

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

In the Matter of the Appeal of:

BRYDENSCOT METAL PRODUCTS  
P.O. Box 5486  
San Bernardino, CA 92412

Employer

Docket Nos. 2003-R3D3-3554  
and 3555

**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 the Division of Occupational Safety and Health (Division) under submission, makes the following decision after reconsideration.

**JURISDICTION**

Brydenscot Metal Products (Employer) fabricates metal parts for use in manufacturing by other entities, and operates a place of employment at 1299 E. Riverview Drive, San Bernardino, California. Following an accident investigation conducted between March 17, 2003 and August 12, 2003, the Division cited Employer for violating sections 342(a) (regulatory) and 4214(a) (serious) of the occupational safety and health standards contained in Title 8, California Code of Regulations.

Employer timely appealed the citations and a hearing was held before an Administrative Law Judge (ALJ) of the Board on February 1, 2006. The ALJ rendered a decision on March 28, 2006 that upheld both citations, but reduced the classification of the section 4214(a) violation from serious to general.

The Division submitted a petition for reconsideration on May 2, 2006. Employer submitted an answer to petition on May 31, 2006. The Board took the Division's petition under submission on June 1, 2006.

**FINDINGS AND REASONS  
FOR  
DECISION AFTER RECONSIDERATION**

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the petition for reconsideration and the answer thereto. In light of all of the foregoing, we find that the ALJ's decision was proper, that the decision was based on substantial evidence in the record as a whole, and that the findings of fact support the decision.

With respect to the section 342(a) citation, while the decision was rendered before we issued our Decision after Reconsideration (DAR) in *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006), we find the reasoning, approach and conclusion of the Brydenscot decision to be consistent with the analysis and the conclusion reached in the *Callaway* Decision After Reconsideration.

Therefore, we adopt the attached ALJ's decision in its entirety and incorporate it into our decision by this reference.

**DECISION AFTER RECONSIDERATION**

The decision of the ALJ dated March 28, 2006 is reinstated and affirmed.

CANDICE A. TRAEGER, Chairwoman  
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: November 2, 2007

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

*In the Matter of the Appeal of:*

**BRYDENSOT METAL PRODUCTS**

P.O. Box 5486

San Bernardino, CA 92412

Employer

**DOCKETS 2003-R3D3-3554**

**through 3555**

**DECISION**

**Background and Jurisdictional Information**

Employer fabricates metal parts for use in manufacturing by other entities. On March 17, 2003 and August 12, 2003, the Division of Occupational Safety and Health (the Division), through Ramesh K. Gupta (Gupta), Associate Cal/OSHA Engineer, conducted an accident investigation at a place of employment maintained by Employer at 1299 E. Riverview Drive, San Bernardino, CA (the Site). On August 14, 2003, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.<sup>1</sup>

<b><u>Cit / Item</u></b>	<b><u>Section</u></b>	<b><u>Type</u></b>	<b><u>Penalty</u></b>
1/1	342(a) [Failure to Report Serious Injury]	Regulatory	\$ 5,000
2/1	4214(a) [Failure to Guard Press Brake]	Serious	\$ 12,600

Employer filed timely appeals contesting the existence and classification of each alleged violation, and the reasonableness of each proposed civil penalty.

This matter came on regularly for hearing before Jean-Yves L. Thepot, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board, at West Covina, California, on February 1, 2006.

<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

Employer, a corporation, was represented by Shawn Cathey (Shawn Cathey), CFO, and Scott Cathey (Scott Cathey), President. The Division was represented by Raymond L. Towne, Staff Counsel. Oral and documentary evidence was introduced by the parties and received into evidence. The record was kept open for the parties to submit briefs regarding the ALJ's authority to reduce the proposed penalty regarding Citation 1/ Item 1. A schedule for filing the briefs was ordered and the time periods included 5 additional days for mailing. The Division had until February 17, 2006 to submit its brief, and did so timely. The Employer had until March 14, 2006 to file its reply brief. On March 16, 2006, Employer served a late reply brief by mail. It was received by the Board on March 20, 2006. Because of its un-timeliness, the Employer's reply brief shall not be considered. Therefore, the record was closed and the matter was submitted on March 15, 2006.

