

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

In the Matter of the Appeal of:

BELLINGHAM MARINE
INDUSTRIES, INC.
8810 Sparling Lane
Dixon, CA 95620

Employer

Dockets. 12-R2D2-3144 through 3146

**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 taken the petition for reconsideration filed by Bellingham Marine Industries, Inc. (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on June 18, 2012, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Dixon, California maintained by Employer. On October 15, 2012, 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 342(a) [failure to report a serious injury]. Citation 2 alleged a serious violation of section 3203(a)(7)(C) [failure to provide training/instruction to employee on operation of saw]. Citation 3 alleged a serious violation of section 4307.1(a)(1) [failure to ensure that miter saw was guarded in full cut position].

Employer filed timely appeals of the citation.

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

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

issued a Decision on November 19, 2013. The Decision denied Employer's appeal and upheld the classifications of the two serious citations, imposing total civil penalties of \$28,060.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the petition.

ISSUES

1. Does the Division have jurisdiction to issue citations for the three alleged citations?
2. Did the ALJ properly find a violation of the appealed Citations?
3. May Employer amend its appeal to include the Newbury defense?

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.

Employer designs and constructs marinas. On April 17, 2012, the Division was notified via letter of an accident sustained by a former employee of Employer, John Rider (Rider). Rider's counsel was seeking an injury report for an injury suffered by Rider on January 28, 2011; the District Office of the Division was unable to locate any record for Rider's injury. An associate safety engineer, Ronald Aruejo (Aruejo), was assigned to investigate the incident.

Aruejo conducted an inspection of Employer's place of business on June 8, 2012. Aruejo spoke with plant manager Ed Heaton (Heaton), who informed Aruejo that Rider had been injured with a miter saw, and had been taken to a fire department located directly behind the Employer's workplace for help. From there Rider had been transported for further treatment. Heaton told Aruejo that he knew Rider was in the hospital for a couple days.² No report was made to the Division.

Prior to the accident, Rider was helping out in the Wood Department, due to a relative lack of work in the Foam Department, his usual assigned area. Doug Sturgeon (Sturgeon) was the Wood Department supervisor at that time and testified to assigning Rider work and providing training. He recalled providing about 45 minutes of training on the miter saw the day before Rider's accident. On his fifth day in the department, Rider was assigned to cut Brazilian ipe, which is an extremely dense hardwood. He was tasked with cutting the wood into four inch long pieces with a miter saw. Rider, while

² Rider was hospitalized from January 28 through February 5, 2011, as a result of his injury.

making the cuts wearing neoprene gloves, sustained a laceration and open fracture of the left thumb metacarpal.

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 petition for reconsideration and the Division's answer to it.

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 petitioned for reconsideration on the basis of Labor Code section 6617(a), (c), and (e).

Does the Division have jurisdiction to issue citations for the three alleged citations?

We first address Employer's argument that the Division is barred from issuing citations in this matter under the statute of limitations found in the Labor Code at section 6317, which requires citations to be issued within six months. In its petition, Employer cites *AKM LLC, dba as Volks Constructors v Secretary of Labor and OSHRC* (2012 D.C. Cir.) 675 F.3d 752. In *Volks*, that court reviewed a citation related to the requirement under the Federal OSHA scheme, whereby employers must record work-related injuries on the OSHA 300 log and retain those records for a period of five years. The *Volks* decision found that the statute of limitations could not be extended upon Federal OSHA's discovery of an Employer's failure to comply with this record-keeping requirement.

