

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

IRBY CONSTRUCTION
100 West Keystone Road
Brawley, CA 92227

Employer

Docket No. 03-R3D3-2728

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. This decision is rendered in response to a petition for reconsideration filed by Irby Construction (Employer) in this matter.

JURISDICTION

Beginning February 6, 2003, a representative of the Division of Occupational Safety and Health (Division) investigated an accident at a place of employment located at Oats Lane and Jackson Street, Coachella, California, where one of Employer's workers was injured. On July 8, 2003, the Division cited Employer for violating section 2943(g)(1)(A)¹ of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.²

Employer filed a timely appeal contesting the existence and classification of the alleged violation, the reasonableness of the proposed \$18,000 civil penalty and raising 12 affirmative defenses.

On September 23, 2005, a hearing was held before an Administrative Law Judge (ALJ) of the Board in West Covina, California. S. Shane Sagheb, Attorney, represented Employer and Raymond L. Towne, Staff Counsel, represented the Division. On October 16, 2006, the matter was re-submitted

¹ Section 2943(g)(1)(A) states, "(g)(1) Any exposed ungrounded part of conductors or equipment, not worked upon in accordance with the provisions of subsections (d) or (e) above, shall not be worked upon until the following provisions have been complied with. (A) Conductor(s) or equipment to be grounded are clearly identified and isolated from all sources of voltage."

² All section references are to California Code of Regulations, Title 8, unless otherwise specified.

for decision and a decision was rendered on October 20, 2006, which upheld the serious violation citation.

Employer filed a timely petition for reconsideration on November 22, 2006. The Board took Employer's petition for reconsideration under submission on January 10, 2007, and stayed the Decision of the ALJ pending the Board's decision after reconsideration. The Division submitted an Answer to the Petition for Reconsideration on December 27, 2006.

EVIDENCE

An accident occurred in which one of Employer's workers, Julio Aldrete, was injured while disconnecting high tension wires, energized to 7,200 volts, from a switch. The accident resulted in the amputation of his right index finger, and parts of other fingers, as well as permanent, disfiguring scarring. He was hospitalized for approximately 20 days for treatment.

Aldrete's unrefuted testimony was that Gilbert Salinas, who he believed to be his foreman, instructed him to perform the work on the line that led to his accident and told him that the power was off immediately before he began to work. The basis for Salinas' belief is not reflected in the record. Aldrete further testified, without contravention, that Salinas was standing approximately 10 to 15 feet behind him when the accident occurred, and that John Schriver, who Employer's documentation identifies as the foreman that day, saw the accident happen.

Aldrete worked as a groundman for Employer for five years and was an apprentice lineman. He asserted that he had no experience working on live equipment and had never tested voltage and grounding on cabinets to determine if they were energized. With noted exceptions, the ALJ found Aldrete's testimony to be credible.

Employer disputed Aldrete's claimed lack of experience with live equipment. Employer also testified and presented considerable evidence regarding its policies, including those which state that equipment is to be considered energized until precautions are taken to ensure that it is grounded. This evidence demonstrates that Aldrete was informed of, and, in some cases trained on, these policies.

Employer also presented evidence demonstrating that Aldrete received substantial training, including training regarding how to work on live lines and how to use a voltage indicator to test a line to see if it was energized. Employer asserted that the accident could have been prevented had Aldrete followed Employer's safety procedures and applied the training he received.

Employer presented further testimony of safety rule enforcement. Employer stated that all violations are reviewed by a committee and, if a

violation is found, disciplinary action is recommended. Employer proffered a “random sampling” of prior disciplinary actions imposed and testified to the disciplinary action taken following Aldrete’s accident, which affected several employees.

The Division conducted an inspection following the accident and found no fault with Employer’s written safety program. The Division cited Employer because the foreman failed to ensure that equipment was de-energized prior to telling Aldrete to work on the line.

At hearing, Robert Jennings, the Division’s inspector, testified to his experience and explained that he classified the violation as serious because, in his opinion, a person who contacts 7,200 volts is likely to receive injuries requiring hospitalization for more than 24 hours. In addition, Jennings found Employer knew of the violation because of Schriver’s proximity to the accident. Jennings, however, did not know how close Schriver was to the site when the accident occurred.

