BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1306170**
SIU'S PRODUCTS AND DISTRIBUTOR, INC. **700 KEVIN COURT** **OAKLAND, CA 94621** **Employer**	**DECISION**

Statement of the Case

Siu's Products and Distributor, LLC (Employer), manufactures and distributes packaging materials. On March 28, 2018, the Division of Occupational Safety and Health (the Division), through Safety Engineers Hoanhni Nguyen and Michael Chrisman (Chrisman), commenced an inspection of a work site located at 1067 45th Avenue in Oakland, California, after a report of an injury on March 28, 2018.

On August 31, 2018, the Division cited Employer for five alleged safety violations, two of which remain at issue: failure to de-energize a cutting machine to prevent inadvertent movement during set-up operations; and failure to guard in-running rolls of a cutting machine to prevent fingers from being caught between the rolls as material was being fed into the rolls. The parties reached a settlement of Citations 1, 2, and 4, prior to commencement of the hearing.

Employer filed timely appeals of the citations, contesting the existence of the violations and asserting affirmative defenses.[1] Additionally, Employer's appeal of Citation 5 was amended during the hearing to assert that the proposed penalty was unreasonable.

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board. On March 2 and 3, 2021, ALJ Lewis conducted the hearing from Elk Grove, California, with the parties and witnesses appearing remotely via the Zoom video platform. Ru Ji Li, Office Manager, and Kuai Cheong Siu, Owner, represented Employer. Carl Paganelli, Staff Counsel, represented the Division. The matter was submitted on March 3, 2021.

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

Issues

1. Was the C40 cutting machine de-energized or disconnected from its power source to prevent the equipment from inadvertent movement during set-up operations?

2. Did Employer fail to guard the in-running side of the rolls to prevent the fingers of the operator to be caught between the rolls?

3. Did Employer establish that the Independent Employee Action Defense relieved it of liability for the violations?

4. Is the proposed penalty for Citation 5 reasonable?

Findings of Fact

1. On March 28, 2018, Yi Ji Zhang (Zhang), an employee of Employer, was injured when his finger was caught in the in-running rolls of a bag-processing machine (C40 cutting machine).

2. The C40 cutting machine was energized at the time of Zhang's injury.

3. Zhang was setting up the C40 cutting machine to process bags that were an irregular size.

4. Zhang pressed a button as he attempted to feed material through the rolls, but the button caused more movement than he intended, which caused Zhang's hand to be pulled into the rolls.

5. The in-running rolls of the C40 cutting machine were not guarded at the time of the accident.

6. Zhang had been a mechanic working on Employer's machines regularly for approximately three to four years.

7. Zhang did not intentionally press the particular button that caused the in-running rolls to activate.

8. The proposed penalty for Citation 5 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Was the C40 cutting machine de-energized or disconnected from its power source to prevent the equipment from inadvertent movement during set-up operations?

California Code of Regulations, title 8, section 3314, subdivision (d),[2] provides:

(d) Repair Work and Setting-Up Operations.

Prime movers, equipment, or power-driven machines equipped with lockable controls or readily adaptable to lockable controls shall be locked out or positively sealed in the "off" position during repair work and setting-up operations. Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with Section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy. In all cases, accident prevention signs or tags or both shall be placed on the controls of the equipment, machines and prime movers during repair work and setting-up operations.

In Citation 3, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, March 28, 2018 the employer did not ensure the C40 cutting machine was de-energized or disconnected from its source of power or otherwise effectively disengaged to prevent the equipment from inadvertent movement during set up operations.

a. Applicability of the Safety Order

To establish a violation of the safety order, the Division must demonstrate the applicability of the safety order to the facts of the case. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2384, Decision After Reconsideration (Oct. 7, 2016).)

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

Section 3314 provides, in relevant part:

(a) Application.

(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.

The Appeals Board has recognized that it is "always dangerous to work around energized machinery" and "[t]his 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).) Section 3314, subdivision (d), applies specifically to "Repair Work and Setting-Up Operations." Part of Employer's argument revolves around whether the injured employee was setting up the machine or testing it to ensure that it had been properly repaired.

The Appeals Board has "interpret[ed] 'setting-up' to refer to the process of preparing a machine or equipment for operation … ." (*Newman Flange & Fitting Company*, Cal/OSHA App. 07-2581, Decision After Reconsideration (Oct. 5, 2011).) Based on this interpretation, the task of testing the machine after it has been repaired is also "preparing a machine or equipment for operation."

