BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1291481**
SIERRA FOREST PRODUCTS **P.O. BOX 10060** **TERRA BELLA, CA 93270** **Employer**	**DECISION**

Sierra Forest Products (Employer) is a lumber company. On January 30, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ronald Chun, commenced an accident investigation of Employer's work site located at 9000 Road 234 in Terra Bella, California (work site). On June 26, 2018, the Division issued one citation to Employer. The citation alleges that Employer failed to ensure that a machine was stopped and de-energized or disengaged from the power source and mechanically blocked or locked at its movable parts, if necessary, to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification of the citation, the reasonableness of abatement, and the reasonableness of the proposed penalty. Employer also asserted numerous affirmative defenses, including the Independent Employee Action Defense.[1]

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), in Fresno, California, on November 28, 2018, September 24 and 25, 2019. Additional hearing days were conducted from Sacramento, California, on May 25 through 27, 2021, and June 9, 16, and 17, 2021, with the parties and witnesses appearing remotely via the Zoom video platform. Perry Poff, attorney at Donnell, Melgoza & Scates LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. This matter was submitted for Decision on December 11, 2021.

[1] Except where discussed in this Decision, Employer did not present evidence in support of other affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition For Reconsideration (May 26, 2017); see also *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).)

Issues

1. Did Employer fail to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation?

2. Did Employer establish the Independent Employee Act Defense?

3. Did the Division establish that the citation was properly classified as Serious?

4. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

5. Did the Division establish that the citation was properly characterized as Accident-Related?

6. Were the abatement requirements reasonable?

7. Is the proposed penalty reasonable?

Findings of Fact

1. On December 29, 2017, Lucio Meza (Meza) was an employee of Employer. Meza was injured while clearing a jam in Employer's Coastal Planer, suffering amputation of his fingers in a manner that included bone loss.

2. The Coastal Planer (Coastal Planer or the Planer) consists of many parts including feed rollers (rollers or feed rollers) and cutting heads (heads or cutting heads).

3. The Planer is involved in processing wood at Employer's work site and jams can occur at various places throughout the Planer during the processing. Employer had other planers at the work site.

4. Each jam is unique and the severity of the jam, whether minor or major or something in-between, is unknown at the time that the jam occurs. Employer defines the severity of the jam by the method used to resolve the jam.

5. Employer's procedure for unjamming the Planer includes the following steps: stopping the rollers, though not necessarily the heads; opening the guard panel to the Planer to allow an employee to examine the situation inside the Planer; and proceeding with a series of escalating attempts to unjam the Planer.

6. The series of escalating attempts to unjam the Planer range from using the rollers and extension tools to clear a jam to using Lockout/Tagout to have more access to the Planer to clear a jam.

7. The Coastal Planer can be stopped and the power source can be de-energized or disengaged during the clearing of all jams. The Planer does not need to be in operation for clearing jams. Employer prefers to keep the cutting heads energized during some unjamming activities due to concerns about operational downtime, not operational necessity.

8. During the unjamming process that resulted in Meza's injury, Meza had not stopped or de-energized the cutting heads while clearing the jam.

9. Employer has a Lockout/Tagout policy and requires Lockout/Tagout for some, but not all, jams on the Planer.

10. Employer's Lockout/Tagout written policy requires the use of extension tools for clearing minor jams without stopping the cutting heads.

11. Employer's Lockout/Tagout policy and the practices actually employed do not provide a method for diagnosing which jams are minor or major other than through the escalating series of attempts to unjam the Planer.

12. The cutting heads are inset with large, sharp metal blades and it takes approximately seven minutes and 30 seconds for the heads to stop spinning on their own when the power to the heads is turned off due to the momentum of the heads.

13. Employer's employees have used sticker sticks, an extension tool made of wood and supplied to employees for clearing jams, to slow down the heads so that they will stop more quickly.

14. At the time of the accident, Employer made sticker sticks available to employees to use for unjamming the Planer. However, employees also used their hands to remove some wood from the Planer.

15. Meza used his hand rather than an extension tool during the unjamming process that resulted in his injury.

16. Meza's training on the Coastal Planer and another planer at the work site took place approximately five years prior to the accident. Meza was primarily trained on the other planer, which had a different configuration than the Coastal Planer. Meza was trained by David Arellano (Arellano) and Octavo Ortiz (Ortiz) in how to operate the planers.

