

Cal/OSHA Appeals Board Decision - Tools and Equipment - Pneumatic Nail Guns

Citation: Employer failed to make sure employees knew to disconnect pneumatic nail guns from the air supply when not in use or unattended.

Defense - Independent Employee Action

The Company, in the business of providing lumber, trusses and labor for construction framing, was inspected two days after an accident at a housing development site where it was a subcontractor. The Division cited a serious violation carrying a \$4,725 penalty after reductions (approx. (\$14,000) for low extent rating, moderate likelihood rating, and credits for size, good faith and history. The Company was also given a 50 percent abatement credit.

§1704(b): Serious violation and \$4,725 penalty affirmed – Appeal Denied

The Company did not prove all five elements of the Independent Employee Action defense and was not relieved of liability for the violation.

On the day of the accident, a laborer was using a new pneumatic nail gun. A supervisor observed his skill with the tool, and then assigned him to framing work. The supervisor said he learned of the accident details through a foreman. The laborer and an assistant were nailing studs in the foyer of a house when one handed the nail gun to the other between studs. The gun apparently bumped a stud and the trigger went off, sending a nail through the laborer's neck. The two involved in the accident were the only witnesses to it.

During the Cal/OSHA inspection, the Inspector checked the area near the accident site and found a strip nailer attached to a hose and an air compressor. She disconnected the hose before photographing the nail gun, the compressor and the foyer area. The compressor gauges registered 100 to 120 psi indicating use at the time. Shortly thereafter, a worker returned to the area and told her that he had just been using the nail gun on a windowsill. He stated that "he had not been told to disconnect the strip nailer."

At the appeal hearing, the inspector "explained that the nail gun has a spring inside the trigger chamber. If the safety spring is working correctly, a worker could not just hold the gun and cause it to discharge. In other words, the head of the nozzle would have to be pressed against something to make the gun discharge." The inspector believed that, "for the nail gun to have discharged, ... either the laborer or his helper must have had a finger on the trigger at the same time the head of the gun bumped against the side of a stud. Alternatively, an unexpected discharge could also occur if the safety device has been removed." But there was no evidence that the safety device had been removed, therefore no citation.

According to the supervisor, regular safety meetings were held at which Employer discussed nail gun safety, and the company had written rules for the use of nail guns. However, there were no records to show that the laborer had

attended safety meetings. The supervisor recalled "one specific rule that the hose should be disconnected from the gun when the gun was not in use."

Another employee testified that Company provided safety training every Friday afternoon. As part of that training, employees were told not to leave nail guns unattended when not in use. "He had received nail gun training "approximately four months before the accident."

The Company owner testified that he was involved in employee training and about 50 percent of the weekly meetings was spent on safety issues. "Written safety rules pertaining to the use of nail guns are provided to employees in English and Spanish." One rule "specifically states that a worker is always to disconnect the nail gun when leaving the area or when the gun is not in use."

The Independent employee act defense. The Company raised the independent employee act defense. In *Mercury Service, Inc.* (Cal/OSHA App. 771133, DAR (Oct. 16, 1980) [Digest 114,137R]), the Appeals Board set up a five-part test that an employer must satisfy to avoid liability for a violation:

1. That the employee was experienced in the job being performed.
2. That it has a well-devised safety program that includes training employees in matters concerning safety as it relates to the particular job performed.
3. That it effectively enforces its safety program.
4. That it has a policy of sanctions that it enforces against employees who violate the safety program.
5. That the employee caused the safety violation that he knew was against the employer's safety rules.

In this case, the Company showed that its written safety program instructed employees always to disconnect a nail gun (1) - when leaving the area or when it is not in use. An employee also testified at the hearing that he had received training in the safe use of the strip nailer - (2) although he told the Inspector no one had told him to disconnect it when not in use. The appeal judge found that the company "made some showing that the worker was aware at the time of the inspection that not disconnecting the strip nailer from the hose was in violation of Employer's own safety rules." This satisfied two elements of the Mercury Service test.