The mechanic, Zhang, was injured while he was working on a bag-processing machine that cut material to size and sealed the end of it. There is a security video of the accident that shows Zhang put his hand near the rollers on the C40 cutting machine, pressed a button on the control panel, and then pulled his hand out after the rollers moved, resulting in injury to his thumb. (Ex. 3.) Chrisman testified that he interviewed Zhang as part of his inspection and Zhang informed him that he was setting up the machine for an irregular-sized bag. Employer's Plant Manager, John Huynh (Huynh), also informed Chrisman that Zhang was setting up the machine because the operator would be cutting an irregular-sized bag.

Huynh performed an accident investigation and prepared a report, which says repeatedly that Zhang was setting the machine up:

Q What were you doing at the time?
A: I was trying to set up the machine (C-40)…

Q: Describe step by step what led up to the injury/near miss?
A: Helping production worker set up poly film to convert…

Q: Describe fully how the accident happened?
A: Setting up poly film for converting.

[…]

Q: Describe, step by step, the events that led up to the injury.
A: C40 converting machine. Worker was setting up converting machine with poly film.

(Exhibit 21.)

Employer argued strenuously that Zhang was not setting the machine up and theorized that Huynh's reference to "setting up" in his report may have been the result of a miscommunication between Zhang and Huynh due to a language barrier. However, this argument is unpersuasive. Although Zhang speaks Cantonese and Huynh does not, part of the accident report is written in Chinese characters and is signed by Zhang. (Ex. 21, p. 1.) That is, the statements included in that section of the report could not have been misconstrued by Huynh due to the language barrier. A certified Cantonese interpreter translated the document during the hearing. Zhang's own words say that he was setting up the machine.

Huynh is a management employee who was assigned to conduct the accident investigation. If Huynh's report was inaccurate, the matter could have been addressed, clarified, and corrected if Ru Ji Li (Li) or Kuai Siu had reviewed his work. Instead, the report was submitted to Employer by Huynh and subsequently produced to the Division as a business record and authorized admission of a management representative.

Although Philip Siu, Employer's current Production Manager, testified that Zhang had been fixing an issue with the machine and had re-energized it in order to test the machine, the weight of the evidence supports a finding that Zhang was setting the machine up for processing irregular-size bags.

Accordingly, the safety order applies to the task being performed at the time of the accident.

b. De-Energized to Prevent Inadvertent Movement

The safety order requires that an employer take positive action, "such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy." (§3314, subd. (d).) "Inadvertent movement" within the context of section 3314 means any movement that was not intended. (*Rialto Concrete Products, Inc*., Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001).)

There was a significant amount of testimony regarding Zhang's intended action when he pressed a button on the machine that led to its movement and the subsequent injury to his hand. The testimony did not definitively answer the question of which button Zhang actually pushed versus which button he intended to push. Neither party called Zhang to testify. The testimony of Philip Siu, Michael Chrisman, and Kuai Siu conflicted with regard to the buttons involved in the accident. However, there was no dispute that the machine was energized and that Zhang attempted to feed material into the rollers by pressing a button on the control panel, which caused the rollers to pinch his finger. The evidence provided through testimony of Li, Kuai Siu, Philip Siu, in addition to Employer's Accident Report, confirms that Zhang pressed the wrong button which resulted in an unintended and, therefore, inadvertent, movement.

As set forth above, the safety order requires that an employer take positive action to "prevent the … machine from inadvertent movement or release of stored energy." (§3314, subd. (d).) There was no dispute that the machine was not de-energized at the time of the accident and Employer did not assert that there was some other action taken to prevent the machine from inadvertent movement while the employee was performing the task of feeding material through the rollers. There was no evidence that Zhang pressed a particular button with the intention of moving the rollers the way they moved. As such, the movement was inadvertent.

Accordingly, Citation 3 is affirmed.

2. Did Employer fail to guard the in-running side of the rolls to prevent the fingers of the operator to be caught between the rolls?

Section 4187, subdivision (a), provides:

> The in-running side of the rolls shall be protected with a fixed or self-adjusting barrier so arranged that the material can be fed to the rolls without permitting the fingers of the operator to be caught between the rolls or between the guard and the rolls[.]

In Citation 5, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on March 28, 2018, the employer failed to protect the in-running side of the rolls with a fixed or self-adjusting barrier so arranged that the material can be fed into the rolls without permitting the fingers of the operator to be caught between the rolls or between the guard and the rolls.

