

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

In the Matter of the Appeal of:

**MCELROY METAL MILL, INC.  
dba MCELROY METAL  
1500 HAMILTON ROAD  
BOSSIER CITY, LA 71111**

**Employer**

Inspection No.  
**1405439**

**DECISION**

**Statement of the Case**

McElroy Metal Mill, Inc, DBA McElroy Metal (Employer) manufactures metal building components such as roofing and siding. Beginning May 31, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Elia Fernandez (Fernandez) of the High Hazard Unit South, conducted a scheduled comprehensive inspection at 17031 Koala Road, in Adelanto, California (the site).

On September 11, 2019, the Division issued two citations to Employer alleging violations of California Code of Regulations, title 8.<sup>1</sup> Citation 1, Item 1, alleges that Employer failed to guard revolving parts at the discharging end of a machine. Citation 2, Item 1, alleges that Employer failed to guard three machines at their points of operation.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, and the reasonableness of the proposed penalties. Additionally, Employer asserted various affirmative defenses for both citations, including the assertion that multiple state and federal agencies have performed inspections without issuing citations, that there were no injuries to support a serious classification, and, with reference to Citation 1, Item 1, that a prior inspection and citation relating to the same machine precludes the issuance of a citation for a different part of the same machine in a subsequent inspection.<sup>2</sup>

This expedited matter came before Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on March 18,

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<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

<sup>2</sup> Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

2020, November 10, 2020, December 4, 2020, December 29, 2020, and January 8, 2021. ALJ Avelar conducted the first day of hearing telephonically from West Covina, California and the remaining days of the hearing from Pasadena, California with the parties and witnesses appearing remotely via the Zoom video platform. William Hester, Attorney at The Kullman Firm, represented Employer. Emelinda Lim, Senior Safety Engineer for the High Hazard Unit, represented the Division. At the commencement of the proceedings, the Parties stipulated that:

1. Fernandez inspected McElroy Metal Mill, Inc. on May 31, 2019, which resulted in the issuance of Citation 1, Item 1, and Citation 2, Item 1.
2. McElroy Metal Mill, Inc. employees operated the Double High Machine, Ridge Cap, Green Jorns AG Folding Machine, and Blue Jorns AG Folding Machine at the Adelanto facility.
3. The Green Jorns AG Folding Machine and Blue Jorns AG Folding Machine have the same functionality and operation.
4. Employer installed a physical guard on the Ridge Cap Machine as abatement.

The matter was submitted on February 21, 2021.

### **Issues**

1. Did Employer fail to ensure the revolving parts at the exit of the Double High Machine were guarded?
2. Did Employer fail to ensure that the points of operation on the Ridge Cap Machine, Green Jorns AG Folding Machine, and Blue Jorns AG Folding Machine were guarded?
3. Is the Division estopped from issuing a citation to Employer for failure to guard the Double High Machine due to prior inspections by the Division or the Federal Occupational Safety and Health Administration?
4. Did the Division establish a rebuttable presumption that the citations were properly classified as Serious?
5. Did Employer rebut the presumption that the violations were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?
6. Are the proposed penalties reasonable?

### **Findings of Fact**

1. The Double High Machine processes metal sheets and is approximately 100 feet long, four feet across, and five feet tall. Horizontal rollers at its terminus expel the finished product. There are gaps between the rollers and the directions of their rotations alternate, creating in-running and out-running areas between the rollers.
2. The Double High Machine is located in the middle of Employer's open layout facility, with the rollers at the terminus facing the center of the facility where employees freely move.
3. The terminus of the Double High Machine was not guarded at the time of inspection.
4. The Ridge Cap Machine presses metal sheets between two dies to create a bend at the midline of the sheet of metal. The dies are no less than 30 inches wide and are situated approximately at the elbow height of an adult standing at the working level.
5. New blank metal sheets may be inserted through a space between the dies of the Ridge Cap Machine. The space between the dies varies from three quarters of an inch to one and one quarter inch wide.
6. The Ridge Cap Machine was located at the end of a row of machines in Employer's open layout facility and was not guarded at the time of inspection.
7. The Green Jorns AG Folding Machine and Blue Jorns AG Folding Machine have the same functionality and operation. These machines perform two actions: clamping a blank sheet of metal and folding the clamped sheet.
8. The Green and Blue Jorns AG Folding Machines are each over 20 feet long. The clamp and the folding arm of each machine extend the entire length of the machine and are located approximately at waist height for an adult standing at the working level.
9. The clamps and the hinges of the folding arms of the Green Jorns AG Folding Machine and Blue Jorns AG Folding Machine are unguarded.
10. Employees regularly operated the four cited machines at the site.

11. Employer performed job safety analyses and regular inspections of the four cited machines.
12. Penalties were calculated in accordance with the Division's policies and procedures.

### Analysis

#### 1. **Did Employer fail to ensure the revolving machine parts at the exit of the Double High Machine were guarded?**

Section 4002, subdivision (a), provides:

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.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on May 31, 2019, the employer failed to ensure guards to revolving part at the exit of the Double High Machine, which create a hazard were in place.

"Machine parts" is defined in section 3941 as, "All moving parts of the machine, except those forming part of the point of operation."

