

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

In the Matter of the Appeal of:

CROP PRODUCTION SERVICES
P.O. Box 698
Imperial, CA 92251

Employer

Dockets. 09-R6D4-4036 through 4038

**DECISION AFTER
RECONSIDERATION
and ORDER of REMAND**

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 Decision in the above-entitled matter on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on July 13, 2009, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Imperial, California maintained by Crop Production Services (Employer). On November 3, 2009, the Division issued three citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleged a Regulatory violation of section 461(c) [air tank permit not posted], and a General violation of 3203(a)(7) [no training on care of coveralls]. Citation 2 alleged a Serious violation of 3329(b) [piping not designed in accordance with good engineering practice]. Citation 3 alleged a Serious violation of 3380(e) [protective coveralls not suitable].

Employer filed timely appeals contesting the existence of the violations, the classifications of Citations 2 and 3, and the reasonableness of all proposed penalties. Employer alleged the affirmative defense of lack of employer knowledge.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking

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

testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on October 26, 2010. The Decision granted in part and denied in part Employer's appeal. Civil penalties of \$655 were affirmed.

The Board ordered reconsideration of the Decision on its own motion of the ALJ's Decision. The Employer filed an answer to the Board's order of reconsideration.

ISSUE

Is there sufficient evidence in the record to support the Decision?

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 July 10, 2009, at approximately 6:10 am, Gerardo Berumen (Berumen), an employee of Employer, and a co-worker, Francisco Rosales (Rosales), were beginning the process of unloading sulfuric acid from a railroad tank car to Employer's stationary tank, via Employer's hose assembly system. (Ex. B). The hose system of Employer consisted of green rubber hosing attached to metal piping with two stainless steel T-block clamps, designed in-house by Employer. There were several parts of the piping system that were made with iron and did not have a lining. (Ex.s I-1, I-2 [similar assemblies], Ex. 10).

The railroad car had an opening at its top, and a platform for employees to stand on to connect the hose assembly. Berumen was at the top of the car with the hose, while Rosales assisted from the other side of the railcar. As Berumen was beginning to connect the hose to the railcar, the green hose began slipping off of Employer's piping. Not yet connected in any way to the railcar of sulfuric acid, pressure in the hose caused the connection between the pipe and hose to fail. Berumen shouted to Rosales to run; Rosales was sprayed with sulfuric acid in the neck and Berumen was hit in the thigh.² Both men were wearing personal protective equipment at the time of the accident. Berumen was wearing Sawyer-Tower CPC Gore Polyester coveralls (referred to as the "red coveralls"), while Rosales was wearing a more common yellow suit (Ex. 14, I-3).

² The parties stipulated to the seriousness of Berumen's injuries under the Labor Code. His assistant Rosales' injuries were stipulated to as not meeting the definition of serious under the Labor Code.

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 Employer's answer to its order of reconsideration.

Citation 1, Item 1 Regulatory Violation of Section 461(c) and Item 2 General Violation of Section 3203(a)(7)

Citation 1, Item 1 is a regulatory violation of section 461(c), which requires air tank permits "be posted under glass in a conspicuous place on or near the air tank or in a weatherproof container secured to the unit, and shall be available at all times to any qualified inspector." As discussed in the ALJ's decision, Employer did not dispute the Division's testimony that it did not have the permit posted, but argued that it should not be required to post the permit by the air tank. Employer's remedy in an instance such as this is to either apply for a permanent variance from the Standards Board or to petition the Standards Board for a change in the safety order. (*Hyatt Diecasting, Co., Inc.*, Cal/OSHA App. 93-1530, Decision After Reconsideration (Oct. 1, 1997), citing *Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985).) The Appeals Board has a duty to apply regulations as promulgated by the Standards Board, and must do so here, where a violation has been established by the Division. (*Southern California Edison*, Cal/OSHA App. 75-415, Decision After Reconsideration (May 5, 1976).)

The regulatory citation and \$375 penalty affirmed by the ALJ is upheld by the Board.

Citation 1, Item 2 alleges a general violation of section 3203(a)(7). The citation alleges that Employer failed to provide training to employees in using, maintaining, cleaning, storing, and inspecting the red coveralls which employees were issued for protection against sulfuric acid.

