BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
ANHEUSER-BUSCH, LLC **dba ANHEUSER-BUSCH** **15800 ROSCOE BLVD** **VAN NUYS, CA 91406** **Employer**	**1398352** **DECISION**

Statement of the Case

Anheuser-Busch, LLC. (Employer) is a beverage maker. Beginning April 24, 2019, the Division of Occupational Safety and Health (the Division), through Junior Safety Engineer Jesus Reyes, conducted an inspection arising from an injury at Employer's facility at 15800 Roscoe Blvd., in Van Nuys, California (the site).

On September 6, 2019, the Division issued three citations to Employer alleging violations of California Code of Regulations, title 8.[1] Citation 1 alleges that Employer failed to immediately report to the Division a serious injury occurring at the workplace. Citation 2 alleges that Employer failed to de-energize and lock-out a machine during cleaning operations. Citation 3 alleges that Employer did not develop and utilize machine specific hazardous energy procedures.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties. Employer asserted several affirmative defenses, including the Independent Employee Action Defense.[2]

The Division withdrew Citation 1, Item 1, at the commencement of the hearing in exchange for Employer's agreement to waive any rights to petition for or recover costs or fees pursuant to Labor Code section 149.5, or section 397. As such, only Citations 2 and 3 remain at issue.

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on August 25, 2022,

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] Except as otherwise noted in the 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).)

and January 10 and 11, 2023. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Sean Paisan, of Jackson Lewis P.C., represented Employer. Lisa Wong, Staff Counsel, represented the Division. The matter was submitted on July 19, 2023.

Issues

1. Did Employer fail to stop and disengage the pallet lift from power?

2. Did Employer fail to develop and utilize machine-specific hazardous energy control procedures?

3. Did Employer establish the Independent Employee Action Defense?

4. Did the Division establish rebuttable presumptions that Citations 2 and 3 were properly classified as Serious?

5. Did Employer rebut the presumptions that the violations in Citations 2 and 3 were Serious?

6. Is Citation 2 properly characterized as Accident-Related?

7. Are the abatement requirements for Citations 2 and 3 reasonable?

8. Are the proposed penalties reasonable?

Findings of Fact[3]

1. George Caro (Caro) was Employer's employee when he suffered a work-related accident on March 7, 2019.

2. Caro was attempting to remove a piece of wood from a machine at work when, unexpectedly, a moving part of the machine pinned his arm against the frame of the machine, injuring him.

3. Caro's supervisor and Operations Manager, Cory Wilson (Wilson), had directed Caro to perform a 5-S Audit (Audit) of the box-making area of Line 2, which is one of Employer's numerous assembly lines.

[3] Findings of Fact numbers 1, 2, and 17 are the stipulations of the parties.

4. An Audit is a machine review process which includes steps such as “Sort” “Standardize,” and “Shine.” The “Shine” step may reveal a need for cleaning.

5. Line 2 was not in operation when Caro began his Audit of the box-making area, which progressed into a deep cleaning.

6. Employer provided Caro with an air blow gun, broom, and grabber, but did not train him to use these tools and avoid using his hands when clearing debris in the pallet stacker (Stacker) located in the box making area.

7. During his Audit, Caro reached his hand into the Stacker to remove a large wooden fragment that jammed the pallet lift (Lift) inside the Stacker.

8. Airbags under the Lift inflate and deflate to move the Lift up or down.

9. Employer’s Safe Access to Machinery Standard Operating Procedures (SAM) requires pressing the nearest emergency stop (e-stop) and does not include instructions for blocking.

10. The e-stop prevents the light sensor in the Stacker from sending automatic signals to move the Lift, and it also prevents manually selected commands from the control panel from moving the Lift.

11. The e-stop does not disengage the Lift from sources of energy.

12. Caro performed SAM, pressing the e-stop, prior to his Audit.

13. The e-stop functioned properly, but when Caro reached into the Stacker for the wooden fragment, the Lift unexpectedly moved, pinning his arm.

