

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

EZ-MIX, INC.
11450 W. Tuxford Street
Sun Valley, CA 91352

Employer

Docket. 08-R4D3-1898

**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 by EZ-Mix, Inc. (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

On February 25, 2008, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Sun Valley, California maintained by Employer, as the result of a reported injury which occurred on February 19, 2008. On April 28, 2008, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The Employer timely appealed, and ultimately withdrew its appeal of Citation 1, Item 1, limiting the hearing to the issue of Citation 2, which alleges a Serious violation of section 4002(a) [Unguarded nip points (belt and pulley—idler roller) of inclined conveyor]. Citation 2 alleges “[o]n February 19, 2008 an employee sustained a serious occupational injury when his arm was caught between an unguarded belt and pulley (idler roller) of the Inclined [sic] conveyor in the main production area.” Citation 2 alleges “[d]uring the investigation initiated on February 25, 2008 the Division determined that nip points of the head pulleys and conveyor belts of the palletizer were unguarded.”

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ

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

issued a decision on September 14, 2009. The decision found merit in the appeal of Citation 1 but denied the appeal of Citation 2, and upheld the civil penalty of \$16,200.

Employer timely filed a petition for reconsideration of the ALJ's Decision of Citation 2. The Division filed an answer to the petition.

ISSUE

Was the ALJ decision correct?

EVIDENCE

The decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

On February 19, 2008, employee Ramon Flores (Flores) was at work at EZ-Mix, Inc. where he was employed as a welder. As he walked to the employee lunchroom, he noticed that the belt on an inclined conveyor needed cleaning. Since beginning his employment with Employer approximately twelve years prior, it had been Flores' responsibility to clean this conveyor belt two to three times daily. Flores testified that he completed the task with the aid of a spatula which has a four or five foot long handle. As Flores was cleaning the quick-moving belt, the spatula was pulled into the roller, which drew Flores' jacket-- and then arm-- into the conveyor. The accident resulted in amputation of his right arm between the elbow and wrist. (Ex. 8.) The parties stipulated that the injury was serious within the meaning of the labor code.

Flores recalled that he was required to "crawl or duck" under the bars of the inclined conveyor to get into a position where he could reach the belt to clean it. Once underneath the bars, Flores could stand up, but he would still have to extend his reach a couple inches over his head and use the spatula to clean the belt. While there were several belts in the plant, most had wipers on them, which cleaned the belts automatically as they ran. As far as Flores knew, all of the belts had to be running to be cleaned, due to their length, and the only other way to clean the belt besides the spatula method was with a wiper. Flores testified that other belts had wipers, and were not cleaned with the spatula tool.

The Division's investigator, Arsen Sanasaryan, both observed the belt in question and was able to gather documentation related to the conveyor belt from the Employer, which established that it moves at 300 feet per minute.² Sanasaryan testified that he interviewed several employees, who reported that cleaning crews and other employees regularly work near the conveyor belt and its nip points—within arm's length-- but he was unable to provide names.

² Approximately 3.4 miles per hour.

Sanasaryan did not witness any employees working near any of the belts. No other employees besides Flores testified at hearing.

Based on his prior pinch point investigations, including 30 accident investigations, 29 of which Sanasaryan testified would qualify as serious under the Labor Code, Sanasaryan testified on pinch point hazards. He testified that the machine involved in the accident created the kinds of hazards that were described in the cited safety order. Sanasaryan explained that the typical injuries one could expect from an accident involving these kinds of belts and pulleys would be amputation and crushing, or if the nip points were large enough, even death.

DECISION AFTER RECONSIDERATION

1. The Safety Order Was Applicable Based on the Evidence

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 Employer's petition for reconsideration and the Division's answer to it.

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 of Labor Code section 6617(a), (c) and (e).

Citation 2, Item 1 alleges Employer caused a serious violation of section 4002(a), Moving Parts of Machinery or Equipment, which reads as follows:

All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

The citation also provides a reference to section 3999(b), Conveyors, which states:

(b) Belt conveyor head pulleys, tail pulleys, single tension pulleys, dip take-up pulleys, chain conveyor head drums or sprockets and dip take-up drums and sprockets shall be guarded. The guard shall be such that a person cannot reach behind it and become caught in the nip point between the belt, chain, drum, pulley or sprocket.

The Division's citation alleged the following violation of 4002(a):
On February 19, 2008 an employee sustained a serious occupational injury when his arm was caught between an unguarded belt and pulley (idler roller) of the Inclined [sic] conveyor in the main production area.

The ALJ ruled against the Employer, finding that although the Employer argued the proper citation is section 3314, the Employer did not meet its burden to show that it had complied with the allegedly more applicable safety order. (*The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001), (Decision, p. 6).) The ALJ was able to conclude that the Division inspector's testimony on the dangers of the inclined conveyor, as well as the easily accessible location of the nip points on the machine, established a violation of Section 4002(a). (Decision, p. 6).

