

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

In the Matter of the Appeal of:

**BLACKWOOL, INC.
751 GREENTREE ROAD
PACIFIC PALISADES, CA 90272**

Employer

Inspection No.
1312486

DECISION

Statement of the Case

Blackwool, Inc. (Employer) specializes in remodeling homes. Beginning April 30, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Paul M. Grier, conducted an inspection at 751 Greentree Road in Pacific Palisades, California (the site) in response to an injury report.

On September 11, 2018, the Division issued two citations to Employer alleging violations of California Code of Regulations, title 8.¹ Citation 1, Item 1, alleges that Employer failed to immediately report a serious occupational injury to an employee. Citation 2, Item 1, alleges that Employer used a Skilsaw under conditions that are contrary to the manufacturer's recommendations.

Employer filed timely appeals of the citations, contesting the existence of the violations and asserting a series of affirmative defenses for both citations.² Additionally, Employer contested the classification and the reasonableness of the penalty for Citation 2.

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in West Covina, California, on December 3, 2019. Eugene F. McMenamin, of Ogletree, Deakins, Nash, Smoak & Stewart P.C., represented Employer. Victor Copelan, District Manager, represented the Division. At the time of hearing, the parties presented a stipulation regarding Citation 1, Item 1, wherein Employer withdrew the appeal and accepted a reduced penalty. The matter was submitted for decision on January 29, 2020.

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

² Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer violate section 3328, subdivision (a)(2), by using or operating a Skilsaw under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations?

Findings of Fact

1. Employee Marious Songwa (Songwa) injured his hand while operating a Skilsaw to slice a two-inch piece from a plank of cedar that was approximately 8 inches wide by 14 inches long.
2. The Skilsaw manufacturer publishes an instruction manual (Manual) for the saw that contains safety warnings, instructions, and recommendations for use.
3. Songwa did not use the saw at speeds contrary to the manufacturer's recommendations in the Manual.
4. Songwa did not use the saw at stress levels contrary to the manufacturer's recommendations in the Manual.
5. Songwa did not use the saw at load levels contrary to the manufacturer's recommendations in the Manual.
6. Songwa did not use the saw in environmental conditions contrary to the manufacturer's recommendations in the Manual.

Analysis

- 1. Did Employer violate section 3328, subdivision (a)(2), by using or operating a Skilsaw under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations?**

The Division cited Employer for a violation of section 3328, subdivision (a)(2), which provides:

(a) All machinery and equipment:

[...]

(2) shall not be used or operated under conditions of speeds, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations or, where such recommendations are not available, the engineered design.

In Citation 2, Item 1, the Division alleges:

Prior to and during the course of the inspection, wood being cut using the Skilsaw SPT77 circular saw serial number 707007533 was not secured to a stable platform with both hands being used to hold the saw handles during use as per the manufacturer's

recommendations. As a result, on or about April 4, 2018 an employee sustained serious injuries to the left thumb.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

In order to establish a violation of section 3328, subdivision (a)(2), the Division is required to prove that Songwa operated the Skilsaw under conditions of speed, stress, load, or environmental condition contrary to the manufacturer's recommendations.

It is a basic canon of statutory construction that where an undefined term is used in a statute, it must be construed in light of its common law meaning in the absence of evidence of a contrary meaning. (*Gerdau dba Gerdau Reinforcing Steel*, Cal/OSHA App. 315832014, Denial of Petition for Reconsideration (Feb. 27, 2017).) This is known as the "plain meaning rule," under which words in regulations should be given the meaning they have in ordinary usage. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010).) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (Jun. 12, 2013).)

The rules of regulatory construction require courts and the Appeals Board "to give meaning to each word and phrase and to avoid a construction that makes any part of a regulation superfluous." (*Donley v. Davi* (2009) 180 Cal.App.4th 447, 465.) Accepted canons of statutory construction oblige "giv[ing] meaning to each word if possible and avoid a construction that would render a term surplusage." (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (3d Dist. 2006) 138 Cal.App.4th 684, 695.) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*California Highway Patrol*, Cal/OSHA App. 09-3762, Denial of Petition for Reconsideration (Aug. 16, 2012).)

