser on the scope of his assignment. We disagree with these findings.

We first address Postel's explanation of the compliance crew's work assignment to Moser. The decision concluded that Moser was not installing a light fixture at the time of the accident, but was instead installing a scotch lock. The decision stated that the code compliance crew was not assigned to install scotch locks, but concluded that Moser did not know this because of Postel's deficient instruction. Accordingly, the decision found that Moser unknowingly exceeded the scope of his assignment.

It is undisputed that Postel discussed Moser's job assignment with him the day before the accident, which was the first day Moser was on Postel's crew. It is also undisputed that gang box meetings were held with the crew each morning to discuss, among other things, job assignments. In addition, there is no evidence that Postel did not adequately describe the job to Moser. Rather, it appears that a negative inference was drawn from the lack of detail in Postel's testimony about what he told Moser regarding his job duties.[3]

The decision draws a similar negative inference from another omission in Postel's testimony. Specifically, the decision emphasized a disparity in the testimony of Postel, on the one hand, and Frank Caprino and Tom Barnes, both general foremen, on the other. The decision notes that Caprino and Barnes testified that the code compliance crew was to document problems they encountered that were outside the scope of their duties and pass them up the chain of command. Because Postel did not say anything about the crew's documentation responsibility, the decision concluded that Postel did not know about this requirement and did not pass it on to Moser. Based on this, the decision found that Moser did not know what to do if he found exposed wiring, and asserted that he might have thought he could put on scotch locks where needed rather than bring such deficiencies to Postel's attention.

While the noted disparity in testimony exists, our independent review of the record persuades us that the evidence compels a different conclusion. The decision's finding seems to be based on a series of assumptions.

First, it assumes that Moser was installing a scotch lock at the time of the accident. Although there is some evidence to support this conclusion, the evidence does not preponderate in its favor. There was no testimony to suggest that Moser was installing a scotch lock. Rather, the ALJ reached this conclusion based on a photograph in evidence and a suggestion, one of many in a series, contained in the Division's post-hearing brief.[4] In contrast, we have a wealth of testimony from knowledgeable electricians indicating that the evidence they observed suggested that Moser was installing the light fixture. Indeed, it is entirely possible that Moser was installing a scotch lock in preparation for installing the light fixture. The record fails to show that these actions are inconsistent. Accordingly, we find that the record demonstrates that Moser was working on an uninsulated wire at the time of the accident, but fails to reflect why Moser was engaged in the activity.

Second, the decision's conclusion assumes that Postel did not know at the time, and did not tell Moser, what to do if he found exposed wiring or another problem that exceeded his job duties. We are not satisfied that the

[3] We note that Postel's memory of details was weak, in general, but we find him to have been a credible witness. We further note that Postel testified over two years after the incident occurred and over two years after he stopped working for Employer.

[4] It is significant that the ALJ conceded on the record that she is not knowledgeable about electrical work.

record supports this conclusion. We find that, in order for Moser to believe that he was acting consistent with his job assignment by stripping the wire, Postel would have needed to omit substantial, key information when explaining his job duties.

Tom Barnes, the general foreman who transferred Moser to Frank Caprino, Caprino, the general foreman for the code compliance crew who took Moser from Barnes, Postel, the foreman directly overseeing Moser on the day of the accident, and Tom Spingola, the project superintendent and Caprino's supervisor, all understood that Postel's crew was not working on energized equipment or un-insulated wiring.[5]

The witnesses consistently testified that the code compliance crew was to label, strap and identify conduit, and cover junction boxes. The only wiring the crew might be required to touch would be insulated wiring extending from a junction box, which would not require LOTO procedures unless the lines were live and had to be placed back in the box. Some of the witnesses testified that, if the lines were live, the employees were to leave them alone and not place them in the junction box. Others testified that the code compliance crew was not to work on anything energized at all. Although the precise contours of the crew's work were not clearly defined, the largely consistent testimony of the individual witnesses demonstrates that working on un-insulated wire was not within the scope of its assignment.

In fact, Barnes transferred Moser to Caprino based on Caprino's description of the compliance crew's work. Caprino, in turn, put Moser on Postel's crew because it was the safest option given that the crew was not doing "any actual electrical work." Also, Barnes spoke with Moser the morning of the accident and Moser reported that he was performing work consistent with the supervisors' understanding of the crew's assignment.[6] Given that all these individuals were clear on the nature of the code compliance crew's work, and that Moser worked consistent with that understanding for some time, we conclude that it is more likely than not that Moser shared this common understanding of the crew's, and his, assignment.

Although we agree with the assertion in the decision that "fixing a code violation" and "code compliance work" are broad and vague terms that could have led Moser to believe the scope of work was broader than it was, these terms were not used in isolation. Rather, they were used in conjunction with a specific and defined work assignment. Given the consistent testimony regarding the nature of that work, Moser's decision to strip the wire was not a

[5] Barnes testified on June 18, 2002, Postel testified on November 5, 2002, and Caprino and Spignola testified on August 14, 2003. Neither Barnes, Postel nor Caprino worked for Employer at the time they testified.

[6] Barnes's hearsay testimony regarding Moser's statement may be used to supplement other evidence to support a finding. Title 8, California Code of Regulations, section 376.2.

minor deviation from the compliance crew's assigned work; it was a significant divergence. We find it unlikely that Moser was led so astray that he believed removing the insulation on the wire was consistent with his job assignment.

