

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

JENSEN PRECAST
5400 Raley Boulevard
Sacramento, CA 95838

Employer

Docket No. 05-R2D1-2377

**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 this matter under submission, renders the following decision after reconsideration.

JURISDICTION

Starting on November 1, 2004, the Division of Occupational Safety and Health (Division) conducted an injury accident investigation at Jensen Precast's (Employer) place of employment in Sacramento, California.

On March 24, 2005, the Division cited Employer for an alleged serious violation of California Code of Regulations, Title 8, section 4184(b) [point of operation of a reinforcing rod bending machine not guarded].¹ The citation proposed a civil penalty of \$18,000 against Employer.

Employer timely appealed the citation, contending the safety order was not violated, the serious classification was incorrect, the abatement requirements were unreasonable and raising a series of affirmative defenses.

The matter was heard by an Administrative Law Judge (ALJ) of the Board on March 6, 2008. The ALJ issued a Decision on June 26, 2006 which sustained the citation and proposed civil penalty and denied Employer's appeal.

Employer timely filed a petition for reconsideration with the Board, which the Board granted on September 18, 2008. The Division filed an Answer to Employer's petition.

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

ISSUE

Whether the Decision correctly sustained the citation.

EVIDENCE

The summary and discussion of the evidence in the Decision are incorporated here by reference. For clarity, we briefly restate the evidence here.

Employer produces precast concrete products for large infrastructure installations such as highways and water systems. At least some of those products incorporate steel reinforcing rods or bars (frequently referred to by the shorthand term “rebar”) as a component in order to strengthen or reinforce the concrete. Employer takes lengths of rebar and uses a machine to bend them into appropriate shapes for use in the concrete products it produces. One such rebar bending machine is the subject of the citation at issue.

The bending machine consists of two horizontal concentric circular plates. The inner plate is stationary. The outer plate, also referred to as the “turntable,” rotates around the inner one. The operator starts and stops the machine and selects the direction of rotation, clockwise or counterclockwise, by using a foot pedal on the ground near the machine.

Each plate has holes or indentations drilled into it, into which “pins” or “rollers” can be placed. The pins on the inner plate are used to hold one or more lengths of rebar in place. The pins on the outer plate are used to establish the point at which the rebar is bent by the rotational force exerted by the turntable. As the outer plate turns, the rebar is pressed or squeezed between pins and thereby bent. Controlling the pins’ placement and the amount of rotation allows the operator to make bends of various sizes and angles.

On the day of the injury accident at issue, one of Employer’s employees was training another employee how to operate the bending machine. The injured employee had begun placing pieces of rebar into the bending machine. While his hand was in the area of the inner plate where the rebar and pins are in contact or close proximity of each other, either he or his fellow worker inadvertently stepped on the foot pedal and the outer plate moved. The injured employee’s right hand was caught between the pins and/or rebar and injured by the squeezing force. The injury resulted in hospitalization for four days, and at least as of the date of the hearing, he still suffered from numbness, loss of dexterity and some weakness of the injured hand.

It was undisputed that the rebar bending machine had no guard at the point of operation.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis that the Decision was issued in excess of the Board's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision. Employer advances five arguments in support of those claims, each of which is set forth and addressed below.

1. The citation adequately notified Employer of the alleged violation.

Employer first contends the citation was unenforceable because in it the Division failed to specify a machine identified in Group 8 which presents hazards similar to those created by the rebar bending machine involved in this proceeding.

The safety order cited, section 4184(b), provides: "All machines or parts of machines used in any industry or type of work not specifically covered in Group 8, which present similar hazards as the machines covered under these point of operation orders, shall be guarded at their point of operation as required by the regulation contained in Group 8." The quoted language applies to machines not specifically listed or identified in Group 8 which present point of operation hazards to employees.

Section 4184(a) provides: "Machines as specifically covered hereafter in Group 8, having a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, in which an employee comes within the danger zone shall be guarded at the point of operation in one or a

combination of the ways specified in the following orders, or by other means or methods which will provide equivalent protection for the employee.”

Section 4188(a) defines the terms “danger zone” and “point of operation.” “Danger zone” is “Any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.” “Point of operation” is “That part of a machine which performs an operation on the stock or material and/or that point or location where stock or material is fed to the machine. A machine may have more than one point of operation.”

Applying the above definitions to the facts of the accident involved here, we see that Employer’s employee’s hand was in a zone of danger and injured when caught in the point of operation. His hand was “caught between moving and stationary objects or parts of the machine[.]” The part of the machine involved in the accident also falls within the definition of a point of operation, because the stationary plate holds the rebar to be bent so that the force generated by the moving plate can be exerted against the rebar and bend it, thus performing an operation on the material being worked on (the rebar). If there was no place or part of the machine to hold the rebar, the moving part would just push the rebar without bending it.