17. Using hands to clear jams while the Planer was energized was against Employer's safety policy. However, Meza was not trained according to that safety policy. Meza's training included the instruction that he was permitted to use his hands to retrieve wood from a planer in certain instances. Meza observed a trainer using the trainer's hands, instead of the extension tool, to retrieve wood from a planer.

18. At the time of the accident, Meza was not aware that using his hands was against Employer's safety policy.

19. Meza did not receive further training after his initial training on the planers. However, he was occasionally present to operate the planers to cover breaks or fill in as needed during the five year period after his training ended.

20. Meza had operated the Coastal Planer for approximately a year prior to the accident.

21. After the beginning of the hearing in this matter, Employer obtained, made available, and trained employees on the use of, an alternate extension tool that allows employees to grab pieces of wood with the tool, unlike the sticker stick which is a piece of wood without moving parts.

22. Extension tools used to clear a jam can become a hazardous projectile if they come into contact with a cutting head while in motion.

23. Wood in the Planer can be ejected in certain circumstances and poses an ejection hazard to employees.

24. After the issuance of the citation, Employer installed a new guard on the Planer, but the guard is opened to inspect a jam while the cutting heads are still energized and moving.

25. After the issuance of the citation, Employer installed a "redundant stop control for the feed rollers."

26. Employer had over 100 employees and the penalty was calculated in accordance with the penalty setting regulations set forth in California Code of Regulations, title 8, sections 333 through 336.

Analysis

1. Did Employer fail to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation?

Employer was cited for an alleged violation of California Code of Regulations, title 8,[2] section 3314, subdivision (c). Section 3314, subdivision (a), provides the conditions for the application of section 3314 and, therefore, it is first necessary to analyze section 3314, subdivision (a), to determine applicability of the cited regulation.

a. Applicability of section 3314

Section 3314, subdivision (a), provides in relevant part:

(1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.

(2) For the purposes of this Section, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment.

It is first necessary to determine whether the employee was involved in a cleaning, repairing, servicing, or adjusting operation of a machine. Thereafter it is necessary to determine whether the machine involved could cause injury to employees by way of unexpected energization or start up or through the release of stored energy.

In the instant matter, an employee was injured during the process of clearing a jam from Employer's Coastal Planer. As to the first element of the applicability analysis, the evidence

[2] All references are to California Code of Regulations, title 8, unless otherwise indicated.

indicates the employee was engaged in a cleaning or servicing activity because the plain language of section 3314, subdivision (a)(2), establishes that the unjamming process is a cleaning or servicing task that is performed on a machine.

As to the second element of the applicability analysis, the evidence indicates that Meza's fingers were amputated when exposed to the cutting heads when the heads had not been de-energized. Therefore, it is established that the energized machine was capable of employee injury. Further, it is inferred that the sudden energization of the cutting heads could cause injury to an employee. This is supported by the testimony of Johnnie Goodson (Goodson), Employer's Dry End Superintendent, who testified that the blades of the cutting heads are "sharp like razors" and that a hand could be injured by merely reaching in to the area of the blades. Indeed, Goodson testified that he had cut himself many times even when the machine was de-energized. Therefore, the sudden motion of such blades could cause injury.

Goodson testified that, even when the heads are no longer being powered by their motors, it takes approximately seven minutes and 30 seconds for the heads to stop spinning on their own. Additionally, Meza testified that he had seen other employees use sticker sticks, an extension tool made of wood that Employer provides for clearing jams, to slow down the heads to get them to stop more quickly because it takes so long for the heads to stop moving independently. Therefore, it is established that the cutting heads maintain considerable momentum when they have been in operation. It is noted that Goodson explained that if an extension tool used to clear a jam came into contact with a cutting head it could become a projectile. Further, Goodson testified that one reason that Employer's Lockout/Tagout (LOTO) policy is required for some servicing operations is that if a tool for adjusting the machine were to contact a cutting head, it would pose a potential hazard to employees. As such, even if the motor was no longer powering a cutting head, but where the head was still in motion, the evidence shows that if the stored momentum energy were released by striking an object or an employee's hand that injury to the employee could result.

Section 3314, subdivision (a), applies to machines and equipment in which unexpected energization or start up, from a de-energized state, or release of stored energy, from a state with stored energy, could cause injury to employees. Pursuant to the foregoing, section 3314 is applicable to the unjamming of the Coastal Planer and, therefore, it is necessary to determine whether there was a violation of section 3314, subdivision (c), for which Employer was cited.

