BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: STAFFCHEX 1122 East Lincoln Avenue, Ste. 118 Orange, CA 92865 Employer	Dockets. 10-R4D3-2456 through 2458 **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 Decision of the Administrative Law Judge (ALJ) on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on March 22, 2010, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Chatsworth, California maintained by Aware Products, a client of Staffchex (Employer). On July 21, 2010, 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, Item 1 alleged a Regulatory violation of section 14300.40(a) [Cal/OSHA Log 300 not timely provided]. Citation 1, Item 2 alleged a General violation of section 14300.40(b)(6) [Cal/OSHA Log 300 not posted]. Citation 1, Item 3 alleged a General violation of section 3203(a) [Inadequate Illness and Injury Prevention Plan]. Citation 2 alleged a Serious violation of section 4186(b) [Inadequate guard at point of operation of bottle filler/capping machine]. Citation 3 alleged a Serious violation of section 4184(b) [Inadequate guard of moving sprocket and chain pulley and nip/pinch points on bottle filler/capping machine].[2]

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

[2] The Division reduced the penalty for Citation 2 to $675 by application of section 336(k), as the hazard was similar to that in Citation 3. The parties stipulated that if the serious classification for Citation 2 was upheld, the penalty would be $675. The Division withdrew Citation 1, Item 1 and Item 2. Employer withdrew its appeal of Citation 1, Item 3, with a non-admissions clause found in the ALJ's decision at p. 2-3.

Employer filed timely appeals of the citations and asserted a number of affirmative defenses.

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 April 29, 2011. The Decision granted Employer's appeal of citations 2 and 3.

The Board, on its own motion, ordered reconsideration of the decision. Both the Division and Employer filed an answer to the Board's Order.

ISSUES

Is the Decision's analysis of primary and secondary employer responsibility correct?

Is the Decision supported by evidence in the record?

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.

Staffchex is a staffing services provider (known as a "primary employer") which employed Maria Mata (Mata) on the date of her accident, March 4, 2010, and assigned her to work at employer Aware Products.[3] Staffchex provides employees to Aware (the "secondary employer"), which is in the business of manufacturing and packaging lotions, shampoos, and similar products. Mata, who worked for Staffchex at the Aware plant as a machine operator for five years, had her fingers caught in a chain and sprocket mechanism while attempting to clear bottle caps. Her fingers were amputated by the metal chain.

Division Associate Safety Engineer Jeff Magro (Magro) was assigned to investigate the accident. He observed the bottle filling and capping machine where Mata was injured, which has Plexiglas and aluminum doors, allowing bottles to go in and out. (Ex. 2, photos of machine). The doors were large enough for a hand to go through, and when opened, the machine did not stop.

Magro met with representatives of Aware's management and Misal Medina (Medina), an on-site Staffchex supervisor. Medina informed Magro that his responsibilities on behalf of Staffchex were to make sure assigned

[3] The parties stipulated to Staffchex's status as primary employer of Mata.

personnel showed up, check their hours, perform day-to-day safety inspections, and discipline Staffchex employees. Medina was a fulltime Staffchex employee. He told Magro that the capper would become jammed four to six times a week, and that employees were instructed to turn off the machine and call a mechanic in the case of jams.

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 both the Employer and Division's answers to the Board order of reconsideration.

In some instances, an employee may have two employers. This is sometimes referred to as "dual employment", with the "primary employer" being the employer who loans or leases one or a number of employees to the "secondary employer" (also referred to as "general" and "special" employer). (*Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal. App. 4th 684, 693-694). It has long been found by the Board that each employer has safety responsibilities to the employee—for example, a primary employer must establish an Illness and Injury Prevention Program (IIPP) and provide training which addresses general hazards as well as the potential hazards employees may be exposed to at the secondary worksite. (*Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011).)

The Board has also recognized that both the primary and secondary employers may assert the usual defenses that may be available, such as lack of knowledge (as a defense to a serious citation), the independent employee action defense, the logical time defense, and so on. However, in the 1985 Decision After Reconsideration *PEMCO II*, the Board found that because the primary employer had contracted away its ability to effectively supervise its employees, a new defense would be appropriate.[4] (See, *Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985) ("PEMCO II").)

