

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MORROW MEADOWS CORPORATION
231 Brenton Court
City of Industry, CA 91789

Employer

Docket No. 12-R4D1-0717
through 0719

**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 the Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 20, 2011, the Division conducted an accident inspection at a Los Angeles International Airport worksite maintained by Morrow Meadows Corporation (Employer). On February 27, 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 alleges a Serious violation of Section 2302.2, subdivision 2(a)(6) [Energized equipment- failure to ensure suitable eye protection has been provided and used]. Citation 2 alleges a Serious, Accident-Related violation of Section 2302, subdivision (a)(4) [Energized equipment- failure to ensure approved and insulated gloves were available and worn]. Citation 3 alleges a Serious, Accident-Related violation of Section 2320.3 [failure to treat the installation of an electrical system as energized during the test process].

Employer filed timely appeals of the citations.

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 December 23, 2015. The Decision granted Employer's appeal in full, vacating all citations and associated penalties.

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

ISSUES

1. Did the Division establish by a preponderance of evidence the violations alleged in citations 1, 2 and 3?
2. Did the Employer establish its asserted affirmative defenses?

FINDINGS OF FACT

1. Journeyman Mark Machado (Machado) was working with Apprentice Duane Pfannkuch (Pfannkuch) on February 27, 2012, when Pfannkuch was fatally electrocuted at the Terminal 6 worksite maintained by Employer.
2. At the time of the accident, Machado and Pfannkuch were in the process of locking and tagging out a breaker. As a step in that process, the two electricians were verifying the breaker that was to be locked and tagged was the breaker that controlled power to the circuit they were going to be working on. After this step was complete, the breaker could then be locked and tagged out, and the verified de-energized old and new wires could be spliced together.
3. Pfannkuch was not wearing approved insulated gloves.
4. Pfannkuch was an apprentice electrician with over 5600 hours, or 3 years, of training and experience. Pfannkuch was making good progress in his classroom and on the job training.
5. Employer had an established and enforced policy forbidding employees from engaging in work on exposed, energized equipment without express written permission. (Exhibit JJ [Hot Work Policy, 11-1].) No such permission was sought or required for the work.
6. Employer has an effective safety program which includes an Illness and Injury Prevention Program, an Electrical Safety Program, and Code of Safe Practices. Employees of employer, including Pfannkuch, undergo extensive training as a condition of employment, including an OSHA 10 and OSHA 30 hour course, with refresher training every 2 years, via joint labor-management apprenticeship training.

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 Division's petition for reconsideration and the Employer'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.

The Division petitioned for reconsideration on the basis of Labor Code sections 6617, subdivisions (c) and (e).

Has the Division Established a Violation of Section 2320.2, Subdivisions (a)(4) and (a)(6) by a Preponderance of the Evidence?

Citations 1 and 2 allege a violation of low-voltage electrical safety order section 2302.2, subdivisions (a)(4) and (a)(6) respectively², which read as follows:

(a) Work shall not be performed on exposed energized parts of equipment or systems until the following conditions are met:

[...]

(4) Approved insulated gloves shall be worn for voltages in excess of 250 volts to ground.

[...]

² Citation 1 alleges the following facts: "On or about September 20, 2011, at LAX Terminal 6, the employer did not ensure that suitable eye protection were provided and used by employees who worked on the 480-V, 3-phase, 30-A energized system in the mechanical room." Citation 2 similarly alleges, "On or about September 20, 2011, at LAX Terminal 6, the employer did not ensure that approved and insulated gloves were available and worn by employee [sic] who worked on the 480-V, 3-phase, 30-A energized system. As a result, an employee received an electrocution while working on the said system in the mechanical room."

(6) Suitable eye protection has been provided and is used.

The Division argues in its Petition for Reconsideration that Pfannkuch accessed the energized wiring by deliberately removing a cap, leading to the accident that caused his death. The Division states that insulated gloves and suitable eye protection should have been worn at the time, but were not, constituting a violation of section 2302.2, subdivisions (a)(4) and (a)(6).

While there is no dispute that a fatal accident occurred on September 20, 2011, the Board is unable to find that the Division has met its burden of proof in demonstrating a violation of either section 2302.2, subdivision (a)(4) or (a)(6). (See, *R & L Brosamer, Inc., Cal/OSHA App. 03-4832* (Oct. 5, 2011) ["The burden of showing something by a 'preponderance of the evidence' simply requires the trier of fact to believe that the existence of the fact is more probable than its nonexistence before she may find in favor of the party who has the burden to persuade the judge of the fact's existence. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602)."]) As the ALJ's Decision correctly discusses at pages 4 and 5, in order to establish a section 2302.2 violation, the Division must initially demonstrate that work was performed on exposed energized parts or equipment, in contravention of subdivision (a). "Exposed energized parts" constitutes a term of art that has been given particular meaning by the Standards Board, and that definition must be taken into consideration as the Board interprets the regulation as a whole. Section 2300, subdivision (b) states:

Exposed. (As applied to live parts.) Capable of being inadvertently touched or approached nearer than a safe distance by a person. It is applied to parts not suitably guarded, isolated, or insulated.

