

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

In the Matter of the Appeal of:

BIMBO BAKERIES USA
264 So. Spruce Avenue
South San Francisco, CA 94080

Employer

Docket Nos. 03-R1D3-5215
through 5217

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration on its own motion, renders the following decision after reconsideration.

BACKGROUND AND JURISDICTIONAL INFORMATION

On July 28, 2003, the Division of Occupational Safety and Health (the Division) conducted an accident inspection at a place of employment maintained by Bimbo Bakeries USA (Employer) at 264 Spruce Avenue, South San Francisco, California, where Employer produces bread and rolls. On November 6, 2003, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations:¹ Section 3203(a)(4), general, failure to identify lack of guarding hazard during safety inspection; Section 3314(a), serious, failure to de-energize equipment while servicing; and, Section 4075(a), serious, guard on chain and sprocket drive ineffective.

Employer timely appealed, asserting all available defenses on the Appeal form. And, on the Amended Appeal document, Employer listed twelve "affirmative defenses," including the following: "This appeal raises the following affirmative defenses : . . . 2. The inspection(s) was invalid".

The matter was heard before an Administrative Law Judge for the Board, at Oakland, California, on June 14, 2007. The parties introduced oral and documentary evidence, submitted post-hearing briefs, and the matter was submitted for decision on August 10, 2007.

¹ Unless otherwise specified all section references are to Title 8, California Code of Regulations.

LAW AND MOTION

At the hearing's outset, each party requested and was granted a standing objection to hearsay. Employer moved to amend the scope of its Appeals by withdrawing its challenge to abatement requirements, but noted that everything else remained at issue.

During the hearing, the parties stipulated to the following:

1. In calculating the penalty for Citation 2, the extent was amended to low from medium; as amended, the parties agree the penalties were calculated in accordance with the Division's Policy and Procedures.

2. Citation 3, Item 1, concerns one instance.

3. Exhibit 5 depicts the machine called the Winkler Stringline Proofer on which Rosa Frias (Frias), the injured employee, was injured.

4. The Winkler Stringline Proofer was located at Employer's place of employment.

5. Exhibit 10 depicts the sprocket and chain on which Ms. Frias was injured (as marked).

6. The machine was running at the time Ms. Frias was injured.

7. As a result of the accident, Ms. Frias suffered an injury that was properly defined as serious under the Labor Code and Title 8.

8. The Plexiglas doors depicted in Exhibit 5 were present at the time of the injury.

Also, Employer requested and was granted a continuing objection to the testimony of the Division employee concerning the inspection and accident. The objection was based on lack of foundation.

SUMMARY OF EVIDENCE

Michael Frye (Frye), Division District Manager, testified on behalf of the Division. Frye testified that Brooks (the former compliance officer who conducted the inspection) is no longer employed by the Division. As District Manager, Frye reviewed the *Bimbo Bakeries USA* file with Brooks, participated in both an informal and a pre-hearing conference on the Division's behalf, and reviewed the file and its photographs (Exhibits 4 through 18) several times to

prepare for the hearing. He discussed the case with Brooks and the injured employee.

Frye testified that as District Manager, he assigned Brooks to investigate the accident described on the form. Brooks did so, reporting back that Rosa Frias was seriously injured; her right arm was amputated above the elbow when she tried to pull dried dough from a sprocket and chain in the Winkler Stringline Proofer. Brooks took photographs, which Frye reviewed with him.

Frye testified that, as the District Manager, he issued Citation 1, Item 1, (Division's Exhibit 1) based on Exhibit 5, Exhibit 10, and discussions with the injured worker, Frias, and the inspector, Brooks. Exhibits 5 and 10 both depict the machine where the injury occurred, but Exhibit 10 is a close-up view of the chain and sprocket assembly. From this information, Frye concluded that Employer failed to recognize and identify the hazard of the unguarded chain drive. Pursuant to section 3203(a)(4), Employer should have recognized and fixed the condition in the course of an inspection, and it did not. The chain and sprocket depicted in Exhibit 10 were in no way hidden from Employer's view. Employer's failure to identify the hazard of the employees' exposure to the sprocket and chain assembly resulted in Citation 1, Item 1.

Frye testified that he issued Citation 2, Item 1. Indicating the Winkler Stringline Proofer on line #3 in Exhibit 5, he testified that its parts, including the chain and sprocket, move, and therefore must be stopped before it is cleaned by removing dough from the chain. He issued the citation because he understood the machine was not de-energized, locked out, or blocked out when the accident occurred.² As District Manager, he opined that Frias' action to remove the jammed dough constituted cleaning, servicing or adjusting.

Frye testified he classified the violation as serious because it "resulted in a serious injury," since the lockout and tagout were not done, and since the unguarded condition was in plain sight. For these reasons, management should have known that it was probable that someone would have his or her arm caught in it. He explained that the sprocket and chain worked by using gears with small teeth, which go into the chain's small holes, and described how, if a body part gets between the gear and the hole, it cannot easily be removed, causing serious injury. He opined that the most likely injury resulting from such an accident would be amputation. He testified that in his experience as both an investigator and District Manager, which included supervising approximately 200 investigations of violations concerning sprocket and chain assemblies, the most common injuries from unguarded devices are

² According to Frye, the accident occurred when dough got "jammed up" on the Proofer which acts as a conveyor to move dough. When Frias reached in to remove the dough, her hand got caught between the chain and the toothed sprocket, resulting in amputation of her arm.

amputations. More serious injuries, up to and including death, can occur from the hazard created by failing to de-energize sprocket and chain assemblies when needed.