ISSUES

- 1) Did the Division establish that Employer violated section 2943(g)(1)(A)?
- 2) Did Employer prove that the Independent Employee Action Defense applies in this case?
- 3) Was the violation properly classified as serious?
- 4) Did the ALJ exceed her powers by not issuing a timelier decision and was Employer prejudiced by the delay?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The referenced issues represent the arguments raised in Employer’s petition for reconsideration.

1. The Division Established a Violation of Section 2943(g)(1)(A).

The ALJ found that documentary evidence, as well as the consistent testimonies of Division inspector Jennings, Aldrete, and James McGowan, Employer’s then Director of Safety and Training, established that Aldrete worked for Employer on the day of the accident and worked on equipment energized to 7,200 volts that had not been isolated from all sources of voltage.

Based on the foregoing, the ALJ found that Employer violated section 2943(g)(1)(A).

Employer's petition does not contest these findings. Rather, Employer contends that it complied with section 2943(g)(1)(A) by appropriately training its employees, including Aldrete, to consider equipment energized until it was tested and grounded. Employer argues that it cannot be held to have violated the standard given that Aldrete failed to act in accordance with his training and his obligation to adhere to Employer's safety rules.

Section 2943(g)(1)(A) states specific requirements that an employer must satisfy to comply with the regulation. Under the "plain meaning rule" of statutory construction,³ words used in a safety order must be given the meaning they bear in ordinary use and, if the language is clear and unambiguous, there is no need for construction. *The Home Depot*, Cal/OSHA App. 98-2236, Decision After Reconsideration (Dec. 20, 2001).

Section 2943(g)(1)(A) makes no reference to training and, given the lack of ambiguity in the standard on this issue, we are not authorized to interpret the standard in a manner that renders training sufficient to comply with its requirements. See, *Teichert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (March 12, 2002); *Rudolph & Sletten, Inc.*, Cal/OSHA App. 93-1251, Decision After Reconsideration (April 8, 1998). The Occupational Safety and Health Standards Board, in accordance with Labor Code section 142.3, has adopted numerous regulations that require employers to provide training⁴ and, were this such a standard, compliance could be demonstrated through evidence that the requisite training was provided. Section 2943(g)(1)(A) is not such a standard.

Employers may not, of their own accord, substitute a safety measure for the one required by a safety order, and do not have the discretion to decide when they will follow a safety order. *Certified Grocers of California, LTD.*, Cal/OSHA App. 78-607, Decision After Reconsideration (Oct. 27, 1982). As a result, we disagree with Employer's assertion that training Aldrete constituted compliance with the regulation and served as a substitute for ensuring that the equipment was isolated from all sources of voltage.

On the other hand, evidence of training may be a component of an employer's defense to an alleged violation. In that regard, we understand the remainder of Employer's argument to be an assertion of the Independent Employee Action Defense, which we now address.

³ The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d, 1510, 1517.

⁴ See, e.g., sections 1599 (flaggers), 2982 (electronic news gathering), 3155 (tramways), and 3270.1 (rope access).

2. Employer Failed to Prove the Independent Employee Action Defense.

To assert the Independent Employee Action Defense (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*, 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)).

The ALJ found that Employer failed to carry its burden to prove elements 1, 3 and 5.

With respect to the third element, Employer's petition argues that its evidence amply demonstrated that it disciplines employees who violate its safety rules, that it provides significant training regarding its safety rules, and that it had an applicable safety rule in place to guard against the hazard at issue here. Employer further asserts that the appropriate safety devices (i.e., voltage indicators) were available on-site when the accident occurred. Employer contends that these factors suffice to satisfy the third element of the IEAD.⁵

Although the ALJ did question whether Employer adequately enforced its safety program given the number of employees disciplined in response to Aldrete's accident, the ALJ found that Employer failed to satisfy its burden on this element of the IEAD because it did not demonstrate its efforts to detect hazards before accidents occur. Employer's petition does not argue that the ALJ disregarded evidence regarding its detection efforts nor does our independent review of the record suggest that she did.

