

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

In the Matter of the Appeal of:

**MCELROY METAL MILL INC.
1500 Hamilton Road
Bossier City, LA 71111**

Employer

Inspection No.
1405439

**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 McElroy Metal Mill Inc. (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹

Employer timely appealed the citations and administrative proceedings were held before an administrative law judge (ALJ) of the Board, including a contested evidentiary hearing. After conclusion of the hearing and a review of the record, the ALJ issued a decision (Decision) on March 16, 2021, upholding the alleged violations.

Employer timely petitioned for reconsideration.

The Division answered the petition.

ISSUES

Were the violations proved? Did Employer's administrative controls satisfy its obligation to protect employees from the machines' points of operation? Is DOSH estopped from citing Employer because it did not cite the subject violations during an earlier inspection?

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

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

- (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 asserts that the evidence does not justify the finding 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 Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances. We have taken no new evidence.

Employer was cited for failure to guard the points of operation of four machines which form sheet metal into desired shapes. Citation 1 alleged a violation of section 4002, subdivision (a) for failing to guard a point of operation on the "Double High Machine." Citation 2 alleged a violation of section 4184, subdivision (b) for failure to guard points of operation on three other machines which were of types of machines not specifically covered in Group 8.

It was not disputed that there were no physical guards. It is also not disputed that the machines have points of operation which require protection. Instead, Employer contended that its administrative controls rendered it compliant with applicable safety orders, and that industry practice does not require guarding. A summary of the operations at issue will help put the issues in context.

The "Double High Machine," subject of Citation 1, had exposed rollers at the output end which were not guarded. Instead, the employee or employees who take the formed metal sheets out of the machine are supposed to stand three feet from the rollers. Employer argues that that distance protects them from injury. Employer further contends that there is no history of injury caused by the machine. The ALJ held, first, that the three foot distance does not address inadvertent or accidental contact with the rollers by employees assigned to work at the Double High Machine, and, second, that the output end is in a high traffic area of Employer's plant, and thus employees passing by are therefore also exposed to accidental contact with the output rollers.

Section 4002, subdivision (a) provides: "(a) All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded." By its terms, section 4002, subdivision (a), applies to the Double High Machine, which rollers present the hazard of drawing employees' body parts into the mechanism. Since it was uncontested that the rollers were not guarded, and since we agree with the ALJ that directing employees to stay three feet away is not sufficient to protect them, we affirm the Decision with respect to Citation 1.

The ALJ correctly applied Board precedent regarding guarding (e.g., *Bethlehem Steel Corp.*, Cal/OSHA App. 78-723, Decision After Reconsideration (Aug. 17, 1984) and employee exposure to the zone of danger around hazards. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

Bethlehem Steel, supra, held that employer's rule requiring employees to stay four feet away from rollers was not sufficient to achieve compliance. The Board held, "The relevant test as expressed in the cited safety order [§ 4187] and its accompanying 'Note' (which clearly sets forth the Standards Board's intent) is whether the roll machine permits the fingers of the operator to be caught between the rolls." We apply that reasoning here: the machines' operation and moving arms permit employees to be caught in the mechanism. Similarly, *Benicia Foundry & Iron Works, Inc., supra*, established the principle that if it is shown employees are or are likely to be within the zone of danger presented by a machine or condition in a place of employment, the violation is shown.

The other three machines were treated as a group by Citation 2. They also form sheet metal by applying pressure to it on dies to produce the desired shape. The machines have clamps to secure a sheet of metal and, after it is so secured, arms which move and bend or press the metal as needed.

The Division alleged in Citation 2 that the failure to guard three machines violated section 4184, subdivision (b). That section provides:

(a) Machines as specifically covered hereafter in Group 8, having a grinding, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, in which an employee comes within the danger zone shall be guarded at the point of operation in one or a combination of the ways specified in the following orders, or by other means or methods which will provide equivalent protection for the employee.

(b) All machines or parts of machines, used in any industry or type of work not specifically covered in Group 8, which present similar hazards as the machines covered under these point of operation orders, shall be guarded at their point of operation as required by the regulations contained in Group 8.