Frye testified Citation 2 was classified as accident-related because "people did it all the time" - i.e., used their hand to remove dough from the machine without de-energizing it. Further, he opined that if the machine *had been* de-energized, the accident could not have occurred since the gear would not have been turning so it could not have caught ("sucked in") the worker's hand.

Frye testified he issued Citation 3, Item 1, because all gears and sprockets on the machine should have been guarded as the chains and sprockets were seven feet or less above the floor, but he found no guards on it. He testified he classified the violation as serious because the condition was in plain sight of management, who knew or should have known of it. He opined the probability of serious injury from an accident due to the violation alleged in Citation 3 is very high, ranging from amputation of a finger, arm, hand, or foot, to death.

Frye opined that any guard was inadequate if it could be opened while the machine is running. He acknowledged that section 4075 does not require an interlocking device, but testified that another safety order required that a guard be secured. Finally, he stated that in order to remove the dough, Frias would have had to open the hinged, latched, Plexiglas doors. Frye opined that the Plexiglas doors shown in front of the upper chain and sprocket drive in Exhibits 5 and 10 could not serve as guards because they were not permanently affixed, which is required for a guard to be effective. These Plexiglas doors were held shut by a hook that was easily moved. Thus, the chain drive was not effectively guarded. Therefore, Frye issued Citation 1.

Rosa Frias, the injured employee, testified briefly through an interpreter. However, due to the great discomfort of the witness recalling the incident, the parties stipulated to certain facts concerning the occurrence of the injury.³ An offer of proof was made as to what Frias's testimony would have been, including that she was working on the Winkler Stringline Proofer when she saw the dough was caught, reached her hand into the opening to remove it, and her hand was caught in the sprocket. The testimony offered by Rosa Frias included a statement that, in her accident, she reached in to the machine through an opening below the Plexiglas doors, and reached in to the area

³ The parties agreed that parts of the Offer of Proof would be embodied in the Stipulations (set out above), and as to the remainder, Employer agrees that if Frias were called to testify, she would have testified as offered, but does not agree with or adopt her testimony as ultimate fact, other than the facts covered by the stipulations.

behind the Plexiglas doors to remove dried dough. The sprocket and chain that caught her arm was located behind the Plexiglas doors. The machine was running at the time she reached in, and it was not her regular work practice to de-energize the machine to remove dough in this manner.

Frias would also have testified that during the years she worked on the Winkler Stringline Proofer, when misplaced dough was within reach, it was common practice for employees to reach into the Proofer to remove dough without turning the machine off. This was done in front of supervisors. Further, she and other employees did not turn off the machine to reach inside because they had to work fast. Frias would also have testified that a hook was sometimes used to remove the dough but only when the dough was otherwise out of reach.

John Igleheart testified on behalf of the Division. He had worked for Employer for nine years, and was a line worker when he left. When the accident occurred, he was a foreperson on line #3, where Frias was among the five workers he supervised over two years. His duties included ensuring the quality of the rolls they baked, making sure employees took breaks and had someone cover their work when away on break, training employees, including placing new employees in an appropriate ("easy") spot until fully trained, reporting absences, referring safety violations to a supervisor,⁴ and stopping unsafe conduct.

Igleheart identified Exhibit 5 as the "Winkler," but explained it was actually composed of several machines. His account of the accident was consistent with those of Frias and Frye, including identifying Exhibit 10 as depicting the gear involved. When the accident occurred, Igleheart was at the site. His back was to Frias, but he responded immediately when he heard her scream. Immediately after the accident, the machine was still running, and he turned it off.

While not depicted in Exhibit 5, he testified that the Proofer had stainless steel guards on the lower sprocket and chain assembly, which was not involved in the Frias injury, at the time of the incident. However, the Plexiglas doors (at the top of the machine) were in place at the time, with a hook holding the two pieces closed (marked on Exhibit 5). He testified that "flipping that hook" allowed both pieces to swing open, showing the view depicted in Exhibit 10.

Igleheart testified that the Plexiglas doors were closed when the accident occurred, and Frias reached into the area indicated by the circle on Exhibit 5, which is an access point in to the machine located below the Plexiglas doors.

⁴ He explained he was still a union member and therefore referred violations to a supervisor.

He testified that he saw employees often use their hands to pull dough out of the machine without turning it off. He had done so himself, both as a line worker and foreperson. As a foreperson, he did not discipline employees for doing so. He stated:

“If you saw something hanging, you would just pluck it out . . . for stuff down on ground level, you would just reach in and pull it out; there were hooks for stuff higher up.”

He identified the item depicted in Exhibit 4 as a hook similar to those employees used at the time of the accident, but only if they needed to reach dough caught higher up than they could reach by hand without the hook.

On cross-examination, Igleheart acknowledged that he was designated and considered himself a foreperson, but referred disciplinary and safety violation matters to a supervisor.