The Division has the burden of proving a violation by a preponderance of the evidence. (*Nolte Sheet Metal, Inc. v. Occupational Safety and Health Appeals Board*, 44 Cal.App. 5<sup>th</sup> 437, 446; *ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct 1, 2019).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

To establish a violation of section 4002, subdivision (a), the Division needs to establish: the applicability of the safety order by showing that the machine parts at issue created hazardous revolving, drawing, or rolling actions; that employees were exposed to the hazard; and that the hazardous area was not guarded by the frame of the machine, location, or some other way.

a. Applicability: Hazardous Revolving, Drawing, or Rolling Actions

Fernandez testified that the Double High Machine housed exposed cylindrical rollers that revolved and created nip points and entanglement hazards. Fernandez did not watch the machine in operation. She described what she learned from speaking with Employer's Operations Manager, Matthew Edwards (Edwards), during the inspection and from reviewing information Employer provided. Edwards testified that the machine is approximately 40 inches wide, five feet high, and 100 feet long. One end is the intake for blank metal, and the other end is where the finished product exits.

After being shaped, the finished metal sheets exit between one of two pairs of rotating cylinders at the terminus of the machine. The cylinders rotate in alternating directions and create nip points and entanglement hazards where a hand or clothing be pulled in and drawn around and back out by in-running rotations. As such, the machine parts created hazardous rolling actions.

b. Exposure to Hazard

Employer argued that employees were not exposed to the rotating parts at the terminus of the Double High Machine.

The Appeals Board has articulated tests for determining employee exposure. In *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), the Appeals Board states:

The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc.*, *supra*, Cal/OSHA App. 00-2976.) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016), citing *Gilles & Cotting, Inc.*, 3 O.S.H. Cas (BNA) 2002, 1975-76 O.S.H. Dec. (CCH) P 20448, 1976 OSAHRC LEXIS 705 (Feb. 20, 1976) fn 4.)

In addition to demonstrating actual employee exposure to the hazard, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc., supra*, Cal/OSHA App. 14-1471, citing *Benicia Foundry & Iron Works, Inc., supra*, Cal/OSHA App. 00-2976.) That is, the Division may establish employee exposure by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*Id.* [citations omitted].)

Edwards testified that the machine was used daily, Monday through Friday. Edwards explained that employees were stationed three feet from the terminus of the Double High Machine and had no reason to approach any closer. Edwards testified that the rollers are required to rotate in order to push the material through while an employee waits to catch the finished product. Edwards testified that the Double High Machine has lock out tag out procedures for any need to reach inside the terminus.

The Appeals Board has long held that if the Standards Board, by safety order, has decreed that employee protection against a particular hazard must be provided by means of positive guarding, then administrative policies do not substitute for mechanical protection. (*Bethlehem Steel Corp.*, Cal/OSHA App. 78-723, Decision After Reconsideration (Aug. 17, 1984); *City of Los Angeles, Dept. of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986).) Operating the Double High Machine requires placing an employee at the terminus, and there is nothing in place to physically prevent employees from coming closer to terminus while waiting. Further, the controls for the machine are located at a kiosk at the side of the machine, requiring an employee stationed at the terminus to cross in front of the exposed rollers to reach it. Employees instructed to lock out and tag out, or remain three feet from the rollers, may still inadvertently contact the rollers. Employees were thus actually exposed to the hazards of the revolving rollers and powered cylinder.

Finally, the terminus of the machine was placed near the center of the facility and its exposed rollers and powered cylinders faced anyone walking about. The location of the terminus is directly within deliberate or inadvertent reach of anyone travelling through the building. Thus, it was also reasonably predictable that by operational necessity or inadvertence, employees were exposed to the zone of danger.

c. Guarding and Guarding by Location

Both Edwards and Fernandez testified that, at the time of the inspection, the rollers and powered cylinders were not guarded or guarded by the frame of the machine. Employer argued that the rotating parts were guarded by location.

"Guarded by location" is defined in section 3941 as: "The moving parts are so located by their remoteness from floor, platform, walkway, or other working level or by their location with reference to frame, foundation or structure as to remove the likelihood of accidental contact." For a machine to be guarded by location, the "likelihood of accidental contact with moving parts is removed by their remoteness," and decreasing the likeliness of accidental contact is not enough. (*EZ-Mix, Inc.*, Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013).) "Accidental contact" is defined in section 3941 as: "Inadvertent physical contact with power transmission equipment, prime movers, machines or machine parts which could result from slipping, falling, sliding, tripping or any other unplanned action or movement."

All finished metal sheets require an employee to guide them after being expelled. The rollers must be in motion to expel a sheet while the employee waits. As mentioned previously, the rollers and powered cylinders were placed approximately at five feet above the working level, and thus, not located in a remote location out of reach.

Employer did not present sufficient evidence to refute Fernandez's testimony or evidence. The Division met its burden and established a violation of section 4002, subdivision (a), because employees were exposed to the hazards of rotating and rolling parts of a machine that were not guarded either by the frame of the machine or by location. Accordingly, Citation 1, Item 1, is affirmed.