14. Employer developed two written hazardous energy control procedures which provide different levels of de-energization for Line 2: Lock Out Tag Out Standard Operating Procedures (LOTO), as well as SAM.

15. SAM may be used in the box-making area, but no LOTO is designated for this area of Line 2.

16. Employer’s LOTO and SAM are not machine-specific and do not provide procedural steps for any of the machines.

17. Caro's injuries meet the definition of serious injury under Title 8 section 330, subdivision (h), and serious physical harm under the Labor Code section 6432.

18. Employer expected employees to be responsible for their own safety and Employer did not instruct supervisors to observe employees regularly.

19. The proposed penalties are calculated in accordance with the penalty-setting regulations.

Analysis

1. Did Employer fail to stop and disengage the pallet lift from power?

Citation 2 alleges a Serious, Accident-Related, violation of section 3314, subdivision (c), which requires:

> (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 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 inspection, the power source was not de-energized on Line 2 Box Making Pallet Stacker, nor was it locked out to prevent inadvertent movement during cleaning operations. As a result, on or about March 7, 2019, an employee was seriously injured when his arm was crushed between the frame of the machine and the pallet lift platform.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) "'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." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

To establish applicability of the safety order, the Division must show Employer was cleaning Stacker, which could cause injury upon unexpected start up or release of stored energy.

a. Does section 3314 apply?

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.

The Appeals Board has long recognized that there is an inherent danger in working around energized machinery and the danger is present however the activity around the energized machine is characterized. (*Dade Behring, Inc*., Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008) citing *Stockton Steel Corporation*, Cal-OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002).) The Appeals Board liberally construes terms in a safety order in order to effect the purpose of the regulation, and the overall Occupational Safety and Health Act. (*Dade Behring, Inc., supra,* Cal/OSHA App. 05-2203 [Broadly interpreting the terms "servicing or adjusting" as used in section 3314, subdivision (c).]).) Thus, the term "cleaning" must be liberally construed in relation to Caro's activities.

Caro testified that he and other employees worked on Line 2, which is one of Employer's glass bottling lines. He testified that a box-making station located at the beginning of this production line receives pallets of cardboard sheets for box production. The sheets unload for assembly and the empty pallets move to the Stacker for removal. The Stacker consists of a large metal cube-like frame with a platform at its base, the Lift. Pneumatic energy powers the Lift, causing it to rise or fall as the airbags below inflate or deflate. The Lift raises empty pallets above four "dogs," or retractable forks. Caro testified that these forks hold the growing stack of pallets. One by one, the Lift inside the Stacker adds emptied pallets to the bottom of growing stack, collecting several before removal.

Caro's supervisor, Wilson, informed the Division's Junior Safety Engineer Jesus Reyes (Reyes) that he assigned Caro to perform an Audit of the Line 2 box-making area. Caro testified that two of the five words in "5-S Audit" stand for "Sort" and "Standardize." Later in the proceedings, Employer's Assistant Operations Manager, Scott Shaeffer (Shaeffer), testified that another word is "Shine."[4] Caro testified that he was performing both an Audit and a deep cleaning,

[4] No further information regarding the nature or purpose of an Audit was provided.

and he considered them the same. The Division asserted that Caro was engaged in cleaning the Stacker when his injury occurred.

Reyes testified that he interviewed Caro, whose injury occurred while he was removing a piece of wood stuck in the Lift inside the Stacker in the box-making area of Line 2. Caro explained to Reyes that this type of deep cleaning occurs at least once monthly and lighter cleanings occur twice or more each month.

Caro testified that he began his Audit with tasks such as scraping glue, using pressurized air to remove debris, and wiping Plexiglass. Caro's air blow gun could not remove a large wooden fragment lodged in the corner of the Lift, so he used his hand to pull the fragment out. He thus reached into the Stacker. He characterized his task at the time of his injury akin to a deep cleaning.

As set forth above, section 3314, subdivision (a)(2), includes, "cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment." Thus, Caro was cleaning when he was clearing the jam. The parties stipulated the Lift unexpectedly rose and pinned his arm. For these reasons, the safety order is found to be applicable.