Associate Safety Engineer for the Division, Michael Doering (Doering), testified that he observed a care tag in the red coveralls worn by Berumen. The tag included specific instructions for care, use, and storage of the coveralls, and had a bold warning which stated that failure to comply with the instructions and user's manual, and to properly care for and inspect the garment could result in a serious injury or death. Doering communicated with Nelson Schlatter (Schlatter), a Technical Applications Chemist at Ansell, the company that sold the red coveralls, to gather further care information on the suit. (Ex.s 5, A). Schlatter responded that delicate care laundering would be

appropriate, as well as inspection after each wash, to check for delamination, cuts and other damage.³

Doering also interviewed the injured employee, who stated that he had not been trained on how to wash or care for the red coveralls. Doering requested records showing training in the care, use and storage of the coveralls, but did not receive a response from Employer. Employer's Operations Coordinator, Leo Garcia (Garcia), testified on cross examination that generally the employees took care of cleaning the suits at home, and that he was not sure how employees would know how to care for the red coveralls.

The Board agrees that the evidence presented is enough to find an Illness and Injury Prevention Program (IIPP) violation as described in the Division's citation. The testimony of Doering, Garcia, and the injured employee, as well as the lack of requested documentation, evinces a lack of governing procedures to train employees on the maintenance, care, storage, and proper inspection of the red coveralls. (*Pouk & Steinle, Inc.*, Cal/OSHA App. 03-1495, Decision After Reconsideration (Jun. 10, 2010), *Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998).)

The citation, and the corresponding \$280 penalty as recalculated by the ALJ, is affirmed.

Citation 2, Serious Violation of Section 3329(b)

Citation 2 alleges a serious violation of section 3329(b), which requires the following:

All pressure piping shall be designed, constructed, installed, and maintained in accordance with good engineering practice. Piping which meets the requirements of the applicable ANSI B31 standard shall be considered as providing reasonable safety.

The citation alleges that the hose connection, made with two stainless steel, sheet metal T-block hose clamps, was not of a design that was in accord with good engineering practice. What constitutes "good engineering practice" is a matter of reasonable interpretation. According to the Board in *Valley Crest Landscape, Inc.*, Cal/OSHA App. 86-171, Decision After Reconsideration (Oct. 29, 1987), "'Good engineering practice' would include practices developed through experience and other means and generally accepted within an industry as prudent, information about product limitations supplied by product manufacturers and standards developed through research and application by

³ As discussed in greater detail in the ALJ's decision at page 7, Employer obtained an affidavit from Schlatter. Information contained in the Technical Support Answers attached to Schlatter's affidavit was stipulated to by Employer.

ANSI and other highly regarded and accepted industry and professional societies.”

Both parties could only theorize as to why Employer’s piping system failed on July 10. The Division set forth several possibilities. Although the accident occurred at 6:10 am, the parties agreed that the Imperial Valley is subject to high temperatures, which climb above 105 degrees Fahrenheit in the summer months, and occasionally break the 120 degree Fahrenheit mark. According to the Division, the temperature on July 10 was possibly over 100 degrees, and heat could have led to the sulfuric acid expanding and pressurizing, the force of which the piping system was unable to withstand. The circumstances lead to an inference that the sulfuric acid that injured Berumen was in the piping system from a prior unloading, as the piping was not yet connected to the railcar.⁴

The Division also theorized that water from the air or from another source found its way into the piping system. Sulfuric acid reacts violently with water, and Doering speculated that moisture from the atmosphere mixing with the acid could have either lead to or exacerbated pressure build-up in the piping system. Another theory presented by Doering was that the sulfuric acid in the hose reacted with the metal piping, causing corrosion and subsequent creation of hydrogen gas. Doering introduced a Southern States Chemical document on unloading sulfuric acid from tank cars and trucks in support of his contention that sulfuric acid can create hydrogen gas through corrosion. (Ex. 8). Employer objected to the document as hearsay, and the ALJ found the exhibit, as well as several other exhibits, to be hearsay without an exception.⁵

Under the Board’s Rules of Practice and Procedure:

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. [...] (Section 736.2).

⁴ The parties stipulated that Berumen was sprayed with liquid that was 98% sulfuric acid. Sulfuric acid is more corrosive when diluted, and reacts violently with water, particularly when water is added to the acid. (Ex. D).

⁵ On page 14, the ALJ describes exhibits 7, 8 and 9 as hearsay. Exhibit 7 is a document from General Chemical and Exhibit 9 is an email from Greg Rhoads of the American Chemistry Council.

Insofar as these documents are used to supplement the credible testimony of Doering, who has a master's degree in public health, is a certified industrial hygienist, and has 21 years of experience with the Division, including with the hazardous materials and process safety management units, they may be considered.

Having presented several alternate theories as to what occurred in the pipe to cause the pressure buildup, the Division concluded that the Employer's piping system would not have failed despite that pressure, but for lack of good engineering practice in design of the piping system. Neither Doering nor the Employer's witnesses were able to estimate with any specificity the amount of pressure that was on the piping system when it failed.