Employer's post-hearing brief alleges that "the LOTO regulation does not apply to the minor servicing activity of clearing minor jams and does not apply to Mr. Meza's accident because there was no unexpected energization or startup of the Coastal Planer." (Employer's Post-Hearing Brief.) While this argument is discussed more fully below, it is noted that Employer has a LOTO policy and applies that policy to the Planer. Goodson, who participated in

the hearing as Employer's representative, testified about conditions where the unjamming process for the machine required LOTO. Employer's contention that section 3314 does not apply to minor servicing activities is rejected as section 3314, subdivision (a), does not contain any restrictions to minor servicing activities. Although section 3314 contains an exception to section 3314, subdivision (c), amongst other exceptions, not all subdivisions are subject to exception and not all exceptions reference minor servicing activities. Therefore it is not reasonable to conclude that section 3314, as a whole, does not apply to minor servicing activities. Additionally, Employer's contention that because there was no unexpected energization or startup of the Coastal Planer section 3314 does not apply is rejected because Section 3314, subdivision (a), does not require an unexpected energization or startup in order to apply. Rather, section 3314, subdivision (a), provides that section 3314 shall apply to machines and equipment which could cause employee injury if the machine were to have an unexpected energization or a release of stored energy.

b. Did the Division establish a violation of section 3314, subdivision (c)?

Section 3314, subdivision (c), provides in relevant part:

(c) Cleaning, Servicing and Adjusting Operations.

> Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

The Alleged Violation Description for Citation 1 provides:

> On or about, including, but not limited to, on 12/29/2017, Sierra Forest Products failed to ensure the Coastal Planer equipment, which was capable of movement, was stopped and the power source de-energized or disengaged prior to an employee conducting an unjamming operation. As a result, the employee sustained partial finger amputations when he attempted to remove broken pieces of lumber from the planer.

In order to establish a violation of section 3314, subdivision (c), the Division must establish that (1) during a cleaning, servicing, or adjusting operation (2) on a machine capable of movement, an employer (3) failed to stop the machinery or de-energize or disengage the power source of the machinery, or (4) failed to mechanically block or lock the equipment or machinery,

where necessary, (5) to prevent the inadvertent movement or release of stored energy. Additionally, the Division may establish a violation of section 3314, subdivision (c), by demonstrating Employer failed to place accident prevention signs or tags or both on the controls of the power source of the machinery or equipment.[3]

As discussed above, the Coastal Planer is a machine capable of movement and the unexpected movement of the machine or release of stored energy in the machine could result in injury to employees. Indeed, in the instant matter, Meza's fingers were amputated by the blades of the cutting head and Meza testified that the heads were spinning at the time of his accident. Notably, Meza, Arellano, and Goodson testified that the Coastal Planer is a device that can be stopped and the power source can be de-energized or disengaged. Additionally, Meza testified that the accident occurred when he was in the process of clearing a jam from the machine. Therefore, the evidence establishes that the Coastal Planer is capable of movement and, at the time of the accident, it was not stopped during the cleaning, servicing, or adjusting operation comprised of unjamming the Coastal Planer and that Meza was exposed to the hazard during the unjamming process. As such, the Division met its burden of proof to establish a violation of section 3314, subdivision (c).

c. Did the Employer establish that an exception to section 3314, subdivision (c), applies?

Employer argues that section 3314 does not apply "because there was no unexpected energization or startup of the Coastal Planer" and that Exception 1 to section 3314, subdivision (c), applies in the instant matter. Each will be addressed below.

i. <u>Applicability of section 3314 to activities where there is not an unexpected energization</u>

Employer's post-hearing brief argues that section 3314 does not apply to "the minor servicing activity of clearing minor jams and does not apply to Mr. Meza's accident because there was no unexpected energization or startup of the Coastal Planer." (Employer's Post-Hearing Brief.) Employer's argument does not address the considerable momentum of the cutting heads or the hazard posed by the cutting head blades. Instead, Employer contends that, because it did not de-energize the machine, the regulation contemplating de-energizing the machine cannot apply. Employer cites to *Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2217, Decision After Reconsideration (Apr. 18, 2017) (*Thyssenkrup*) in support of this contention.

[3] The parties did not provide any evidence regarding that accident prevention signs or tags required by section 3314, subdivision (c), so it is not discussed further herein.