He testified that prior to Frias’s injury, he did not consider it unsafe to reach a hand in to the Winkler Stringline Proofer to remove dough; that it was “SOP,” standard operating procedure. Although no shift supervisor was present the day of the accident, one was on the floor at least some of the time, and he opined that a shift supervisor “must have been” present some of the times that employees “flipped” dough out with their hands, though he could not recall specifically. He explained that when he began, his foreman had taught him how to reach in and pull out the dough, and Frias removed the dough the same way he (Igleheart) had been taught.

Employer did not present any witness to testify on its behalf and relied entirely on the testimony of witnesses for the Division.

BRIEFS SUBMITTED AFTER HEARING

After the hearing, the ALJ permitted each party to submit contemporaneous Post Hearing Briefs.

In its brief, Employer contended that all citations should be dismissed. First, Employer contends the six month statute of limitations was not met by the Division in issuing its Citations on November 6, 2003. Employer also argued that the Division’s evidence was inadmissible because the Division failed to prove its inspection of Employer’s bakery was conducted pursuant to a warrant or by Employer’s consent, and thus Employer’s Fourth Amendment rights were violated. Then, the brief asserted that the evidence for each citation is insufficient in some way.

The Division, in its brief, makes arguments as to why the evidence presented satisfies the burden of proof for each element of each of the three Citations. The Division's post-hearing brief makes no arguments regarding the Fourth Amendment.

No reply briefs were allowed, so the Division never had an opportunity to present rebuttal argument regarding the Fourth Amendment "lack of consent" argument that was raised for the first time in the Employer's post-hearing brief.

ADMINISTRATIVE LAW JUDGE'S DECISION

The ALJ's Decision held: (1) that the Division failed to establish free and voluntary consent to the inspection; (2) that the inspector did not testify regarding Employer's consent to the inspection; (3) a warrant to inspect was not issued; (4) the evidence obtained as a result of the Division's entry into Employer's place of business must be excluded; and, 5) that the Division failed to establish the violations alleged by a preponderance of the evidence. The ALJ did not address any other issue in the Decision and merely granted Employer's appeal as to the entire proceeding.

BOARD RECONSIDERATION

On October 10, 2007, the Appeals Board ordered reconsideration of the ALJ's Decision and invited additional briefing on the issue of which party, the Division or Employer, bears the burden of proof regarding establishing valid consent in the situation of a warrantless inspection of Employer's premises.

Both the Division and Employer supplied additional briefs germane to this issue.

ISSUES PRESENTED

- 1. What are the Notice and Proof requirements an Employer must satisfy in order to raise a Fourth Amendment challenge to an inspection conducted by the Division?**
- 2. Was the evidence sufficient to establish a violation of 3203?**
- 3. Was a serious violation of 3314(a) established by testimony that an employee reached her hand in to a machine to remove misplaced dough without turning off the machine?**

4. Was the evidence sufficient to establish a violation of 4075(a)?
5. Were the Citations issued timely?

DECISION AND DISCUSSION

Upon review of the entire administrative record, we find the decision granting Employer's appeal misapplied the procedural and evidentiary rules that control when an Employer asserts, as a defense, an "invalid inspection." We further find that the Division proved all three Citations by a preponderance of the evidence. We therefore issue this Decision After Reconsideration denying the Amended Appeals.

I. APPEALS RAISING FOURTH AMENDMENT CHALLENGES TO DIVISION INSPECTIONS REQUIRE EMPLOYER TO TIMELY ARTICULATE FACTS DESCRIBING THE INTERESTS PROTECTED AND THE ALLEGED VIOLATIVE CONDUCT OF THE INSPECTOR, AND TO PROVIDE EVIDENCE SUPPORTING SUCH ALLEGATIONS, IN ORDER TO SHIFT THE BURDEN TO THE DIVISION TO ESTABLISH A VALID SEARCH.

Based on long standing Board precedent, and California and Federal requirements imposed upon criminal defendants who wish to assert a Fourth Amendment interest, we determine that the ALJ did not properly analyze that issue in her Decision. In sum, the burden is on the employer to effectively raise Fourth Amendment issues well before the hearing to provide proper notice to the Division. After giving the requisite notice, the employer retains the burden of offering evidence to support its Fourth Amendment challenge at hearing. Only then does the burden shift to the Division to prove that a warrantless inspection was valid in light of the Fourth Amendment. An employer who fails to timely and specifically assert its Fourth Amendment rights cannot effectively do so for the first time in a post-hearing brief. This rule satisfies both the purpose of the Act and the Employer's Fourth Amendment rights. (*Salwasser Manufacturing Co. v. Occupational Safety and Health Appeals Board (Salwasser II)* (5th Dist.1989) 214 Cal.App.3d 625.)

A. THE FOURTH AMENDMENT APPLIES TO PROTECT EMPLOYER'S REASONABLE EXPECTATION OF PRIVACY IN THE WARRANTLESS SEARCH CONTEXT.