The safety order on its face regulates specific conditions of use. The regulation is narrow, only prohibiting usage under the particular conditions of speed, stresses, loads, or environmental conditions that are contrary to the manufacturer's recommendations. If the safety order were to apply as broadly as the Division suggests, the Standards Board would have drafted it without the four conditions.

From its alleged violation description, to its opening statement, through testimony, and closing argument, the Division demonstrated that it considered any use that varied from the manufacturer's recommendations was a violation of section 3328, subdivision (a). This

interpretation is rejected because the regulation identifies only particular conditions contrary to the manufacturer's recommendations, not any and all conditions contrary to the manufacturer's recommendations.

The Division bypassed discussion of conditions of speed, stress, load or environmental condition. These conditions are examined to determine whether they are applicable to the circumstances that led to the injury, and therefore a violation of the regulation.

a. Speed Conditions

The only regulation discussing speed in the General Industry Safety Orders with regard to circular saws, other than the cited regulation, is contained in section 4322. It provides:

Circular saw blades or knives shall not be operated at speeds in excess of those recommended by the manufacturer.

The Appeals Board has not provided a definition of speed in relation to a circular saw in the context of either section 3328 or section 4322. The Division did not present information about conditions of speed, and a review of the Manual yields no recommendations related to a condition of speed.

The regulation requires that if manufacturer recommendations on the conditions of speed, stress, load or environmental conditions are not available, then the condition must be evaluated in relation to the engineered design.

Speed in the context of sawing could refer to the speed at which a saw cuts the intended distance through a substrate. There is no allegation that the cutting was done too quickly or slowly for the engineered design.

Speed may also be related to the saw wheel rotation. The blade speed appears to be an all-or-nothing prospect. The blade is either spinning or not spinning. The saw is either turned on or turned off, with a transition when the blade coasts to a stop.³

³ The Manual provides:

Do not run the tool while carrying it at your side. Lower guard may be opened by a contact with your clothing. Accidental contact with the spinning saw blade could result in serious personal injury. [...]

Always observe that the lower guard is covering the blade before placing saw down on bench or floor. An unprotected, coasting blade will cause the saw to walk backwards, cutting whatever is in its path. Be aware of the time it takes for the blade to stop after switch is released.

[Emphasis in original.]

Interpreting the regulation to construe that any spinning of the blade that incurs an injury is a violation would seem to blame the victim. This interpretation is unsupported because it would lead to an absurd result. Interpretations leading to absurd results are to be avoided. (*Flannery v. Prentice* (2001) 26 Cal.4th 572; *Bigge Crane & Rigging Co.*, Cal/OSHA App. 317351781, Decision After Reconsideration (Mar. 1, 2017).)

The regulation's speed condition does not appear applicable to a stopped blade either. The Manual refers to "binding" of the saw, and methods to avoid getting the blade of the saw from getting stuck in the workpiece. If the speed of the saw wheel is considered to be a condition of speed, then binding might be interpreted as a blade speed of zero. The Manual discusses binding. The Manual suggests how to avoid binding and how to best handle the machine if binding occurs.⁴ Since binding is anticipated as a common occurrence during sawing, it is within the engineered design.

The Division did not present any evidence about or offer any discussion of the imposition of speed conditions on the Skilsaw that was contrary to the Manual or engineered design that would trigger a violation of the regulation.

b. Stress Conditions

The General Industry Safety Orders do not provide a definition of the word "stress." Based upon the ordinary use of the term, the Appeals Board has accepted the definition of "stress" as a "force acting across a unit area in a solid material resisting the separation, compacting, or sliding that tends to be induced by external forces." (*The Herrick Corporation*, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001).) A "condition of stress" is instability, the resistance to separation, compacting or sliding and is to be differentiated from that of "load." (*DPS Plastering*, Cal/OSHA App. 03-2731 (Apr. 2, 2008) citing *The Herrick Corporation*, *supra*.) The Appeals Board has not provided its own definition of stress in relation to a circular saw in the context of this regulation.