Employer presented evidence regarding its engineering practices through Richard Swayne (Swayne), an engineering management consultant with experience in the piping industry. Swayne testified that he believed Employer's piping system constituted good engineering practice in general, although he believed the system did have faults. The rubber hose that Employer used was rated to handle most common chemicals and 200 pounds per square inch (psi) of pressure. He noted that if the Employer's clamp had been manufactured and sold as part of a commercial piping assembly, it would have been pressure tested, but he thought the clamp was preferable to some off the shelf models, as it was adjustable and could be tightened regularly. Swayne advised regular maintenance, pressure testing, and that the clamps be pressure tested as capable of withstanding 200 psi to avoid future accidents. To further engineer out hazards, Swayne also suggested a pressure valve and possibly a pressure gauge and quick rather than threaded connection. Swayne theorized that the accident occurred either due to moisture in the line or thermal expansion, with the likely culprit being the latter. Swayne ruled out corrosion, as he explained a small amount of acid left in the piping would create a level of oxide-- it would be unlikely that a significant amount of corrosion would occur.⁶

William Embree (Embree), an environmental services consultant who testified for Employer, stated that Employer's piping system is typical of the systems he sees in the fertilizer industry in California, and that he did not believe it to be any more or less safe than the off the shelf systems sold by manufacturers. Embree explained that generally the piping system would only be exposed to a maximum of 20 to 30 psi of pressure while at the railcar, with 10 psi being normal, and described the 200 psi system Employer had designed as "overkill", given that there is no expectation that the system will ever see even 50 psi of pressure.

⁶ The best guess of Employer, as testified to by the Doering, was that approximately 20 gallons of sulfuric acid had been in the line and escaped to injure Berumen. Swayne was unsure as to the amount of acid.

It is the Division's burden to demonstrate by a preponderance of the evidence each element of an alleged violation. (*Howard J. White*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) Employer's witnesses credibly testified that the system both met standards of good engineering practices, and was as effective as or better than systems available for purchase commercially, and designed to withstand levels of pressure much greater than the system would ever handle under typical circumstances. While both the Division and Employer were in agreement that the accident occurred due to an unusual amount of pressure, the Division was unable to meet its burden of showing that the Employer's piping system failed due to lack of good engineering practice, which was not in accordance with applicable ANSI B31 standards.

Therefore, the Board agrees with the decision of the ALJ, which found that the Division failed to establish Citation 2 by a preponderance of the evidence. The appeal is granted and the citation is dismissed.

Citation 3, Serious Violation of Section 3380(e)

The citation as issued by compliance officer Doering makes the following factual allegations:

On July 10, 2009, an employee suffered a serious chemical burn injury to his upper leg when he was sprayed with 98% sulfuric acid during an unloading operation. He was wearing vapor permeable splash resistant protective coveralls. These coveralls were not intended for continuous contact or deluge with sulfuric acid. They were stored inside a vehicle or metal building in hot weather, were two years old, used many times and were not in their original condition. The coveralls on that day were not of such design or durability as to provide adequate protection against a direct spray of 98% sulfuric acid.

Section 3380(e) reads as follows: Protectors shall be of such design, fit and durability as to provide adequate protection against the hazards for which they are designed. They shall be reasonably comfortable and shall not unduly encumber the employee's movements necessary to perform his work.

The Board requires only a general notice pleading for hearings, to give the employer a fair notice and opportunity to prepare its defense. (*Sacramento Bag Mfg. Co.*, Cal/OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992), citing *Certified Grocers of California, Ltd.*, Cal/OSHA App. 78-607, Decision After Reconsideration (Oct. 27, 1982).) The Board's rules also allow post-submission amendments to the issues on appeal. Should a party argue that the amendment would be prejudicial, the Board may order further

proceedings to allow the party to present additional evidence. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration Cal/OSHA App. 09-1218 (Sep. 6, 2012), Section 386(b), Government Code section 11516.)

In the present case, there is evidence on the record demonstrating that in regards to Citation 3, the parties litigated a violation of section 3380(d), rather than section 3380(e). Section 3380(d) reads as follows:

The employer shall assure that all personal protective equipment, whether employer-provided or employee-provided, complies with the applicable Title 8 standards for the equipment. The employer shall assure this equipment is maintained in a safe, sanitary condition.

Having reviewed the record in its entirety, it is the opinion of the Board that the most appropriate procedure in the instant matter is to return this citation to hearing operations, to provide such notice to the parties of amendment of the citation under Section 386(b), as well as opportunity for other proceedings and decision as are necessary. (*Taylor v. City of L.A.* (1997) 60 Cal. App. 4th 611, 617 [Amendments to conform to proof are within the broad discretion of administrative bodies.]) We remand the matter to hearing operations for issuance of a Notice of Proposed Amendment.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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