However, the company did not provide any evidence or testimony to show it met three of the other elements:

- (3) That the worker was experienced in the job being performed; (*proof of tenure or experience on an employment application*),
- (4) That it effectively enforced its safety program; (*previous or safety violation notices.*)
- (5) That it had a policy of sanctions that were enforced against employees who violated safety rules. (*The employee should have been written up for the accident violation*).

Because all the elements were not satisfied, the independent employee act defense was not established.

Excavations and Trenches - Inadequate Protection

Citation: Two employees worked in an inadequately shored or benched excavation. The men were aware they violated company safety policy at the time of the infraction.

Defense - Independent Employee Action

Employer was working on an excavation for installation of a concrete vault. After a drive-by observation, a Division safety engineer inspected and cited Employer for a serious violation, proposing a \$5,400 penalty. At the hearing, the Division reduced the classification from serious to general, based on insufficient evidence to prove employer knowledge, and recalculated the penalty to \$600. The parties agreed on the violation's existence with the amended classification, and that Employer satisfied all but one element of the employee independent act defense.

§1541.1(a)(1): General violation and \$600 penalty vacated – Appeal Granted

The Company successfully proved all five elements of the Independent Employee Action defense and was relieved of liability for a trench violation.

The Cal/OSHA inspector testified at the hearing that he saw two employees working at the base of a seven-foot-deep excavation without a protective system in place complying with §1541.1(a)(1). He later found that the Company's Injury and Illness Prevention Program was "very adequate," and the Company "was quite diligent with a strong history regarding worker safety."

One of the two offending employees, who no longer worked for Company, testified that he recalled the inspection incident - "they were getting the 'box' ready to sand and grade for installation." He acknowledged that shoring and benching was in place, but it was not adequate. He recalled telling the Inspector that "he was aware that he was violating company policy. In fact, looking back, he was very aware that he was violating Company policy. He further testified that before the inspection, he had received competent person training regarding excavation safety procedures."

As a result of his actions, he was disciplined by Employer - relieved of his duties and fired. He believed that his brother, the other employee in the excavation, "was also aware that they were violating company policy..." They had both worked for Company for 16 years.

The company authenticated safety training records for the two men, showing that each received competent person training in excavation safety, as well as several other training and safety programs and also authenticated a payroll change notice for each man that documented that they were "discharged for a grossly negligent safety infraction (working in a 7' excavation without shoring)." Both men were discharged the day after the inspection. (Note that "authenticated" means produced documentation)

The independent employee action defense

The independent employee action defense (LEAD) was set up by the Appeals Board in **Mercury Service, Inc.** (Cal/OSHA App. 771133, DAR (Oct. 16, 1980) [Digest 9[14,137R]), as a mechanism "to relieve employers of liability for safety order violations committed by employees acting against the best safety efforts of the employer." As it is an affirmative defense, a Company must prove each of five elements:

- (1) The employee was experienced in the job being performed.
- (2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments.
- (3) The employer effectively enforces the safety program.
- (4) The employer has a policy of sanctions against employees who violate the safety program.
- (5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements."

The parties also stipulated that the first four of these elements were satisfied. The only controverted issue at the hearing, the ALJ wrote, was whether the employee caused a safety infraction which he knew was contrary to the Company's safety requirements.

The testimony from the witnesses was not disputed.

The inspector acknowledged that the two men, at the time of the inspection, "acknowledged that there should have been some more protective shoring or benching."

The employee testified about his and his brother's long-time history with the Companyr. He admitted knowing he was violating company policy, recalled telling the inspector so, and "strongly affirmed that his brother also would have been aware that their action in working at a depth of seven feet without adequate shoring or benching protection violated the company's safety policy."

The Company provided and authenticated records of the workers' safety training and long work experience, including "not just excavation safety but also multiple competent person trainings..." It could be inferred, the ALJ found, that they knew their work in the inadequately protected trench violated Employer's safety requirements.

Based on all the testimony, the ALJ concluded that the employee knew he acted against the Company's safety requirements. Having proved the final element of the Independent Employee Action, - (5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements" –the Company was relieved of responsibility for the violation; the appeal was granted.