In addition, even if Postel failed to explain the need to document specific types of problems, it would be reasonable for Moser to take any number of steps if he encountered a problem that seemed to exceed the scope of his work (e.g., ask Postel about it much as he did when he asked to install the light fixture). Instead, it appears that he forged ahead and tried to address it.

We further note that the language quoted above from *Bryant Rubber*, *supra,* requires that the instruction provided to an employee address the hazards an employee "*is likely to encounter*" during the performance of the work "*assignment."* Nothing in the record suggests that Postel should have anticipated that Moser was "likely to encounter" or work on un-insulated wire. On the contrary, the weight of the evidence indicates that stripping the wire was outside the scope of the assigned work.

Based on all the foregoing, we conclude that Moser had adequate instruction regarding the scope of his duties and knowingly exceeded his job assignment. It is significant to our decision that Moser was a journeyman electrician with vast experience in his trade.

We next examine Postel's alleged failure to investigate the potential hazard. Given Postel's testimony that he explicitly told Moser not to install the light fixture, it is unclear why he was required to inspect the circuitry for it.[7] This is especially true given that Moser told Postel he would not install the fixture.[8]

Also, Moser was an experienced journeyman electrician. Even if he decided to install a scotch lock or light fixture, it would be reasonable to expect someone with his experience to test the wire before working on it,[9] or to treat it as energized until proven otherwise without a supervisor checking the circuitry first.

In addition, Postel's unrefuted testimony was that he had been in Moser's work area two or three times the morning of the accident and general foreman Barnes testified that he, too, observed Moser while working that morning.[10] The work assigned presented no unusual peril that required further supervision.[11] See, *Lift Truck Services, Corp., supra.* Given the nature

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[7] Although Division Inspector Brian Brooks believed Postel instructed Moser to install the light fixture, we credit Postel's account of the incident and find that Postel issued no such instruction.

[8] Postel's hearsay testimony regarding Moser's statement may be used to supplement other evidence to support a finding. Title 8, California Code of Regulations, section 376.2.

[9] Caprino testified that the tick tracer (a tool to test whether a line is energized) given to Moser was found in a separate room after the accident.

[10] The accident occurred shortly after the lunch break.

[11] Moser was assigned to do work that the Division observed was more appropriate for an apprentice.

of the work Moser was assigned to perform, and his extensive experience, we do not believe that Postel was required to inspect the missing fixture's circuitry and we find the level of supervision to be reasonable.

As previously noted, the Board has held that an employer may defend against a serious classification based on an employee's unforeseeable decision to exceed the scope of his assignment, because it can serve to prove that the employer lacked knowledge of the violation, and could not have learned of the violation through the exercise of reasonable diligence. *Anderson Tile Co. supra; Napa Pipe Corp., Cal/OSHA App. 90-143, Decision After Reconsideration (Apr.18, 1991)*; see also, California Labor Code section 6432(b).[12] Employer bears the burden of proof on this issue. *Id.*

The record persuades us that Employer had no actual knowledge of the violation. Moreover, we have found that Moser knowingly exceeded the scope of his assignment and we have found that Employer exercised reasonable diligence by providing adequate instruction and reasonable supervision. We are therefore convinced that Employer could not have learned of the violation through the exercise of reasonable diligence. Accordingly, we find the serious, accident related classification improper and find that the violation must be classified as general.

4. The proper penalty

Because the Division classified the violation to be serious, accident related, Employer was afforded a penalty credit only for its size. (See, Cal. Labor Code section 6319(d); Title 8, California Code of Regulations section 336(d)(7).) Additional credit calculations are not contained in the record.

The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. *Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004). However, when, as here, the change in classification results in a change in penalty, the Board may calculate the penalty in accordance with the Director's regulations, sections 335 and 336, to the extent possible. See, *JSA Engineering, Inc.* Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002). If the record fails to provide sufficient information to allow us to properly calculate a credit, Employer will be given the maximum credit. *Plantel Nurseries, supra.*

We determine that the severity of the violation is properly rated as high, which results in a base penalty of $2,000. We rate extent as low given that

[12] *Anderson Tile* and its predecessors were decided before the amendment to Labor Code section 6432 that made it the employer's burden to show that it did not know, and could not have known with reasonable diligence, of the violation. Despite the change in statute, we uphold this defense and hold that the employer continues to carry the burden of demonstrating that it did not know of the violation despite its due diligence.

Moser was the only exposed employee and the record indicates that this was an isolated violation, which reduces the penalty to $1,500. Based on the lack of evidence regarding likelihood, we allow the maximum credit and rate it as low, which results in a $1,000 penalty. We credit the 10% reduction for size afforded by the Division, which further reduces the penalty to $900. We find good faith to be fair based on the evidence regarding Employer's safety program in the record and reduce the penalty to $750. Maximum credit (10%) is given for history because of the lack of evidence in the record regarding Employer's history and a 50% abatement credit is given based on the Division's determination that the violation was abated. This results in a penalty of $335, which we find to be appropriate.

DECISION AFTER RECONSIDERATION

The Board finds that Employer violated section 2320.4(a)(2), and that the violation is properly classified as general. The Board assesses a $335 civil penalty.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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