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

Citation 2 alleges a violation of section 3314, subdivision (c), which requires:

> (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 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 inspection, the power source was not de-energized on Line 2 Box Making Pallet Stacker, nor was it locked out to prevent inadvertent movement during cleaning operations. As a result, on or about March 7, 2019, an employee was seriously injured when his arm was crushed between the frame of the machine and the pallet lift platform.

In *Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), the Appeals Board interpreted the operative language in section 3314 as follows:

> [The] Section … imposes two primary safety requirements prior to cleaning, adjusting and servicing machinery: (1) machine parts capable of movement must be stopped, and (2) the power source must either be de-energized or disengaged. If the two primary requirements are not effective to prevent inadvertent movement, another requirement applies—the parts capable of movement must be mechanically blocked or locked in place.

Was the Lift stopped?

Employer presented a video modeling SAM for the Stacker. (Exhibit AAA.) It depicts pressing an e-stop on the Stacker. Employer's Senior Manager for Environmental Health and Safety, Christopher Harden (Harden), testified that the Stacker does not function when the e-stop is engaged. Shaeffer testified that using the e-stop and verifying nonoperation at the control panel ensures the Stacker is safe to enter. The video shows immobilization of the Lift despite manual commands at the control panel, demonstrating that the control panel cannot cause movement when the e-stop is engaged. Caro testified that he performed SAM prior to his task, including pressing the e-stop. Yet, the Lift still moved. As such, the Lift was not stopped as required by the regulation.

Was the Lift de-energized or disengaged from power?

Harden testified that Employer provided Caro both SAM and LOTO training and identified Caro's training materials. (Exhibit UU.) Close review of the SAM training section reveals an alert, "A Common Misconception is that this [SAM] is considered a zero energy state: WRONG!" The warning establishes that SAM does not entirely de-energize or disengage power to a machine.

Reyes testified that Caro explained to him that he inserted his hand in the Stacker to clear a piece of wood and thus triggered the light sensor, activating the Lift which then pinned his arm to the frame of the Stacker, injuring him. Employer contended that SAM prevents the light sensor from triggering the Lift. Shaeffer testified that the light sensor detects the presence of a pallet and sends a signal from a module which instructs the Lift to rise. Shaeffer testified that the e-stop de-energizes this signaling module and it thus could not have triggered movement as Caro claimed.

Harden testified that Employer had its own electricians attempt to start up the machine with the e-stop pressed and they found the machine would not function. He testified that Employer thereafter hired Brighton Engineering Project (BEP) to test if the machine could function with the e-stop pressed. Harden testified that BEP also "could not show that it could happen." Harden summarized BEP's written conclusions, "the machine would not start up if the Stacker e-stop was

pressed." (Exhibit R.)[5] The report reflects that BEP pressed the Stacker's e-stop and observed de-energization of the signalers that trigger the Lift's motor.[6]

Caro pressed the e-stop and BEP determined that the e-stop did not malfunction. Thus, the e-stop de-energized the light sensor's signaling module. However, there is no evidence that the e-stop turned the Stacker off. In fact, SAM clearly warns that the e-stop does not create a zero-energy state. The e-stop simply stops automatic signals from the light sensor and manual commands from the control panel. Thus, the Lift is found to have remained energized.

Was the Lift capable of inadvertent movement?

As discussed previously, Employer's electricians and BEP verified that the e-stop functioned as intended. But BEP did not entirely replicate the conditions at the time of Caro's injury. BEP's inquiry was constrained to the e-stop's electric connections. BEP did not break the light beam or test for movement at the touchscreen control panel.[7] BEP did not try to detect other sources of power other than the e-stop.

It is undisputed that airbags raise and lower the Lift, and that their pneumatic energy is responsible for its movement. Reyes testified that the Division attributes the Lift's movement to the release of stored pneumatic power upon dislodgement of the wooden fragment. Whether due to stored pneumatic energy or otherwise, the Lift remained capable of inadvertent movement and required blocking.

