

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

In the Matter of the Appeal of:

DAMON, INC.
9602 Samoline Avenue
Downey, CA 90240

Employer

Dockets. 13-R6D5-1975 & 1976

**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 Damon, Inc. (Employer).

JURISDICTION

Commencing on April 25, 2013, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On June 7, 2013, the Division issued two citations to Employer alleging three violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

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 June 3, 2014, the ALJ issued a Decision which sustained the alleged violations and imposed civil penalties.

Employer timely filed a petition for reconsideration.

The Division filed an answer to the petition.

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

ISSUE

Does the record show that Employer committed the three violations as alleged?

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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) Construing the petition in the light most favorable to Employer, it may be said to assert that the evidence does not justify the findings of fact, and 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.

Citation 1 included two Items. Item 1 alleged a general violation of section 1512(b) [no appropriately trained person on site to render first aid]; Item 2 alleged a general violation of section 3395(f)(3) [heat illness plan lacked required elements]. Citation 2 alleged a serious violation of section 4070(a) [belt and pulley drive not guarded]. We address Employer's arguments regarding the above in turn.

Citation 1, Item 1

Item 1 alleged a violation of section 1512(b), which states:

Appropriately Trained Person. Each employer shall ensure the availability of a suitable number of appropriately trained persons to render first aid. Where more than one employer is involved in a single construction project on a given construction site, the employers may form a pool of appropriately trained persons. However, such pool shall be large enough to service the combined work forces of such employers.

Section 1512 is a “construction safety order,” which “establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts.” (Section 1502(a).) As will be seen, the construction safety orders (§§ 1500 through 1938) include a series of definitions codified in section 1504.

Employer challenges the Decision’s upholding of Citation 1, Item 1 on two grounds. First, he argues that the wording of the safety order (that appropriately trained personnel be “available” to render first aid) does not mean such person must be on site at all times, based on the dictionary definition of *available*.

Webster’s New World Dictionary defines *available*, among other definitions not pertinent, as: “2 that can be got, had, or reached; handy[.]” Considering that definition in the context of section 1512(b) it is reasonable to construe *available* to mean present at the worksite or located close enough so as to be able to reach the worksite on short notice. When someone is injured or taken ill at a worksite the situation may well require that first aid be provided immediately or in but two or three minutes. Depending on the injury or illness, time may well be critical, literally a matter of life or death. While the safety order does not require, and we do not interpret it to require, such person(s) to be on site at all times, *available* for purposes of rendering first aid to someone in need suggests such person be able to do so (i.e., to be “had” or “reached”) in the span of but a few minutes.

Section 1504 includes a definition of “first aid” within the defined term “Emergency Medical Services.” It defines “first aid” as “The recognition of, and prompt care for injury or sudden illness prior to the availability of medical care by licensed health-care personnel.” This definition’s use of “prompt care” is consistent with our understanding of the meaning of “readily available” in section 1512(b).

The evidence in the record shows that among Employers employees only Employer's owner had any formal training in first aid (which occurred at some unspecified past time in the military) and that he himself testified that he was some distance away at the time of the inspection.² Based on this evidence we conclude that there was no one "appropriately trained" on site or readily available at the time of the inspection. We turn now to Employer's other argument about the first aid situation.

Employer's second point is that the owner was trained in first aid in the military and he trained two of his employees who were on site in first aid. In essence the argument is that even though the owner himself was not on site or "readily available," two other employees were there and were appropriately trained. It is here that the definitions in section 1504 again come to the fore.

Section 1504 includes among its provisions a definition of the term "Emergency Medical Services." Paragraph (A) thereof states:

Appropriately Trained Person. A physician or registered nurse currently licensed in California or a person possessing a current certificate (training within the past three years or as specifically stated on the certificate) from the American National Red Cross or equivalent training that can be likewise verified. Acceptable Red Cross certificates are those from the Standard First-Aid Multimedia, Stand First Aid and Personal Safety, or Advanced First Aid and Emergency Care courses.

Note: Equivalent training includes, but is not limited to, training which is equivalent to that provided by the American National Red Cross, or training required for certification as mobile intensive care paramedics as provided under chapter 2.5, article 3, sections 1480 through 1484.4 of the California Health and Safety Code; and courses that are given by nationally recognized voluntary health organizations, official agencies, such as Mine Safety and Health Administration, or accredited teaching institutions.