The Court of Appeal has applied criminal law doctrines of search and seizure to proceedings before the Cal/OSHA Appeals Board. (*Salwasser II, supra; Salwasser Manufacturing v. Municipal Court* (5th Dist. 1979) 94 Cal. App. 3rd 223.) However, it has done so only to the extent necessary to balance the Fourth Amendment rights of an employer with the public interest served by the

Act. (*Salwasser II, supra* at 632.) In the *Salwasser* cases, Cal/OSHA warrant requirements under the Fourth Amendment were thoroughly considered. Those cases did not consider the issue presented here, which is the scope and manner in which an Employer may question the lawfulness of a warrantless OSHA inspection.

Even though the Fourth Amendment protects individuals, and businesses, from unreasonable searches and seizure by government agents, it only does so to the extent that those rights are properly asserted.

[T]he United States Supreme Court has stated that “in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally had an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one which ‘has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.’” (*Minnesota v. Carter* (1998) 525 U.S. 83, 88, quoting *Rakas v. Illinois* (1978) 439 U.S. 128, 134.) The defendant must assert a reasonable expectation of privacy in “the *particular area searched or thing seized* in order to bring a Fourth Amendment challenge.” (*People v. McPeters, supra* 2 Cal 4th at p. 1171[.])

A defendant has the burden of establishing a legitimate expectation of privacy interest in the place searched and the thing seized.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 972; see also *Rudolph and Sletten, Cal/OSHA, App. 01-478, Decision After Reconsideration* (Mar. 30, 2004).)

This reasonable expectation of privacy in the area searched is not presumed under any rule. It is a fact-specific expectation to be determined by a judge upon the presentation of evidence. (*Rudolph and Sletten, supra.*) Different buildings (homes, businesses, places open to the public, etc.) can carry different Fourth Amendment protections. (*People v. James* (1977) 19 Cal.3d 99; *People v. Doty* (2nd Dist. 1985)165 Cal.App.3d 1060; *Rudolph and Sletten, supra.*; *People v. Channing* (4th Dist. 2000) 81 Cal.App.4th 985, 990; and *De La Cruz v. Quackenbush* (2000) 80 Cal.App. 4th 775.) Thus, evidence of the features of the place searched must be offered in order to establish a reasonable expectation of privacy in the place searched. Without any evidence, no Fourth Amendment right can be established.

Although the Fourth Amendment imposes these requirements on both employers and criminal defendants, the Penal Code does not apply to Cal/OSHA matters. (*Salwasser II, supra*, at p. 632; *Scribner Construction,*

Cal/OSHA App. 93-2161, Decision After Reconsideration (Sep. 1, 1990).) However, the Fourth Amendment applies to Cal/OSHA inspections because of the potential criminal law consequences of Cal/OSHA violations. (*Id.*) Also, in the Cal/OSHA context, the Fourth Amendment protection of employers is less extensive than that afforded individuals suspected of criminal activity. (*Salwasser II*, supra at p. 632.) Specifically, the relaxed proof requirement for obtaining an OSHA search warrant (administrative probable cause rather than criminal probable cause) balanced the purpose of the Cal/OSHA Act with the Fourth Amendment rights of the Employer. (*Id.*)

We recognize that this reduced protection afforded employers under the Fourth Amendment is necessary to effectuate the purpose of the Act. Therefore, the Division does not carry the burden to prove the lawfulness of a warrantless inspection unless and until an employer establishes an expectation of privacy in an area searched. Such interest will not be presumed. (*Scribner*, supra, citing *Metro-Young Construction Co*, Cal/OSHA App. 80-315, Decision After Reconsideration (Apr. 23, 1981).) The assertion that proof of a valid inspection is jurisdictional, or to be borne by the Division as part of its case in chief, was rejected nearly 20 years ago by the Board, and that holding remains the rule today. (*Metro-Young Construction*, supra.)

B. TO BALANCE THE PURPOSE OF THE ACT WITH THE FOURTH AMENDMENT RIGHTS OF EMPLOYERS, AN EMPLOYER MUST GIVE ADEQUATE NOTICE AND PRODUCE SUFFICIENT EVIDENCE OF ITS FOURTH AMENDMENT CHALLENGE IN ORDER TO SHIFT THE BURDEN TO THE DIVISION TO PROVE A WARRANTLESS SEARCH WAS VALID.

Although the Board is not bound by the Penal Code, we look to it and the Fourth Amendment jurisprudence in criminal cases for guidance in preserving the employer's rights. In warrantless inspections in criminal cases, the defendant must specifically identify the facts underlying his claim that a warrantless search is invalid. He does so by bringing a Penal Code Section 1538.5, motion. He must use this procedure in order to afford the prosecution adequate notice of the facts underlying the claim of inappropriate government action, so that the prosecutor can obtain all relevant evidence concerning the legality of the search. (*People v. Williams* (1999) 20 Cal. 4th 119.) Only after the criminal defendant provides the factual basis regarding the claimed impropriety of the police action, does the burden shift to the prosecutor to show either a warrant was obtained, or an exception to the warrant requirement existed. (*Williams*, supra, at pages 119, 129.) In *Williams*, the court clarified that one reason for the specificity is to give each of the parties an opportunity to litigate the facts and inferences relating to an adverse party's contentions. (*Id.* at page 136.) Also, the criminal defendant provides evidence with his Penal Code Section 1538.5 moving papers.

