

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

In the Matter of the Appeal of:

CGK INC. dba PREMIER STEEL
FABRICATION
8229 Mabel Avenue
El Monte, CA 91733-1424

Employer

Dockets. 13-R4D4-518 and 519

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by CGK Inc. doing business as Premier Steel Fabrication (Employer).

JURISDICTION

Commencing on August 17, 2012 the Division of Occupational Safety and Health (Division) conducted an accident inspection of a place of employment in California maintained by Employer.

On January 31, 2013 the Division issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Citation 1 alleged a general violation of section 3203, subdivision (a)(2) [incomplete Injury and Illness Prevention Program (IIPP)]. Citation 2 alleged a willful violation of section 4214, subdivision (a) [press brakes not guarded at point of operation].

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing.

On August 6, 2015 the ALJ issued a Decision (Decision) which upheld the citations and imposed civil penalties.

Employer timely filed a petition for reconsideration.

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

The Division did not answer the petition.

ISSUES

Did the Division prove the alleged violation?

Was the violation properly classified as serious and willful?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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's petition maintains that the Decision was procured by fraud, the evidence does not justify the findings of fact, and/or the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

We note before delving into the details of Employer's petition that it addresses only Citation 2. The Decision notes that the parties had resolved Citation 1 by stipulation. (Decision, p. 1, fn. 2.)

Employer operates a steel fabrication business, at which it operates several press brakes. The press brake involved in the accident at issue is a large piece of equipment which is used to bend and/or otherwise reshape metal into other forms, apparently for use as components in various products. In the present circumstance it was being used to bend pieces of flat sheet steel to form an angle in them. The employee performing that operation suffered a partial fingertip amputation while using a press brake to do so. Although the injury suffered was

a fingertip amputation, it was not “serious” as defined by statute and regulation because only soft tissue and not bone was lost.

Employer first contends that because the injury suffered by its employee was not serious, the serious classification is incorrect. That argument is not valid. Labor Code section 6432 defines a serious violation as one which entails the realistic possibility of serious harm. The machinery involved here, a large² press brake without guards at its point of operation, presents a reasonable possibility that serious injury could occur, and the Division introduced evidence to that effect. It is not the actual result of the accident which controls whether the violation was serious, but rather the realistic possible outcomes. (Labor Code section 6432, subd. (a).)

As to the willful classification, the Decision found that Employer knowingly violated the guarding requirements of section 4214, subdivision (a), and thus at least the first alternative test of a willful violation was met. For reasons set forth below, the Decision was correct.

A violation is willful if (1) the employer intentionally violated the applicable safety order, or (2) the employer was aware of the hazard and took no actions to eliminate it. (Section 334, subd. (e); *Rick’s Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034.) The evidence showed that Employer was cited previously, in 2010, for failing to guard press brakes at its facility. That evidence established that Employer was aware, as the citations put it on notice, that guarding was required. The evidence also showed that six press brakes at Employer’s facility were unguarded at the time of the accident, proving the violation of the guarding requirement.

Employer, however, argues that an exception in section 4214 applies. The Board considers exceptions to safety orders as affirmative defenses; the employer advancing the defense must prove in met the conditions or elements of the exception. (*Guardsmark*, Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011), writ denied Orange County superior court, 2015.)

To understand why Employer’s argument is not persuasive, it should be examined in light of the exception itself. Section 4214, subdivision (a) requires that a press brake be guarded to prevent the operator’s hand or hands from entering the point of operation. Subdivision (b) sets forth a non-exclusive list of several options for satisfying subdivision (a). Subdivision (b)(9) further provides:

When the nature of the work or size and/or shape of material being worked is such that compliance with the provisions of Section 4214(b)(1) through

² From photographs in evidence it appears the press brake at issue was approximately 6 to 7 feet high and 8 or more feet wide, left to right.

(8) is not practical, the employer shall ensure compliance with the following:

(A) The operator shall be qualified, and

(B) The operator maintains a safe distance from the point of operation through the use of hand tools or the size and/or shape of the material being worked so that the operator's hands never enter the point of operation, and

(C) Only general-purpose press brakes with general-purpose dies are used.

The pieces of steel the injured employee was forming were approximately 3 inches by 5 inches, and it was not disputed that their size was “such that compliance with” subdivision (b)(1) though (8) was not possible.

Employer contends it was in compliance with the quoted exception. The facts do not support its argument. Note that the elements of subdivision (b)(9) are written in the conjunctive. To satisfy the exception the employer advancing it must prove that (A) the operator was qualified; (B) the operator stayed a safe distance from the point of operation or used tools such that his “hands never enter the point of operation”; and (C) only general-purpose press brakes with general-purpose dies are used. Although the evidence shows the operator was experienced and that general-purpose dies were in use, tools were not being used and the accident itself shows that the employee’s hands entered the point of operation. In short, part (B) of the exception was not established. Thus, only two of the three conditions of the exception was met, and the affirmative defense fails.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 30, 2015