Caro performed SAM prior to cleaning the Stacker and its Lift. As discussed in more detail in the next section, SAM does not contain blocking instructions, and Employer did not develop LOTO for the box-making area, which includes the Stacker. For these reasons, Employer failed to ensure that the Lift was blocked. The preponderance of the evidence shows that Employer failed to ensure the Lift was stopped, de-energized or disengaged from power, or blocked.

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[5] BEP's report was not discussed. It compares wiring plans to the actual wiring of a group of Line 2 e-stops and examines whether the Stacker's e-stop disconnects power to its moving components. A close reading while viewing photographs in Employer's LOTO (Exhibit DDD) reveals that the power panel for Line 2 is the energy source for the Lift motor LR02XP1-6. In sum, BEP's report shows that the e-stop at issue, CST02XP1-6, is wired in a series of three other e-stops. Pressing any one of these four e-stops can de-energize power to control relay CR02XP-8720414 ("CR-14") which routes power to another control relay, CR02XP1-8720424 ("CR-24"). CR-14 powers output card O0305 and CR-24 powers output card O0306. The lift motor at issue, LR02XP1, powered by the Line 2 electrical panel labeled EEP02 XP01, is wired to outputs from output cards O0305 and O0306. Output O0306-6 and output O0306-7, from unspecified output cards (presumably O0306), fire solenoids SV02XP1-7E and SV02XP10-7F. Respectively, they control the lift motor's raising and lowering functions.

[6] Specifically, Employer's evidence establishes that SAM de-energizes a control relay that powers the light sensor's output cards. Without power, the light sensor cannot transmit signals to the solenoids controlling the air valve. In this manner, the e-stop prevents the light sensor from communicating with the Lift.

[7] BEP reports in its findings, "Finally, I pushed the E-stop at CST02XP1-6 and observed the control relays coils de-energize[.] Note: Prior to or after the E-stops had been pushed, I did not attempt to operate the machinery due to it being taped off and out of service."

c. Did Employer establish that an exception applies?

Employer asserted that Caro's task was a minor servicing activity, which is an exception to the requirements of section 3314, subdivision (c). Section 3314 provides, in relevant part:

> EXCEPTIONS to subsections (c) and (d):
> 1. 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.

Section 3314, subdivision (b), defines "normal production operations" as:

> Normal Production Operations. The utilization of a machine or equipment to perform its intended production function.

"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 hearing." (*Fed Ex Ground, Inc.*, Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020), citing *Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008).) "Exceptions are to be strictly construed in order to justify a freedom from the general rule." (*Dade Behring, Inc., supra*, Cal/OSHA App. 05-2203.) Employer must establish that clearing wood fragments was (1) a minor servicing activity (2) taking place during normal production operations, that was (3) routine, repetitive, and integral to the use of the equipment for production, and (4) the work was performed using alternative measures which provide effective protection.

1.) Minor Servicing Activity

Shaeffer testified that the "Shine" procedure in an Audit is an opportunity to perform minor cleaning such as dusting or shining, not major cleaning or use of chemicals. He testified that wooden pallets commonly splinter. He testified that an Audit does not classify degrees of cleaning. Shaeffer explained that "Shine" procedures are typically routine but noted that each employee must assess risks when contemplating a task. The evidence shows that pallets splinter during stacking, creating incidental debris requiring collection for disposal. Caro testified he performed a deep cleaning to remove a larger fragment he could not dislodge with tools. Whether an Audit is considered a minor servicing activity or not, the evidence shows that Caro's initial Audit evolved into a deep cleaning to unjam a piece of wood lodged into the Lift.

2.) Normal Production Operations

Caro testified that Line 2 was not operational before he began the Audit, thus there was no production. As such, the Stacker was not in normal production operation when Caro was cleaning.

3.) Routine, Repetitive, and Integral

As already discussed above, the Lift frequently splintered wooden pallets. However, even if the Audit and debris removal were considered routine, Employer provided no evidence to show the Audit and cleaning were integral to the use of the Stacker.