Both the Division and Employer provided testimony and other evidence on the question of whether the live wire was intentionally exposed by Pfannkuch, or had inadvertently become exposed through loss of a cap. As the Board stated in *Webcor Builders, Cal/OSHA App. 02-2834, Decision After Reconsideration* (May 24, 2005):

In *California Shoppers, Inc.*, the court discussed the general rules characterizing the availability of inferences in the fact finding process, including the rule that "[i]f the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary," (quoting *Reese v. Smith* (1937) 9 Cal.2d 324, 328.)

While the Division puts forth theories that are in the realm of possibility, it failed to meet its evidentiary burden. No witness observed the cap falling off, and no defective cap was presented as evidence. Journeyman Machado, who had handled the wires shortly before the accident occurred, testified the wires had all been suitably capped. In sum, the Division has failed to put forth sufficient evidence to show that the live parts were exposed, as defined by section 2300--it has not shown the wires had not been suitably guarded or isolated by caps. This element of the violation not being met, no further analysis is required.

The Decision of the ALJ, vacating Citations 1 and 2, is upheld.

Has the Division Established a Violation of Section 2320.3 by a Preponderance of the Evidence?

Citation 3 alleges a Serious and Accident-Related violation of Section 2320.3, an electrical safety order stating as follows: "All electrical equipment and systems shall be treated as energized as required by Section 2320.2 until tested or otherwise proven to be de-energized." The Division's alleged violative description reads:

On or about September 20, 2011, at LAX Terminal 6, the employer's employee did not treat the 480-V, 3-phase, 30-A system, they were installing as energized during the test process. As a result, an employee received an electrocution while working on the energized system in the mechanical room.

The Division, in its Petition for Reconsideration, argues no test was done by the apprentice and journeyman to prove the system was de-energized. Rather, at the time of the accident, the employees were verifying which breaker controlled power to the wires at issue, prior to performing lockout/tagout on the breaker. Regardless of what activity Machado and Pfannkuch were engaged in, to uphold a violation, the Division must demonstrate by a preponderance of the evidence that the electrical system was not treated as energized until proven to be de-energized. "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed 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. *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483, review denied." (*Santa Fe Aggregates, Inc.*, Cal/OSHA App. 00-388 Decision After Reconsideration (Nov. 13, 2001).)

The Division's inspector, Hien Le (Le), interviewed Machado shortly after the accident occurred. Machado told Le that when Machado went into the fan room, he asked Pfannkuch if the power in the panel had come on, and Pfannkuch replied, yes, momentarily. However, at hearing, Machado testified that the conversation went differently. Machado recalled that Pfannkuch

verified it was hot, that electrician Nathan Rose left the room, and that Machado then stated to Pfannkuch that 'I'm going to go turn it off and lock it off.' After making that statement, according to Machado's testimony at hearing, Machado turned to leave, then heard Pfannkuch grunt, and turned back and saw Pfannkuch falling off the ladder. The ALJ appears to have credited this testimony over that of Morrow Meadows' electrician Rose, who had a differing recollection of the events. According to Rose, when Machado came into the room, Pfannkuch reported to Machado that the panel was still hot, but Machado contradicted him, telling Pfannkuch, 'No it's not, I turned it off.'" Rose testified that he was not sure what happened next, because at that point he left the room and did not see the accident.

Although the Board will generally defer to the credibility determination of an ALJ, it is within the authority of the Board to alter, amend, affirm, or rescind the order or decision of the hearing of the ALJ. (See, Labor Code 6620, 6621; "Unlike the court, the Board is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record; nevertheless, any award, order or decision of the Board must be supported by substantial evidence in the light of the entire record. *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627].") (*Bracken v. Workers' Comp. App. Bd.* (1989) 214 Cal. App. 3d 246, 255.) Here, the ALJ has not provided any basis upon which the Board can determine the merits of the ALJ's findings; the decision to credit the testimony of Machado over Rose is not explicitly tied to demeanor, manner, attitude, or any inferences connected to the evidence before the ALJ. We therefore decline to follow the implied credibility determination found in the ALJ's Decision.

Rather, the Board finds Machado's version of events, as between Machado and Rose, to be less credible. We base this finding on the inconsistency of his statements from the time of his conversation immediately after the accident with the Division's inspector, and his testimony at hearing. We also consider that while both Machado and Rose were thoroughly cross-examined, Rose revealed no other interest in the proceeding than that of an uninterested bystander.