On the contrary, we note that the accident here likely could have been prevented had Employer engaged in proper detection efforts. Specifically,

⁵ *City of Los Angeles Department of Water & Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (April 4, 1988), cited by Employer to support its position, involved a fact pattern that differs greatly from the one present here and is distinguished on that basis.

Employer's then Director of Safety and Training, James McGowan, testified that, in order to comply with his training, Aldrete would have needed to test a voltage indicator on a known energy source before using it to test the switch on which he was to work. McGowan identified truck batteries and sources located 35 to 45 feet in the air as known sources that Aldrete could have used to test a voltage indicator. McGowan agreed that truck hoods would have needed to be lifted to use the batteries and a lineman would have needed to assist with the overhead sources. McGowan further explained that the implements involved in the testing process are six to ten feet in length. Given Aldrete's unrefuted testimony that Schriver was physically near where he was working, and that he went straight to work on the switch after receiving instructions from Salinas, Employer, through Schriver,⁶ could have easily detected that Aldrete omitted these measures and was not using proper procedures to test the switch before beginning work.

Board precedent holds that "[a]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (Sept. 15, 1999); see also, *Atchison, Topeka and Santa Fe Railway Company*, Cal/OSHA App. 86-1700, Decision After Reconsideration (March 17, 1988). We reaffirm this conclusion and concur with the ALJ's finding that Employer failed to demonstrate that it strives to detect safety rule violations before accidents occur.

Moreover, the Board has long held that an employer may not avail itself of the IEAD when an employee violates a safety rule in plain view of management, as occurred here. *Kingston Constructors, Inc.*, Cal/OSHA App. 95-1098, Decision after Reconsideration (Sept. 15, 1999); *Polvera Drywall Corp. dba Great Western Drywall*, Cal/OSHA App. 90-1246, Decision after Reconsideration (Sept. 6, 1991). Although Employer may have maintained an otherwise acceptable safety program, Employer failed to establish that it enforced its safety program at a time critical for this violation. *Kingston Constructors, Inc.*, *supra*.

Employer may have met certain aspects of the IEAD's third element, but it did not carry its burden to prove that it satisfied this part of the defense. Because Employer did not prove this element of the defense, the IEAD cannot apply in this instance.⁷ See, *Gal Concrete, supra*; *Central Coast Pipeline Construction Company, Inc.*, *supra*.

⁶ As explained under item 3 below, we conclude that the preponderance of the evidence demonstrates that Schriver was the foreman on the project when the incident occurred.

⁷ Because we find the IEAD was not established due to Employer's failure to satisfy its burden to prove the third element, we do not analyze the arguments pertaining to the first and fifth elements. See, *Tri Valley Growers, supra*.

3. The Violation was Properly Classified as Serious.

Employer argues that the evidence compels a finding that the serious classification is unfounded and cites *Criterion Catalyst Company, L.P.*, Cal/OSHA App. 91-557, Decision After Reconsideration (Feb. 16, 1993) to support its position. In *Criterion Catalyst*, the Board reduced the classification from serious to general based on evidence that the injured employee had been recently counseled regarding the proper use of the equipment in question and because employer's safety program lacked deficiencies.

Here, the Division found no deficiencies in Employer's written safety program and Employer testified at length regarding the training Aldrete received, which included training provided not long before the accident occurred. Employer challenges the classification by asserting that it reasonably expected Aldrete to act consistent with the training he received.

Labor Code section 6432(b) addresses serious violations and states that, a serious violation shall not be found to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Criterion Catalyst was decided prior to an amendment to Labor Code section 6432(b) that shifted the burden of proof on the issue of reasonable diligence from the Division to the Employer. In *Criterion Catalyst*, the Division bore the burden of proof on this issue.

Board precedent written following the amendment to Labor Code section 6432(b) deviates from the conclusion reached in *Criterion Catalyst*. In contrast to the finding there, we have held that, in order to meet its burden to show reasonable diligence, an employer must demonstrate that the hazard occurred at a time and place that deprived it of a reasonable opportunity to detect it. *Bickerton Iron Works, Inc.*, Cal/OSHA App. 01-4978, Decision After Reconsideration (Feb. 25, 2004). No such claim is made here, nor do we believe that the evidence would support one.

