

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

In the Matter of the Appeal of:

A. TEICHERT & SON INC.,
dba TEICHERT AGGREGATES
P.O. Box 15002
Sacramento, CA 95851

Employer

Docket No. 09-R5D1-2443

**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 ordered reconsideration of the above-entitled matter on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on June 8, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Sacramento, California maintained by A. Teichert & Son Inc., dba Teichert Aggregates (Employer). On July 1, 2009, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1, Item 1 alleged a General violation of section 3212(a)(2)(A) [failure to provide a swinging gate for elevated work platforms accessed by ladders]. Citation 1, Item 2 alleged a General violation of section 3272(c) [failure to keep stairways reasonably clear]. Citation 1, Item 3 alleged a General violation of 3314(h)(3) [failure to certify that inspection of its hazardous energy control procedures had been performed]. Citation 1, Item 4 alleged a General violation of section 3328(b) [failure to maintain equipment according to the manufacturer's recommendations]. The Division withdrew Citation 1, Item 4.

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

Employer filed timely appeals of the citation. Employer stipulated to the reasonableness of the proposed penalties, should a violation be found.

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 issued a Decision on January 20, 2011. The Decision granted Employer's appeal, and vacated the 3 General violations.

The Board ordered reconsideration of the Decision of the ALJ's decision on its own motion. Both the Employer and Division filed answers to the Board's motion.

ISSUE

Was the ALJ's conclusion that Employer's employees' statements were hearsay 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. The Division's Associate Safety Engineer, Douglas Patterson conducted an inspection of Employer's worksite, on June 8, 2009. Pursuant to that inspection, Patterson held an opening conference with Anthony Granillo (Granillo), who identified himself as Employer's electrical foreman, Mike Cunningham (Cunningham), Employer's plant manager, and Mike Goss (Goss), plant superintendent. Business cards for these employees of Employer were entered into the record as Exhibit 3.²

Patterson and representatives of Employer toured Employer's asphalt plant, where Patterson observed a 7-foot vertical ladder leading up to a dryer drum. (Ex. 4). At the asphalt plant, Patterson also viewed the stairway, and took photos, which were entered into the record as Exhibits 7 and 8. He viewed an 11-foot ladder at the top of an 80-foot high silo, used by employees to access a work area. (Ex. 5).

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 answers filed by both parties.

² Granillo's card reflects a title of "Electrician." Patterson testified that Granillo informed him that he was the electrical foreman, and he knew him to be such from their "dealings."

Citation 1, Item 1

Citation 1, Item 1 alleges a violation of section 3212(a)(2)(A), which reads as follows:

Every ladderway floor opening or platform with access provided by ladderway, including ship stairs (ship ladders), shall be protected by guardrails with toeboards meeting the requirements of General Industry Safety Orders, Section 3209, on all exposed sides except at entrance to the opening. The opening through the railing shall have either a swinging gate or equivalent protection, or the passageway to the opening shall be so offset that a person cannot walk directly into the opening.

Exception: Ladder openings for entrance/access at perimeter roof edges where guardrail protection is not required by subsection (d) of this section.

The Division's citation alleges that the ladder way opening in the guard rail around the elevated platform at Employer's asphalt plant had no swinging gate, nor did the ladder way at the top of the drag slat conveyor drive platform.

At hearing, Patterson testified that he conducted his planned inspection of Employer's sand and gravel facility while accompanied by Granillo, Cunningham and Goss. They viewed Employer's asphalt plant, where a vertical ladder of 7 feet tall leads up to up to an elevated platform. Patterson testified that he heard voices inside the drum, and saw an electrical cord leading into the drum, leading him to make the assumption that there were employees of Employer at work inside. (Ex. 4). He asked Cunningham and Goss who the employees were, and was told that it was Robert Trent and Roger DeMarteau, who were doing some repair work in the dryer drum.³ Patterson testified that as shown in Exhibit 5, he viewed a similar ladderway at the top of the silo at the asphalt plant.

From Patterson's testimony and the clear color photographs entered into the record, it is evident that Employer's two ladderway floor openings did not have either a swinging gate or equivalent protection. Neither passageway to the opening is so offset that a person cannot walk directly into the opening, as required by the plain language of the safety order. Employer did not present any evidence to suggest that either ladderway met the requirements of the safety order or an applicable exception. However, the ALJ's decision found that Patterson did not establish a violation as he relied on inadmissible hearsay in

³ Patterson was unsure if it was Goss, Cunningham or Granillo who gave him these details, but testified that it was one of the three who were with him on the inspection.

presenting evidence of employee exposure to the alleged violation.⁴ (Decision, p. 5).

The ALJ's decision on this point is in error. The decision correctly states that it is the Division's burden to show employee exposure to a violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 Decision After Reconsideration (Apr. 24, 2003), citing *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) However, direct evidence of employee exposure is not required. The Board has found indirect evidence of employee exposure, such as the location of tools, to be enough to show employees have been in the zone of danger. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (Jun. 21, 1982).) Circumstantial evidence may be used to demonstrate that employee exposure is more likely than not: here, presence of the electrical wire plainly visible in Exhibit 4, as well as Patterson's testimony that he heard employee voices in the dryer drum, is enough to establish circumstantial evidence of employee exposure. (*Benicia Foundry & Iron Works, Inc.*, supra, citing *C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26 2001).)