In *Thyssenkrup,* the Appeals Board found that the machine in question had been de-energized, worked on, and re-energized repeatedly in order to diagnose and repair a problem. In the instant matter, the cutting heads were not de-energized or stopped during the unjamming process. The testimony at hearing indicates that this was not because it was necessary to keep the heads moving during the unjamming process, but rather, because Employer has a concern about operational downtime. Therefore, the facts of *Thyssenkrupp* are significantly distinct from the matter at hand because in *Thyssenkrupp* the re-energization was a necessary part of the repair process whereas in the instant matter the cutting heads' continued energization was not part of the unjamming process. Goodson's testimony clearly set forth that jams, generally speaking, can be cleared by following the LOTO process and opening up the Planer while the machine is entirely de-energized.

Adopting Employer's interpretation of the regulation would eviscerate the purposes of section 3314 when read as a whole, as it would allow for a machine that could cause injury through the release of stored energy or sudden energization to remain energized, contra to section 3314, subdivision (c), based on the premise that, because it was not de-energized it could not become suddenly energized or have stored energy. Section 3314, subdivision (a), plainly contemplates machines that could cause injury when changed from a de-energized state or state with stored energy, but it does not require that, as a condition of application, those machines must first be put in that state. However, whether an exception to the requirements of section 3314, subdivision (c), may apply to the instant matter is discussed below.

ii. Applicability of Exception 1 to section 3314, subdivision (c)

Employer argues that Exception 1 to section 3314, subdivision (c), should be applied in the instant matter. The Appeals Board has explained that "an exception is in the nature of an affirmative defense, and Employer bears the burden of proving the exception by a preponderance of the evidence." (*Walsh/Shea Corridor Constructors*, Cal/OSHA App. 1093606, Decision After Reconsideration (Feb. 9, 2018), citing *Roof Structures Inc.*, Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983), and *Koll Company*, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983); see also *Dade Behring, Inc.,* Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008).) "'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. [Citations.]" (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).)

Exception 1 to section 3314, subdivision (c), provides:

> Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

In the instant matter, Employer argues that the activity at issue was a minor servicing activity that took place during normal production operations that was routine, repetitive, and integral to the use of the equipment for production and that alternative measures, extension tools, were available to provide effective protection. At issue in the instant matter is whether (1) the activity involved was a minor servicing activity, and (2) whether the work was performed using alternative measures which provided effective protection.

1. Whether the servicing activity being performed was a minor servicing activity

It is first noted that the testimony from Meza, Arellano, and Goodson established that there is a broad range of jams that occur in the machine and the parties agreed that there are minor jams and major jams. The testimony of Arellano and Goodson also established that, when the jam occurs, it is uncertain whether the jam is minor or major or something in between. The testimony of Arellano and Goodson also sets forth that Employer's procedure for determining the severity of the jam is done by inspecting the machine and then attempting to remove the jam in an escalating series of attempts ranging from using the rollers and using extension tools, to implementing the LOTO procedures. This process raises an issue with Employer's argument as to the applicability of the exception.

The issue with Employer's argument is evidentiary in nature. Employer's argument that it would have been appropriate for Meza to use an extension tool relies on the premise that the jam involved in the accident was a minor servicing activity. Meza testified that, when he used the rollers to attempt to clear the jam, the board broke and wood was left in the cutting head section of the machine. Employer did not establish that this remaining portion of wood could be cleared with an extension tool or that its removal would resolve the jam. Employer, as the party with the burden of proof, failed to establish that the jam involved in the accident was a minor jam and, as such, fell short of demonstrating it was a minor servicing activity. As the exception indicates that it only applies to "[m]inor tool changes and adjustments, and other minor servicing activities," it is essential that Employer establish that the alternative method is only used during minor servicing activities or minor tool changes and adjustments. Employer has not established those facts here.

2. Whether the servicing activity was performed using alternative measures which provided effective protection

The second issue to address is whether the servicing activity was performed using alternative measures which provided effective protection. The Appeals Board considered relatively similar circumstances in *Dade Behring, Inc., supra,* Cal/OSHA App. 05-2203 (*Dade Behring*). In *Dade Behring*, the Appeals Board explained that the testimony established that the employer provided the injured employee with extension tools, extensive safety training, instructions to not put hands in harm's way, and emergency stop buttons. The Appeals Board also noted and emphasized that the injured employee did not use the available extension tool in the unjamming process. (*Id.*) The Appeals Board also explained that section 3314, subdivision (c)(1), could not apply where the injured employee did not use the extension tool. (*Id.*) The Appeals Board took note, as to the exception, that where the employer sought to identify extension tools as its alternate protective measure, the requirements of section 3314, subdivision (c)(1), regarding the use of extension tools and the need for thorough training in the specific uses of extension tools, persist. (*Id.*) The Appeals Board explained that insufficient evidence was presented regarding the specific training on the use of extension tools and that, although the injured employee was a long-time, experienced employee who was trained in the use of extension tools, the evidence was insufficient to demonstrate that he was trained in the use of such tools for the particular task he was performing on the morning of the accident. (*Id.*)