[4] Specifically, the PEMCO II defense states that the primary employer will not be found liable for a citation where it can meet four elements: (a) the contract employee carries out his work assignments wholly in and about the secondary employer's establishment (the work site); (b) The contract employee, in the execution of his work assignments, is supervised solely by management personnel of the secondary employer; (c) The primary employer is barred by contract with, or by policy of secondary employer from access to the work site, except to maintain time records of contract employees, or for purposes unrelated to the supervision of work activities of contract employees; (d) The primary employer maintains an accident prevention program and contracts out only employees who have been trained in the work they are able to do for the secondary employer, and who have been instructed concerning the hazards peculiar to such work. (*Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985) ("PEMCO II").)

There is no dispute that Staffchex was the primary employer and Aware the secondary employer in this situation; Staffchex argues that under the *PEMCO II* rule, it should not be found responsible for the safety of its employees working at Aware.

In considering this argument the Board turns to the Cal/OSH Act, which mandates that every employer has a duty to its employees to furnish a place of employment that is safe and healthful — that duty is non-delegable. (Labor Code section 6400). Board decisions prior to PEMCO II recognized this fact: "An Employer cannot contract away its responsibilities to its employees which have been imposed by a safety order." (*Moran Constructors, Inc.*, Cal/OSH App. 74-381, Decision After Reconsideration (Jan. 28, 1975). In *Cal-Cut Pipe & Supply Co.*, Cal/OSHA App. 76-995, Decision After Reconsideration (Aug. 26, 1980) the Board reiterated this, stating:

> When an employer assigns an employee to a work site, it has a non-delegable duty to inspect the site and make certain that it is safe for its employees intended activities… Employer cannot escape liability by its assertions of lack of control. Each Employer in the state of California owes a duty to its employees to furnish a safe and healthful place of employment.

Nearly 30 years have passed since the Board promulgated the rule found in Pemco II, and temporary (or "perma-temporary") employment has increased sharply. This affirmative defense has led to complexity and confusion, when the intent of the Act is plain. The Board finds that *PEMCO II* is not consistent with achieving the goal of each employer furnishing a safe and healthful workplace in all circumstances, and so finding, declines to recognize the defense found therein.

Staffchex and Aware were in a dual employer relationship. Staffchex, after conducting a safety inspection on February 12, 2009 at Aware's worksite, discovered the machine guarding problem. (Ex. 3). Although Staffchex properly made efforts to conduct this initial safety inspection, and also had made the investment of a full-time on-site supervisor at the Aware worksite, it did not ensure that its employee was no longer exposed to the hazard created by the guarding defect. Mata received little or no training from Aware on use of the machine, or how to stop the machine if it were to jam. Although Mata's machine was both unguarded and jammed regularly, there is no indication that Staffchex made any effort to have Aware fix the machine so that it would operate safely, or to relocate Mata to a machine that was in better working order. On-site supervisor Medina does not appear to have had the direction or authority from Staffchex to intervene with the secondary employer to quickly

resolve matters of training and safety; had Medina been instructed and empowered to do so, perhaps an accident could have been avoided.

Aware was cited for the same alleged violations as Employer, and Aware abated the violative condition. (Decision, p. 5). The facts and evidence preponderate to a finding of violations of sections 4186(b), for inadequate guarding of the bottle filler machine and 4184(b), for inadequate guarding of the chain pulley and sprockets, which created a nip/pinch point.

Citation 2 Section 4186(b)

Citation 2 alleges a violation of section 4186(b), which requires:

> (b) All point of operation guards shall be properly set up, adjusted and maintained in safe and efficient working condition in conformance with Figure G-8 and Table G-3 or other guard configurations which will prevent the operator's hand from entering the point of operation.