Board procedures are governed by rules that require adequate notice of the issues on appeal. Adequate notice requires specific facts be contained in documentation properly submitted to the Appeals Board. Issues are “raised” at the Appeals Board by the allegations in the citation in light of the contentions on the corresponding appeal forms. (Board Regulation 361.3.)⁵ Employers may raise additional issues by moving to amend their appeal forms. (Board Regulations 371.2 and 371.) Motions to amend appeal forms must be made no later than 20 days before a hearing date, absent good cause showing why the deadline was not met. (*Ibid.*) These procedures may allow for the submission of evidence prior to the hearing (i.e. with Board Regulation 371 motion), but they do not require it. If an employer does not provide evidence on which it carries the burden of proof prior to the hearing, it must provide that evidence at the hearing.

Thus, in balancing the Fourth Amendment rights of employers against the public interest served by the Act, we conclude that the employer must provide facts describing its Fourth Amendment interest in the area searched, and facts describing the conduct of the Division employee that allegedly violated that right. It may do so by asserting sufficient facts in its appeal form. In the alternative, it may use the Board’s pre-hearing motion procedures to file a timely motion to amend the appeal form to specifically assert the defense. This process satisfies one of two requirements – to place the opposing party on notice as to what issue will be litigated.

Assuming the appealing employer provides sufficiently specific facts in its appeal form, or by pre-hearing motion, to place the Division on notice that its citation is being challenged on an alleged Fourth Amendment basis, the burden remains on the employer to present evidence, at the hearing, substantiating those claims. Only after that evidence is presented does the burden shift to the Division to prove the inspection was valid, either because a warrant was obtained, or consent was given, or other exception to a warrant existed. This process satisfies the second of the two requirements. This two-step requirement is consistent with *Rudolph and Sletten*, *supra*, and *Scribner Construction*, *supra*. The Board has never ruled that the Division must prove, as part of its case in chief, that the employers’ constitutional rights were *not* violated. Effectively challenging the propriety of the inspection has always required the employer to put forth evidence surrounding the constitutional interest protected and the conduct of the Division inspector alleged to violate that interest.

⁵ “. . . If the Division action appealed from is a citation, the employer must specify on the appeal form which one or more of the following issues it is raising in its appeal.” [Emphasis added.] §361.3(a)

Here, Employer filed a properly amended appeal document containing the phrase "Affirmative Defenses: . . . Inspection(s) was invalid." However, there may be a variety of ways an inspection could be invalid, to wit, failure of the inspector to properly identify him/herself, inspecting at unreasonable times or in an unreasonable manner, not obtaining consent, etc.⁶ Therefore, a statement in the appeal form merely asserting that an inspection was invalid fails to put the Division on notice that a Fourth Amendment issue is being raised. Indeed, the first indication the Division had that Employer was raising a Fourth Amendment issue – as opposed to some other inspection deficiency – was in the post hearing brief, to which no reply was allowed. This is the exact gamesmanship the *Williams* court sought to prohibit when it recognized the burden to effectively raise a Fourth Amendment issue rests with the one asserting a violation, and that if not properly raised (timely and specific) that such arguments are waived. (*Williams, supra* at pages 129-133.) It is not the government's burden to anticipate any possible but unstated argument, and to disprove them all even if not specifically raised.

Moreover, since the Fourth Amendment is involved, the "invalid inspection" pleading is not a true affirmative defense. Rather than bearing the burden of proof that the inspection was invalid, Employer must, timely, provide sufficient factual allegations as to its interest protected by the Fourth Amendment, and the conduct of the Division it claims unreasonably infringes on that interest. If sufficiently timely and specific, and the factual assertions are later supported with evidence offered at the hearing, then the burden to prove the inspection did not violate Employer's Fourth Amendment rights shifts to the Division.

The record below is bereft of any motion, statement, or evidence sufficient to alert the Division that it had to present evidence concerning the Fourth Amendment rights of Employer. The affirmative defense in the Amended Appeal is a mere statement in a pleading that contains no facts, and may or may not pertain to the Fourth Amendment. We have found no administrative, civil or criminal authorities that elevate such an unspecific allegation to either sufficient notice to the governmental entity, or adequate to shift the burden of proof to a prosecuting entity, as is required under Fourth Amendment jurisprudence. Thus, Employer failed to effectively raise, or

⁶ Labor Code § 6314 states: "To make an investigation or inspection, the chief of the division and all qualified divisional inspectors and investigators authorized by him or her shall, upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect during regular working hours, and at other reasonable times when necessary for the protection of safety and health, and within reasonable limits and in a reasonable manner." Thus, an inspection could be unreasonable if, for example, the investigator removed all of the workers from their job duties for a length of time that disrupted production to the extent of causing financial hardship on the employer, but this would not violate the employers Fourth Amendment rights. It may very well, however, be so unreasonable that it creates an invalid inspection. Thus, an invalid inspection could still be a consensual inspection.

support with factual evidence, any claim that its Fourth Amendment rights were violated.

C. PRESUMPTION OF PROPER GOVERNMENT ACTION, IN EVIDENCE CODE 664, BECOMES CONCLUSIVE IN ABSENCE OF ANY EVIDENCE TO REBUT THE PRESUMPTION.