The Division has a responsibility when issuing a citation to ensure that it cites the safety order which most closely addresses the alleged violative condition, practice, means, method, operation or process that lead to the citation. (*Truecast Concrete Products*, Cal/OSHA App. 80-394, Decision After Reconsideration (Nov. 21, 1984).) In its petition, the Employer raised the question of whether 3314(c)- Cleaning, Servicing and Adjusting Operations, rather than 4002(a), was the appropriate order. The text of 3314(c) reads:

Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

(1) If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar

with the safe use and maintenance of such tools, methods or means, by thorough training.

The testimony presented at hearing made it clear that at a minimum, Flores had daily access to the moving conveyor belt and its associated nip points in order to clean the belt. He would reach the belt by ducking under a set of metal bars, and used an extension tool to perform his cleaning task. Flores testified that this cleaning had to be done while the belt was on, due to the length of the belt, which is why he was provided with the long spatula, and why the other belts were cleaned with wipers. Based on this record, we will assume without deciding that section 3314(c) was applicable as the more specific safety order: the conveyor had to be operating to be cleaned, and when Flores was cleaning the belt, Employer had a duty to comply with the safety order that addresses safe cleaning and servicing of machinery.

Where an Employer would defend against a citation by arguing that it was in compliance with an alternative safety order, Employer must first establish that it was in compliance with the alternative safety order. (*Bragg Crane & Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (Jun. 28, 2004).) The 3314(c) safety order requires an Employer whose equipment must be on while cleaned to take steps to ensure the work is done safely. Rather than providing evidence of compliance, Employer defends by stating that Flores had engaged in the cleaning activity for 12 years. This may be true, but the fact that a “violation had never before caused an injury is not a defense to the existence of the violation.” (*Sonoma Grapevines, Inc.*, Cal/OSHA App. 99-875, Decision After Reconsideration (Sept. 27, 2001).) Employer provided no evidence to show that the spatula provided to Flores was the safest option, that Flores was trained in using and maintaining the spatula, or that there were other training and safety protocols in place to ensure cleaning with the tool was done in a safe manner. As the ALJ also noted, Flores was wearing a jacket which got caught in the conveyor. (Decision, p. 7). No testimony or evidence was presented to demonstrate that the wearing of long sleeves while cleaning the belt was against promulgated safety rules, or even considered as a risk factor. We agree with the ALJ that Employer has not met its burden of demonstrating that it was in compliance with section 3314, and the Employer’s defense fails. (Decision, p. 6).

Although Employer may be correct in arguing that section 3314 could apply in this instance, the Board has also found that failure to cite an applicable safety order, where two or more equally applicable safety orders could be referenced, does not nullify a citation. (*Puritan Ice Company*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003).) The Division must always cite the most clearly applicable safety order; but where there is more than one safety order of equal applicability, the Division may use its discretion to cite only one without compromising the validity of its citation. (See, *Truecast Concrete Products*, *supra*; *Puritan Ice Company*, *supra*.) The ALJ was able to reasonably conclude that had the nip points on the moving machinery or equipment been guarded, as required by section 4002, the

accident would not have occurred. (Decision, p. 7). Had the Division issued a citation under section 3314, the ALJ may have been able to find a violation based on this record, or the Employer may have been able to successfully defend against that action had it introduced additional evidence on Flores's training and how it determined that cleaning with an extension tool was the safest option available. Either way, the case is not analogous to *Carris Reels of California*, Cal/OSHA App. 95-1456, Decision After Reconsideration (Dec. 6, 2000), where the Division cited a safety order that "does not, and was not intended by the Standards Board, to extend to the facts of this case."

The Employer also seems to suggest that if section 3314 is not found to be more specific, section 3999(b), which is referenced in the initial citation, should have been cited, rather than section 4002(a). Where both a general and specific safety order apply, the Employer has the burden of establishing that the specific safety order excludes the general order through an inconsistency. (*Roger Byg dba Packaging Plus*, Cal/OSHA App. 96-4574, Decision After Reconsideration (Jul. 19, 2000); *JD² Incorporated*, Cal/OSHA App. 02-2693, Decision After Reconsideration (Aug. 16, 2004).) Both section 3999(b) and 4002(a) call for guarding -- there is no apparent inconsistency, nor did Employer make a showing of an inconsistency. Going a step further, and comparing the plain language of these two sections with section 3314, the three safety orders still demonstrate no inconsistency.