As the ALJ correctly found in her Decision, the Board is not bound by Federal precedent interpreting the Federal OSH Act, and we look to California law for guidance in interpreting the California Occupational Safety and Health Act. (*Southern California Gas Company v Cal. Occupational Safety and Health App. Bd.* (Oct. 7, 1997) 58 Cal.App.4th 200, 207-080, *Brunton Enterprises, Inc.*

Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013). Furthermore, the *Volks* decision is related to a record-keeping requirement, rather than the affirmative employer duty to report an injury to the Division once it has occurred. The Federal OSHA duty to report, which is similar to the Cal/OSHA 342(a) reporting rule, is not addressed by the *Volks* decision, and has been interpreted by the Federal Occupational Safety and Health Review Commission as including a discovery rule, allowing the statute of limitations to toll until OSHA discovers or reasonably should have discovered the failure to report an injury. (*Yelwington Welding Service*, 78 OSAHRC 84/D6, 6 BNA OSHC 2013, 1978 CCH OSHD 23, 092 (No. 15958, 1978).)

The Board and Employer are both unaware of any California court decision which provides definitive guidance on the Board's longstanding rule allowing tolling of the statute of limitations. However, the Board has been instructed by the appellate court, in a decision interpreting Labor Code section 6317's language requiring citations to be issued with "reasonable promptness" to read the jurisdictional language with the protective intent of the Act in mind:

It is a perverted sense of justice which punishes the enforcer of a law by permitting its violator to go free. Such is the effect of the Board's rule. While it may have the incidental effect of encouraging more prompt enforcement action, its primary, immediate and self-defeating effect is to thwart the objectives of Cal/OSHA and to frustrate and dishearten its enforcement personnel, who often, as in this case, may be unable logistically to proceed with the desired alacrity. The losers under such a rule are the members of the class (workers) whom Cal/OSHA is specifically intended to protect; the winners are the offenders. Such a highly distasteful and anomalous result is impermissible. (*Vial v. California Occupational Saf. & Health Appeals Bd.* (1977) 75 Cal. App. 3d 997, 1004-1005).

While there may not be explicit language describing tolling in Labor Code section 6317, the California Supreme Court has found it within the discretion of the courts to grant tolling. In *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal. 4th 88, 107, found that "the Legislature's authority to declare tolling bases (see, e.g., Code Civ. Proc., §§ 351-356) and the courts' ability to do so may coexist in the absence of an explicit legislative directive that they may not (citations)." In *McDonald*, the lack of language in the statute barring tolling, and a brief statute of limitations made tolling appropriate. (*McDonald, Id.* at 107). The Board notes that the Division has a similarly short statute of limitations (6 months) to contend with under the Labor Code, and that the Code does not expressly prohibit tolling. Based upon the reasoning in *McDonald* and other California cases on the question, we do not believe there is reason to depart from the discovery rule enunciated in *Bayles Ranch*, Cal/OSH App. 86-1277, Decision After Reconsideration (Feb. 4, 1988) which allows the

statute to be tolled until the Division learns or should have reasonably learned of the violative condition.

Citation 1

Employer has been cited for failure to report a serious injury under section 342(a).³ The injury, which occurred on January 28, 2011, came to the attention of the Division via a letter on May 14, 2012, which requested the Division's records related to the incident. Division inspector Aruejo interviewed the injured employee on September 5, 2012, and was told that Rider was hospitalized for several days, from January 28 to February 5, 2011. During his inspection of the workplace, the plant manager, Heaton, also confirmed that Rider was hospitalized due to the injury.

The Board will uphold a citation for failure to report a serious injury where the Employer knew of the serious injury, or should have known that the injury was serious had it made a diligent inquiry into the matter. (*Burbank Recycling, Inc.*, Cal/OSHA App. 10-0562 Decision After Reconsideration (Jun. 30, 2014, citing *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003). In this case, Employer was aware that the cut was serious enough to warrant immediate attention by professionals, and ultimately resulted in the employee spending more than one day in the hospital. Any doubts about the Employer's duty to report would properly have been resolved in favor of making a timely report to the Division. (*Burbank Recycling, Inc.*, *supra*).

Employer's failure to report constituted a violation of section 342(a). As discussed above, the Division was made aware of the failure to report on April 17, 2012, and on that date, rather than the date of the accident, the statute of limitations for issuance of the 342(a) citation began to run. The citation was issued on October 15, 2012, and is therefore timely. (*Bayles Ranch*, Cal/OSH App. 86-1277, Decision After Reconsideration (Feb. 4, 1988).)