When there is a shortfall in evidence on a particular factual issue, an ALJ may turn to the Evidence Code for guidance. The presumption in Evidence Code 664 is available to resolve questions of fact analogous to the one at hand. Evidence Code Section 664 states:

“It is presumed that official duty has been regularly performed. This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.”

There has been no arrest here, so the general rule applies.

The official duty of the Division investigator is to identify himself as a Division employee, obtain consent to enter and inspect, and if consent is refused, the investigator may obtain a warrant. (Lab. Code, § 6314; C.C.P. §1822.51 and *Beacom Construction Co.*, Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981).) In the absence of any evidence to the contrary, it is presumed officers act legally. (*Victor Badillo v. Superior Court*, (1956) 46 Cal.2d 269.)

When no evidence regarding the validity of the inspection is offered by the employer, the inspection is presumed to be lawful. (*Scribner Construction, supra.*)

It is well established in criminal search and seizure law that the burden is not on the prosecutor to establish a valid search but upon the defendant to raise and prove that a search was invalid. (*People v. Carson* (1970) 4 Cal.App.3d 782). This burden falls on the charged party by the operation of Evidence Code Section 664, which imposes a presumption that official duties are properly performed. The courts have held that criminal law doctrines of search and seizure law are applicable to proceedings before the Appeals Board. (*Salwasser Manufacturing Co. v. Occupational Safety and Health Appeals Bd. (Salwasser II)* (1989) 214 Cal.App.3d 625.) Evidence Code section 664 requires the Board to presume that the inspector acted properly in the conduct of his official duty until that presumption is rebutted.

(*Scribner Construction, supra.*)

We find no evidence one way or the other that inspector Brooks did or did not present his credentials, inform Employer of the purpose of his visit, or otherwise make a valid request to inspect. At the same time, Employer, who had the burden of proof to raise the issue, presented nothing to refute the presumption that the inspection was legally performed. There was no evidence presented on which the ALJ could conclude Employer had a constitutionally protected expectation of privacy in the area searched. The ALJ erred in concluding this dearth of evidence was sufficient to overcome the presumption of a valid search.

II. THE RECORD ESTABLISHES THE CITATIONS WERE PROVEN BY A PREPONDERANCE OF THE EVIDENCE, AND CIVIL PENALTIES ARE HEREBY ASSESSED.

A. Citation 1, Item 1.

The Division established, by a preponderance of the evidence, that Employer failed to identify a hazard that it should have identified, contrary to established safety orders.

Citation I, Item 1, alleges:

GENERAL 8 C.C.R. 3203(a)(4). INJURY AND ILLNESS PREVENTION PROGRAM.

The program shall include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

Employer did not identify the hazard of an unguarded chain drive on the "Winkler Stringline Proofer" on line #3.

The testimonies of Rosa Frias and John Igleheart establish that, more likely than not, the sprocket and chain drive assembly that injured Rosa Frias was a hazard Employer failed to identify. Both witnesses testified that Rosa Frias reached under the existing Plexiglas door into the machine, near a sprocket and chain assembly, while it was moving. The same witnesses testified that prior to the injury, supervisory personnel observed the machine in the condition it was in when Rosa Frias reached in underneath the hinged Plexiglas doors. The ability to reach in to make contact with the sprocket and

chain assembly establishes that it was unguarded. Both Frias and Igleheart confirmed the photograph (Exhibit 5) taken during the inspection accurately depicted the unguarded, shoulder height chain drive as it existed for several years prior to the July 2003 injury and inspection.

The violation's classification is general, so employer knowledge is not an element of the Citation. (*Ayoob & Perry*, Cal/OSHA App. 86-937, Decision After Reconsideration (May 18, 1987).) This unguarded hazard existed for sufficient duration that Employer should have identified and corrected it. Contrary to the assertion of Employer, the evidence does not support a conclusion that this was an isolated occurrence. The great weight of evidence is to the contrary. The Appeal is Denied, and the proposed penalty of \$375.00 is imposed.

B. Citation 2.

Citation 2 was also established by the Division by a preponderance of the evidence. The Citation is stated as follows:

Type of violation: SERIOUS

8CCR.3314(a) CLEANING MACHINERY AND EQUIPMENT.

Machinery or equipment capable of movement shall be stopped and the power source de-energized, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement during cleaning, servicing or adjusting operations.

An employee serviced a machine (a "Winkler Stringline Proofer") without de-energizing the power source, when the woman tried to remove a piece of displaced dough. The employee was seriously injured when her hand and arm were caught in a chain and sprocket drive.