The three machines at issue are not specifically covered in the Group 8 safety orders as required in subdivision (a) of section 4184, and because they present point of operation hazards similar to the machines specifically regulated in Group 8, they fall within the ambit of section 4184, subdivision (b).

Employer argues that employees are required to stay on the side of the arm which is away from the point of operation, in a position which would apparently place them outside the range of its motion. The ALJ held that so requiring employees to position themselves was not sufficient to be in compliance, because of the possibility of inadvertent or accidental entanglement, both by employees assigned to operate the three machines and others moving through the plant.

Employer's petition argues that guarding is not required if there is no hazard. (Petition, p.3.) This argument does not take into account and implicitly ignores the risk of inadvertent or accidental contact with points of operation by employees operating the machines as well as other employees in the area. Employer's engineering and administrative controls pertaining to where employees were to stand when operating the machines do not eliminate the hazard, and thus are not sufficient to be compliant. (*EZ-Mix, Inc.*, Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013); *Bethlehem Steel, supra.*) Even assuming Employer acted in good faith in establishing its employee-positioning rules, that does not absolve its failure to guard the machines, nor does the history of having no injuries. (*Fibreboard Box and Millwork Corporation*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).) Similarly, Employer's claim that it is industry practice not to guard the machines is not a defense. (*Ekedal Concrete Inc.*, Cal/OSHA App. 13-0131, Decision After Reconsideration (Mar. 28, 2016).)

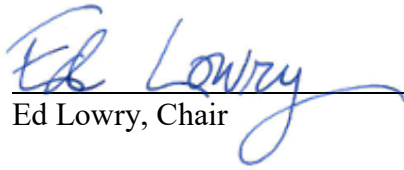
Employer next argues that since the Division did not cite it for guarding violations on any of the machines at issue here after a 2012 inspection means the Division is estopped now from citing it. That is not correct. The doctrine of equitable estoppel does not apply here. Employer has not satisfied the elements of the doctrine: 1) the party to be estopped must be apprised of the facts; 2) that party must intend that its conduct shall be acted upon; 3) the other party must be ignorant of the true state of facts; and 4) he must rely upon the first party's conduct to his injury. (*Owens-Illinois Glass Container, Inc.*, Cal/OSHA App. 09-2021, Decision After Reconsideration (June 16, 2014) (citation omitted).) Further, Employer's petition does not state any facts which might be a basis for applying the doctrine. That the Division previously inspected its facility does not mean that the inspector was aware of the guarding violations or exclude the possibility that the inspector was focused on other issues. And, it does not change the fact that the machines were not guarded as required when the instant inspection occurred.

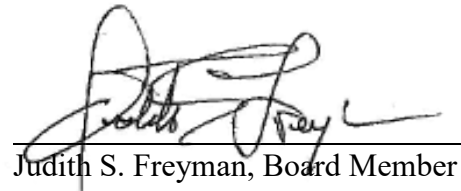
Employer also argues that it did not know of the violation. It was aware that the four machines did not have guards, and it chose to substitute engineering and administrative controls for point of operation guards. Employers have the obligation to know the law. (*Lion Raisins*, Cal/OSHA App. 08-2253, Decision After Reconsideration (Nov. 26, 2013).) Further, they may not substitute their own protections for those called for in safety orders. (*Solarcity Corporation*, Cal/OSHA App. 14-3707, Denial of Petition for Reconsideration (Apr. 14, 2016).) An employer's recourse, if it believes it has a better or at least as effective means of protection, or even if it believes compliance with a standard is impossible, is to seek a variance for the California Occupational Safety and Health Standards Board. (*Ibid; Spencer & Son, Inc.*, Cal/OSHA App. 94-407, Decision After Reconsideration (May 10, 1999).)

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's Decision and penalties are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD


Ed Lowry, Chair


Judith S. Freyman, Board Member


Marvin P. Kropke, Board Member



FILED ON: **05/27/2021**