Unrebutted evidence demonstrated that the side openings of Aware's capping machine were "too large": the openings were large enough for a hand to go in and reach the point of operation, in contravention of the safety order. Employee testimony also established that the machine was regularly used by employees, demonstrating exposure to the hazard. (See, *Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (Jun. 8, 2010).) A violation is found.

Citation 3 Section 4184(b)

Citation 3 alleges a guarding violation as related to the chain pulley and sprockets of the bottle capping machine. Testimony by Magro and Mata, as well as photographs entered by the Division, demonstrate that the Plexiglas doors of the capping machine were neither latched nor secured—the doors failed to prevent Mata from reaching into the chain and sprocket area to clean out excess caps and accidentally making contact with the chain. (Ex. 2, photos of machine). (See, *Warner-Lampert Company*, Cal/OSHA App. 82-052, Decision After Reconsideration (Sep. 28, 2004).) The violation is established.

Classification of Violations

Citation 2, the violation of section 4186(b), is established by a preponderance of the evidence as serious. The Division's witness, Magro, testified to conducting similar investigations involving machinery with chain and sprocket configurations, all of which resulted in amputations. Labor Code section 6432 defines a "serious violation" as follows: "a 'serious violation' shall

be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation…"[5] "Substantial probability" does not refer to the likelihood of an accident occurring in the workplace due to the violative condition, but to the probability of a death or serious harm occurring, should the accident or exposure take place. (*Vernon Melvin Antonsen & Colleen K. Antonsen, individually and dba Antonsen Construction*, Cal/OSHA App.06-1272, Amended Decision After Reconsideration (Aug. 30, 2012).)

Amputation of fingers is a serious injury under Labor Code section 6302(h). (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011).) The Division's evidence showed that the bottle capping machine allowed the operator's hand to access the point of operation. Mata testified that she would routinely access the machine's inner workings in order to clear jams, due to pressure for quick production. She explained that the machine did not stop running when the Plexiglas doors opened, and that she would reach her hand in to clear bottle caps that would become caught on the conveyor chain.

As the ALJ properly found, the Independent Employee Action Defense (IEAD) is not available to an employer in a guarding case such as this one. (*City of Los Angeles, Dept. of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration, (Dec. 31, 1986).) Testimony established that Staffchex had ample opportunity to learn of the guarding defects; Staffchex's lack of knowledge defense also must fail. (*Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).)

The serious, accident-related classification of the Citation 3, section 4184(b) violation is upheld. The unlatched, unsecured Plexiglas doors did not provide guarding from the chain and sprocket assembly which amputated Mata's fingers. (See, *Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (Jun. 9, 2010).) Magro's testimony, which was unrebutted, established that there was substantial probability of an amputation due to the violative condition should an accident occur. (See, *Jensen Precast*, Cal/OSHA App. 05-2377, Decision After Reconsideration (Mar. 26, 2012).) To establish an accident-related classification, the Division must demonstrate by a preponderance of the evidence a causal nexus between the violation and injury. (*Pierce Enterprises*, citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) Magro's unrebutted testimony regarding the violation of section 4184(b) established that due to the lack of appropriate guarding, Mata's fingers were amputated by the chain on the bottle capping machine.

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[5] Labor code section 6432 was amended effective January 1, 2011. We apply the rule in effect at the time of the events discussed herein.

The base penalty for a serious, accident-related citation is $18,000. Magro testified that Employer was not eligible for a size credit. As the ALJ correctly noted in her Decision at page 12, under section 335(a)(2), where a citation is not related to employee illness or disease, extent is based upon the degree to which a safety order is violated. Specifically, "[i]t is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is." The Division did not establish the number of violations related to the bottle capping machines. This rating will be adjusted to "low". Magro's testimony related to likelihood of injury is credited, and the rating remains "high". The penalty is therefore $18,000.

Accordingly, we find the Division has established a violation of sections 4186(b) and 4184(b). Per the stipulation of the parties, a civil penalty for Citation 2 is assessed at $675. An $18,000 penalty for Citation 3 is assessed.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUGUST 28, 2014