At the time the decision below was rendered, 8 C.C.R. section 3314(a) provided:

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 during cleaning, servicing or adjusting operations unless the machinery or equipment must be capable of movement during this period in order to perform the specific task. If so, the employer shall minimize the hazard of movement by providing and requiring the

use of extension tools (*e.g.*, extended swabs, brushes, scrapers) or other methods or means to protect the employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools by thorough training. For the purpose of Section 3314, cleaning, repairing, servicing and adjusting activities shall include un-jamming prime movers, machinery and equipment.⁷

The terms “cleaning, servicing or adjusting” have been broadly construed. (Wiping a roller while alternately advancing the turn of the roller by depressing the activation switch was “cleaning” under § 3314(a), *California Box II*, Cal/OSHA App. 01-924, Decision After Reconsideration (Jul. 21, 2003); Employee reaching in to a laminating machine that had moving and turning rolls, to scrape defects off material with her fingernail, and to inspect for defects, as instructed by the manufacturer, violated § 3314(a) because the employee was not instructed to de-energize the machine before inspecting and cleaning, *Integritek*, Cal/OSHA App. 86-629, Denial of Petition for Reconsideration (Feb. 4, 1987). Inserting a 12-inch wire brush in to a moving conveyor violated § 3314, *Harbor Sand & Gravel, Inc.*, Cal/OSHA App. 01-1016, Decision After Reconsideration (Jun. 5, 2003). Attempting to clear an ice jam while the ice crushing machine was still running by use of improper tools violated the section, *Puritan Ice Company*, Cal/OSHA App. 01-3893, Decision After Reconsideration (Dec. 4, 2003).

Board precedent provides some guidance for determining when an Employer has, or has not, violated §3314. For example, the use by employees of improper cleaning procedures over a long period of time indicates that the employer is not requiring the use of safe methods. In *Integritek, Inc.*, *supra*, an employee was injured when she was cleaning a machine without using extension tools. The evidence demonstrated that she had used the dangerous cleaning method for eight months without reprimand in an area highly visible to her supervisors. The Board upheld a finding of a violation of §3314.

(*Tri Valley Growers*, Cal/OSHA App. 89-173, Decision After Reconsideration (Aug. 15, 1990).)

Here, the citation recites the number and substance of the safety order violated, 8 CCR 3314(a), and describes how and where the employee was injured, the nature of the injury, and the machine that caused the injury,

⁷ Effective 1-6-2005, this section was reorganized so that subsection (a) is a definitional section, and subsection (c) contains the substantive language of the charged safety order at issue here. The amendment made no relevant substantive changes.

including what she was doing when she reached in to the machine. The evidence supports the allegation. Specifically, by her testimony, the machine was moving, and not de-energized, when Rosa Frias reached in to the machine to remove misplaced dough. In doing so she caught her arm above the hand in the sprocket and chain drive, which drew her hand into the machine and severed it. She testified to this, as did co-employee John Igleheart, who was working that day as her floor supervisor. Igleheart turned the machine off after the injury.

The Safety Order requires a machine to be de-energized and incapable of movement before an employee can reach in or come in to contact with moving parts. This machine was moving, and there was no evidence that extension tools were required to perform this servicing function. As the Division supervisor testified, the injury would not have occurred if the machine was de-energized. The record contains substantial evidence that a violation of section 3314(a) occurred.

The Employer stipulated that the injury was serious, and the record contains ample evidence of the correctness of the serious classification. A violation is serious if it is substantially probable that it could result in serious physical harm or death, unless the cited employer proves that it did not know of the violation and could not have known of it by exercising reasonable diligence. (Lab. Code 6432(a); *Nibbelink Masonry Construction Corp.*, Cal/OSHA App. 02-1399, Decision After Reconsideration (Dec. 20, 2007).)

By classifying the violation as serious in the citation, the Division alleged it was substantially probable that death or serious physical harm could result if an employee got a hand caught in the Winkler Stringline Proofer's sprocket and chain assembly while energized. The Division District Manager testified that in his years of experience investigating sprocket and chain assemblies, and supervising the investigation of sprocket and chain assemblies and injuries occurring thereon, that amputations were the most likely result of failure to de-energize such machines prior to reaching in to them for any reason. The fact that Frias lost part of her arm in just such an accident corroborates the Division's allegation. This is sufficient evidence of the substantial probability that a violation will result in serious injury or death. (*Nibbelink Masonry Construction Corp.*, *supra*; *R. Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).) For these reasons, it is found that serious physical harm was a substantially probable result of the section 3314(a) violation found in this case.

The violative condition or practice proven by the evidence was that Employer allowed Frias and other employees, including Igleheart, to remove dislodged dough from within the Winkler Stringline Proofer while the source of power was not disengaged.

The lead employee for the Winkler Stringline Proofer that injured Rosa Frias testified the practice of reaching in was "standard operating procedure" for the nine years he worked there. He testified management was aware of this practice, and discouraged de-energizing the machines because it slowed the work. Employer failed to prove that it did not know of the violative practice or condition and, therefore, the serious classification of the violation is correct.

For years, this Employer allowed employees to reach in to this machine to remove dough that was misplaced during the proofing stage of bread production. There is no evidence to the contrary. A serious violation is found, and the proposed penalty of \$18,000.00 is hereby assessed.

C. Citation 3]

The violation of machine guarding standards was also established by the Division by a preponderance of the evidence.

Citation 3] states:

Type of violation: Serious

8CCR 4075(a) GEARS AND SPROCKETS.

All gears, sprockets and sprocket chain drives located 7 feet or less above the floor or working level shall be guarded.

A sprocket and chain drive on the "Winkler Stringline Proofer" was not guarded as required because its cover doors were readily openable.

