BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **KERN RIDGE GROWERS, LLC.** **P.O BOX 455** **ARVIN, CA 93203** **Employer**	Inspection No. **1334995** **DECISION**

Statement of the Case

Kern Ridge Growers, LLC (Employer) grows and processes carrots. On August 1, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Larry Johnson, commenced an accident investigation at a work site located at 14322 Di Giorgio Road, in Arvin, California (the site), after report of an injury at the site on July 4, 2018. On January 4, 2019, the Division cited Employer for 1) failure to guard a carrot-cutting machine, and 2) failure to ensure that a carrot-cutting machine was stopped and the energy source de-energized or disengaged prior to a cleaning operation.

Employer filed timely appeals of the citations on the grounds that the safety orders were not violated, the classifications of the violations were incorrect, and the proposed penalties were unreasonable. In Citation 2, Employer also contested the reasonableness of abatement requirements. Additionally, Employer asserted a series of affirmative defenses for both citations.[1]

This matter was heard by J. Kevin Elemendorf, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, in Bakersfield, California, on October 31, 2019. Ben Laverty IV, CSP, of the California Safety Training Corporation, represented Employer. Greg Clark, Senior Safety Engineer, represented the Division. The matter was submitted on December 20, 2019.

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[1] 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).) Employer presented no evidence regarding the reasonableness of abatement requirements in Citation 2, and as such, that ground for appeal is also deemed waived. At the hearing, the parties stipulated that the penalties for Citations 1 and 2 were calculated in accordance with the Division's policies and procedures. (Exhibit J-1.)

Issues

1. Did Employer violate section 4002, subdivision (a),[2] by failing to guard the Urschel Crosscut Slicer (Model 30) #20 carrot-cutting machine (the carrot-cutting machine)?

2. Did Employer violate section 3314, subdivision (c), by failing to ensure that the carrot-cutting machine was stopped and the energy source de-energized or disengaged prior to a cleaning operation?

3. Did Employer establish that it was in compliance with section 3314, subdivision (c)(1)?

4. Did Employer establish the Independent Employee Action Defense (IEAD) in Citation 1 or in Citation 2?

5. Did the Division establish rebuttable presumptions that Citations 1 and 2 were properly classified as Serious?

6. Did Employer rebut the presumptions in Citations 1 and 2 that the violations cited 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?

7. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

Findings of Fact

1. The five-eighths inch opening on the back side of the running carrot-cutting machine was unguarded.

2. Jesmer Parubrub (Parubrub) sustained a finger amputation when he reached with his left hand to remove dirt on the spinning carrot-cutting machine.

3. It is possible for the carrot-cutting machine to be cleaned when powered off.

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[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

4. A hose and water is not an extension tool – it is not equivalent to an extended swab, a brush, or scraper, or any other method or means used to protect employees from injury due to the movement of machinery. The hose and water was ineffective for the task of cleaning the carrot-cutting machine. Because the hose and water method was ineffective Parubrub used his hand to remove the dirt on the spinning carrot-cutting machine.

5. Parubrub received no specific training on the effective use of a hose and water as an extension tool.

6. At the time of the accident, Parubrub did not think that he was doing anything wrong.

7. Failure to guard the carrot-cutting machine could result in amputation or permanent disfigurement.

8. Failure to stop and de-energize the energy source, or disengage the unguarded carrot-cutting machine prior to a cleaning operation could result amputation or permanent disfigurement.

9. The unguarded carrot-cutting machine was in plain view at the site. The task of cleaning the running carrot-cutting machine was regularly conducted in plain view at the site.

10. Failure to stop the carrot-cutting machine prior to the cleaning operation was a cause of the injury sustained by Parubrub.

Analysis

1. Did Employer violate section 4002, subdivision (a), by failing to guard the Urschel Crosscut Slicer (Model 30) #20 carrot-cutting machine (the carrot-cutting machine)?

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, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on August 1, 2018, the employer did not install and maintain a guard on the Urschel Crosscut Slicer (Model 30) #20 machine before employees utilized the equipment.

Larry Johnson (Johnson), Associate Safety Engineer, testified that, at the time of the accident, the carrot-cutting machine had a five-eighths inch unguarded opening on the rear side of the machine. (Exhibit 3-5.) It was through this opening that the injured worker sustained a finger amputation while the machine was in operation. Employer presented no evidence to refute this testimony. In its closing brief, Employer concedes that, at the time of the accident, there existed a five-eighths inch opening on the rear side of the carrot-cutting machine.

Accordingly, the Division has met its burden, and a violation of section 4002, subdivision (a), is established.

2. Did Employer violate section 3314, subdivision (c), by failing to ensure that the carrot-cutting machine was stopped and the energy source de-energized or disengaged prior to a cleaning operation?

Section 3314, subdivision (c), provides:

> 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.

In Citation 2, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on August 1, 2018, the employer did not ensure that an Urschel Crosscut Slicer (Model 30) #20 machine capable of movement was stopped and the power source de-energized or disengaged prior to an employee cleaning the equipment. As a

> result, on or about July 4, 2018, the employee suffered a serious injury when he placed his hand through an opening in the powered equipment. The employer did not place accident prevention signs or tags or both on the controls of the power source of the equipment.