The Appeals Board “has interpreted section 4184(b) broadly to include any machine that ‘grinds, shears, punches, presses, squeezes, draws, cuts, rolls, mixes, or acts similarly ... and is used in any industry or type of work not specifically covered in Group 8.’” (Citation omitted.) (*Sonoma Grapevines, Inc.*, Cal/OSHA App. 99-875, Decision After Reconsideration (Sep. 27, 2001).) Further, safety orders are to be liberally interpreted to achieve a safe working environment. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.)

The rebar bending machine involved here presented a squeezing, rolling, or pressing hazard. Squeezing, rolling and pressing are among the types of point of operation hazards covered by section 4184(b) and in Group 8. Even if, for the sake of argument, one were to say the machine did not press, roll, or squeeze *per se*, its actions “present similar [to squeezing, rolling or pressing] hazards as the machines covered in Group 8[.]” and therefore fall within the scope of section 4184(b).

Labor Code section 6317 (in pertinent part) requires a citation to “describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated.” Employers must be given notice sufficient to enable them to prepare an opposition or defense (*Adia Personnel Services*, Cal/OSHA App. 90-1015, Decision After Reconsideration (Mar. 12, 1992).)

The citation at issue gave notice to Employer of the alleged violation. It quoted section 4184(b) and further described the circumstances giving rise to the citation with specificity: “On September 29, 2004 in the Jensen Precast production facility’s rebar cutting and bending department located at 5400 Raley Boulevard in Sacramento, a Rebar Machine Service Inc. Stirrup Master – Serial 3107 rebar bending machine not specifically covered in Group 8 but which presented similar hazards was not guarded at its point of operation as required by the regulations contained in Group 8.”

We hold that the quoted portion along with the other information contained in the citation was adequate to satisfy the requirements of Labor Code section 6317 and put Employer on notice of the allegations made against it.

Employer contends the citation was defective because it did not identify a specific machine within Group 8 which presents similar hazards as its rebar bending machine. It is not necessary for the citation to identify another specific machine which presents a similar hazard.² (*Nursery Supplies, Inc.*, Cal/OSHA App. 99-2731, Decision After Reconsideration (Aug. 2, 2002); *United Foods, Inc.*, Cal/OSHA App. 89-197, Order Pursuant to Remand (Aug. 6, 1990).) One reason is that section 4184 states no such requirement. Another is that although the hazards created may be the same or similar to those articulated in section 4184, there may not be a “specific” machine listed in Group 8 which presents a similar hazard, and further that any attempt to identify such a machine would needlessly open the door to dispute over whether any machine so identified by the Division was sufficiently specific or similar.

Equally important, Employer knew which machine was involved in the injury accident, and the way in which it injured its employee. Under those circumstances it would be unnecessary for the Division to be required to identify *another* type of machine which poses the same hazard; had it done so, Employer might well now be arguing it was confused by the reference.

2. The evidence established Employer’s use of the rebar machine presented a hazard similar to machines covered by a Group 8 standard.

Section 4184(b) requires that machines or parts of machines used in any industry or type of work not specifically covered in Group 8 but which present similar hazards as the machines covered under these point of operation orders, must be guarded at their point of operation as required by the regulation contained in Group 8. Section 4184(a) requires machines listed in Group 8 which having a grinding, shearing, punching, pressing, squeezing, drawing,

² We note that Employer’s petition does not contend that the citation should have informed it of the *type of hazard* involved, as opposed to specifying another *machine* presenting the same hazard. Issues not raised in a petition are waived as a matter of law. Labor Code section 6618.

cutting, rolling, mixing or similar action be guarded at the point of operation in a way which will provide protection for the employee.

Contrary to Employer's contention, the evidence adduced at the hearing showed that Employer's employee's hand was caught between moving parts of the rebar bending machine or between one of its pins and the rebar itself, and was injured as a result. In view of the nature of the unguarded point of operation (moving parts capable of capturing a body part and squeezing, pinching or compressing it between the parts), there was substantial evidence in the record to support the Decision's finding that the evidence showed rebar bending machine presented a hazard covered by the safety order.