### **Law and Motion**

The Division, without objection, moved to amend Citation 2 to read: "The employee, a supervisory employee, sustained amputation of his right index finger at the first knuckle and partial amputation of his left finger tip." This amendment conformed to the proof presented at the hearing. The Division stipulated that the ALJ could consider any affirmative defenses contained in Employer's two letters of explanation, both dated September 8, 2003, in addition to the grounds checked in paragraphs 2 and 3 of the pre-printed Notice of Appeal.

The parties stipulated that the reporting time of the accident was March 7, 2003, at 1:40 p.m., and that therefore, premised upon exigent circumstances, the Employer was 54 hours late in reporting the accident. The Division moved, without objection, to withdraw any allegations regarding the 2 "Cincinnati-FM II" press brakes affixed with serial numbers 48731 and 52126. Upon the Division's request, the ALJ took Judicial Notice of Labor Code section(s) 6302(h), and 6409.1(b) and Regulation section(s) 330(h), 376.3, 4214 and *Loupensky Molding* Cal/OSHA App. 03-R1DI-3405, ALJ Decision; and *K. A. Bine Construction* Cal/OSHA App. 03-R1D5-2031, ALJ Decision.

### **Docket 03-R3D3-3554**

Citation 1, Item 1, Regulatory, Section 342(a)

### **Summary of Evidence**

#### **Failure to Report Serious Injury**

The Employer was cited for failing to immediately report a serious injury to the Division.

Balderamo Haro (Haro), the injured employee, testified that he was injured March 3, 2003 at 11:30 p.m., while working overtime and alone, at the site. He was operating a CINCINNATI-FM II press brake, serial number 48836, bending a run of 200 metal pieces lengthwise at 90 degree angles. The bars were 20 gauge-steel, 48 inches long and 1 ½ inches wide. Haro testified that he was using the foot pedal to bring the top ram down to a ¼ inch above the bottom die and then inserting the metal stock which was being supported by support arms. He would then remove his hands from the point of operation and activate the ram using a foot pedal.

After bending 190 pieces, Haro's hands slipped into the point of operation while he inadvertently and simultaneously activated the foot pedal. When the top ram contacted the bottom die his right and left index fingers were caught between them. He removed his fingers and realized that he was injured. His right index finger was crushed and his left index finger was bleeding. Haro called 911 and was transported by paramedics to Loma Linda Medical Center where he was treated in the Emergency Room.

At Loma Linda Medical Center Haro's crushed right index finger was amputated to the first knuckle. His left index finger was sutured where a small portion of the tip had been amputated by the press brake.

The following morning, March 4<sup>th</sup>, at 4:00 a.m., Haro was released from the Loma Linda Medical Center. The same day, at 8:00 a.m., he reported the injury to his employer. The Employer then reported the injury to their Worker's Compensation carrier, Freemont Employers, that same day, at 9:15 a.m.<sup>2</sup> However, the Employer did not report the injury to the Division until March 7, 2003, at 1:40 p.m.<sup>3</sup> At no time did the emergency responder report the injury to the Division.

Gupta testified that the \$ 5,000 proposed penalty was calculated in accordance with the Division's policies and procedures.<sup>4</sup>

The Employer did not offer any specific objection to the calculation of the proposed penalty, other than to state that the amount was not fair.

Shawn Cathey testified that, despite receiving regular updates to *Barclay's Official California Code of Regulations*, Title 8, the Employer was unaware of the reporting requirement. The Employer, in over 20 years of operation, had never experienced a prior serious injury or been inspected by the Division.<sup>5</sup>

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<sup>2</sup> Exhibit(s) 8, A-4, Fax Transmittal and A-5, Fax Transmittal.

<sup>3</sup> Exhibit 2, Accident Report, Division of Occupational Safety and Health.

<sup>4</sup> Director's Regulation 334(a)(6)

<sup>5</sup> Exhibit(s) A-14 through A-21, F, G and H.

Both Shawn Cathey and Scott Cathey testified that they first became aware of the reporting requirement after talking with a competitor who described his own experience with reporting an injury to the Division. Shawn Cathey testified that upon learning of the reporting requirement, she immediately reported the injury to the Division.