As the ALJ correctly concluded, the Division established by a preponderance of the evidence that the Employer failed to report this serious injury to the Division, as required by section 342(a), and as such, a penalty of \$5000 is warranted. (*Burbank Recycling, Inc.*, *supra*, citing *Allied Sales and*

³ Section 342(a) requires in pertinent part:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but no longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident[.]....

Distribution, Inc., Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012).

Citation 2

Citation 2 alleges a serious violation of section 3203(a)(7)(C), which requires that the employer:

(7) Provide training and instruction:

[...]

(C) To all employees given new job assignments for which training has not previously been received;

Specifically, the Division's citation alleges an Illness an Injury Prevention Program (IIPP) violation:

On and before 1/28/11, the employer did not provide training and instruction to an employee prior to assigning the employee to operate a Rigid radial saw [...]

There is no dispute that Employer's IIPP, as written, provides for training and instruction for new job assignments, such as the assignment Rider was given in the wood shop in January, 2011. (Ex. B, p. 11-12 [IIPP safety training to reassigned employees]). However, the Division may prove a violation of section 3203(a)(7)(C) where the IIPP as a document is adequate but its implementation on the shop floor is lacking. (*Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Here, the Division requested a copy of the Employer's documentation of training provided to Rider related to his new assignment in the Wood Department. While Employer was able to provide evidence of several toolbox meetings related to hardhats, and receipt of a Code of Safe Practices, no documentation was provided related to training in the Wood Department, as required by section 3203 and Employer's own IIPP. While not dispositive, the failure to provide documentation does support the Division's claim that the training either did not occur, or was cursory in nature. (*Tomlinson Construction, Inc.*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998), *CA- Prison Industry Authority, State of CA*, Cal/OSHA App. 09-2459, Denial of Petition for Reconsideration (Oct. 26, 2011).)

Aruejo testified that during his inspection of the Employer's facility, he inquired as to the content of the training that the Wood Department supervisor had provided to Rider, but Sturgeon was unable to provide any details, except

to say he had given training.⁴ Nor is there evidence in the record to suggest that Rider had any experience with work or tools of the kind used in the Wood Department. (*Hill Crane Service, Inc.*, Cal/OSHA App. 12-2475, Decision After Reconsideration (Dec. 23, 2013).) Aruejo also testified that former employee Rider stated during his interview that he had received no training on using the radial saw.⁵

Employer rebutted the Division's evidence through the testimony of Sturgeon, who stated that he trained Rider on how to make a chop cut, a regular cut, how to place his hands on the saw safely, and what sizes of wood he should cut. Sturgeon responded in the affirmative to a question regarding training in using a clamp, and testified that he did not anticipate Rider needing to use a clamp in the work being done and so did not require Rider to demonstrate how to use the clamp when cutting the wood. Aruejo testified that clamping would have been important when cutting small pieces of wood to help keep the employee's fingers away from the blade. On cross-examination, Sturgeon admitted that he was aware that Rider was wearing gloves as he used the saw, but had not trained Rider on this danger, nor did he warn Rider when he noticed the employee engaged in the dangerous practice. He also admitted to failing to inform Rider that there was an operating manual available for the radial saw, and where the manual was located.

The ALJ's decision properly credits the evidence and testimony of the Division over Sturgeon's, who appeared to vacillate in his testimony at times, and, as the ALJ noted, was unable to recall any details for Arujo during the inspection, but testified to a variety of key facts at hearing.⁶ The Board will typically not disturb an ALJ's credibility determination on reconsideration and find no reason to do so in this instance. (*General Truss Co., Inc.*, Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011).) The preponderance of the evidence in the record supports the ALJ's conclusion that

⁴ As to Aruejo's testimony regarding Sturgeon's statements during the course of the inspection, see Evidence Code section 1220: Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

⁵ Employer objects to Aruejo's testimony regarding Rider's statements as hearsay; however, under section 376.2: 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. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded.