We have also upheld violations classified as serious despite evidence that an employee was trained on a given hazard (*New England Sheet Metal Works*, Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 6, 2005); *Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004)), and despite evidence that the employer had a policy against the behavior in question. *Bickerton Iron Works, supra*; *Plantel Nurseries, supra*. Moreover, we have asserted that an employer must exercise reasonable diligence to ensure that safe work practices were actually followed in order to successfully defend against a serious violation classification. *Bragg Crane & Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (June 28, 2004). As discussed above, we believe that, had Employer used reasonable

diligence to ensure that Aldrete followed safe work practices, this accident might have been prevented.

Given the referenced Board precedents, and the referenced change in Labor Code section 6432(b), we find that a sound safety program coupled with recent training on a hazard, without more, is insufficient to defeat a serious classification and find that the conclusion reached in *Criterion Catalyst* is inapplicable under current law.⁸ Employer's focus on Aldrete's failure to act consistent with his training, and its assertion that it reasonably expected him to proceed as he had been trained, is insufficient to justify reducing the classification in this case.

Employer further argues that the ALJ improperly relied on inferences drawn from testimony provided by witnesses not present at the accident and from documents created after the accident occurred to support the violation's classification. Employer contends that these inferences are contrary to Aldrete's direct testimony that Salinas was the foreman at the site when the accident occurred and that Salinas told him that the power was off.

A serious classification is based on an employer's ability to know, or learn through reasonable diligence, of a violative condition through its foreman or supervisors. *Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998). Aldrete's testimony regarding the roles of Salinas and Schriver was equivocal. While he identified Salinas as his foreman, he was unsure whether Salinas or Schriver was his supervisor that day.⁹ The record fails to explain why Aldrete believed Salinas was his foreman but possibly not his supervisor, or the import he attributed to the titles "foreman" and "supervisor." Given the ambiguous nature of his testimony, we cannot place too much emphasis on Aldrete's testimony on this issue.

Employer's documentation regarding the accident, on the other hand, is unequivocal and clearly demonstrates that John Schriver was the foreman and supervisor on site that day. As noted in the ALJ's decision, Employer's Supervisor's Incident Report, which was prepared by Employer and entered into evidence without objection, lists Schriver as a "Journeyman Foreman" and names him as the supervisor. James McGowan reviewed this document at the hearing and indicated that it was accurate.

Similarly, the Project Safety Committee Minutes, which were also prepared by Employer, reviewed by McGowan and admitted into evidence

⁸ An employer could potentially defeat a serious classification where, for example, an accident resulted from aberrant behavior by an employee who had correctly completed a specific task on prior occasions and had consistently performed as he was trained until the accident. Those facts, however, are not before us.

⁹ In response to the question, "Was John your supervisor?" Aldrete testified, "I believe it was Gilbert Salinas. After I was in the hospital and I was recovering, I believe that I remember that it was Gil Salinas, but I don't know whether it was. It was one of the two of them."

without objection, address Aldrete's accident and state that Schriver was "the person in charge." The minutes fault Schriver for failing to hold and document a job briefing meeting and find that Schriver failed to follow proper grounding procedures in connection with Aldrete's accident. The committee determined that Schriver should be terminated for failing to follow these company procedures. We note that there is no evidence to suggest that Schriver, himself, was engaged in work that required him to follow Employer's grounding procedures. We further note that the minutes do not hold any of the other individuals mentioned in them responsible for violating these procedures.¹⁰

From all the foregoing, we find that the preponderance of the evidence demonstrates that Schriver was the supervisor on site and was responsible for ensuring that Employer's procedures were implemented and followed. This conclusion is further bolstered by Division documentation and the testimony of Inspector Jennings, which indicate that Schriver was the foreman on the job. Jennings testified that his conclusions were based on input from McGowan and Employer's job superintendents.

We next consider whether Schriver knew or could have learned of the violative condition through the exercise of reasonable diligence. We note that Employer's Supervisor's Incident Report, which lists Schriver as the supervisor, indicates that the work in question was being directly supervised. In addition, Aldrete's uncontested testimony was that he encountered Schriver "on the other side of the switch, where the accident happened, the positive side." He, in fact, stated that Schriver saw the accident occur and moved away when Aldrete received the impact. Accordingly, the undisputed evidence demonstrates that Schriver was physically near Aldrete when the accident occurred.¹¹

Given Schriver's proximity to Aldrete when the accident occurred and his supervisory role on the project, we conclude Employer could have known or learned of the violative condition at issue had reasonable diligence been exercised. This is particularly true in light of McGowan's testimony regarding the very obvious nature of the voltage testing that should have, and did not, take place prior to Aldrete beginning work on the switch.