The Appeals Board noted that conclusory statements regarding elements of a safety order or an exception to a safety order do not sufficiently demonstrate that the proposed alternative measures are effective without further specific evidence demonstrating that such measures "rise to a level which justifies freedom from the general protective provisions in §3314(c)." (*Dade Behring, supra.*) Adding, "[e]xceptions are to be strictly construed in order to justify a freedom from the general rule." (*Id.*) Ultimately, the Appeals Board concluded that the employer in *Dade Behring* failed to demonstrate specific evidence showing how its measures constituted effective protection in performing the assigned tasks and, therefore, the measures taken by the employer could not be deemed to have been effective alternative measures. (*Id.*)

In the instant matter, Meza did not use the extension tool made available by Employer, the sticker sticks, during the unjamming process at issue. In *Dade Behring*, the Appeals Board

took note that section 3314, subdivision (c)(1), could not apply where the extension tool was not used. Section 3314, subdivision (c)(1),[4] provides:

> If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (eg., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

Here, Meza's failure to use an extension tool supports the conclusion that the alternate method selected by Employer in an attempt to comply with Exception 1 to section 3314, subdivision (c), was not effective. This is because, even assuming that the method could be effective for a minor servicing activity, where that method was not used, the exception does not apply.

Additionally, in *Dade Behring*, the Appeals Board explained that the evidence established that the employer provided the injured employee with extension tools, extensive safety training, and instructions to not put hands in harm's way. Unlike in *Dade Behring*, Meza testified credibly that he had seen other employees use their hands to retrieve wood from the machine. This testimony was supported by the testimony of Arellano, who, after much equivocating and tumultuous testimony, admitted that he had instructed Meza that in certain instances hands may be used to retrieve wood from the machine in the context of when it is not de-energized during LOTO. Meza was trained on how to operate the Planer by Arellano and Ortiz. This indicates that Meza's instruction and training was not to exclusively use extension tools or the LOTO procedure and that training against hand use was either ineffective or not present.

Further, Goodson testified that Meza received training on the unjamming process approximately five years prior to the accident. Goodson explained that Meza's training in operation of the Planer stopped in approximately 2012 when Meza started training to become a grader. Goodson testified that there would not have been subsequent training on Planer operation as Meza's focus would have been on training as a grader. Goodson testified that, despite the change in job assignment, Meza was periodically present to operate the Planer to cover breaks or fill in when needed. As noted in *Dade Behring*, section 3314, subdivision (c)(1), requires thorough training in the use of extension tools. Thorough training cannot be deemed to exist

[4] It is noted that Employer's closing brief did not raise section 3314, subdivision (c)(1), as a defense to the citation. However, as the point was discussed at hearing it is noted that it is well established through the testimony of Goodson that the Coastal Planer does not need to be in operation for unjamming operations and that it can be de-energized for such operations. It is further noted that Goodson's testimony establishes that keeping the Coastal Planer's cutting heads energized during unjamming is Employer's preference due to its concerns about operational downtime.

where an employee does not use the extension tool required by policy and the evidence adduced indicates the training on the tool was last visited approximately five years prior. Therefore, similar to the reasoning in *Dade Behring*, the evidence does not support the conclusion that the procedure adopted by Employer for unjamming the machine employed alternative effective protections.

Pursuant to the foregoing, Employer failed to establish that Exception 1 to section 3314, subdivision (c), applies.

2. Did Employer establish the Independent Employee Act Defense?

Employer asserted the Independent Employee Act Defense (IEAD) should apply in the instant matter. In *Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020), citing *Fedex Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained:

> There are five elements to the IEAD, all of which must be shown by an employer in order for the defense to succeed: (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 contrary to employer's safety rules. (*Synergy Tree Trimming, Inc.*, [Cal/OSHA App.] 317253953, Decision After Reconsideration (May 15, 2017) [other citations omitted].)