**2. Did Employer fail to ensure that the points of operation on the Ridge Cap Machine, Green Jorns AG Folding Machine, and Blue Jorns AG Folding Machine were guarded?**

Section 4184, subdivision (b), provides:

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 Division refers to section 4214, subdivision (a), in the citation. It provides:

(a) Press brakes, mechanically or hydraulically powered, shall be guarded in a manner that will accomplish the following:

- (1) Restrain the operator(s) from inadvertently reaching into the point of operation, or
- (2) Inhibit machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or
- (3) Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

In Citation 2, Item 1, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on May 31, 2019, the employer failed to ensure guards to the point of operation of three machines which present a hazard were in place:

1. Ridge Cap Machine
2. Green Jorns AG Folding Machine
3. Blue Jorns AG Folding Machine

To establish a violation of section 4184, subdivision (b), the Division needs to show: the applicability of the safety regulation by showing that the cited machines present similar hazards as those in Group 8; that employees were exposed to the hazards; and that the machines were not guarded. The Division cites three machines as allegedly violative of this safety order. Each stage of the analysis below will consider each of the three machines in turn.

a. Applicability: Similar Hazards

Machines that are included in Group 8 are described in section 4184, subdivision (a). These machines perform the following specific actions described in the safety order:

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.



In determining the applicability of section 4184, subdivision (b), the Division must show a machine presents similar hazards as those machines in Group 8. (*Jensen Precast*, Ca/OSHA App. 05-2377, Decision After Reconsideration (Mar. 26, 2012).) “The Appeals Board has interpreted section 4184, subdivision (b), broadly to include any machine that grinds, shears, punches, presses, squeezes, draws, cuts, rolls, mixes, or acts similarly...and is used in any industry or type of work not specifically covered in Group 8.” (*Id.*, citing *Sonoma Grapevines, Inc.* Cal/OSHA App. 99-875, Decision After Reconsideration (Sep. 27, 2001).) Further, safety orders are to be liberally interpreted to achieve a safe working environment. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.)

"The determinative factor under Section 4184(a) is the similarity of the action of the moving parts and under Section 4184(b) it is the similarity of the hazard presented." (*Guillaume Grapevine Nursery, Inc.* Cal/OSHA App. 08-3273, Decision After Reconsideration (Oct. 25, 2011).) The Division must thus establish that the three machines create actions and hazards similar to those presented by a machine in Group 8.

#### *Ridge Cap Machine*

Employer presented Gerald Doss (Doss) who testified that he was a cell leader who trained other employees on the operation of the Ridge Cap Machine. Both Doss and Fernandez testified that the machine performs one action in which an upper die descends and meets a lower die to bend a sheet of metal into a V-shape. Pressing a pedal by foot causes the top die to descend and press down on the lower die, thereby placing a bend in the sheet of metal. The hazard presented is from the pressing or squeezing forces on whatever may be caught between the two dies. The point of operation thus creates a squeezing or pressing action and related hazards contemplated in Group 8.

#### *Green and Blue Jorns AG Folding Machines<sup>3</sup>*

Like the Ridge Cap Machine, these two machines also place folds in metal. Edwards testified that the machines perform two actions to complete a folding cycle for a sheet of metal. The first is to clamp the sheet of metal between an upper and lower clamp, and the second is to place the fold in the clamped metal with a hinged platform, called a “folding arm,” that rises to bend the metal. Upon closure of the clamp, the folding arm may then engage. When the folding arm rises, it rotates upwards from its hinge along the lower clamp, bending the sheet of metal. The

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<sup>3</sup> The parties stipulated that the Green Jorns AG Folding Machine and the Blue Jorns AG Folding Machine have the same functionality and operation. Thus, the analysis and conclusion for the Green Jorns AG Folding Machine applies to the Blue Jorns AG Folding Machine for this section and the following sections.

clamp presents a pressing and squeezing action, and the closing hinge creates a pinch point, both presenting hazards similar to those described in Group 8.

For the reasons above, the safety order applies to the Ridge Cap Machine, Green Jorns AG Folding Machine, and Blue Jorns AG Folding Machine.

#### b. Exposure to Hazards

As discussed previously, the Division must show that employees were actually exposed to the hazards or that the zone of danger was accessible during the course of work. The Division must establish that the three machines in this citation create a "... pressing, squeezing... cutting... or similar action, in which an employee comes within the danger zone[.]" (*PCC Rollmet, Inc.*, Cal/OSHA App. 15-3653, Decision After Reconsideration (Aug. 15, 2017).)

Section 4184, subdivision (a), requires guarding of a machine at the point of operation so that employees who come into the danger zone are protected. Terms found in section 4188, Points of Operation and Other Hazardous Parts of Machinery, Definitions, are useful for interpreting the regulation. In particular, it provides the following definitions of "Danger Zone" and "Point of Operation":

**Danger Zone.** Any place in or about a machine or piece of equipment where an employee may be struck by or caught between moving parts, caught between moving and stationary objects or parts of the machine, caught between the material and a moving part of the machine, burned by hot surfaces or exposed to electric shock.

**Point of Operation.** That part of a machine which performs an operation on the stock or material and/or that point or location where stock or material is fed to the machine. A machine may have more than one point of operation.

