Is Worker's Work Refusal Justified if Employer Doesn't Require Use of Safety Feature?



SITUATION

A rail company worker is assigned to install metal tie plates under a track suspended by a power jack. His employer's procedures require workers to do this job using their hands, although the power jack's manufacturer has installed safety wands on the jack that can be used for this purpose. The worker refuses to do the job manually, saying he's afraid his hands or fingers will be crushed if he doesn't use the safety wands. He points out that, while using the manual procedure, a co-worker was almost injured the day before, another worker had his fingers crushed the year before and there were other near miss incidents. But the employer says the manufacturer's instructions indicate use of the safety wands is optional. The employer says its method is preferable to using the safety wands because workers have to bend down and pick up the tie plates and using the wands takes more time, reducing productivity. In addition, the employer's JHSC has reviewed the manual procedure and found that it's equally as safe as using the safety wands.

QUESTION

Is the worker justified in refusing to install the plates using the manual procedure’

A. No, because the manufacturer’s instructions don’t require use of the wands.

B. No, because the employer’s JHSC found that the manual procedure was just as safe as using the safety wands.

C. Yes, because a worker needn’t work if he’s afraid of injury.

D. Yes, because other injuries or near misses have already occurred when this procedure was done manually.

ANSWER

D. There have already been injuries and near misses using the manual procedure, so the worker’s refusal is justified.

EXPLANATION

This hypothetical is based on a federal OHS Tribunal decision confirming a health and safety officer’s agreement with a rail company worker’s refusal to work without using safety wands installed on a power jack. The rail company appealed the officer’s direction. The Tribunal noted that there had been several near misses in which workers almost injured their fingers adjusting the plates with their hands and one instance in which a worker’s fingers were actually crushed. But use of the safety wands protected workers from the pinch point hazard. So the Tribunal concluded the best way to prevent workers from injuring or dismembering their hands while operating the power jack was to use the wands that were installed for that purpose and thus, ‘operating the power jack machine without the use of the installed wands constitutes a danger to the employees.’

WHY THE WRONG ANSWERS ARE WRONG

A is wrong because the manufacturer's instructions aren't the ultimate determining factor in deciding whether a danger exists that justifies a work refusal. A work refusal is justified when a potential hazard or condition could reasonably be expected to cause injury. The manufacturer's statements about safe use of a product is one factor in determining whether a work condition's dangerous or safe'but it isn't the only factor to be considered. A health and safety officer, tribunal or court must consider *all* of the circumstances of the specific situation to determine whether a danger exists. Here, the manufacturer may not have required use of the safety wands. But the circumstances and specific use of the power jack at this workplace'specifically the near misses and actual injuries caused when the safety wands weren't used'indicate that the employer's manual procedure did pose a danger to workers.

B is wrong because the JHSC's opinion isn't dispositive. Just as the manufacturer's statements about safe use of its product are only one factor to be considered, the JHSC's opinion on the safety of the manual procedure can be helpful but isn't binding on a court or tribunal when deciding whether a work refusal was justified. Here, although the employer and JHSC determined the manual procedure for this task was safe enough, the near misses and real injuries indicate otherwise and thus justify the worker's refusal to use that procedure.

C is wrong because the individual worker's subjective fear of danger simply isn't enough to justify a work refusal. The worker must have a reasonable fear of danger to support his refusal to work. That worker's fear must also be sincere and not a pretext to avoid work. Finally, the worker's fear won't be sufficient cause to refuse work if the danger is inherent in the job. For example, a firefighter can't refuse to work because he's afraid of fire as the dangers associated with fire are inherent in the job. Here, the worker was sincerely afraid of using his hands to do the assigned job. His fear was

reasonable given the prior injury and near misses related to the manual procedure. In addition, the danger wasn't inherent in the job because it could be done safely using the safety wands provided by the manufacturer. For all of those reasons, the worker's refusal was justified.

***Insider* Says**: For more information about work refusals, visit the Work Refusal Compliance Centre.

SHOW YOUR LAWYER

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