Exhibit C is the Instruction Manual for the carrot-cutting machine. Page 23 of the "Cleaning and Maintenance" section includes the following:

> Partially clean the machine by directing a stream of water or cleaning solution through the feed opening and discharge chute while the machine is running. It is particularly important that you must keep your hands, cleaning hose, and tools out of the feed opening and discharge chute.
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> All protective guards must remain in place while the machine is running.
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> Before beginning to clean or lubricate the internal parts, disconnect and lock out the electrical power source. Make sure that all machine parts have stopped before removing guards.
>
> After the guards are removed, always avoid exposed cutting parts and pinchpoints that can cause personal injury.

Employer had developed a practice wherein the employees cleaned the carrot-cutting machine by directing a stream of water through the feed opening or discharge chute while the machine was running. Although this method comports with the manufacturer's instructions, the unguarded opening in the side of the outer cover remained unprotected during the described cleaning operation.

Unrefuted testimony established that Parubrub was injured at an unguarded opening in the side of the outer cover while the machine was running, and not in the feed opening or discharge chute areas. Protective guards for the side of the outer cover appeared to be missing or non-existent, which created a cutting hazard. Employer performed a cleaning operation on the carrot-cutting machine while it was running, without considering the cutting hazard created by the five-eighth inch opening in the side of the outer cover. The machine was not stopped and the power source was not de-energized nor disengaged prior to the cleaning operation. These facts are sufficient to establish a violation of section 3314, subdivision (c).

3. Did Employer establish that it was in compliance with section 3314, subdivision (c)(1)?

Section 3314, subdivision (c)(1), under "Cleaning, Servicing and Adjusting Operations," 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.

In *Dade Behring Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008), the Appeals Board held:

> An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at the hearing. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982).)

Section 3314, subdivision (c)(1), has three elements which, if proven by an employer, would excuse the violation and result in the employer's appeal being granted. Employer must prove: (1) that the machinery must be capable of movement during this period in order to perform the specific task; (2) that the employer minimized the hazard by providing and requiring the use of extension tools or other methods or means to protect employees from injury due to such movement; and (3) that employees were made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

The first element is whether the machinery must be capable of movement during the cleaning operation in order to perform the task. Pete Smith, Operations Manager for Employer, testified that the carrot-cutting machines could be cleaned by utilizing a process in which the machine was turned off to spray it, then turned back on to spin the machine, then turned off again, repeating the process. This process would involve turning the machines off and on multiple times, and would involve several more hours of cleaning time. Accordingly, the carrot-cutting machine need not be running during the cleaning operation.

The second element requires employers to provide and require the use of extension tools or other methods or means to protect employees from injury. A hose and water is not an effective

extension tool – it is not equivalent to an extended swab, a brush, or scraper, or any other method or means used to protect employees from injury due to the movement of machinery. The hose and water method or practice was ineffective for the task of cleaning the carrot-cutting machine. Because the hose and water method was ineffective Parubrub used his hand to remove the dirt on the spinning carrot-cutting machine. There was no testimony that Employer minimized the hazard presented by the carrot-cutting machine by providing an effective extension tool or any other means or methods to protect employees from the cutting movement of the machine.

The third element requires employers to make employees familiar with the safe use and maintenance of such tools, methods or means, by thorough training. There was no evidence presented by Employer that demonstrated that Parubrub received specific training on the effective use of a hose and water as an extension tool. The evidence showed that Parubrub, while holding a hose in one hand, reached into the running carrot-cutting machine with his hand to clear dirt, which resulted in a finger amputation.

Employer has failed to prove any of the three elements, all of which are required to meet its burden of proof to establish an affirmative defense by way of section 3314, subdivision (c)(1). Therefore, Employer may not avail itself of this affirmative defense.

4. Did Employer establish the Independent Employee Action Defense (IEAD) in Citation 1 or in Citation 2?

In *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. "'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).)

Additionally, in *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:
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> > 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.*, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980).
>
> […]
>
> 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.

Appeals Board precedent holds that the IEAD is unavailable where the cited safety order requires protection against a particular hazard by means of positive guarding, since the purpose of a guard is to prevent inadvertent or accidental contact. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).)

Citation 1:

Employer's failure to provide adequate guarding for the carrot-cutting machine in this case falls within the purview of required positive guarding for which the IEAD does not apply. Therefore, the violation of section 4002, subdivision (a), is sustained.

Citation 2:

In the instant matter, Parubrub testified that, at the time of the accident, he was reaching with his hand to remove dirt on the carrot-cutting machine, and did not think that he was doing anything wrong. Employer provided no evidence that called into doubt the testimony of

Parubrub, and provided insufficient evidence to suggest that he knew that he was acting contra to Employer's safety requirements. As Employer bears the burden of proof, it has failed to demonstrate by a preponderance of the evidence that it is more likely than not that Parubrub's action was willful or intentional. Accordingly, Employer failed to establish the fifth element of the IEAD.