The Division did not present testimony on stress conditions, but a review of the Manual reveals recommendations that may be related to a condition of stress. The Manual warns on page two:

⁴ The Manual provides:

When restarting a saw in the workpiece, center the saw blade in the kerf and check that saw teeth are not engaged into the material. If saw blade is binding, it may walk up or kickback from the workpiece as the saw is restarted. [...]

Blade depth and bevel adjusting locking levers must be tight and secure before making the cut. If blade adjustment shifts while cutting, it may cause binding and kickback.

[Emphasis in original.]

Power tool use and care

Do not force the power tool. Use the correct power tool for your application. The correct power tool will do the job better and safer at the rate for which it was designed.

The Manual warns on page 12:

CUTTING MASONRY/METAL

This tool is not designed for use with metal or masonry cut-off wheels.

[Emphasis in original.]

The Division did not present any evidence about or offer any discussion of the imposition of stress conditions on the Skilsaw that would trigger a violation of the regulation. For example, the Division did not demonstrate that Songwa used the wrong kind of saw.

c. Load Conditions

The General Industry Safety Orders do not provide a definition for "load." The Appeals Board has established that "load" may have several meanings depending on the context. (*Michels Corp DBA Michels Pipeline Construction*, Cal/OSHA App. 07-4274, Decision After Reconsideration (Jul. 20, 2012).) The Appeals Board has also applied the ordinary or dictionary meaning, which is "a weight or quantity resting upon something else regarded as its support." (See, *Western States Steel, Inc.*, Cal/OSHA App. 84-1089, Decision After Reconsideration (Aug. 13, 1987).) The Appeals Board has not provided its own definition of load in relation to a circular saw in the context of this regulation.

The Division did not present information about conditions of load, and a review of the Manual reveals no recommendations that may be related to a condition of load.

The regulation requires that if manufacturer recommendations on the conditions of speed, stress, load or environmental conditions are not available, then the condition must be evaluated in relation to the engineered design. A Skilsaw is not designed to bear weight. The Division did not present any evidence about or offer any discussion of the imposition of load conditions on the Skilsaw that would trigger a violation of the regulation.

d. Environmental Conditions

Other than in section 3328, subdivision (a)(2), there is no discussion of environmental conditions in the General Industry Safety Orders.

The Appeals Board has not addressed "environmental conditions" in the context of section 3328.

Dictionary definitions of “environmental” and its noun form, “environment,” converge on the concept of “surroundings.” It is defined as, “the aggregate of surrounding things, conditions, or influences; surroundings; milieu.”⁵ It is also defined as, “the circumstances, objects, or conditions by which one is surrounded.”⁶

The Manual recommends environmental conditions for Skilsaw operations on page two:

Work area safety

Keep work area clean and well lit. Cluttered or dark areas invite accidents.

Do not operate power tools in explosive atmospheres, such as in the presence of flammable liquids, gasses or dust. Power tools create sparks which may ignite the dust or fumes.

Keep children and bystanders away while operating a power tool. Distractions can cause you to lose control.

Electrical safety

[...]

Do not expose power tool to rain or wet conditions. Water entering a power tool will increase the risk of electric shock.

[...]

When operating a power tool outdoors, use an extension cord suitable for outdoor use. Use of a cord suitable for outdoor use reduces the risk of electric shock.

If operating a power tool in a damp location is unavoidable, use a Ground Fault Circuit Interrupter (GFCI) protected supply. Use of an (*sic.*) GFCI reduces the risk of electric shock.

