

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

TRIO METAL
15318 East Proctor Avenue
City of Industry, CA 91744

Employer

Docket No. 03-R4D4-0317

**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 Trio Metal (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning August 6, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at 15318 East Proctor Avenue, City of Industry, California.

On December 19, 2002, the Division issued Employer two citations, one of which pertained to section 4206(a)(use of point of operation guard device)¹ of the occupational safety and health standards and orders found in Title 8, California Code of Regulations. The violation was classified as serious and the Division proposed a \$14,400 penalty.

Employer filed a timely appeal contesting the alleged violations, and later withdrew its appeal of citation 1, leaving only the serious violation previously referenced before the Board.²

The matter came on regularly for hearing on March 17, 2005 before an Administrative Law Judge (ALJ) for the Board, and the matter was submitted

¹ Title 8, section 4206(a) states, in its entirety, "General. The employer shall provide and ensure the use of properly applied and adjusted point of operation devices or guards for every operation performed on a power operated press."

² The Board's Order of Reconsideration inadvertently included the docket number for citation 1, but because Employer withdrew its appeal of citation 1, only citation 2 was considered.

that day. The ALJ's decision, issued on April 13, 2005, upheld the violation, the serious classification, and the \$14,400 penalty.

Employer then filed a petition for reconsideration on May 17, 2005. The petition contends that the evidence did not support the findings of fact on which the ALJ relied to uphold the serious classification.³ The petition, in essence, maintains that the Division failed to prove "beyond a reasonable doubt" that Employer knew or could have known of the violative condition. The Division filed an answer to Employer's petition on June 17, 2005 in which it contests Employer's position and asserts that the Board may not act on Employer's petition because it was improperly verified.

EVIDENCE

The Division conducted an accident investigation after an employee's failure to wear a protective device while operating a press brake resulted in the partial amputation of two of her fingers. The employee began her shift at 6:00 a.m. and the accident occurred at approximately 6:40 a.m. As part of her work, the employee needed to leave her station every 10 to 15 minutes to have a sample part inspected to ensure that the machine was accurately producing the fabricated part.⁴

Employer contended at hearing, and asserts in its petition for reconsideration, that the employee may well have just returned to her station after having a part inspected when the accident occurred. Employer posits that the employee may have been wearing her safety device until she went to have the part inspected and may have forgotten, for the first time that morning, to reattach the safety device when she returned. Under such a scenario, Employer contends, it could not have known of the violative condition through the exercise of reasonable diligence.

ISSUES

- 1) Is Employer's petition properly before the Board?
- 2) Does the evidence support the findings of fact used to uphold the serious classification of the violation?

³ Employer's petition nominally argues the Division's failure to prove the violation, but Employer also conceded that the employee was not wearing the protective device when the accident occurred, which negates its own argument regarding the violation's existence. As stated in Employer's petition, the injured employee ". . . was not wearing the pull back safety devices: That fact is uncontested."

⁴ Substantial evidence was adduced at the hearing, much of which was disputed and most of which is not relevant to our analysis here. As a result, we do not attempt to summarize the extensive evidence, but instead include only the facts critical to our decision.

**FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION**

1. The Board may act on Employer's petition.

As a preliminary matter, we address the Division's argument that the Board may not act upon Employer's petition because it is improperly verified. The Division correctly notes that a petition for reconsideration is to be verified in the manner required for verified pleadings in courts of record. Cal. Labor Code section 6616. California Code of Civil Procedure section 446, which governs such verifications, requires that a verification be executed by a party unless specified circumstances, not present here, exist. In the present action, Employer's representative verified the petition in lieu of Employer.

While the Division's argument has merit, the courts have held that a pleading may stand despite an improper verification by a party's attorney in lieu of a verification by the party itself. *California State University v. Superior Court* (2001) 108 Cal.Rptr.2d 870, 90 Cal App 4th 810, 822, citing, *Frio v. Superior Court* (1988) 203 Cal.App.3d 1480, 1498, 250 Cal.Rptr. 819. The object of a verification is to assure good faith in the averments or statements of a party. Absent a complaint regarding the verifying attorney's good faith, the pleading may be considered despite the flaw in the verification. *Id.* We find that the same reasoning applies with respect to employer representatives before the Board. Here, the Division did not question Employer's representative's good faith, nor do we see a basis on which to do so. As a result, the Board may consider the petition.

2. The evidence supports the findings of fact made to support the serious classification.

The Division bears the burden to prove the essential elements of a violation by a preponderance of the evidence,⁵ including the elements needed to uphold the classification. *Control Air Conditioning Corp.*, Cal/OSHA App. 05-1627, Denial of Petition for Reconsideration (Dec. 28, 2007), citing, *Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision after Reconsideration (Aug. 20, 2007). To satisfy its burden of proof for a serious classification, the Division must show a substantial probability that death or serious physical harm could result from a violation. Labor Code section 6432(a); *Nibblelink Masonry Construction Corp.*, Cal/OSHA App. 02-1399, Decision after Reconsideration (Dec. 20, 2007). We agree with the ALJ that the Division met its burden of proof on this issue.

Once the Division satisfies its burden, an employer may defend against the citation by establishing that it did not, and could not with the exercise of

⁵ The "preponderance of the evidence" standard applies in Board proceedings rather than the "beyond a reasonable doubt" standard that Employer implies governs here. See, *Jerlane, Inc.*, *supra*. The latter standard is commonly used in criminal proceedings.

reasonable diligence, know of the presence of the violation. Cal. Labor Code section 6432(b). The Employer carries the burden of proving this defense. *Id.*; *Sunrise Window Cleaners*, Cal/OSHA App. 00-3220, Decision after Reconsideration (Jan. 23, 2003). In order to prove that it could not have known of the violative condition despite exercising reasonable diligence, an employer must establish that the violation occurred at a time and under circumstances which deprived it of a reasonable opportunity to have detected it. *Vance Brown, Inc.* Cal/OSHA App. 00-3318, Decision after Reconsideration (Apr. 1, 2003); *Sunrise Window Cleaners*, *supra*. As the ALJ noted, reasonable diligence requires reasonable supervision of employees. *Id.*

Employer here suggests a scenario may have occurred under which it would have been deprived of the opportunity to detect the violation at issue. Employer asserts the Division's failure to demonstrate that the accident occurred in a manner other than it advocates defeats the serious classification.

Employer's argument confuses the burden of proof on this issue. Employer could have defended against the citation by proving that it lacked the opportunity to detect the violation. *Id.* For example, if Employer demonstrated that the injured employee in fact worked without the safety device for a short time, it might have satisfied its burden to show it could not have known of the violation. It was incumbent upon *Employer*, however, to show this occurred. *Id.* The Division did not need to show, as Employer suggests, that the violative condition existed over time or that the fact pattern Employer posits did not happen.

Because the record does not demonstrate that the violative condition was short in duration, or otherwise show Employer was prevented from detecting the violation, we find that the ALJ properly upheld the serious classification.

DECISION AFTER RECONSIDERATION

The Board affirms and reinstates the ALJ's decision and affirms the assessment of a \$14,400 civil penalty.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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