There was no dispute that the C40 cutting machine did not have a guard affixed at the time of the accident and Zhang's fingers were caught between the rolls as he was trying to feed the bag material through the rolls. The testimony established that the machine has guards, but Zhang or someone else had removed the guards earlier in the day and they had not been replaced as Zhang was performing the task involved in the accident. Additionally, Chrisman testified that the guard that had been removed would not have prevented an employee's fingers from contacting the rollers even if it had been in place.

Employer asserted that the guards needed to be removed for the work that Zhang was performing. However, the safety order requires that there must be a barrier to prevent fingers from being caught between the rolls when material is being fed into it regardless of the task being performed. The safety order does not include an exception for performing specific tasks, but instead clearly specifies an intent to protect employees against moving rollers.

Accordingly, Citation 5 is affirmed.

3. Did Employer establish that the Independent Employee Action Defense relieved it of liability for the violations?

Although Employer did not specifically assert an affirmative defense, its appeal forms indicated "Another Affirmative Defense" and there was an addendum with a narrative response to each citation. For Citations 3 and 5, Employer's narrative responses reflect an assertion that the alleged violations were caused by the employee pushing the wrong button. Construing the appeal in the light most favorable to Employer, the facts will be analyzed as to the sufficiency of the Independent Employee Action Defense (IEAD).[3]

In order to assert the affirmative defense of IEAD successfully, an employer must establish the following elements:

(1) The employee was experienced in the job being performed;

[3] The Division's closing argument addressed the IEAD argument, so permitting Employer to assert the IEAD does not prejudice the Division.

(2) The employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 14-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

It is noted that the IEAD is unavailable where the cited safety order requires protection against a particular hazard by means of positive guarding, since the purpose of a guard is to prevent inadvertent or accidental contact. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) As such, even if the following analysis of five elements of IEAD were sufficiently established, the defense would not absolve Employer of liability for a failure to ensure that the machine was guarded for Citation 5.

a. Was Zhang experienced in the job being performed?

Philip Siu testified that Zhang had worked as a mechanic for Employer for between three to four years. A regular part of Zhang's job was to fix the various machines and perform routine maintenance, including setting up the machines.

Employer satisfied the first element of the IEAD.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments. (See, *Mercury Service, Inc*., *supra,* Cal/OSHA App. 77-1133.) In *Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010), the Appeals Board held that the lack of training records for an injured worker does not undermine the quality of the safety program when there is evidence that the worker had, in fact, been trained. The Appeals Board gave consideration to the fact that the Division failed to cite the employer for defects in its Injury and Illness Prevention Program (IIPP) "given the evidence that the missing components were accounted for in other ways ... ." (*Ibid.*)

There was no testimony regarding Employer's overall safety program and training of employees with regard to safety. Employer submitted its lockout/tagout program into evidence, but there was no specific testimony about the training process and whether Zhang had been trained on the program.

Employer did not sufficiently establish the second element of the IEAD.

c. Did Employer effectively enforce its safety program?

"While an employer may have a well-defined safety program on paper, an employer must also demonstrate that it effectively enforces that safety program to meet the IEAD. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*FedEx Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).) "[A]n essential ingredient of effective enforcement is provision of that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." (*Ibid.*, citing *City of Los Angeles Water and Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 4, 1988).)

Employer has the burden to show that it enforces the safety policies and procedures set forth in its IIPP and training programs, and promotes a safe working environment. "Enforcement is accomplished not only by means of disciplining offenders, but also by compliance with safety orders during work procedures." (*Martinez Steel Corp.*, Cal/OSHA App. 97-2228, Decision After Reconsideration (Aug. 7, 2001).) The Appeals Board has previously stated that where there is lax enforcement of safety policies, an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak, supra*, Cal/OSHA App. 03-750.) In *Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), the Appeals Board found that the employer did not meet its burden of showing effective enforcement, as the evidence tended to show "ongoing failures to follow basic safety policies promulgated by the Employer."

Chrisman testified that Huynh and Zhang both informed him that the plastic material can be fed into the rollers manually with the machine off rather than energized as it was at the time of the accident. Additionally, Employer's lockout/tagout program references using locks and tags, but Zhang told Chrisman that he does not use locks or tags. (See Ex. C, p. 3.)

As such, even if Employer's safety program was found to be effective, the evidence supports a finding that Employer did not enforce the lockout/tagout program. Accordingly, Employer failed to establish that it met the third element of the IEAD.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

Employers may show compliance with this element through producing records of disciplinary actions related to safety. (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.)