4.) Alternative Measures

Employer identified the use of a grabber as an alternative measure providing effective protection. Employer presented a photograph of the grabber leaning on what appears to be the Stacker, showing scale and its potential use as an extension tool, but provided no evidence to establish that it would have sufficiently served as an alternative measure. (Exhibit EE.)

Additionally, the Appeals Board noted in *Dade Behring, Inc., supra*, Cal/OSHA App. 05-2203, where the employer sought to identify extension tools as its alternate protective measure, that training in the specific uses of extension tools must be provided. The Appeals Board explained that insufficient evidence was presented regarding 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 task he was performing. (*Id.*)

Caro testified that he was not trained to avoid inserting his hand into the machine. He testified that he used an air blow gun and a broom handle prior to using his hand not because he was trained to do so, but because he personally found it easier. Caro testified that using an air blow gun, broom, or his hand, in this order, is sufficient remove any wood fragments. He testified that a grabber was available at the site, but he elected not to use it. He eventually testified he did not use a grabber for no other reason than, “There was no grabber where I was at.” Further, Employer provided no evidence that it provided specific training on the use of extension tools. Therefore, it is found the grabber was not an alternative measure providing effective protection.

Even if an Audit might qualify as an exception to the requirements of section 3314, Shaffer noted that “Shine” includes an opportunity to perform cleaning and that each employee must assess risks, thus anticipating progression to a non-routine non-minor activity. Caro may have commenced with a minor servicing activity, but it progressed into a deep cleaning before his injury. Furthermore, Line 2 was down and there was no production operation taking place.

Employer did not establish all the elements of the exception. For these reasons, the exception found inapplicable. As such, Citation 2 is affirmed.

2. Did Employer fail to develop and utilize machine-specific hazardous energy control procedures?

In Citation 3, the Division cited Employer for an alleged violation of Section 3314, subdivision (g), which provides:

> (g) Hazardous Energy Control Procedures.
> A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.
>
> (1) The procedure shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including but not limited to, the following:
> (A) A statement of the intended use of the procedure;
> (B) The procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
> (C) The procedural steps for the placement, removal and transfer of lockout devices and tagout devices and responsibilities; and,
> (D) The requirements for testing a machine or equipment, to determine and verify the effectiveness of lockout devices, tagout devices and other hazardous energy control devices.
>
> (2) The employer's hazardous energy control procedures shall be documented in writing.
> (A) The employer's hazardous energy control procedure shall include separate procedural steps for the safe lockout/ tagout of each machine or piece of equipment affected by the hazardous energy control procedure.

In Citation 3, the Division alleges:

> Prior to and during the course of the investigation, the employer did not develop and utilize machine specific hazardous energy control procedures specific to the Line 2 Box Making Pallet Stacker to prevent inadvertent movement during cleaning, repairing, servicing, setting-up or adjusting operations.

To establish a violation of the safety order, the Division must show that Employer failed to develop machine-specific hazardous energy control procedures for the Stacker.

Shaeffer testified that Employer developed two levels of hazardous energy control: SAM for routine tasks, requiring pressing the e-stop and verifying to make sure nothing is moving; and LOTO for tasks involving a "deeper level" of de-energizing the equipment.

Employer introduced Caro's LOTO and SAM training which admonishes, "Always follow equipment specific and task specific SAM & LOTO SOPs." (Exhibit UU.) Employer presented its LOTO (Exhibit DDD) and SAM (Exhibit NN) for the Line 2 box-making area. Shaeffer testified that Employer's LOTO was "the machine-specific lock-out/ tag-out procedure in effect" at the time of Caro's injury. Reyes and Caro testified that the box-making area, and thus the Stacker and the Lift therein, does not have any LOTO. However, LOTO is examined because it still applies to and affects Line 2, where the Stacker is located.