#### *Ridge Cap Machine*

The Division presented photographic evidence showing that the point of operation is located approximately at elbow height for an adult standing on the working level of the facility. Doss testified that the machine is used approximately three times per month. He testified that the machine is designed to receive sheets of metal which are approximately 41 inches wide and 30 to 36 inches long. It is deduced from this testimony and from the photographic evidence that the length of the two dies is no less than 30 inches.

Fernandez testified that the space between the upper and lower dies ranged from one and one quarter inch to three quarters of an inch. She testified that fingers could enter the point of operation along the entire length of the dies. Doss confirmed in his testimony that if the machine should cycle through a press, and fingers were in the point of operation, a crushing injury could occur. Thus, employees were actually exposed to the danger zone located along the length of the two dies.

Fernandez testified that the machine stands on two supports extending in front of and behind the machine which, in addition to its movable foot pedal, create a potential for someone to trip and inadvertently come into contact with the point of operation. The Division presented evidence and testimony from both Fernandez and Doss showing that, at the time of the inspection, the Ridge Cap Machine was located in an open area of the facility, at the end of a row of machines. Its point of operation and its danger zone were thus accessible by the operator or any individual traversing through the facility.

#### *Green and Blue Jorns AG Folding Machines*

Employer presented Maintenance Technician Raymond Bailey (Bailey) to testify about the operation of these machines. Bailey, Edwards, and Fernandez all testified an operator must hold new sheets of metal in the machines while it is being clamped.

Prior to closing, the upper clamp pauses at a safety stop position five eighths of one inch wide. Fingers may inadvertently enter this space and become injured. Employer asserted that it trained its operators to use a 12-inch magnetic tool to manipulate the metal sheet prior to closing the clamp. However, the Division established through video evidence that operators were inconsistent in the use of a magnetic tool, electing to use their hands to stabilize the metal sheet and actually coming within two inches of the point of operation and its danger zone while a machine was in operation.

When the folding arm is engaged, and as it rotates up, it creates a pinch point along the length of the machine at its hinge and upper clamp. Edwards testified that the motion of the rising folding arm would have the effect of pushing someone away from a machine. However, it is evident from both Employer's training video and the Division's video taken on site that someone caught in the clamp could be exposed to the hazards of the pinch point.

Both Edwards and Bailey testified that employees following the training would not expose themselves to any hazards. However, they remain exposed to inadvertent contact.

The video shows that the clamp and the folding arm are located approximately at waist height for an adult standing on the working surface. Edwards testified that the Green Jorns AG

Folding Machine is approximately 21 feet long and the Blue Jorns AG Folding Machine is approximately 32 feet long. Thus, the points of operation and danger zones are accessible to an operator or anyone further along the length of the machine and out of view of the operator.

c. Guarding

The Appeals Board has held that if a safety order requires that employee protection against a particular hazard must be provided by means of positive guarding or some other safety device, then warnings and specific instructions on how to avoid the hazard are not an acceptable alternative. (*Bethlehem Steel Corp.*, *supra*, Cal/OSHA App. 78-723; *City of Los Angeles, Department of Public Works*, *supra*, Cal/OSHA App. 85-958.) Administrative policies do not substitute for mechanical protection. (*Id.*) The purpose of a guard is to prevent accidental or unintended contact with a hazard. (*Pacific Westline, Inc.*, Cal/OSHA App. 10-0278, Decision After Reconsideration (Dec. 20, 2010).)

*Ridge Cap Machine*

Edwards testified that there was no guard in place prior to the inspection to prevent an employee's hands from entering the point of operation.

*Green and Blue Jorns AG Folding Machines*

It is undisputed that the clamping and folding points of operation on these machines were not guarded. Employer and the Division both provided evidence showing that guarding for the Green and Blue Jorns AG Folding Machines was available, but Employer asserted that such guarding was not feasible.

When an employer has compelling reasons for failing to meet the requirements of a safety order, Labor Code section 6450 permits the employer to apply to the Division for a temporary variance from an applicable standard. Under section 143, an employer may apply to the Standards Board for a permanent variance by showing it has an alternate program of equal or superior safety to that presented by the safety order. However, absent a variance, an employer remains subject to the requirements of the safety order.

Employer further argued that having no guards was the industry standard, and in fact, the manufacturer does not sell the machines with guards. However, the Division is not obligated to take into consideration the industry standard when enforcing a safety order, and Employer may not ignore a safety order in reliance on its industry's own practices. (*Empire Pro-Tech Industries*, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008).)

The Division demonstrated through a preponderance of the evidence that Employer failed to guard the points of operation of the Ridge Cap Machine, Green Jorns AG Folding Machine, and Blue Jorns AG Folding Machine, thereby exposing employees to the pressing and squeezing hazards of each of the machines. The Division thus met its burden and established a violation of section 4184, subdivision (b). Accordingly, Citation 2, Item 1, is affirmed.