A failure to prove even a single element of the IEAD defeats the defense. Accordingly, Employer has failed to establish the IEAD, and the violation of section 3314, subdivision (c), is sustained.

5. Did the Division establish rebuttable presumptions that Citations 1 and 2 were properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

> 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 (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.

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).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment

that results in, among other possible factors, "the loss of any member of the body," and "any serious degree of permanent disfigurement" (Lab. Code §6432, subd. (e).)

Citation 1:

Johnson is current on his Division-mandated training. He testified that there is a realistic possibility that one could sustain an amputation or permanent disfigurement from an accident involving an unguarded carrot-cutting machine. Johnson observed Parubrub's amputation and the associated permanent disfigurement. In the instant matter, the injury sustained by Parubrub was not just a realistic possibility, but was an actuality. Therefore, in Citation 1, the Division established a rebuttable presumption that the violation was properly classified as Serious

Citation 2:

Johnson also testified that there is a realistic possibility that one could sustain an amputation or permanent disfigurement from an accident resulting from a carrot-cutting machine not being shut off during a cleaning operation. In the instant matter, the amputation injury and permanent disfigurement sustained by Parubrub was not just a realistic possibility, but was an actuality. Therefore, in Citation 2, the Division established a rebuttable presumption that the violation was properly classified as Serious.

6. Did Employer rebut the presumptions in Citations 1 and 2 that the violations cited 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) [; 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.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists.

The Appeals Board has long held that hazardous conditions in plain view constitute serious violations since the employer could detect them by exercising reasonable diligence. (*Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991).)

Citation 1:

Employer failed to guard the exposed five-eighth inch gap on the rear side of the carrot-cutting machine. This condition existed for years in the carrot-cutting room. This hazardous condition was in plain view and could have been detected by exercising reasonable diligence. (*Fibreboard Box & Millwork Corp.*, *supra,* Cal/OSHA App. 90-492.) With the exercise of reasonable diligence, Employer would have identified the need for guarding to address the hazard to workers performing cleaning operations near the rear of the carrot-cutting machine. As such, Employer failed to demonstrate that it did not, and could not, with the exercise of reasonable diligence, have known of the violation which existed at the time of the accident. Employer failed to meet its burden to rebut the presumption that the violation was properly classified as Serious. Therefore, the Serious classification of Citation 1 is sustained.

Citation 2:

Employer failed to stop and de-energize or disengage the energy source prior to a cleaning operation. Stopping the carrot-cutting machine during this operation was especially important to ensure worker safety because cutting blades were in motion within the unguarded

gap. Employer had conducted this type of cleaning operation for years, with a very apparent unguarded gap. The hazardous condition created by the unguarded machine was in plain view and could have been detected by exercising reasonable diligence. (*Fibreboard Box & Millwork Corp*., *supra,* Cal/OSHA App. 90-492.) With the exercise of reasonable diligence, Employer would have identified the need for guarding to address the hazard to workers performing cleaning operations near the rear of the carrot-cutting machine. As such, Employer failed to demonstrate that it did not, and could not, with the exercise of reasonable diligence, have known of the violation which existed at the time of the accident. Employer failed to meet its burden to rebut the presumption that the violation was properly classified as Serious. Therefore, the Serious classification of Citation 2 is sustained.

7. Did the Division establish that Citation 2 was properly characterized as Accident-Related?

In order for a citation to be characterized as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) 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." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

In *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." [Citation.] 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.]

Labor Code section 6302, subdivision (h), provides that a "serious injury" includes, in relevant part, any injury or illness occurring in a place of employment or in connection with any employment in which an employee suffers the loss of any member of the body or suffers any serious degree of permanent disfigurement.

The Division met its burden to demonstrate a causal nexus between the violation of section 3314, subdivision (c), and the finger amputation and permanent disfigurement of Parubrub. If Employer had shut off the carrot-cutting machine prior to the cleaning operation, Parubrub would not have suffered the finger amputation and permanent disfigurement. The Division established that Employer's failure to ensure that the carrot-cutting machine was

stopped and the energy source de-energized or disengaged prior to the cleaning operation was a cause of Parubrub's injury. Therefore, the citation was properly characterized as Accident-Related.

Conclusion

In Citation 1, the Division established that Employer violated section 4002, subdivision (a), by failing to guard the carrot-cutting machine The Division established the Serious classification. The penalty is reasonable.

In Citation 2, the Division established that Employer violated section 3314, subdivision (c), by failing to ensure that a carrot-cutting machine was stopped and the energy source de-energized or disengaged prior to a cleaning operation. The Division established the Serious classification and the citation was properly characterized as Accident-Related. The penalty is reasonable.

Order

It is hereby ordered that Citation 1 is affirmed and the penalty of $8,435 is sustained.

It is hereby ordered that Citation 2 is affirmed and the penalty of $22,500 is sustained.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: 01/03/2020

J. Kevin Elmendorf
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.**