There was no evidence to support that Employer disciplines its employees for failure to comply with its safety program. Accordingly, Employer has not established element four of the IEAD.

e. Did Zhang commit a safety infraction which he knew was contra to Employer's safety requirements?

"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." (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.) When the record lacks evidence that the employee actually knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc*., Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009).)

In *Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953, the Appeals Board also found that the employer had not satisfied the fifth element of the IEAD because the employer was "unable to demonstrate that [the employee's] actions were anything less than an unfortunate one-time error. Put another way, the Employer has not shown that [the employee's] actions were intentional and knowing, as opposed to inadvertent, or that [the employee] was conscious of the fact that his actions constituted a violation of a safety regulation or rule at the time of the accident."

There was no testimony or other evidence regarding Zhang's actual knowledge of the lockout/tagout policy. Li and Kuai Siu both made reference to not knowing whether Zhang intentionally pushed the wrong button or whether it was an accident. This vague supposition by Li and Kuai Siu is insufficient evidence to establish that Zhang intentionally violated Employer's safety program by sticking his hand into the machine and pressing the start button. It is more logical to believe that Zhang made an inadvertent error by pressing the wrong button, because to believe otherwise requires that Zhang intended to cause himself grievous bodily harm, with the potential for amputation of one or more of his fingers.

The Appeals Board has held that inadvertence or an error in judgment is insufficient to demonstrate a knowing violation of an employer's safety program. (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.) As such, Employer has failed to establish element five of the IEAD.

A single missing element defeats the IEAD. (*Home Depot USA, Inc. # 6617*, Cal/OSHA App. 10-3284, Decision After Reconsideration (Apr. 8, 2010).) Accordingly, Employer has not met its burden of proof with regard to the affirmative defense of the IEAD for Citations 3 and 5.

4. Is the proposed penalty for Citation 5 reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Chrisman testified as to the basis for the penalty for Citation 5. Employer did not provide any evidence that the Division's calculations were incorrect. However, Chrisman testified that the proposed penalty should have been further reduced for an abatement credit, so a review of the calculations follows.

The Base Penalty for a Serious violation is $18,000, which was increased to $27,000 after applying High Extent and High Likelihood factors for lack of a guard on the C40 cutting machine. (§336, subd. (b).)

The Gravity-Based Penalty of $27,000 was reduced by 45 percent after applying Adjustment Factors of 15 percent for Good Faith and 30 percent for Size. No credit was given for History due to the fact that Employer was issued a Serious citation in 2016. After the application of Adjustment Factors, the Adjusted Penalty was $18,900. (See §336, subd. (d).)

Chrisman conceded that Employer had abated the hazard alleged in Citation 5. However, section 336, subdivision (e)(3)(A), precludes the application of an abatement credit for "Serious violations for which extent and likelihood are rated high." As the violation in Citation 5 was assessed as having High Extent and High Likelihood, the penalty for Citation 5 cannot be reduced for an abatement credit. Accordingly, the penalty for Citation 5 remains $18,900.

Conclusions

For Citation 3, the Division established that Employer violated section 3314, subdivision (d). Employer failed to ensure that a cutting machine was de-energized to prevent inadvertent movement during set-up operations. The classification and reasonableness of the proposed penalty were not appealed.

For Citation 5, the Division established that Employer violated section 4187, subdivision (a), because Employer failed to guard the in-running rolls of the C40 cutting machine to prevent fingers from being caught between the rolls as material was being fed into the rolls. The classification was not appealed. The proposed penalty is found to be reasonable without modification.

Order

It is hereby ordered that Citation 1 is dismissed and the penalty is vacated pursuant to the parties' pre-hearing agreement.

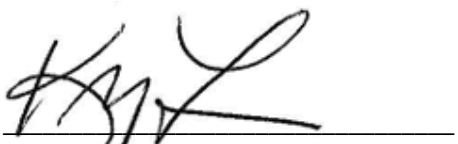
It is hereby ordered that Citation 2 is affirmed and the penalty is reduced to $700 pursuant to the parties' pre-hearing agreement, including the following non-admissions clause: The settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by Employer. Neither Employer's agreement to compromise this matter nor any statement contained in the parties' agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

It is hereby ordered that Citation 3 is affirmed and the penalty of $7,875 is affirmed.

It is hereby ordered that Citation 4 is dismissed and the penalty is vacated pursuant to the parties' pre-hearing agreement.

It is hereby ordered that Citation 5 is affirmed and the penalty of $18,900 is affirmed.

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



Dated: 03/26/2021

Kerry Lewis
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.**