The on-site individuals did not have the required certification in first aid, and there was no evidence that the owner was certified or qualified to give training in first aid, when he had given his two employees that training, or what the content of the training was. The violation was properly upheld given these facts. Whatever the recentness and scope of the owner's military first aid training may have been, there is no evidence in the record that it was equivalent to that training required by section 1504 or that he held or had ever held an American Red Cross (or equivalent) certification in first aid or been certified to give first aid training.

² For purposes of this discussion we assume without deciding or holding that the owner's prior military first aid training made him an "appropriately trained person."

Citation 1, Item 2

Citation 1, Item 2 alleged that Employer's heat illness prevention plan (HIPP) did not contain certain elements required by section 3395(f)(3). Section 3395 applies to outdoor places of employment, and includes "construction" as one of the industries subject to all of its provisions. (§ 3395(a).) It was not disputed that the place of employment at issue was outdoors and was a construction site.

Regarding Item 2 Employer argues, "How is it possible that in 1992 when I was inspected by OSHA my program was good than (sic) and not now. In addition nothing is mentioned by the ALJ about the Safety and Health Requirements Manual that I brought at the hearing and gave to [the inspector]."

Section 3395 was first promulgated in 2005. It follows that whatever program Employer had in place in 1992 was not examined for meeting the requirements of section 3395. Further, Employer admitted at the hearing that his heat illness plan was not in writing, as required. In addition the ALJ did consider the documents Employer and the Division introduced into evidence and found they did not satisfy section 3395(f)(3). (Decision, p. 6.) We agree with the ALJ that the documentary evidence Employer submitted did not show Employer had met the requirements of section 3395(f)(3). And, if the "Manual" Employer's petition references is a separate document than those admitted into evidence the ALJ would not have been able to consider it. The violation was properly upheld.

Citation 2

Citation 2 alleged a serious violation of section 4070(a), which provides: "All moving parts of belt and pulley drives located 7 feet or less above the floor or working level shall be guarded." The belt and pulley in question were part of the drive mechanism for a portable or towable cement mixer Employer was using at the construction site. The mixer rested on its chassis on the ground and was less than 7 feet high. The evidence showed that the belt and pulley were part of the mixer's drive mechanism. The belt connected the power or drive shaft on the mixer's motor to the pulley which was connected to the mixer's mixing drum.

Employer argues that § 4070(a) does not apply to the mixer. First he contends that the mixer was equipped as manufactured, and that therefore he was not in violation. Second, he argues the mixer was in compliance with § 3328.

The evidence shows that the mixer had a motor with an external drive shaft to which was connected a belt which in turn was also connected to a pulley. The portion of the mixer housing the motor was unguarded, and contained the on/off switch controlling the motor. The evidence also established that the mixer was in use at the time of the inspection and that Employer's employees were in the vicinity and using the cement to build a concrete block wall.

It is not a defense to the Citation that the manufacturer failed to equip the mixer with proper guarding when it was made, or that this model mixer is in widespread use in California. (*Western Pacific Roofing Corp.*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996).) The Board has consistently rejected this line of defense when it has been raised. Employers are responsible to "furnish employment and a place of employment that is safe and healthful for the employees therein." (Lab. Code § 6400(a).) "Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees." (Lab. Code § 6401.)

As to section 3328, reading Employer's argument in the light most favorable to Employer it seems he is referring to 3328(a), which states: "Machinery and equipment shall be of adequate design and shall not be used or operated under conditions of speeds, or loads which endanger employees." Given the lack of guarding of the motor compartment, it cannot be said that the mixer was of "adequate design." Therefore we are not persuaded by Employer's argument with respect to section 3328(a).

Lastly, Employer states in its petition that the mixer's motor compartment had a door, which Employer probably intends to suggest would be closed except when turning the mixer on or off. There was no testimony, however, that there was such a door or that it was closed at the time of the inspection. For example, Employer cross-examined the Division's witness in detail about the mixer, but the existence of a door was not brought up.

To the extent Employer seeks to introduce new evidence regarding the existence of a door on the mixer's motor compartment and its condition of being closed (or open), it is inappropriate to do so in a petition for reconsideration except as provided in Labor Code section 6617(d). Employer's petition makes no claim that the existence of the door is new evidence which could not, in the exercise of reasonable diligence, have been discovered earlier. In fact, Employer's argument about its long use of the mixer and its commonality in the construction business in California would belie any such claim. Therefore we decline to grant reconsideration or reverse the ALJ on the basis of this last assertion.

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
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