¹⁰ It is also telling that all but one of the other individuals disciplined in connection with this event were faulted only for failing to "sign a proper tailgate meeting". They were not charged with failing to hold a meeting or for violating a safety procedure. Although Gilbert Salinas was disciplined because "he failed to sign and document a proper tailgate meeting prior to joining John's crew," even he was not found responsible for holding the meeting or violating the grounding procedures. From the minutes and the discipline given, in addition to Aldrete's testimony, it appears that Salinas may have held a position with some responsibility, but the evidence lacks sufficient clarity for us to reach a conclusion regarding his role.

¹¹ It is noteworthy that Jennings also concluded that Schriver was near Aldrete when the accident occurred. Although Jennings did not know how close Schriver was, his conclusion is significant because Jennings did not interview Aldrete prior to reaching his conclusion. As a result, Jennings' belief was derived from information he obtained from someone who corroborated Aldrete's account of the incident.

With respect to Employer's reliance on Aldrete's testimony that Salinas believed the power was off at the time Aldrete began his work, Employer provides no evidence to substantiate Salinas' belief. Assumptions and good faith beliefs regarding work conditions do not satisfy an employer's obligation to use reasonable diligence to detect violative conditions. *Bragg Crane & Rigging, supra; Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).

Based on the foregoing, we affirm the ALJ's finding that Employer failed to demonstrate that it did not know, and could not with the exercise of reasonable diligence have known, of the violative condition.

4. The ALJ did not Exceed her Powers by Issuing her Decision more than 30 days after the Hearing.

Employer contends that it was prejudiced by the delay between the hearing and the issuance of the Decision because, had the Decision been rendered sooner, it would have been based on a fresher recollection of the evidence and the witnesses' demeanor. Employer further states that it first learned of the October 16, 2006 re-submittal date stated in the Decision when it received the decision and asserts that the ALJ exceeded her powers by failing to issue the decision within the 30-day period mentioned in Labor Code section 6608.

Labor Code Section 6608 states that the Board or hearing officer shall make findings and file a decision within 30 days of "when the case is submitted." Section 385(a) of the Board's regulations states the same and explicitly provides for an extension of the submission date.

We have consistently held that these statutory and regulatory requirements are satisfied as long as a decision is issued within 30 days of the submission date as extended, which it was here. *Wieland Daley Corporation*, Cal/OSHA App. 95-4069, Denial of Petition for Reconsideration (Aug. 5, 1997); *Novos Rados Enterprises*, Cal/OSHA App. 76-305, Decision After Reconsideration (Feb. 23, 1983); *Roof Structures, Inc.*, Cal/OSHA App. 78-478, Decision After Reconsideration (June 30, 1981); see also, *Dayton Hudson Corporation dba Target Stores*, Cal/OSHA App. 99-912, Decision After Reconsideration (Dec. 10, 2001). Board precedent further states that failure to notify the parties that a submission date was extended is only a technical omission. *Wieland Daley Corporation, supra*.

Moreover, Employer's assertion of prejudice is speculative at best. To sustain a claim of prejudice, Employer must demonstrate that it was, in fact, prejudiced. *Wieland Daley Corp., supra*; see also, *Bepex Corporation*, Cal/OSHA App. 96-1956, Denial of Petition for Reconsideration (June 10, 1997). There is nothing in Employer's petition to substantiate its implicit claim that the ALJ's decision would have been different had it issued sooner or to otherwise

demonstrate that Employer was prejudiced by the delay in issuing the decision. Accordingly, we conclude that Employer's claim of prejudice is unsubstantiated.

We, therefore, find that the ALJ did not exceed her powers and that she lawfully issued her decision within 30 days of the submission date.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ decision, upholds the citation for a serious violation of section 2943(g)(1)(A) and assesses the civil penalty of \$18,000.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 8, 2007