We use these hearsay statements only for the limited purpose of supplementing and explaining other evidence in the record.

⁶ For instance, Sturgeon initially did not testify to training Rider on use of the clamp, and stated that he had required only two practice cuts. He then testified when asked directly by Employer's counsel that he had demonstrated how to use the clamp, but had not required Rider to practice the skill. Later, Sturgeon amended this statement to say that he had required a demonstration of using the clamp from Rider and that he had required three practice cuts, including the cut with the clamp, but had not felt that it was a topic that needed a good deal of attention.

the Employer failed to appropriately train Sturgeon on his new assignment using the radial saw in the Wood Department as required by its IIPP and section 3203(a)(7)(C). (See, *Kelly Global Logistics*, Cal/OSHA App. 12-0014, Decision After Reconsideration (Sep. 4, 2014).)

Classification of Citation 2

Under Labor Code section 6432,

There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

In this instance, the Division established that there is a realistic possibility that serious injury could result from the actual hazard created by the violation. While not defined in the safety orders, the Board interprets the phrase "realistic possibility" using the ordinary meaning of the words, as a possibility which is within the bounds of reason, and which is not one of pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) In testimony, Aruejo explained that there is realistic possibility of serious physical harm from an employee without training using the miter saw. Aruejo described the actual hazard as laceration of fingers, hands, or amputation. Aruejo stated that once an employee's hands are in contact with the blade it usually results in serious injury, such as deep laceration, and if certain veins are cut amputation can be the result. In this instance, the actual hazard was created by Employer's failure to train the employee in proper operation of the miter saw particularly in light of the special kind of wood that was being cut and the condition of the saw.

The serious classification is upheld, as is the \$5,060 penalty.

Citation 3

Citation 3 alleges a serious violation of section 4307.1(a)(1), a safety order related to miter saws:

(a)(1) With the carriage in the full cut position as depicted in Figures A and B, a guard shall enclose the upper half of the blade and at least 50 percent of the arbor end.

Exception: The guard may have an opening for ejection of sawdust provided the opening is located beyond the outer circumference of the blade, or is located in such a manner that a 1/2 inch diameter probe inserted 2 1/2 inches into the opening cannot contact the blade.

The Division's citation alleges that the Employer did not ensure that the upper half of the saw blade and at least 50% of the arbor end of the miter saw was enclosed by a guard when the carriage was in full cut position, and that an untrained employee was seriously injured while operating the miter saw with an unguarded blade.

Aruejo testified that both Sturgeon and plant manager Heaton informed him during his inspection that there was a problem with the miter saw's guard—specifically, they told Aruejo that the pin holding the cover guard was defective at the time of the accident. According to Aruejo, the pin is a part of the saw's safety equipment and allows the cover guard to automatically retract to the proper position when an employee is operating the saw. Because the pin was not working, the guard was being blocked in an open position to allow cutting to occur. Aruejo surmised that Rider had been holding the guard open with his right hand and feeding the wood with his left. Rider's witness statement, taken by Aruejo, also states that the blade guard was blocked to keep it open while cutting was in process. (Div. Ex. 13, p. 2).⁷

Sturgeon testified that the saw guard had been sticking for several months prior to the miter saw's use by Rider. Sturgeon had told Rider that the guard would stick as it was lowering, and had told him to bring it over the point where it would get stuck by pushing it with his thumb. He testified that the blade would be at least 50 to 60 percent exposed during full cutting position.

The testimony of Sturgeon and Aruejo, supplemented by Rider's declaration, lead to the conclusion that the guard was blocked on the day of the accident, with 50% or more of the blade and arbor end exposed, leading to Rider's injury. While Rider, no longer employed by Employer, was not available to testify, the preponderance of the evidence suggests that the broken pin was manipulated during the cutting process to leave the blade and arbor end exposed in violation of the safety order.