The Division did not offer any evidence regarding the employer's efforts to remain abreast of the Title 8 regulations. Gupta testified that the Division had never been previously investigated or cited the Employer.

### **Findings and Reasons for Decision**

**The Employer did not report to the Division, the serious injury, illness or death, of an employee, occurring in the place of employment or in connection with any employment, within eight hours after the employer knew or with reasonable diligent inquiry would have known of the death, or serious injury or illness.**

**The \$ 5,000 proposed penalty is not reasonable. A \$1,000 penalty is reasonable.**

Employer was cited under Section 342(a) which reads as follows:

(a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but no longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 after the incident.

The Division has the initial burden to show by a preponderance of the evidence the applicability and violation of a particular safety order. (*Howard J. White, Inc.* Cal-OSHA App. 78-741, DAR (June 16, 1983).) Preponderance of the evidence is defined in terms of probability of truth or of evidence that when weighed against that opposed to it, has more convincing force and greater probability of truth taking into account both direct and circumstantial evidence and all reasonable inferences. (*Webcor Builders*, Cal-OSHA App. 02-2834, DAR (May 24, 2005).)

Haro's injury occurred at his place of employment. This finding is based upon Haro's, Scott Cathey's and Shawn Cathey's testimony and the Employer's admissions contained in the Accident Report to the Division<sup>6</sup> and the Employer's report to Fremont Employers.<sup>7</sup>

Haro's injuries were serious. He suffered the loss of his right index finger, from the first knuckle forward and the partial loss of the tip of his left index finger. Therefore, he sustained both the loss of a member of his body and a serious degree of permanent disfigurement.<sup>8</sup> As such, the injuries were reportable under § 342(a).

The Division proved that the Employer did not immediately report the serious injury.

Haro testified and the Employer admitted<sup>9</sup> that Haro was injured on March 3, 2003 at 11:30 p.m. and that the Employer learned of the injury and its extent on March 4, 2003, at 8:00 a.m. Haro and Shawn Cathey both testified that he informed her of the injury and its extent telephonically on March 4, 2003 at 8:00 a.m. Haro told her that he had sustained the amputation of his right index finger and that his left index finger had been injured. Shawn Cathey testified that at that time she understood that Haro had sustained the loss of a member of his body and/or a serious degree of permanent disfigurement.

Shawn Cathey's testimony and the Employer's Accident Report to the Division<sup>10</sup> both establish that Employer first reported the accident to the Division on March 7, 2003, at 1:40 p.m.

Therefore, the Division proved that the Employer did not report to the Division the occurrence of a serious injury sustained by an employee in the place of employment within 8 hours of the employer knowing about it. Employer's conduct constitutes a violation of Section 342(a). The only remaining issue is the reasonableness of the proposed penalty and whether the ALJ is empowered to reduce its amount.

Effective January 1, 2003, Labor Code section 6409.1 was amended (AB 2837, Chapter 885, Statutes of 2002) to state:

(b) In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be

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<sup>6</sup> Exhibit 2

<sup>7</sup> Exhibit 8

<sup>8</sup> Regulation section 330(h)

<sup>9</sup> Exhibit 2 (Accident Report to the Division) and Exhibit 8 (Accident Report to Workers Compensation Insurance Carrier)

<sup>10</sup> Exhibit 2 was received into evidence without objection.

made immediately by the employer to the Division of Occupational Safety and Health by telephone or telegraph. An employer who violates this subdivision **may** be assessed a civil penalty of not less than five thousand dollars (\$5,000). [Emphasis added.]

The above-quoted language does not require the *Appeals Board* to assess a \$5,000 minimum penalty for all section 342(a) violations regardless of each case's circumstances. The Appeals Board's penalty-assessment authority is governed explicitly by Labor Code section 6602, which states:

The **appeals board shall** thereafter issue a decision, based on findings of fact, **affirming, modifying or vacating** the division's citation, order, **or proposed penalty or directing other appropriate relief**. [Emphasis added.]