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

The first element of the IEAD requires that the employee be experienced in the job being performed. Meza testified that he had not worked in the Planer room for approximately one year prior to the accident. Goodson testified that Meza had been trained to work in the Planer room approximately five years prior to the accident. Meza testified that he had primarily been trained on a different planer at Employer's work site. Goodson testified that it takes a long time to train a planerman. The preponderance of the evidence does not support the conclusion that Meza was experienced in the job being performed.

The second element of the IEAD requires the employer to have a well-devised safety program, which includes training employees in matters of safety respective to their particular job assignments. "This element should be analyzed by taking a realistic view of the written program and policies, as well as the actual practices at the workplace. [Citation.]" (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.) As discussed further below, Employer's LOTO policy requires the use of extension tools in situations not permitted by section 3314, subdivision (c), or Exception 1 thereto. Additionally, the record indicates that Meza was not thoroughly trained in the use of extension tools within the meaning of section 3314, subdivision (c)(1), and as contemplated in Employer's argument that Exception 1 to section 3314, subdivision (c), should apply. Where a safety program is in direct contravention of a safety order and training is not established to meet the requirements of the safety order, it cannot be determined that the safety program was well-devised. (See *National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) where training deficiencies were found sufficient to establish that the second element of the IEAD was not met.)

The third element of the IEAD requires that Employer effectively enforces its safety program. As noted above, Meza did not use the extension tool required by Employer's policy on the date of the accident. While Employer's policy is not endorsed as compliant with section 3314, subdivision (c), it is noted that Meza did not follow that policy. Further, Meza testified credibly that he had observed other employees using their hands in the machine to retrieve wood. Additionally, the evidence adduced at hearing suggests that Meza's training on the use of extension tools was not thorough, as discussed above. Therefore, this evidence supports the conclusion that Employer did not effectively enforce its safety program.

The fourth element of the IEAD requires an employer to have a policy of sanctions which it enforces against employees who violate the safety program. Goodson testified that Meza was reprimanded for the accident but was uncertain of the details. Employer did not meet its burden of proof to establish a policy of sanctions because it did not put on sufficient evidence to do so.

The fifth element of the IEAD requires that the employee involved in the violation caused the safety violation which he knew was contrary to the employer's safety rules. *Synergy Tree Trimming, Inc., supra,* Cal/OSHA App. 317253953, the Appeals Board explained:

> The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements. [Citation.] In *Macco Constructors,* Inc. Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Board describes the purpose of the IEAD as follows:

> The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met. See *Mercury Service, Inc.*, [Cal/OSHA App.] 77-1133, Decision After Reconsideration (Oct. 16, 1980).
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> […]
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> Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances.

Meza testified credibly that, during his training, he observed his trainer use the trainer's hands to retrieve wood from a planer. Meza also testified credibly that he observed other employees using their hands in the machine. Arellano's testimony supported Meza's assertions. Meza's testimony established that he did not understand that using his hands was against Employer's safety policy and that he believed he was charged with clearing the jam as quickly as possible. Employer offered the hearsay testimony of Goodson, subject to objection by the Division that Meza came to Goodson immediately after the accident and, while seeking help for his injury, apologized for taking a "shortcut." This hearsay testimony is not relied upon for a finding of fact here as it does not supplement or explain other evidence. Even if this testimony were relied upon it does not suffice to meet Employer's burden to establish that Meza was aware that, at the time he was reaching in to the Planer, he was acting against Employer's safety policy. Rather, it is silent as to Meza's state of mind at the time of the accident and offers comment as to Meza's post-accident description of events. Further, Meza's testimony supports the conclusion that Meza was not aware that he was acting against Employer's safety policy because he was not trained that all hand use was forbidden and he observed other employees using hands to clear jams. This is further supported by the testimony of Arellano, as discussed above. Therefore, the evidence does not support a conclusion that Meza knew he was acting against Employer's safety policy at the time of the accident.

Pursuant to the foregoing, Employer did not meet its burden of proof to establish the IEAD.

3. Did the Division establish that the citation was properly classified as Serious?

Labor Code section 6432, subdivision (a),[5] in relevant part states:

[5] Labor Code section 6432 was amended effective January 1, 2021. The portions discussed herein reflect the version of Labor Code section 6432 as it was in effect at the time of issuance of the citation.

> 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 demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
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> […]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932).)