**3. Is the Division estopped from issuing a citation to Employer for failure to guard the Double High Machine due to prior inspections by the Division or the Federal Occupational Safety and Health Administration?**

Employer asserted that it should not be cited for failing to guard the terminus of the Double High Machine because the Division inspected the same machine in 2012 and did not find a violation for failure to guard the terminus. Employer further argued that it could not have reasonably known it needed guarding if the compliance officer in 2012 did not identify it as hazardous. Employer seems to generally present an argument that the prior inspection serves as approval for unidentified hazards. Employer also advanced the argument that because the Federal Occupational Safety and Health Administration (Fed/OSHA) did not cite the Jorns AG Folding Machines, the machines should be exempt from citation by the Division.

a. Prior Inspection by the Division

Employer provided a copy of the Division's prior citation in 2012 and the testimony of Edwards, who was present for that inspection. Edwards testified that the compliance officer walked around the entire machine, including the terminus, and issued a citation for guarding failures at only the top and sides of the machine. Employer argues that the Division thus provided tacit approval of the sufficiency of guarding at the terminus.

Employer appears assert estoppel as an affirmative defense. The Appeals Board has rejected arguments that a previous Division inspection which did not identify a particular hazard at the work site may form the basis of a valid defense to a later citation for that specific hazardous condition. Safety inspections by the Division do not serve as permanent approval of unnoticed, existing hazards. (*Fibreboard Box & Millwork Corp.* Cal/OSHA App. 90-492, Decision After Reconsideration (Jun. 21, 1991).) Prior inspections finding no violations do not relieve Employer of its duty to have a plan nor does it excuse any other violation. (*Advanced Components Technology*, Cal/OSHA App. 91-1045, Decision After Reconsideration (Nov. 13, 1992).)

The Division's prior inspection thus may not be considered a basis for a valid defense to the pending citation. For the foregoing reasons, this defense fails.

b. Prior Inspection by the Federal Occupational Safety and Health Administration

Edwards testified that its other facilities located outside of California also use the Green and Blue Jorns AG Folding Machines. Edwards testified that Employer's California and out-of-state facilities are inspected by Fed/OSHA. He stated that the out-of-state Jorns AG Folding Machines were subject to Fed/OSHA inspections, as well as the occupational safety and health administrations of other states, and they have never been cited.

The Appeals Board has long found that actions of Fed/OSHA cannot be the basis of estoppel against the Division as the two agencies operate independently and enforce different sets of safety standards. (*Owens-Illinois Glass Container, Inc.*, Cal/App. 09-2021, Decision After Reconsideration (Jun. 16, 2014).) Prior Fed/OSHA inspections do not bear on the validity of a citation by the Division. In *Advanced Components Technology, supra*, Cal/OSHA App. 91-1045, the Appeals Board held:

Employer's arguments that [...] neither federal OSHA nor the Division cited Employer for not having a guard in previous inspections are irrelevant in deciding whether the citation was proper.

For these reasons, this defense also fails.

Prior inspections from the Division or Fed/OSHA do not bar the Division from issuing citations to an employer later. For the foregoing reasons, Employer's affirmative defense of estoppel fails.

**4. Did the Division establish a rebuttable presumption that the citations were properly classified as Serious?**

The Division classified both Citation 1 and Citation 2 as Serious. Labor Code section 6432, subdivision (a), sets forth the evaluative framework for determining whether a citation has been properly classified as Serious. It provides:

(a) 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. The actual hazard may consist of, among other things:

[...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

[...]

Labor Code section 6432, subdivision (e), further provides that "serious physical harm," means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in, among other things, the loss of any member of the body or any serious degree of permanent disfigurement.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Fernandez testified that she was current in her Division-mandated training at the time of the hearing. Therefore, under Labor Code section 6432, subdivision (g), Fernandez is deemed competent to offer testimony relevant to the issue of whether the violations were properly classified as Serious.

#### *Double High Machine*

Fernandez testified that the exposed in-running cylinders of the Double High Machine presented an entanglement hazard, and that the rollers at the top created nip points along the top of the frame. She identified the potential for broken bones, crushing, laceration, or amputation injuries if someone came into contact with the rotating parts.

### *Ridge Cap Machine*

Fernandez testified that when the space between the unguarded dies allowed for fingers to fit through. She testified that when the dies close, the pressing or squeezing forces may cause a crushing injury, broken bones, laceration, or amputation to a part of the body caught between the dies.

### *Green and Blue Jorns AG Folding Machines*

Fernandez testified that the clamp and the folding arm of the Green and Blue Jorns AG Folding Machines presented crushing, amputation, and laceration hazards if a hand or finger catches at these points of operation.

Accordingly, the Division established a rebuttable presumption that Citation 1 and Citation 2 were properly classified as Serious.

#### **5. Did Employer rebut the presumption that the violations were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence have known, of the existence of the violations?**

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Each of the machines will be examined in turn.



### *Double High Machine*

The Division provided Employer's job hazard analysis for the Double High Machine. It identifies pinch points, crushing, and laceration injuries, showing the Employer was aware of these hazards. The Division also provided proof that Employer performed weekly inspections of the Double High Machine. The job hazard analysis and inspections show Employer had multiple opportunities to identify and eliminate exposure to the hazard, but the record demonstrates Employer did not.