In exercising its Labor Code section 6602 review powers, the Appeals Board has long held that it is not obligated to impose penalties that have been calculated following the Director's Penalty Procedure and proposed by the Division. (*Candlerock Restaurant*, Cal/OSHA App. 78-433, DAR (Feb. 21, 1980); *Liberty Vinyl Corporation*, Cal/OSHA App. 78-1276, DAR (Sept. 24, 1980); *Wunschel and Small*, Cal/OSHA App. 78-1203, DAR (Feb. 29, 1984); and *Specific Planting Co. Inc.* Cal/OSHA App. 95-1607 et.al., DAR (Oct. 15, 1997).) The Board has historically affirmed, modified or vacated monetary penalties proposed by the Division and repeatedly maintained that its authority over penalties is distinct from the Division's. (Supra, and see *Capri Manufacturing Co.* Cal/OSHA App. 83-869 et.al., DAR (May 17, 1985); and *Associated Ready Mix*, Cal/OSHA App. 95-3794 (Dec. 6, 2000).) The Board's function is not to adhere to the Director's regulations, but to exercise discretionary authority to adopt, modify, or set aside the penalties proposed by the Division. (*Associated Ready Mix*, supra.) In one case, the Board stated:

To hold that the Appeals Board is bound by regulations adopted by the Director and penalties proposed by the Division would ignore the language of the Labor Code, deny an employer the right of independent review of the Division's proposal, and frustrate the purpose of providing fair and equitable enforcement of the California Occupational Safety and Health Act of 1973. [citing *Limberg Construction*, Cal/OSHA App. 78-433, DAR (Feb. 21, 1980).]

Since at least 1984, Labor Code section 6602 has remained unchanged.

By legal presumption, the Legislature is regarded as having in mind existing laws when it passes a statute, and its failure to change the law in a particular respect manifests the Legislature's intent to leave the law as it stands. In adopting legislation, the Legislature is presumed to also know the

decisional history of how the statute has been applied in that body of decisional law. (*Estate of McDill* (1975) 14 Cal.3d 831, 837-839; and *Bailey v. Superior Court* (1977) 19 Cal. 3d 970, fn. 10.) The presumption applies with equal force to state administrative agency decisional law interpreting status and regulations. (See, e.g. *Moore v. California State Bd. Of Accountancy* (1992) 2 Cal.4<sup>th</sup> 999, 1017 [9 Cal. Rptr.2d 358] cert. denied 113 S.Ct. 1364; and *Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4<sup>th</sup> 226, 233-235 [5 Cal.Rptr.2d 782].)

Consequently, when the California Legislature amended Labor Code section 6409.1 in 2003, one may conclude it knew the Appeals Board's decisional history and how it interpreted its authority over proposed monetary penalties. The Legislature's decision not to change Labor Code section 6602 in any way manifests its intent to leave the law as it stands. When the Legislature enacted the 2003 amendments to Labor Code section 6401.9, it expressed no reference, and imposed no explicit limitation, to the Appeals Board's Labor Code section 6602 authority. By not explicitly limiting the Board's discretion under section 6602 in the language of the new section (6409.1(b)), one can thus conclude that the Legislature meant to leave the Board's discretion intact, even for the reporting violations.

Furthermore, statutory grants of authority are generally not considered superseded by subsequent legislation, "except to the extent that such legislation shall do so expressly." (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 202 [149 Cal.Rptr. 1].) By the Legislature's leaving Labor Code section 6602 intact and not expressing any limitations on the Board's authority when it amended Labor Code section 6409.1, one cannot reasonably *imply* a Legislative restriction (in 2003) of the authority it granted to the Appeals Board over proposed penalties. Therefore, one must conclude that the amendments to Labor Code section 6409.1, specifically subsection (b), cannot be read to command the Appeals Board to assess a minimum \$5,000 penalty for every section 342(a) violation regardless of circumstances.

If, then, the Legislature did not eliminate or curtail the Board's discretionary authority over penalties for reporting violations what, if any, binding effect does the Director's regulation section 336(a)(6) have on the Appeals Board? Should, or must, the Board give the regulation deference and apply it to every section 342(a) violation? After all, the Board has given the Director's penalty regulations considerable deference. (See *DPS Plastering Inc.*, Cal/OAHA App. 00-3865 et. al., DAR (Nov. 17, 2003).)