Employer conceded that Meza suffered finger amputation that included loss of bone. Meza testified that he lost portions of his fingers when reaching in to the Planer in the process of clearing a jam. Finger amputation falls within the meaning of "serious physical harm" as set forth in the Labor Code. As such, serious physical harm was not merely a realistic possibility, but an actuality in the instant matter. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

4. **Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?**

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

As discussed above, Employer had an ineffective safety policy. The evidence demonstrated that Meza's training was long prior to the accident and that employees used their hands to clear jams while the Planer was not de-energized. Moreover, as discussed above, Employer failed to establish that the exception to section 3314, subdivision (c), applies. Therefore, Employer's policy requiring the use of extension tools promoted violation of the safety order by failing to ensure de-energization pursuant to section 3314, subdivision (c), in those instances where de-energization was required. Accordingly, Employer failed to take 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 by failing to establish an effective safety policy.

It is, therefore, unnecessary to consider here whether Employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered because rebuttal of the presumption requires that Employer establish both elements. As such, Employer failed to rebut the presumption of a Serious classification and the Serious classification was properly established.

5. Did the Division establish that the citation was properly characterized as Accident-Related?

In *Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600, the Appeals Board explained:

> In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury."

(Citations omitted.)

Labor Code section 6302,[6] subdivision (h), provides that a "serious injury" includes, among other things, any injury or illness occurring in a place of employment or in connection with any employment in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement. In the instant matter, Meza suffered finger amputation, which meets the definition of a "serious injury." Additionally, the evidence demonstrates that the finger amputation was suffered while Meza was working on clearing a jam in Employer's Coastal Planer where the cutting heads had not been stopped. No alternative safety method was used during the unjamming process and de-energization was not performed. It is apparent in the instant matter that there is a causal nexus between the violation, the continued energization of the cutting heads where no alternative safety method was used, and the serious injury, the amputation of Meza's fingers. Accordingly, the citation is properly characterized as Accident-Related.

6. Were the abatement requirements reasonable?

Labor Code section 6600 provides:

> Any employer served with a citation or notice pursuant to Section 6317, or a notice of proposed penalty under this part, or any other person obligated to the employer as specified in subdivision (b) of Section 6319, may appeal to the appeals board within 15 working days from the receipt of such citation or such notice with respect to violations alleged by the division, abatement periods, amount of proposed penalties, and the reasonableness of the changes required by the division to abate the condition.

The question posed for abatement is where a violation is found whether an employer has subsequently complied with the requirements of the safety order or eliminated the alleged violation in some other manner. The evidence at hearing indicates that Employer is still operating the Coastal Planer and therefore Employer's efforts to comply with section 3314, subdivision (c), must be examined. Section 3314, subdivision (c), requires:

[6] Labor Code section 6302 was amended effective January 1, 2020. However, the analysis relied upon herein for the definition of "serious injury or illness" uses the definition effective on the date of issuance of the citation, June 26, 2018.

> Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

Employer offered evidence at hearing of steps taken after the issuance of the citation to abate the violation of section 3314, subdivision (c), discussed in turn below.

Employer provided evidence that a new guard was installed after the accident. However, the testimony at hearing established that the guard is regularly lowered without de-energizing the heads in order to clear jams. As such, Employer did not demonstrate that the guard ensured compliance with section 3314, subdivision (c).

Employer also provided evidence that it installed a "redundant stop control for the feed rollers." (Employer's Post-Hearing Brief.) The evidence offered at hearing indicates that de-energization of the feed rollers is not connected to the de-energization of the cutting heads. As such, Employer did not demonstrate that the installed control ensured compliance with section 3314, subdivision (c).

Employer provided evidence that, in its abatement efforts, it obtained a grabbing tool, trained employees on its use, and now follows up with employees to ensure the use of the grabbing tool, an alternate extension tool to the sticker stick. However, Employer's abatement arguments rely primarily on the exception to section 3314, subdivision (c), and the position that extension tools are an effective alternate method of protection, but this exception has not been shown to apply in all instances of unjamming the Planer.

Employer contends that the exception to section 3314, subdivision (c), applies to minor jams and asserts that such jams are minor servicing activities. However, the testimony of Arellano and Goodson sets forth that Employer's ongoing procedure for determining the severity of the jam is done by inspecting the machine and then attempting to remove the jam in an escalating series of attempts ranging from using the machine's rollers and using extension tools to relying on LOTO. With regard to abatement, this process raises an issue with Employer's argument as to the appropriateness of the use of extension tools.