Employer argued that it is unreasonable to expect Employer to have greater expertise than the Division, which, in 2012, did not cite Employer for the unguarded terminus. However, as discussed above, a prior inspection does not relieve Employer from its duty to exercise reasonable diligence. Thus, Employer failed to rebut the presumption.

### *Ridge Cap Machine*

Employer failed to rebut the presumption because the Division provided Employer's lock out tag out procedures for the Ridge Cap Machine which identifies crushing injury and "caught in" injury among other hazards, showing Employer was aware of these hazards. Fernandez also testified that Employer performed regular inspections of the machine. Here too, Employer had several opportunities to identify and eliminate exposure to the hazard, but did not.

### *Green and Blue Jorns AG Folding Machines*

Edwards testified that he evaluated the Green and Blue Jorns AG Folding Machines for hazards and identified a pinch point between the upper and lower clamps. He identified the folding arm as a moving part but did not consider it a pinch point. The Division presented Employer's lock out tag out procedures for the Green and Blue Jorns AG Folding Machines which identify crushing injury and "caught in injury" among other hazards. Additionally, Fernandez testified that Employer performed regular inspections, demonstrating that Employer had opportunities to identify hazards and eliminate exposure to employees. Again, Employer had several opportunities to identify and eliminate exposure to the hazards, but did not. Thus, Employer failed to rebut the presumption.

Employer argued against the Serious classifications in its brief, stating that no injuries ever occurred at the unguarded areas of the four machines. A lack of prior injury relates to the likelihood of an accident, a consideration affecting penalty calculation, not an employer's knowledge of a hazard. As discussed previously, these machines were located in the open. Hazardous conditions in plain view constitute Serious violations since the employer could detect them by exercising reasonable diligence. (*Home Depot USA, Inc.*, Cal/OSHA App. 15-2298, Decision After

Reconsideration (May 16, 2017).) A machine is in plain view if it is located in an employer's facility and is of sufficient size to be easily detectable and recognizable. (*Nolte Sheet Metal, supra*, Cal/OSHA App. 14-2777.) There is no dispute that these machines are all large and have conspicuous moving parts or points of operation.

Accordingly, Employer has failed to rebut the presumption that the violations were properly classified as Serious.

#### **6. Are the proposed penalties reasonable?**

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) However, the Division must provide proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra*, Cal/OSHA App. 01-2346.)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with Division policy and procedure, will be found to have met its burden of showing the penalties were calculated correctly. (*MI Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) In the immediate matter, the Division introduced its proposed penalty worksheet, but did not assert it calculated the penalties according to Division policy and procedure. Fernandez offered testimony pertaining to each of the applicable penalty criteria.

An initial base penalty of \$18,000 is assessed for all Serious violations. (§336, subd. (c).) Both Citation 1 and Citation 2 are Serious violations and the base penalty of \$18,000 applies to each. Each base amount is subject to adjustments for Severity, Extent, and Likelihood of each violation, and adjustment credits of Good Faith, Size, and History of Employer are applied to the penalty total.

### **Severity**

The Severity of a Serious violation is automatically High. (§335, subd. (a)(1)(B).) Fernandez testified she applied High Severity, and so the correct base penalty for Citation 1 and Citation 2 is \$18,000 as to each.

### **Extent**

Section 336, subdivision (c)(1), provides that Extent for a Serious violation is rated under section 335, subdivision (a)(2), which provides:

ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.

HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

Further, section 336, subdivision (c), provides that for a rating of Low, 25 percent of the base penalty shall be subtracted; for a rating of Medium, no adjustment to the base penalty shall be made; and for a rating of High, 25 percent of the base penalty shall be added.

### *Citation 1*

Fernandez testified that she applied Medium Extent because fewer than 50 percent of the machines that perform a similar action to the Double High Machine were in violation of the safety order. As a result, the penalty does not change.

### *Citation 2*

Fernandez testified that she applied Medium Extent because there were a total of three machines that performed similar actions and approximately 50 percent of them were in violation of the safety order. As a result, the penalty does not change.

### **Likelihood**

Section 336, subdivision (c)(1), provides that Likelihood for a Serious violation is rated under section 335, subdivision (a)(3), which states:

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as: LOW, MODERATE OR HIGH

Further, section 336, subdivision (c), provides that for a rating of Low, 25 percent of the base penalty shall be subtracted; for a rating of Medium, no adjustment to the base penalty shall be made; and for a rating of High, 25 percent of the base penalty shall be added.

#### *Citation 1*

While Fernandez explained that Likelihood was determined by the probability of the occurrence of an injury, she did not explain why she placed Likelihood at Low for the Double High Machine. Applying Appeals Board precedent, maximizing credits to minimize the penalty when a calculation is not justified, the Likelihood shall remain Low. As such, 25 percent of the penalty, or \$4,500, is subtracted from the base penalty of \$18,000, resulting in a gravity-based penalty of \$13,500.

#### *Citation 2*

Fernandez testified that she placed Likelihood at Low based on the probability of the occurrence of an injury. She testified that there have been no injuries on the machines at that site but added that she could not preclude the possibility of injuries at other locations. As such, 25 percent of the penalty, or \$4,500, is subtracted from the base penalty of \$18,000, resulting in a gravity-based penalty of \$13,500.