In this situation, there exist compelling reasons for the Board not to defer to the Director's regulation. By making it mandatory for the Division to propose non-adjustable \$5,000 minimum penalties for all such violations when the Legislature states that for such violations, an employer "**may**" be assessed a civil penalty of not less than \$5,000", the Director's regulation has

unintended consequences that at times defeat the purposes of the Cal/OSHA Act of 1973 (Labor Code sections 6300 et.seq.).<sup>11</sup> Administrative regulations that alter or amend a statute, impair its scope, weaken or subvert the act being administered are void. *Pulaski v. California Occupational Safety and Health Standards Board* (1999) 75 Cal.App 4<sup>th</sup> 1315 [90 Cal.Rptr.2d 54], modified on denial or rehearing; and *County of Santa Cruz v. State Bd. Of Forestry* (1998) 64 Cal.APP.4<sup>TH</sup> 826 [75 Cal.Rptr.2d 393], rehearing denied.<sup>12</sup>

Assessing a fixed minimum \$5,000 penalty places this Employer in the same category as employers who *purposely* decline to report a serious work-related injury at all. Indeed, the result creates a *disincentive* for reporting serious work-related injuries. If, for example, an employer realized that it missed the “8-hour reporting window,” even by just one hour, the employer is faced with the choice of reporting it late and facing a certain \$5,000 fine, and not reporting it at all, hoping that the Division never finds out. Logically, many employers faced with a similar choice would opt not to report, defeating the purpose behind the reporting requirement, preventing the Division from quickly inspecting an accident location to determine if any hazards to other employees remain, and frustrating the objectives of the Cal/OSHA Act.

In this case, the reporting requirement’s objectives were fulfilled 4 days after the Employer learned of the accident. The Employer reported the accident to its workers compensation insurance carrier within 90 minutes of learning of it. The Division commenced its investigation 10 days after Employer reported the accident, suggesting the delay did not hamper the Division’s need to investigate.

Assessing an “unalterable penalty” would also treat this employer the same as employers who have no safety programs at all, who do not enforce their safety programs, and who have a history of safety violations. Here, the Employer’s safety program warranted the highest rating available under “good faith”. Employer also exceeded its obligation to seek out and correct safety hazards. Employer had no history of prior Cal/OSHA violations. Removing any discretion to take factors like these into account, when assessing a civil penalty, weakens the Board’s ability to modify a proposed penalty, to order “other appropriate relief,” and erodes established incentives that encourage employers to comply with other provisions of the Act.

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<sup>11</sup> “The [Act] is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health.” (L.C. section 6300)

<sup>12</sup> Compare *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384 [211 Cal.Rptr. 758], holding that an administrative action that is inconsistent with the enabling statute is void.

Civil penalties may have a punitive or deterrent aspect, but their primary purpose should be to secure obedience to statutes and regulations enacted to serve public policy objectives, the amounts should not exceed levels necessary to punish and deter, and the amount should bear some relationship to the gravity of the offense, not be disproportional to it. (*City and County of San Francisco v. Sainez* (2000) Cal.App.4<sup>th</sup> 1302 [92 Cal.Rptr.2d 418].)<sup>13</sup> The record warrants a finding that, the \$5,000 amount far exceeds what is appropriate under these circumstances to further the Act's objectives.

Determining a proper penalty under the current statutory scheme, however, necessitates taking into account the Legislature's intent behind the amendments to Labor Code section 6409.1, even though the Legislature preserved the Board's authority under Labor Code section 6602.

Assembly Bill 2837 was the legislative vehicle by which the second sentence of Labor Code section 6409.1(b)—“An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars (\$5,000).”—was added in 2002. The Senate digest of AB 2837 contains arguments supporting its passage. They indicate that the bill was designed to address problems including “the lack of timely reporting of [workplace] accidents” and “delays and problems in the investigation of accidents.”

The purpose of section 342(a) is to impel *employers* to report every such accident quickly, so the Division can initiate an investigation. The penalty assessed for a section 342(a) violation is designed to encourage injury-reporting and trigger the investigative response. Although Employer's failure to report the injury does not appear to have prejudiced this investigation, the employer did not timely report it.