Written LOTO

Employer's LOTO provides general instruction without reference to machines or machine parts. The instructions imply the existence of more than one power source but do not indicate how many power sources or lockboxes exist or where they are located on Line 2. The instructions also refer to machines and machine parts without providing procedural steps and refer to sources of energy without specifying the machine at issue or providing any procedural steps.

The instructions do not address all the machines in Line 2. The testimony and evidence establish that Line 2 includes the box-making machine, which is comprised of a robotic arm, two box-folding units, and the Lift inside the Stacker, as well as various conveyor belts between these components. The instructions do not identify or provide procedures for this equipment. As such, the Line 2 box-making LOTO does not provide machine-specific procedural steps.

Written SAM

Shaeffer identified Employer's SAM for Line 2, specific to the box-making area, which similarly lacks machine specificity and procedural steps. (Exhibit NN.) SAM is not machine specific and instructions are conspicuously incomplete. For example, it directs:

> VERIFY ISOLATION BY TRYING TO START MACHINE
> Verify to ensure hazardous energy has been controlled. Try to re-start the equipment:
> -

The instruction ends with a bullet point and space reserved for text, but no further direction.

Employer's SAM and LOTO both fail to specify machines or detail specific procedural steps tailored to each. Accordingly, the Division established a violation of the safety order. Citation 3 is affirmed.

3. Did Employer establish the Independent Employee Action Defense?

Employer asserted the Independent Employee Action Defense (IEAD) should apply in the instant matter. Employer argues Caro omitted one or more SAM steps. Employer alleges Caro admitted that he failed to verify the Lift was de-energized at the control screen touchscreen.

In *Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932, 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 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 and must 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.) As Employer must prove all elements, it is only necessary to discuss elements one, two, and three below because those elements most clearly demonstrate Employer's shortcomings in meeting its burden of proof to establish the IEAD.

Element one: Was Caro an experienced employee?

Caro worked for Employer for two years, beginning in 2017 as a box maker on Line 2 and Line 7. He testified that he was experienced with performing Audits. Caro testified that he received LOTO and SAM training. Employer offered evidence of Caro's training, but none of the training materials contained machine-specific procedural steps to control hazardous energy of the Lift inside the pallet stacker of the box-making machine on Line 2. Employer offered no other proof showing Caro received training with procedural steps specifically for the Stacker or its Lift. Caro

may have been experienced with performing Audits, but he is not found to be experienced with controlling hazardous energy because of the deficiencies in his LOTO and SAM training.

Element two: Did Employer have a well-devised safety program?

As discussed above, Employer's written hazardous energy control procedures are not machine-specific and lack procedural steps for the control of hazardous energy. These deficiencies are not limited to just one machine, but several. This evidence strongly supports a finding that Employer does not have a well-devised safety program.

Element three: Did Employer effectively enforce its safety program?

An employer providing a level of supervision reasonably necessary to detect and correct hazardous conditions and practices is essential to effective enforcement, and the adequacy of supervision is a fact-intensive inquiry that requires a case-by-case determination. (*Fed Ex Ground, Inc.*, Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020).) While it may be true that one-to-one supervision is neither practical nor required, employers must show adequate supervision. (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).)

Harden testified that employees are properly trained on operations and safety, and they are "owners of that operation, owners of their territories that they work in."[8] Harden testified that Caro also received on-the-job training with a seasoned operator who would have demonstrated, instructed, and practiced SAM and LOTO with Caro when Caro started working for Employer. Harden testified that Employer conducts a computer-based refresher course at the beginning of every year. He testified that the 2019 refresher training emphasized SAM and LOTO and Caro received this safety refresher training a few weeks prior to his injury. Harden reasoned that if Caro performed SAM correctly, the injury would not have occurred. However, Employer did not show that it tested or otherwise evaluated employees after trainings.

Employer appears to disavow supervision because Harden repeated several times that employees are owners of their own safety and the safety of their area and equipment. Employer offered no evidence that it observed employees during operations. Caro testified he worked in his position for two years and he performed cleaning two to three times per month, and deep cleaning at least once per month. At any time during Caro's regularly scheduled, multi-step process, a supervisor could have observed whether he performed tasks properly.