#### **Good Faith**

Section 335, subdivision (c), provides that an adjustment credit for Good Faith may be applied based on the quality and extent of an employer's safety program, and includes indications of an employer's desire to comply with safety regulations. The ratings are Good for an effective safety program and a reduction of the gravity-based penalty by 30 percent, Fair for an average safety program and a penalty reduction by 15 percent, and Poor for no effective safety program and no reduction to the penalty.

Fernandez testified that she rated Employer's Good Faith as Fair because the Employer has a good safety program and worked well with her, but that violations still remained and she reasoned there was thus room for improvement. Fernandez testified that she applied the 15 percent credit to the gravity-based penalties of Citations 1 and 2.

### **Size**

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that an adjustment credit may be applied for Size when an employer has fewer than 100 employees. For employers with fewer than 50 employees, 20 percent of the gravity-based penalty shall be subtracted. Fernandez testified that Employers had fewer than 50 employees at the site and she applied the 20 percent credit to the gravity-based penalties of Citations 1 and 2.

### **History**

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a negative history of violations in the past three years, based upon no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees, a maximum 10 percent reduction of the penalty may be applied.

Fernandez testified that she searched Employer's history going back five years and found no history of previous violations. Fernandez testified that she applied the maximum 10 percent credit to the gravity-based penalties of Citations 1 and 2.

The application of the 15 percent Good Faith, 20 percent Size, and 10 percent History credits, results in a 45 percent reduction of the gravity-based penalty of \$13,500, or \$6,075, resulting in adjusted penalties of \$7,425 each for Citation 1 and for Citation 2.

### **Abatement**

Section 336, subdivision (e)(2), permits the Division to provide a 50 percent abatement credit. Fernandez testified that that Employer was entitled to the 50 percent abatement credit for Citation 1 because its abatement for the Double High Machine was satisfactory and she reduced the adjusted penalty for Citation 1 to \$3,710. Fernandez testified that Employer was not entitled to abatement credit for Citation 2 because although abatement for the Ridge Cap Machine was appropriate, the violations of the remaining machines were not abated and so there is no change was made to the adjusted penalty of \$7,425 for Citation 2.

Employer did not present any evidence or argument to contradict Fernandez's testimony. Accordingly, the penalty of \$3,710 for Citation 1, Item 1, and \$7,425 for Citation 2, Item 2, are found reasonable.

### Conclusions

The evidence supports a finding that Employer violated section 4002, subdivision (a), by failing to guard the moving parts at the terminus of the Double High Machine. The violation is properly classified as Serious and the proposed penalty is found to be reasonable.

The evidence supports a finding that Employer violated section 4184, subdivision (b), by failing to guard the points of operation of the Ridge Cap Machine, Green Jorns AG Folding Machine, and Blue Jorns AG Folding Machine. The violation is properly classified as Serious and the proposed penalty is found to be reasonable.

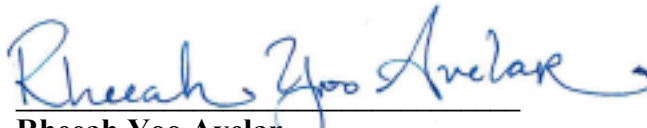
Accordingly, Employer's appeals of Citation 1, Item 1, and Citation 2, Item 1, are denied.

### Order

It is hereby ordered that Citation 1, Item 1, be affirmed, and the penalty assessed as set forth in the Summary Table.

It is further ordered that Citation 2, Item 1, be affirmed, and the penalty assessed as set forth in the Summary Table.

Dated: 03/16/2021

  
Rheeah Yoo Avelar  
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD**

Inspection No.: **1405439**

Employer: **MCELROY METAL MILL, INC. dba MCELROY METAL**

Date of hearing(s): January 8, 2021, December 29, 2020, December 4, 2020, November 10, 2020, August 19, 2020, May 29, 2020, March 18, 2020

**DIVISION'S EXHIBITS**

Exhibit Number	Exhibit Description	Status
1	Jurisdictional Documents	Admitted Into Evidence
2	PDTU Training	Admitted Into Evidence
3 Mod 1	1AY Document Request Mod 1	Admitted Into Evidence
4-1	Photo of Double High Machine Rear Unguarded	Admitted Into Evidence
4-1 Mod 1	Photo of Double High Machine Rear Unguarded Mod 1	Admitted Into Evidence
4-2	Photo of Double High Machine Side	Admitted Into Evidence
5 Mod 1	Employee List Mod 1	Admitted Into Evidence
6	Facility Layout Diagram	Admitted Into Evidence
6 Mod 1	Facility Layout Diagram Mod 1	Admitted Into Evidence
7	Double High Machine Job Hazard Analysis	Admitted Into Evidence
8-1	1BY Double High Machine	Admitted Into Evidence
8-2	Photo of Double High Machine (Pic 1)	Admitted Into Evidence
8-5	Double High Machine unguarded rolls with explanation	Admitted Into Evidence
8-5 Mod 1	Double High Machine unguarded rolls with explanation Mod 1	Admitted Into Evidence
8-6	Double High Machine guarded explanation	Admitted Into Evidence
9	C-10 Proposed Penalty Worksheet	Admitted Into Evidence
10	OSHA 5 year history	Admitted Into Evidence
11-1	Photo of Ridge Cap Machine unguarded	Admitted Into Evidence