Taking into account the Legislature's intent, the objectives of the Act, and the Board's penalty-assessment authority to tailor remedies appropriate to the circumstances, it is found that a \$1,000 penalty is reasonable. The amount, which is hereby assessed, recognizes Employer's innocent mistake, its effective safety program, and its proactive stance on promoting safety. It also acknowledges the Legislature's aim to aggressively encourage compliance with reporting duties, while minimizing the disincentive to report by applying the \$5,000 minimum across-the-board.

### **Docket 03-R3D3-3555**

Citation 2, Item 1, Serious, Section 4214(a)

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<sup>13</sup> See also *Anresco, Inc.* Cal/OSHA App. 90-855, DAR (Dec. 20, 1991). But, compare *Dye & Walsh Technology*, Cal/OSHA App. 00-2327 et.al., DAR (July 11, 2001.); and *The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466, DAR (Sept. 27, 2001.).

## **Summary of Evidence**

The summary of the accident's details, set forth above regarding Citation 1, is incorporated by reference herein.

Gupta testified that he interviewed Haro on August 12, 2003. Gupta memorialized the interview with notes and had Haro sign them.<sup>14</sup> Without objection, Gupta testified regarding Haro's statements concerning his job duties, the Employer's procedure(s) for the set-up and operation of the press brake and how the accident occurred. Haro told Gupta that he was a supervisory employee charged with supervising and assigning work to 2 subordinates.<sup>15</sup> Haro's statements to Gupta are admissible as authorized admissions<sup>16</sup> of the employer and constitute a recognized exception to the hearsay rule. (*Contra Costa Electric Inc.*, Cal/OSHA App.90-470, DAR (May 6, 1991).)

Gupta also testified regarding admissions made by Scott Cathey regarding Scott Cathey's own investigation of the accident and his opinion regarding how the accident occurred.<sup>17</sup>

Haro testified regarding how the accident occurred.

Haro's authorized admissions to Gupta, Haro's testimony, and Scott Cathey's admissions were all consistent. Premised upon this evidence, the Division proved that on March 3, 2003, at approximately 11:30 p.m., Haro, a supervisory employee of the cited employer, was using a Cincinnati FM II press brake, serial number 48836 to bend 48 inch long, 1 ½ wide, lengths of 20 gauge steel a right angles, lengthwise.

The press brake in question is hydraulically powered. This allows the operator to stop the top ram before it contacts the bottom die during the down stroke.

The press brake is equipped with dual palm button control(s) located away from the point of operation.<sup>18</sup> This feature is designed to prevent the operator from reaching into the point of operation because the dual buttons require using both hands simultaneously to activate the ram. On the day in question, Haro used the dual palm button control(s) to set up the press brake, configuring the bottom and top dies. However, he did not use them during the actual production run (production mode).

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<sup>14</sup> Exhibit 6

<sup>15</sup> Mr. Haro was described as a "swing shift supervisor" by Employer in Exhibit(s) 2 and 8.

<sup>16</sup> Evidence Code section 1222

<sup>17</sup> Evidence Code section 1220

<sup>18</sup> Exhibit 4, photographs of the press brake at issue.

Scott Cathey admitted to Gupta and testified that, during the 5 years preceding the accident, the Employer's ongoing practice was to only use the twin palm button control(s) during the set up procedure for the Employer's 3 CINCINNATI-FM II press breaks. During the production runs (production mode) the foot pedals were used to bring the top ram to the point of operation and to then form the parts. The twin palm button control(s) were not used during production mode because of the extra time their use required.

When the accident occurred, Haro was using the foot pedal to bring the top ram to within a ¼ inch of the bottom die and stop it. He then inserted the material and supported it using an arrangement of stops and holding devices. After removing his hands from the point of operation, Haro used the foot pedal to bring the ram downward, bending the material against the dies.

Haro was injured when he inadvertently activated the foot pedal while his hands were in the point of operation, the pinch-point.

Gupta testified that in his opinion the violation should be classified as "serious". He stated there is a substantial probability of serious physical injury any time there is an accident at the point of operation on a press brake. However, the Division did not present any foundation evidence for this opinion.