Employer argues that the citation fails to describe the allegation with particularity, and should be vacated on due process grounds. This particular citation meets the requirements of due process as it puts the Employer on notice of the facts alleged by the Division, the nature and substance of the charge, and provided Employer with the basic information required to formulate a defense. (*Granite Construction Co.*, Cal/OSHA App. 07-3611, Denial of Petition for Reconsideration (Jun. 22, 2010).) In its petition, Employer also theorizes that the appropriate citation would have been for another section of

⁷ Employer objected to Rider's witness statement as hearsay. As discussed above, where a timely objection has been made the Board will only consider hearsay evidence under section 376.2, for the purpose of supplementing or explaining other evidence.

4307. If an employer wishes to allege that another, allegedly more specific safety order should have been cited, the employer must first demonstrate that it was in compliance with the more specific safety order. (*Bragg Crane & Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (Jun. 28, 2004).) There was no showing in this instance; Employer's arguments on these points are rejected.

Employer also defends on the basis of the Independent Employee Action Defense (IEAD). As the ALJ properly found, the IEA Defense is not available in guarding violations; the safety order here requires a guard to cover at least half the arbor end and blade. (See, *Fortuna Iron Works*, Cal/OSHA App. 06-4222, Decision After Reconsideration (Aug. 30, 2012).) In its petition, Employer also suggests that it raised all of the elements of the *Newbury* defense, and should be allowed to conform its defense to proof presented.⁸ The *Newbury* defense is as follows:

A violation is deemed unforeseeable, therefore not punishable, if none of the following four criteria exist:

- (1) that the employer knew or should have known of the potential danger to employees;
- (2) that the employer failed to exercise supervision adequate to assure safety;
- (3) that the employer failed to ensure employee compliance with its safety rules; and
- (4) that the violation was foreseeable.

(*Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.)

Employer has presented evidence on several of the *Newbury* criteria. However, the key factor in *Newbury* is unforeseeability, based upon independent action by an employee or employees in contravention of an employer's well-designed safety program. There is no dispute that the Employer was aware of the broken pin on the miter saw, which hampered saw's automatic guarding mechanism. To say that it is 'unforeseeable' that an accident might occur where there is a broken or malfunctioning piece of safety equipment would inappropriately relieve employers of their responsibility to ensure that such equipment is properly functioning. The defense is inapplicable in this case. (See, *Newbury Electric Co., Ameron, Inc., Pole Products Div.*, Cal/OSHA App. 77-677, Decision After Reconsideration (Feb. 26, 1980).)

The violation is upheld.

⁸ While the Employer does not cite the section, under section 371.2(a) the Board may allow amendment of a citation or appeal [...] so long as any party opposing the amendment has an opportunity to demonstrate any prejudice that the requested amendment will create.

Classification of Citation 3

As above, Aruejo's testimony establishes that the failure to properly guard the saw as required by the safety order created a realistic possibility of a serious injury, including deep lacerations and the potential for amputation.

The citation is also classified by the Division as accident-related serious; Employer did not raise the classification in its petition. "The Division establishes that a violation is accident related by showing the violation more likely than not was a cause of the injury." (*Duininck Bros., Inc.*, Cal/OSHA App. 06-2870, Decision After Reconsideration (Apr. 13, 2012).) Aruejo testified that the miter saw had a defective cover guard, and when cutting small, extremely hard wood, there was a tendency for kickback. The saw's kickback could either draw hands away from the blade or towards the blade, and in this instance, Aruejo concluded that Rider's hands were drawn towards the blade. Wearing gloves exacerbated the problem, as they were an entanglement hazard. The ALJ found, and the Board agrees, that the accident-related nature of the violation has been demonstrated by a preponderance of the evidence.

Therefore, we affirm the result of Decision sustaining the citations and classifications, as well as the associated civil penalties.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: OCTOBER 16, 2014