11-1 Mod 1	Photo of Ridge Cap Machine unguarded Mod 1	Admitted Into Evidence
11-2	Photo of Ridge Cap Machine unguarded rear	Admitted Into Evidence
11-3	Photo of Ridge Cap Machine Point of Operation opening	Admitted Into Evidence
11-4	Photo of Ridge Cap Machine ridge opening	Admitted Into Evidence
11-5	Photo of Ridge Cap Machine location	Admitted Into Evidence
12	Ridge Cap Machine LOTO	Admitted Into Evidence
13-1	1BY Ride Cap Machine response 6pg	Admitted Into Evidence
13-2	Photo of Ridge Cap Machine Pic 1 explanation	Admitted Into Evidence
13-3	Photo of Ridge Cap Machine Pic 2 explanation	Admitted Into Evidence
14-1	Photo of Green Jorns	Admitted Into Evidence
14-2	Photo of Green Jorns opening	Admitted Into Evidence
16	Bender Jorns LOTO	Admitted Into Evidence
17-1	1BY Jorns response 12pg	Admitted Into Evidence
18-2	Weekly Safety Inspection	Admitted Into Evidence
19	OSHA Required Training Total Staff	Admitted Into Evidence

### EMPLOYER'S EXHIBITS

Exhibit Letter	Exhibit Description	Status
E-1	2012 July 30 2012 Serious Accident Citation	Admitted Into Evidence
E-8	2020 Aug 3 Affidavit of Gerald Doss	Admitted Into Evidence
E-9	2020 Aug 3 Affidavit of Raymond Bailey	Admitted Into Evidence
E-10	2020 Aug 3 Affidavit of Matthew Edwards	Admitted Into Evidence

### JOINT EXHIBITS

Exhibit Number	Exhibit Description	Status
Joint 1	Video of Green Jorns (1:58 min)	Admitted Into Evidence



Joint 2	Video of Blue Jorns (59 sec)	Admitted Into Evidence
Joint 3	Video of Twinmatic (43 sec)	Admitted Into Evidence
Joint 4	Video of ER Possible Abatement (1:19 min video of email and video demonstration)	Admitted Into Evidence
Joint 5	Video of Jorns & Schechtel 2-24-15 (9 min)	Admitted Into Evidence

Witnesses testifying at hearing:

Raymond Bailey  
Matthew Edwards  
Gerald Doss  
Elia Fernandez

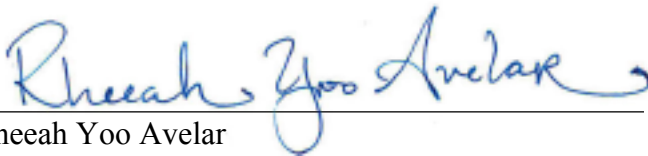
ER Maintenance Technician  
ER Operations Manager  
Employer's Cell Leader  
Associate Safety Engineer Cal/OSHA,  
High Hazard Unit South

**APPENDIX A**  
**CERTIFICATION OF HEARING RECORD**

Inspection No.: **1405439**

Employer: **MCELROY METAL MILL, INC. dba MCELROY METAL**

I, Rheeah Yoo Avelar, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.



Rheeah Yoo Avelar

03/16/2021

Date

## SUMMARY TABLE

### OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: <b>MCELROY METAL MILL, INC. dba MCELROY METAL</b>	Inspection No. <b>1405439</b>
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Citation Issuance Date: **09/11/2019**

C I T A T I O N	I T E M	SECTION	T Y P E	CITATION/ITEM RESOLUTION	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED
1	1	4002 (a)	S	No change	A		\$3,710.00	<b>\$3,710.00</b>
2	1	4184 (b)	S	No change	A		\$7,425.00	<b>\$7,425.00</b>
<b>Sub-Total</b>							<b>\$11,135.00</b>	<b>\$11,135.00</b>

**Total Amount Due\*** **\$11,135.00**

*\*You may owe more than this amount if you did not appeal one or more citations or items containing penalties.  
Please call (415) 703-4291 if you have any questions.*

#### PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:  
**Department of Industrial Relations**

2. Write the **Inspection No.** on your payment

3. If sending via US Mail:  
 CAL-OSHA Penalties  
 PO Box 516547  
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:  
 US Bank Wholesale Lockbox  
 c/o 516547 CAL-OSHA Penalties  
 16420 Valley View Ave.  
 La Mirada, CA 90638-5821

*Online Payments can also be made by logging on to [http://www.dir.ca.gov/dosh/CalOSHA\\_PaymentOption.html](http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html)*

**-DO NOT** send payments to the California Occupational Safety and Health Appeals Board-

**Abbreviation Key:**

G=General	R=Regulatory	Er=Employer
S=Serious	W=Willful	Ee=Employee
RG=Repeat General	RR=Repeat Regulatory	RS=Repeat Serious
		A/R=Accident Related