However, for the purposes of finding a violation of Citation 3, the Board need not delve into the issue of credibility. There is no dispute that Pfannkuch accessed the electrical system, and was electrocuted by doing so. The only reasonable inference that can be drawn from the record is that Pfannkuch did not treat the system as energized until it was tested or otherwise proven to be de-energized. "The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Mechanical Asbestos Removal, Inc.*, Cal/OSH App. 86-362, Decision After Reconsideration (Oct. 13, 1987).) A violation is found.

Employer's Affirmative Defenses

Employer asserts the Independent Employee Action Defense ("IEA Defense" or "IEAD"). To benefit from the IEA Defense, an Employer must show all five elements are met: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was against the employer's safety rules. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The record evidence establishes that Pfannkuch had experience in the tasks at hand on the day of the incident. According to unrebutted testimony from the hearing, his apprenticeship log records over 300 hours of on the job experience with splicing wires, and over 1000 hours working with conduit. Although an apprentice, Pfannkuch was far along in his classroom and on the job training, and close to achieving full journeyman status. The first element of the defense is established. (See, *ABM Facilities Services*, Cal/OSHA App. 12-3496, Decision After Reconsideration (Dec. 24, 2015).)

Elements two and three of the defense are also shown through evidence and testimony. Employer's safety program is well-devised, and Employer actively promotes the safety program at the worksite. "[E]nforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) The Division's inspector, Le, agreed in testimony that the Employer's safety program was well-devised as it exists on paper.

Testimony from Michael Kirley (Kirley), the Employer's Risk Manager, described how Employer's safety program is translated from the page into day to day operations. Employees receive new hire orientation on their first day, attend safety meetings regularly on the job, and receive safety training from multiple instructors, including 5000 hours of training through the joint union-management apprenticeship program, and qualified safety person (QSP) training. Kirley also described the Employer's various routine training and safety inspection protocols, including daily and weekly trainings, inspections, and job walks, and records were introduced showing that those protocols were routinely followed at the worksite. (Ex.s XX, TT; *Glass Pak*, Cal/OSHA App. 03-7250, Decision After Reconsideration (Nov. 4, 2010).)

As to element four, Kirley testified regarding disciplinary actions issued by the Employer in instances where employees violated safety policies. Through the testimony and evidence, the Board is able to conclude element four is met, and Employer has enforced its progressive disciplinary policy when safety violations occur. (See, *Paramount Farms, King Facility*, Cal/OSHA App. 2009-864 Decision After Reconsideration (Mar. 27, 2014).) The records and

testimony demonstrate that progressive sanctions for violations of safety rules including lockout tagout, PPE, and failure to follow policies and procedures regarding the determination of whether a circuit is hot prior to beginning work have been issued by the Employer. (Ex. UU.)

However, Employer did not demonstrate that element five of the defense is met. Pfannkuch had been incorrectly informed by Machado that the system had properly been de-energized and was not hot, according to Rose's testimony. If he had removed the cap purposefully, his doing so would not have been a violation of the Employer's hot work rules. Even if we were to credit Rose, we still would not know if Pfannkuch inadvertently removed the cap, rather than acting contra to a safety rule. The last element of the defense is not met.

The Employer also asserts the judicially-created defense known as the *Newbery* defense. (*Newbery Electric Corporation v. Occupational Safety and Health Appeals Board* (Sept. 17, 1981) 123 Cal.App.3d 641.) 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.)

The Employer has provided evidence and testimony regarding its robust training and education program, including a "no hot work" rule for apprentices, a LOTO procedure that all employees receive training on and is included in the Electrical Safety Program (ESP), an approval process for all hot work, daily "stretch and flex" safety meetings, and regular jobsite inspections. Employer demonstrated that it was taking proper steps to guard against potential dangers at this jobsite, and did not and could not have not known that a situation of this nature would arise at the LAX worksite.

Employer also established that there was adequate supervision at the jobsite. Employer employed several foremen on site who walked the job and interacted with apprentices and journeymen, as well as a general foreman who supervised the foremen, and general field supervisors. Supervisors conducted morning meetings, walked the job, and also lead "stretch and flex" morning safety meetings. The testimony establishes that supervisors were consistently present, and the level of supervision for skilled workers such as those involved in the incident before the Board was not inappropriate.

Regarding element three of the defense, Employer also demonstrated that it had engaged in actions to ensure compliance with its own safety policies and procedures, through testimony and records of disciplinary actions. This satisfies element three. The facts and circumstances as a whole, which encompass Employer's apprenticeship program, the extensive training and experience that the employee involved in the incident had received, job site

supervision, and enforcement of safety policies and procedures made the violation of the safety order unforeseeable. All elements of the defense are met.

A violation of Citation 3 is found, the Employer's *Newbery* defense is established, and Citation 3 is vacated.

ART CARTER, Chairman
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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