[Emphasis in original.]

Songwa testified he was not using the saw in wet conditions. The Division did not present any evidence about or offer any discussion of the environmental conditions on the Skilsaw that would trigger a violation of the regulation.

⁵ (<https://www.dictionary.com/browse/environmental> <accessed December 5, 2019> Original emphasis removed.)

⁶ (<https://www.merriam-webster.com/dictionary/environmental> <accessed December 5, 2019> Original emphasis removed.)

e. Other Conditions

The Division identified the recommendations in the Manual that Songwa allegedly failed to follow, highlighting them in Exhibit 8. The Division presented its theory about the events leading to the injury, but failed to explain how its theory related to the conditions of speed, stress, load, or environmental condition.

During his testimony, Grier highlighted the following safety rules for circular saws on page three and four of the Manual:

Never hold piece being cut in your hands or across your leg. Secure the workpiece to a stable platform. It is important to support the work properly to minimize body exposure, blade binding, or loss of control.

[...]

Hold the saw firmly to prevent loss of control. Figures in this manual illustrate typical hand support of the saw.

[...]

Maintain a firm grip with both hands on the saw and position your arms to resist kickback forces. Position your body to either side of the blade, but not in line with the blade. Kickback could cause the saw to jump backwards, but kickback forces can be controlled by the operator, if proper precautions are taken.

[Emphasis in original.]

The Division did not explain how these recommended conditions excerpted from the Manual above are related to the conditions of speed, stress, load, or environmental conditions.

The Division tried to establish through Grier's testimony and his interview notes that Songwa did not hold the saw with both hands and, additionally, failed to clamp the work piece to a stable work surface.⁷ The Board has held it does "not assume facts that are not in evidence, or take official notice of an element of a violation on which the Division bears the burden of proof." (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20,

⁷ The Division did not identify the "Additional Safety Warnings" section on page 5 of the Manual:

Use clamps or other practical way to secure and support the workpiece to a stable platform. Holding the work by hand or against your body is unstable and may lead to loss of control.

[Emphasis in original.]

2009).) Even if the evidence showed that Songwa did fail to do these things, the Division did not explain how these failures were a violation of the safety regulation.

The Division's alleged violation description advances a theory of how the injury arose. Beyond testimony, there is no other evidence to support the circumstances leading to the injury. The Division did not present any measurements or records of speed, stress, load, or environmental condition related to the Skilsaw operation. The Division identified manufacturer's recommendations that Songwa allegedly contradicted, but did not explain how those recommendations were related to the four conditions in the safety order. Thus, the Division failed to show that Songwa operated the Skilsaw contrary to the particular conditions of speed, stress, load, or environmental conditions recommended by the manufacturer or contrary to the engineered design.

In citing Employer for operating the Skilsaw contrary to recommended uses that do not fall within the categories of speed, stress, load, or environmental condition, the Division renders those words in the regulation surplusage, and violates principles of statutory interpretation. The Division's citation depends on ignoring the regulation, or expanding the scope of the regulation to such an extent that speed, stress, load, and environmental conditions are so broad as to render these specific conditions meaningless.

The Division failed to establish that Songwa's use of the saw was a violation of section 3328, subdivision (a). Accordingly, Citation 2 is dismissed.

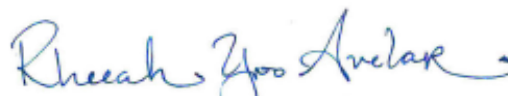
Conclusion

The Division did not meet its burden of establishing that Employer violated section 3328, subdivision (a)(2), in Citation 2, Item 1. Employer's appeal of Citation 2, Item 1, is granted.

Order

Citation 1, Item 1, is affirmed and the penalty is assessed as set forth in the attached Summary Table. Citation 2, Item 1, is dismissed and the penalty is vacated.

Dated: 02/25/2020



RHEEAH YOO AVELAR

Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for

reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**