### **Findings and Reasons for Decision**

**On March 3, 2003, the press brake, a hydraulically-powered press brake, serial #48836, operated by Haro, was not guarded in a manner that would restrain the operator from inadvertently reaching into the point of operation, inhibit the machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or automatically withdraw the operator's hands if they are inadvertently within the point of operation.**

**The Division did not establish the violation's serious classification. The \$12,600 proposed penalty is unreasonable. A \$490 penalty is reasonable for the general violation.**

Employer was cited under Section 4214(a), which reads as follows:

(a) Press brakes, mechanically or hydraulically powered, shall be guarded in a manner that will accomplish the following:

(1) Restrain the operator(s) from inadvertently reaching into the point of operation, or

(2) Inhibit machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or

(3) Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

Section 4214(b) subsection (7) reads as follows:

(b) Devices that will accomplish (a)(1)(2) and (3) above include but are not limited to those listed below:

(7) An arrangement of stops and holding devices such as a feed table or other material support, which will assist in positioning and supporting the material being worked so that the controls can be remotely located. When such stops and material supports are used, the controls shall be so located that the operator(s) can not activate the control(s) and reach into the point of operation.

Gupta's, Haro's and Scott Cathey's testimonies agree that the press brake's controls were not set up to effectively prevent Haro's hands from reaching into the point of operation at the time of the accident. At the time of the accident, while the press brake was being operated in production mode, the foot pedal was being used as a point of operation guard. The dual palm button control(s) were not being so used. This method did not effectively prevent the operator's hands from reaching into the danger zone. Therefore, the Division proved, by a preponderance of the evidence, that the press brake was not guarded as required by Section 4214(a).

Employer next challenged the violation's serious classification. In order to sustain a violation's serious classification, the Division must establish a "substantial probability" that death or serious harm will result assuming an accident or exposure occurs from the violation.<sup>19</sup> This is a matter sufficiently beyond common experience that the opinion of an expert witness would assist the trier of fact.<sup>20</sup>

The evidence must, at a minimum, show the types of injuries that would more likely than not result from the condition which forms the basis of the violation. (*Findly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, DAR (May 7, 1992).) An opinion about the substantial probability of serious harm or death must be based upon a valid evidentiary foundation, such as expertise on the

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<sup>19</sup> Labor Code section 6432 and Director's Regulation section 334(c)

<sup>20</sup> Evidence Code section 801

subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*R. Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, DAR (Nov. 11, 1999).)

In an attempt to qualify Gupta as an expert, Gupta testified regarding his special knowledge, skill, experience, training and education. As of March 16, 2003, he had been employed by the Division, as an Associate Cal/OSHA Engineer, for 21 years. During this period, he conducted 6 accident investigations involving press brakes and consulted with colleagues regarding 4 other investigations involving press brakes. He received between 10 to 40 days of training regarding press brakes. Therefore, Gupta was determined to be an expert regarding the *operation of* press brakes.

However, the Division did not qualify Gupta as an expert on the types of injuries that *more often than not* occur from press brake accidents. Gupta did not testify regarding the types of injuries observed in the press brake accidents that he investigated or those occurring in the accidents that he consulted on. Empirical evidence regarding the forces generated by the press brake and their prospective effect upon human extremities or statistical data regarding the nature and extent of injuries suffered in press break accidents was not presented. The occurrence of an accident in one situation, without more, does not suffice to prove a serious injury is “substantially probable” from an alleged violation. (*Industrial Maintenance Corp.*, Cal/OSHA App. 78-337, DAR (Aug. 31, 1982); and In *National Cement Co.*, Cal/OSHA App. 91-310, DAR (Mar. 10, 1993). Therefore, the Division did not establish, by a preponderance of the evidence, a “substantial probability” that death or serious harm will result assuming an accident or exposure occurs as a result of the violation.

However, evidence was presented and received establishing a relationship between the violation and the occupational safety and health of employees.<sup>21</sup> Therefore, the violation of Section 4214(a) is reclassified as a general violation. Reclassifying the violation necessitates determining an appropriate monetary penalty.

The factors considered in assessing the civil penalty are: severity, extent, likelihood, size of employer’s business and good faith.<sup>22</sup> Where the Division does not present sufficient evidence regarding an adjustment factor, Employer must be afforded the maximum credit possible. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, DAR (Jan. 8, 2004).); (*RII Plastering, Inc.*, Cal/OSHA App. 00-4250, DAR (Oct. 21, 2003).)