[8] Harden testified that approximately 75 managers lead approximately 725 hourly employees. He explained 500 of the 725 employees work in the operations department with Caro but he did not identify the ratio of leaders to members.

Harden testified that he attended Employer's post-injury interview with Caro wherein Caro reported finding Line 2 stopped and not running when he started his Audit. According to Harden, Caro reported pressing the e-stop, but Caro admitted that he did not verify non-operation. Harden testified that verifying energy isolation is critical. Shaeffer agreed that testing for immobility is the most important SAM step. Notwithstanding the proposition that verification of immobility is more critical to hazardous energy isolation than de-energization or blocking, Employer did not show that it provided a level of supervision reasonably necessary to detect and correct omission of either.

Element five: Did Caro deliberately cause a safety violation?

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:
>
> > 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).
>
> [...]
> 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.

Here, Caro allegedly did not verify disengagement. Employer suggests that Caro's omission caused his injury, but provided no evidence warranting an inference that his omission was intentional. Accordingly, Employer failed to establish the fifth element.

Evidence of safety program training is not evidence of safety program enforcement. Rather than demonstrating effective supervision, Employer shifts responsibility for safety to employees. As a failure to prove a single element of the IEAD defeats the defense, Citation 2 remains affirmed.

4. Did the Division establish rebuttable presumptions that Citations 2 and 3 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 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:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

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.)

"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).)

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.

When determining whether a citation is properly classified as Serious, Labor Code section 6432 requires application of a burden shifting analysis. The Division holds the initial burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a).) The Division's initial burden has two parts. First, the Division must demonstrate the existence of an "actual hazard created by the violation." Second, the Division must demonstrate a "realistic possibility" that death or serious

physical harm could result from that actual hazard. (*Shimmick Construction Company*, Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022).) In addition to an inspector's testimony, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the Serious classification. (*Id.*)

Reyes testified that the actual hazard of not having machine-specific hazardous energy control procedures for the Lift is the failure to secure the machine from release of hazardous energy. The actual hazard of failing to stop the movement of a Lift capable of fracturing pallets is injuries such as crushing or fractures. Unanticipated movement of a machine due to a release of hazardous energy presents a realistic possibility of crushing and fracture injuries.

Here, the lack of machine-specific hazardous energy control procedures and failure to stop, de-energize, and block the Lift did, in fact, cause serious physical harm. The Lift pinned Caro's arm to the Stacker's frame causing an injury that required an eight-day hospitalization during which time Caro received treatment. The parties stipulated that Caro's injury met the definition of serious physical harm. As such, serious physical harm was not merely a realistic possibility, but an actuality in this matter.

For the foregoing reasons, the Division established the rebuttable presumption that the violations in Citations 2 and 3 were properly classified as Serious.

5. Did Employer rebut the presumptions that the violations in Citations 2 and 3 were Serious?

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.

To satisfactorily rebut the presumption, an 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.

Factors included in Labor Code section 6432, subdivision (b), referenced in subdivision (c)(1) above, include:

(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.
(D) Procedures for communicating to employees about the employer's health and safety rules and programs.
(E) […]

Citation 2

Harden testified Employer did not know that Caro would reach into a machine without following proper procedures. As discussed above, Employer's written hazardous energy control procedures are not machine-specific and lack procedural steps for the control of hazardous energy. These deficiencies are not limited to just one machine, but several. Without machine-specific procedures in place, Employer could not have properly trained Caro, and thus, falls short of establishing it provided effective training.

Further, Employer provided insufficient supervision of exposed employees. Caro testified that completing SAM for the box-making area is a lengthy process with multiple steps. A reasonable and responsible employer would anticipate the likelihood of skipped steps and would direct a supervisor to perform periodic or spot monitoring of the employee. Such observation would opportunities for correction, but Employer did not provide such supervision.