The Board has found in prior instances that pulleys which are mandated to be shielded by a guard must be cleaned, or where inner parts of the belt mechanisms need to be open for cleaning, the Employer may make a showing that a protective guard will block the ability to clean, thus creating an inconsistency in safety orders as described above, and making section 3314 the enforceable safety order. (*Tri-Valley Growers*, Cal/OSHA App. 78-1183, Grant of Petition For Reconsideration and Decision After Reconsideration (Sept. 28, 1984); *Anheuser-Busch, Inc.*, Cal/OSHA App. 77-174, Granting of Petition For Reconsideration and Decision After Reconsideration (Nov. 30, 1978).) As the Board cautioned at that time, "this holding, however, does not provide a general exception to guarding every time machinery must be cleaned while it is operating." *Tri-Valley Growers, supra*. The Board further stated in *Tri-Valley Growers*, "[e]mployers must establish that they are fully complying with Section 3314(a) before the Appeals Board will find they are excused from complying with 3999(a) and (b)."³

It is the Employer's burden first to show they are in compliance with section 3314, and next to demonstrate the necessity for temporary removal, or a complete lack of guarding, if guarding is required by another applicable safety order. As discussed above, the Employer has provided no evidence upon which the ALJ could reasonably find that Employer was in compliance with the

³ Section 3314 is entitled: The Control of Hazardous Energy for the Cleaning, Repairing, Servicing, Setting-Up, and Adjusting Operations of Prime Movers, Machinery and Equipment, Including Lockout/Tagout. In *Tri-Valley Growers*, the issue was compliance with the machinery lock out provisions of 3314(a) while failing to provide guards under 3999(a) and (b), during cleaning of a moving belt.

provisions of Section 3314(c); there is no evidence of “thorough training” on means and methods of safe use and maintenance of the appropriate extension tool in the record. Without such evidence, the Board cannot reach the question of whether or not the two safety orders would create conflicting standards in Employer’s efforts to clean this particular moving belt at its worksite. (See, *Nabisco, Inc.*, Cal/OSHA App. 01-722, Decision After Reconsideration (Nov. 7, 2003).)

Employer’s conveyor belt at the time of the alleged violation was surrounded by the bars of the machine’s frame, and the nip point was some distance from the ground. Nevertheless, the conveyor was regularly accessed by at least one employee, two to three times per day as a regular job duty. (Decision, p. 4). The Employer has posited that the belt was “guarded by location” as defined in section 3941 and referenced in 4002(a), so that Employer complied with 4002(a).⁴ This logic fails in light of the facts. When even a single employee has been assigned to work in an area that contains a hazard which the employee can make contact with, the employer cannot be said to be guarding by location; at the least, one employee is being assigned to be regular exposure to the danger. (*American Microsystems, Inc.*, Cal/OSHA App. 76-858, Granting of Petition For Reconsideration and Decision After Reconsideration (Jun. 9, 1980); *Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 20, 2002).) For a machine to be guarded by location, the “likelihood of accidental contact with moving parts is removed by their remoteness,” and decreasing the likeliness of accidental contact is not enough. (*Ray Products, Inc.*, *supra.*) That an employee has to climb or reach to be exposed to the hazard is ultimately irrelevant, where the employee has no choice but to reach to the hazard to perform an assigned repair or cleaning task. (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 08-0219, Decision After Reconsideration (Jul. 19, 2012), See also, *Tri-Valley Growers*, Cal/OSHA App., 78-1183, Decision After Reconsideration (Sep. 28, 1984).) Flores credibly testified that he worked near the nip points two or three times a day for twelve years. Flores was not “removed from the likelihood of accidental contact” with the moving parts of the machine, given his daily work near those parts.

Similarly, the Employer would be hard pressed to claim ignorance of this routine, daily assignment. Lack of knowledge of the applicable safety orders is not an excuse for lack of compliance. (*Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug 20, 2007).) We agree with the ALJ, and find that the Division established that a nip point, not otherwise guarded by location or the frame of the machine, was present, and due to the lack of guarding there was a violation of section 4002(a).

2. The ALJ Properly Found a Serious Violation of Section 4002(a)

⁴ Section 3941 defines guarded by location as: The moving parts are so located by their remoteness from floor, platform, walkway, or other working level, or by their location with reference to frame, foundation or structure as to remove the likelihood of accidental contact.

Division inspector Sanasaryan testified that of the 30 accident cases he had investigated involving pinch points, 29 were classified as serious. In his testimony, he discussed some of the risks of nip point injuries, including amputation (as in the current case), crushing, or even death. The Employer stipulated at hearing that the injury in the current matter was serious within the meaning of the labor code. Given that the injury was serious, and taking into account the testimony of Sanasaryan on the nature of nip point injuries, the Division's classification of the violation as serious was merited. The ALJ was correct in upholding the serious classification of Citation 2.

The parties stipulated that the penalties were calculated in accordance with the Division's policies and procedures. The accident was shown to be serious, and ALJ appropriately found that the Division established that Flores would not have sustained the serious injury had the machine been guarded.

Therefore, we uphold the ALJ's ruling that the violation is accident related, and the penalty is reasonable.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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