While no more evidence is necessary to sustain the violation, Patterson credibly testified that a management representative informed him that two employees of Employer, Robert Trent (Trent) and Roger DeMarteau (DeMarteau), were engaged in repairs inside the dryer drum. He also testified that he was told by Goss and Cunningham that these same two employees are responsible for climbing the silo on a daily basis, via the ladderway, to grease the chain conveyor, before the conveyor can be run. The testimony falls under the exception for authorized admissions which may be relied upon to make a finding of fact.⁵ (*San Francisco Newspaper Agency San Francisco Printing Co., Inc.*, Cal/OSHA App. 93-319, Decision After Reconsideration (Dec. 20, 1996).)

⁴ Both parties requested, and were granted, standing hearsay objections.

⁵ Evidence Code Section 1222: Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

See also, section 376.2: The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded. The Appeals Board may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

The Division may rely on the behavior of the Employer's employees during an investigation to establish the identity of authorized supervisory representatives. (*Duininck Bros., Inc.*, Cal/OSHA App. 06-2870 Decision After Reconsideration and Order of Remand (Apr. 13, 2012)). Cunningham, Goss and Granillo sat as representatives of Employer during the opening conference, presented themselves as such to Patterson, and accompanied him on his inspection. The titles of "Plant Manager" and "Superintendent" appear on Cunningham and Goss' business cards, respectively. (Ex. 3). Employer, who employs these employees, chose not to present testimony or evidence to rebut Patterson's testimony that he met with supervisory representatives of Employer during the course of his visit. (*Duninick Bros, Inc., Id.*). It can be reasonably inferred that Patterson correctly identified the individuals who accompanied him during the course of his investigation as management representatives for Employer.⁶

A general violation is found. The penalty of \$365 is affirmed.
Citation 1, Item 2

Item 2 alleges a violation of section 3272(c):

[p]ermanent aisles, ladders, stairways, and walkways shall be kept reasonably clear and in good repair. Where, due to lack of proper definition, such aisles or walkways become hazardous, they shall be clearly defined by painted lines, curbing, or other method of marking.

Here, two photos, as well as Patterson's testimony established the violation of the safety order—the stairway is photographed showing a buildup of asphalt estimated to be 4 to 6 inches on the top step, and 1 inch on the lower steps. The rough, uneven nature of the buildup is apparent in the photographs (Ex.s 7, 8).

According to Patterson's testimony, Employer representatives accompanying him on the inspection stated that every time the chute is used, the stairs become coated in asphalt, as shown in the photograph. The two employees assigned to the asphalt plant, Trent and DeMarteau, also operate the chute, although Patterson did not testify as to how often the chute was operated.⁷

⁶ Evidence Code, Section 664: It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.

⁷ Patterson also testified to speaking with an employee who is responsible for cleaning the stairs (among other tasks), and does so by applying sand to the wet asphalt. This testimony was hearsay without an exception, which, under rule 376.2, "may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

As discussed above, direct evidence of an employee exposure is not necessary for the Board to uphold a violation of a safety order. Non-hearsay evidence, such as direct observations of a violative condition, may be supplemented with authorized admissions to establish sufficient evidence. (*George L. Lively*, Cal/OSHA App. 98-088, Decision After Reconsideration (Apr. 28, 1999)). Patterson's testimony, which was un rebutted, along with two photographs, showing the single entry point to the chute via the stairs-- and the buildup that has accumulated on those stairs-- is enough for a reasonable inference that the stairway had been used in an unsafe condition by Employer's employees. (*Truestone Block, Inc.*, Cal/OSHA App. 82-1280, Decision After Reconsideration (Nov. 27, 1985) [grinder observed without flanges, inference may be made that grinder had been used without requisite flanges]).

A general violation of the safety order is found. The penalty of \$365 is upheld.

Citation 1, Item 3

Item 3 alleges a violation of Section 3314(h)(3). The provisions of section 3314 regulate hazardous energy control, including lockout/tagout and other procedures. Section 3314(h)(3) reads as follows:

(h) Periodic inspection: The employer shall conduct a periodic inspection of the energy control procedure(s) at least annually to evaluate their continued effectiveness and determine necessity for updating the written procedure(s).

[...]

(3) The employer shall certify that the periodic inspections have been performed. The certification shall identify the machine or equipment on which the hazardous energy control procedure was being utilized, the date of the inspection, the employees included in the inspection, and the person performing the inspection.

The "energy control procedure(s)" referenced in 3314(h) are defined in the section at 3314(g) as being necessary in the following situations: A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.

Patterson testified that at the closing conference, held with Goss and Cunningham on June 15, he requested a copy of Employer's certification of periodic inspection, per 3314(h)(3). According to Patterson, Employer was unable to locate those records, and did not provide a certification.

As the ALJ stated in her decision at page 6, Patterson did not testify to the machinery, equipment or prime movers at Employer's worksite that require a hazard energy control procedure under section 3314. Without information in the record to demonstrate that Employer is covered by this procedure, a violation cannot be established.

Citation 3 is dismissed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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