Thus, the Division must show that Employer had a chain and sprocket mechanism, and that it was located seven feet or less above the working level. (*Knotts Berry Farm*, Cal/OSHA App. 01-4331, Decision After Reconsideration (May 31, 2007).) The Division must also show the assembly was not effectively guarded. In addition, the Division must show employees were exposed to the unguarded chain and sprocket assembly.

The evidence established the chain drive on the Winkler Stringline Proofer was a chain and sprocket mechanism.

The ordinary meaning of "sprocket" as defined by the *Dictionary of Scientific and Technical Terms*, Fourth Edition (McGraw Hill 1898) is "A tooth on the periphery of a wheel or cylinder to engage the links of a chain, the perforations of a motion picture, or other similar device." The relevant definition of "chain" from the same source is "1. A flexible series of metal links or rings fitted to one another; used for supporting, restraining, dragging, or lifting objects or transmitting, porting, restraining, dragging, or lifting objects or transmit power.

(Knotts Berry Farm, supra.)

The Division witness, Michael Frye, opined that the mechanism shown in photograph 10, which was identified by Frias and Igleheart as the device which caused the subject injury, was a chain and sprocket device. Indeed, the photograph shows a spiked, circular metal wheel surrounded by a chain, and the teeth of the wheel are inserted serially in to the links in the chain. This element has been established. Next, Igleheart testified the assembly was at approximately shoulder height, well within the 7-foot-from-the-floor requirement.

The exposure requirement is also met. The purported "guard" provided by hinged, latched, Plexiglas doors was not an effective guard for two reasons. First, as soon as the doors are unlatched, the employee is exposed to the hazard, and a violation of section 4075 would occur. (*Warner-Lampert Company*, Cal/OSHA App. 82-052, Decision After Reconsideration (Sep. 28, 2004) [chewing gum dryer conveyor assembly with hinged door guard violated section 4075 because the doors were an ineffective guard when opened to allow employees to inspect for dislodge gum].) Igleheart testified he had personally opened the doors to reach in to machine to remove dough on many occasions in the nine years he worked for Employer.

In addition, the size and location of the doors, as depicted in Exhibit 5, did not prevent employees from contacting the chain and sprocket assembly located behind them. In fact, Rosa Frias did not open the doors on the day of her injury. She reached in under the closed, latched Plexiglas doors to remove dislodged dough when her arm became entangled in the chain and sprocket drive.

The Division District Manager opined that contact with such sprocket and chain devices causes serious injuries, most often amputations, but even at times, death. There was no evidence offered by Employer purporting to show it was reasonably unaware of the ineffective guard. (*Lance Reyerson dba Lance Reyerson Construction* Cal/OSHA App. 08-1365, Denial of Petition for Reconsideration (Feb. 5, 2009).) This evidence, as well as the photographs and testimony of Frias and Igleheart, establish a violation of section 4075 with a serious classification.

The decision by the ALJ in this regard is hereby vacated, and the Appeal is denied, and the proposed penalty of \$3375.00 is assessed.

III. TIMELINESS OF CITATIONS

Upon review of the record in this case, it is clear the Division timely issued the citations. The record contains a report taken in the normal course of business, by employees of the Division, which an amputation accident occurred at a place of employment maintained by Employer on July 27, 2003. Division District Manager Michael Frye testified regarding the business practices of the Division in taking accident reports. This document (Exhibit 3) was generated in that normal course of business. The report is not made inadmissible by the hearsay rule. (Cal. Evid. Code §1280.)

Furthermore, Frye testified he assigned the case to Brian Burke, who performed an investigation on July 28, 2003. As Burke's supervisor, Frye has personal knowledge of the date of the investigation, as well as the processes that generate the assignment of investigations. The testimony of Frye is bolstered by the business record submitted as Exhibit 3, that identifies an injury to Rosa Frias occurring on July 27, 2003, when she reached in to the "Winkler" dryproofer to pull out a piece of dough.

The Division has six months from the time it learns of an accident to investigate and issue citations. (Lab. Code, §6317.) The statute of limitation for this case was therefore January 27, 2004. The citations were dated November 6, 2003, and received by the addressee on November 28, 2003, well within the applicable limitations period. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).) The citations were timely.

DECISION AFTER RECONSIDERATION

Docket No. 03-R1D3-5215

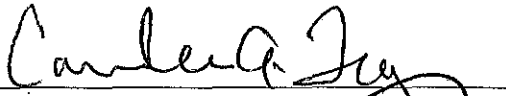
A general violation of section 3203(a)(4) is established and a civil penalty of \$375.00 is assessed.

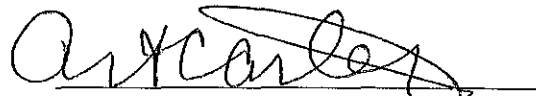
Docket No. 03-R1D3-5216

A serious violation of section 3314(a) is established and a civil penalty of \$18,000.00 is assessed.

Docket No. 03-R1D3-5217

A serious violation of section 4075(a) is established and a civil penalty of \$3,375.00 is assessed.


CANDICE A. TRAEGER, Chairwoman


ART R. CARTER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: JUN 9 2010

DH