Finally, Employer was aware that pallets frequently splinter inside the Stacker. Employer also knew that cleaning the debris entails entering the Stacker, which moves with enough force to fragment wooden pallets. Employer developed SAM and LOTO yet did not provide blocking procedures for the Lift which was capable of inadvertent movement.

Employer did not take reasonable steps to avoid generic instruction and training, detect and correct employee error, and develop blocking procedures for the Lift. Thus, Employer failed to rebut the presumption of a Serious classification.

Citation 3

Employer developed both SAM and LOTO for its Line 2 box-making area. As such, Employer knew the two hazardous energy control procedures did not contain machine-specific instruction. Employer knew that the Lift splintered wooden pallets, creating debris. Employer knew that cleaning of some debris required entry into the Stacker where its Lift moves with a force that could cause severe injury, thus requiring LOTO.

As discussed above, SAM contains requires several steps, making mistakes highly likely. Employer did not take the steps a reasonable and responsible employer would take to ensure its hazardous energy control procedures provided machine specific procedural steps for immobilization and de-energization. As such, Employer failed to rebut the presumption.

Accordingly, Citations 2 and 3 were properly classified as Serious.

6. Is Citation 2 properly characterized as Accident-Related?

For a citation to be characterized as Accident-Related, the Division must show a "causal nexus between the violation and the serious injury." (*Webcor Construction, LP dba Webcor Builders*, 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.*)

At the time of the accident in 2019, Labor Code section 6302, subdivision (h), provided that a "serious injury" included injury or illness occurring in a place of employment or in connection with employment which required inpatient hospitalization for a period exceeding 24 hours for other than medical observation.

The parties stipulated that Caro's injuries meet the definition of a serious injury. Caro's injury occurred when the Lift inadvertently moved. If the Lift had been properly stopped, de-energized, and blocked, the injury would not have occurred because the platform would be blocked to prevent movement.

As such, there is a direct nexus between the violation and injury and Citation 2 was properly characterized as Accident-Related.

7. Are the abatement requirements for Citations 2 and 3 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.

Employer appealed the reasonableness of abatement requirements of Citations 2 and 3. To establish that abatement requirements are unreasonable, an employer must show that abatement is not feasible or is impractical or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

As found above, the Lift was not de-energized or disengaged from power. Employer presented no evidence showing that blocking procedures for isolating stored energy of the Lift was unfeasible, impractical, or unreasonably expensive. Employer also presented no evidence showing that it was unfeasible to develop machine-specific procedural steps needed to control hazardous energy of the Lift inside the Stacker unit of the box-making machine.

For the foregoing reasons, Employer did not establish that abatement requirements for Citations 2 and 3 are unreasonable. The Decision does not specify the method of abatement and Employer may select the least burdensome means of satisfying the cited section. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018).)

8. 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. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.)

The Division submitted into evidence the Proposed Penalty Worksheet and Reyes testified that calculations used to arrive at the proposed penalties were performed in accordance with the penalty-setting regulations. Employer did not present evidence or argument to establish that the penalties were not calculated in accordance with the penalty-setting regulations.

Accordingly, the proposed penalties of $18,000 for Citation 2 and $15,300 for Citation 3 are found to be reasonable.

Conclusion

For Citation 2, the evidence supports a finding that Employer violated section 3314, subdivision (c), by failing to ensure that the Lift was stopped, de-energized, and locked out to prevent movement during cleaning operations. The citation is properly classified as Serious, Accident-Related, and the abatement requirements and the proposed penalty are reasonable.

For Citation 3, the evidence supports a finding that Employer violated section 3314, subdivision (g), by failing to provide machine-specific procedural steps to control hazardous energy. The citation is properly classified as Serious, and the abatement requirements and the proposed penalty are reasonable.

Order

It is hereby ordered that Citation 2 is affirmed, and its associated penalty is assessed as set forth in the attached Summary Table.

It is hereby ordered that Citation 3 is affirmed, and its associated penalty is assessed as set forth in the attached Summary Table.

Dated: 08/17/2023

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.**