Even if, as Employer argues, the Decision was incorrect in comparing the rebar bending machine to a power press, the evidence shows that it presented a hazard similar to machines that present hazards due to "pressing, squeezing . . . [or] rolling" action. The pins which are placed in both the inner and outer plates of the rebar bending machine are cylinders mounted vertically and which act like rollers. Also, as the accident at issue demonstrated, an employee's hand could be and was pressed or squeezed between one such pin and either another pin and/or the rebar in the machine. In addition, several safety orders in Group 8 refer to machines with rollers and require they be guarded to prevent injury to employees. See, for example, sections 4187, 4440, 4441, 4462, 4466, 4468, 4469, 4483, 4491, 4518, and 4580.

3. The employee was not performing "setting up" actions at the time of the accident.

Employer argues that the injured employee was "setting up" the machine. "Setting up Operations" is a term defined in section 4188(b) as: "Operations in which fixtures or tooling which support, secure, or act upon the workpiece are mounted on the machine surfaces or in machine components designed to accept such tooling."

The evidence was that the employee was being informally trained by a fellow employee, who was not a supervisor, on how to operate the rebar bending machine. While the injured employee was placing pieces of rebar into position so they could be bent, one of the two inadvertently activated the machine, which resulted in the injury.

Placing pieces of material into the machine so it could act upon them is not "setting up" the machine. As the definition quoted above states, setting up refers to preparing a machine for operation, making adjustments necessary to perform the task intended, and not to the act of loading or inserting the material that is to be worked on.³ Moreover, the Decision described setting up

³ Compare section 3314, "control of hazardous energy, [] including lock out/tag out," which among other requirements applies to setting up operations. We speculate that Employer would not want to be subject to the requirements of section 3314 each time a new piece of rebar were to be loaded into the bender.

activities with regard to the machine and its method of operation, and they do not involve the activity the injured man was engaged in when the injury occurred. In short, the evidence shows that the employee was not “setting up” the machine when he was injured.

4. The serious classification was supported by substantial evidence.

Employer also argues that the violation’s serious classification was not supported by substantial evidence in the record.

The Division has the burden to prove by a preponderance of the evidence each element of a citation, including its classification. (*Estenson Logistics, LLC*, Cal/OSHA App. 05-1755, Decision After Reconsideration (Dec. 29, 2011).) At the time of the violation Labor Code section 6432(a) provided in pertinent part that a “serious violation” was one which involved “a substantial probability that death or serious physical harm could result from a violation[.]”⁴ In turn, also in pertinent part, Labor Code section 6432(c) provides that “substantial probability” does not mean that an accident or exposure will occur, “but rather to the probability that death or serious physical harm will result, assuming an accident or exposure occurs as a result of the violation.” The Board has interpreted “serious physical harm” as meaning “serious injury or illness” as defined in Labor Code section 6302(h): “‘Serious injury or illness’ means any injury or illness occurring in a place of employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation or in which an employee suffers a loss or any member of the body or suffers any serious degree of permanent disfigurement[.]” (*Estenson Logistics, supra*; *Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985).)

Having reviewed the Decision and the record, we find that there was substantial evidence to support both the classification of the violation as serious and its characterization as accident-related. (*Sacramento Municipal Utility District*, Cal/OSHA App. 02-1654, Decision After Reconsideration (May 16, 2008).) For example, the testimony of the Division’s witness was that he had investigated other incidents involving an employee’s extremity being “subject to pressure from one or both of the metal components [of the machine involved]” and each resulted in serious injury. (Decision, page 14.) Moreover, as the Decision noted, the Division’s evidence on this issue was “uncontroverted” and “not refuted[.]” (Decision, pp.13, 14.)

5. The accident-related characterization was supported by substantial evidence.

⁴ A 2010 amendment to Labor Code section 6432(a) which changed the definition of serious violation to effect on January 1, 2011.

Employer's last argument is that the accident-related characterization was not supported by substantial evidence.

“A violation may be characterized as ‘accident related’ within the meaning of section 336(c)(3) if the evidence establishes that the violation caused a serious injury, illness, or exposure. (*K.V. Mart Company*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).) To establish the characterization of the violation as “accident related,” the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury. (*Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).), i.e., the evidence must establish that Employer's failure to guard in accordance with the cited safety order caused De Leon's serious injury.”

(*Puritan Ice Company*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003).)

The record establishes that the employee was injured by the rebar bending machine, and that the injury was serious. The record also establishes that the rebar bending machine was unguarded, and thus in violation of section 4184(b). A fair inference from the record is that had the rebar bending machine been properly guarded, the injury accident would not have occurred. Therefore, we hold that substantial evidence in the record shows that the violation was properly characterized as accident related.

DECISION AFTER RECONSIDERATION

The Board affirms the ALJ Decision and determines that the Division established a serious, accident-related violation of section 4184(b), and affirms the civil penalty of \$18,000.

ART CARTER, Chairman
ED LOWRY, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MARCH 26, 2012