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<sup>21</sup> Director’s Regulation section 334(b)

<sup>22</sup> Director’s Regulation section 335(a)

The Division did not present evidence regarding the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation.<sup>23</sup> Therefore, severity is being calculated as low and the Base Penalty shall be \$1,000.<sup>24</sup>

Extent is based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain safety order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is.<sup>25</sup> “Likelihood” is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics and records.<sup>26</sup>

Gupta testified that he evaluated the extent as low. The ALJ disagrees. Scott Cathy admitted to Gupta and testified that during the proceeding 5 years, on an ongoing basis, the foot pedal, and not the dual palm button control(s), was used during production mode as point-of-operation guard.<sup>27</sup> While only 3 employees were exposed to this hazard and no prior injuries resulted, the employees were exposed to the danger on an ongoing basis. Therefore, the ALJ determines extent is high and 25% shall be added to the Base Penalty.<sup>28</sup>

The likelihood of an employee being injured as a result of this violation is low. This accident occurred due to the size of the material being fabricated conjunctively with the failure to use the dual palm controls as a point of operation guard. Scott Cathey’s un-contradicted testimony was that the Employer fabricates numerous parts of varying dimensions/configurations and does many small production runs on a daily basis. Each job has its own unique configuration of dies, stops and supports. In the 5 years proceeding the accident, the upper ram of the 3 CINCINNATI-FM II press breaks owned and operated by the Employer had contacted the lower die over 8,000,000 times with only one accident occurring. At the time of the accident, Haro, while working alone, was fabricating a limited production run of 200 pieces. Therefore, the likelihood shall be set as low, and the base penalty adjusted accordingly.

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<sup>23</sup> Director’s Regulation section 335(a)(1)(A)ii

<sup>24</sup> Director’s Regulation section 336(b)

<sup>25</sup> Director’s Regulation section 335(a)(1)(A)(2)

<sup>26</sup> Director’s Regulation 335(a)(3)

<sup>27</sup> Exhibit 1, Press Brake Set-up Procedure

<sup>28</sup> Director’s Regulation 336(b)

The un-contradicted evidence established that the Employer had 21 employees at the time of the accident. Therefore 30% of the Gravity Based penalty shall be subtracted based on Employer size.<sup>29</sup>

The Good Faith of the Employer is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments.<sup>30</sup>

Shawn Cathey's uncontested testimony was that the Employer subscribed to *Barclays Official California Code of Regulations* in an effort to know of and stay current with the safety orders. Employer maintains an Employee Incentive Plan, profit sharing. The profitability is premised, in part, upon a safe and accident free workplace that results in lower Workers Compensation insurance premiums. Employer complies with the quality assurance requirements of ISO 9002:1994.<sup>31</sup> As a condition of ISO 9002:1994 certification, the Employer conducts quarterly audits, that involve safety and quality assurance, and is inspected, on an annual basis, by an outside entity, EAQA Ltd. In February 2003, Employer was subject to a facility survey conducted by Freemont Employers. Cesar Simon, BS, CHSM, Senior Loss Prevention Consultant, found, "All equipment was observed in good condition and properly guarded as required. As a result, no recommendations are being submitted".<sup>32</sup>

The ALJ determines that the Employer's Good Faith is Good. Therefore, 30% of the Gravity-based Penalty shall be subtracted.<sup>33</sup>

Therefore, factoring the above considerations into the penalty calculations, a reasonable penalty of \$490 shall be assessed.

### **Decision**

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and set forth in the attached Summary Table. It is further ordered that the penalties indicated above and set forth in the attached Summary Table are assessed.

JEAN-YVES L. THEPOT  
Administrative Law Judge

Dated: March 28, 2006

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<sup>29</sup> Director's Regulation 336(d)(1)

<sup>30</sup> Director's Regulation 335(c)

<sup>31</sup> Exhibit A-35, Certificate of Registration

<sup>32</sup> Exhibit D, letter dated February 14, 2003, Freemont Employers.

<sup>33</sup> Director's Regulation section 336(d)(2)