The issue with Employer's argument is fundamental to the process adopted by Employer. The testimony of Arellano and Goodson makes it clear that it is not possible to know the extent of the jam, as noted above, because both testified that the determination of a jam being minor or major is based off of the method used to resolve the jam, not specific observable criteria.

Employer's LOTO policy and the testimony of Goodson and Arellano indicate that extension tools are used in attempts to clear jams without stopping the cutting heads. (See Ex. 15.) However, Goodson testified that, depending on the location and type of jam, an employee clearing a jam may ultimately determine that LOTO is required. If the extent of the jam is unknown, it is not reasonable to conclude that each jam is a minor servicing activity, and thereby allow for the use of extension tools in each instance, until the jam is discovered to be more significant and requiring of LOTO to resolve.

Further, the record does not clearly establish that, because the jam can be cleared with extension tools, that a jam is automatically a minor servicing activity. The testimony of Goodson and Arellano established that each jam is unique. While it would follow that, while some jams that can be cleared with extension tools could hypothetically be minor servicing activities, other jams will not necessarily be minor servicing activities and the inquiry is factually driven. Indeed, the time and effort involved in resolving the jam will likely bear more connection as to whether a jam is a minor servicing activity than whether a particular method is used to resolve a jam.

Exhibit 15 was offered as Employer's LOTO policy and no evidence of updates to that policy were offered at hearing. Employer's LOTO policy requires the use of extension tools for clearing minor jams. (Ex. 15.) Although the language of the LOTO policy appears to limit the use of extension tools to only minor jams, it does not address the fact that jams are not known to be minor or major until attempts have been made to resolve the jam. Therefore, the record does not support that the policy has been brought in compliance with section 3314, subdivision (c).

The exception to section 3314, subdivision (c), also does not apply because it does not appear that the extension tool will always be an alternative measure providing effective protection. It is noted that Goodson explained that, if an extension tool used to clear a jam came into contact with the cutting head, it could become a projectile. It is further noted that Goodson testified about an ejection hazard posed by wood in the Planer and that Employer's procedure includes lowering the guard to inspect the Planer while the heads are still energized. As Employer's procedure for clearing jams includes lowering the guard so that an employee may look into the Planer while the heads are still energized, and using a tool that, if used improperly, could become a hazardous projectile, it appears that Employer's procedure does not include alternate measures that provide effective protection. This is because it is deemed unreasonable to conclude that alternate measures to de-energization that introduce new potential hazards to employees are effective alternate protections where those alternate measures are not expressly contemplated by the regulation or demonstrated by the evidence to be necessary for the task of unjamming the machine.

Here, Employer provided insufficient evidence to support the assertion that complying with the safety order was unreasonable and that de-energization was not required by the safety

order.[7] The requirement that Employer comply with section 3314, subdivision (c), is found reasonable. Therefore, Employer is mandated to comply with the requirements of the safety order. However, consistent with the Appeals Board's previous precedent concerning abatement, this Decision does not specify the method of abatement. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (November 15, 2018).) Employer may select the least burdensome means of meeting the requirements of the cited section. (*Id.*)

7. Is the proposed penalty 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. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra*, Cal/OSHA App. 1092600.)

Section 336, subdivision (c), provides that the base penalty for a Serious violation shall be assessed at $18,000. Section 336, subdivision (d)(7), provides that the penalty for a Serious violation causing death or serious injury, illness, or exposure, may only be reduced for Size. As discussed above, the citation is properly classified as Serious and the violation resulted in a serious injury.

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that no adjustment may be made for Size when an employer has over 100 employees. Ronald Chun testified that Employer had more than 100 employees. Therefore, no adjustment is warranted for Size.

Accordingly, the proposed penalty is affirmed in the amount of $18,000.

Conclusion

The evidence supports a finding that Employer violated section 3314, subdivision (c), by failing to ensure that a machine was stopped and de-energized or disengaged from the power source and, if necessary, mechanically blocked or locked at its movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation. The violation was properly classified as Serious and properly characterized as Accident-Related. The proposed penalty is found reasonable.

[7] In *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, citing *City of Sacramento Fire Dept.*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989), the Appeals Board explained that "[i]f an Employer feels a safety order is unreasonable it should apply to the Standards Board for a variance or to have the safety order repealed or amended."

ORDER

It is hereby ordered that Citation 1 is affirmed and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Dated: 01/07/2022

Christopher Jessup
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.**