

BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

In the Matter of the Appeal  
of:

**REALTIME STAFFING SERVICES INC.  
dba SELECT STAFFING**  
5127 Laurel Canyon Boulevard  
North Hollywood, CA 91607

Employer

DOCKETS 12-R4D3-3687  
through 3689

**DECISION**

**Statement of the Case**

Realtime Staffing Services Inc. dba Select Staffing (Employer) is a staffing company. Beginning June 28, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Stacey Christian (Christian), conducted a safety inspection at a place of employment maintained by Employer at 13336 Paxton Street, Pacoima, California, following a serious injury that occurred when an employee suffered a partial thumb amputation on June 1, 2012, while cleaning a dough dividing machine. On November 30, 2012, the Division cited Employer for four violations of California Code of Regulations, title 8: section 3203, subdivision (a) failure to maintain an effective Injury and Illness Prevention Program (IIPP); section 3314, subdivision (j)(1) failure to train employees on hazardous energy control procedures and hazards related to performing activities with machinery; section 4184, subdivision (b) failure to guard machines presenting similar hazards to machines specifically covered by regulation; and, section 3314, subdivision (c) failure to de-energize or lock out a machine capable of movement, during cleaning operations.<sup>1</sup>

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<sup>1</sup> Unless otherwise specified, all references are to Sections of, California Code of Regulations, title 8.

Employer filed timely appeals contesting the existence of the violations and the reasonableness of the proposed penalties in Citations 1, 2, and 3, and also alleging that it was not the controlling employer for purposes of imposing liability under the cited safety orders.

This matter was heard by Sandra L. Hitt, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Van Nuys, California on October 17, 2013, and June 5, 2014.<sup>2</sup> Rico Rose, Director of Underwriting and Safety, and Alvin M. Hall, Esq., represented Employer. Kathryn J. Woods, Staff Counsel, represented the Division. The parties presented oral and documentary evidence at the hearing. Employer and the Division each submitted post-hearing briefs. The matter was submitted for decision on July 21, 2014. Subsequent thereto, Judge Hitt resigned from the Appeals Board. The parties stipulated to waive hearing de novo on January 14, 2015. This matter was subsequently transferred to the undersigned Administrative Law Judge, who extended the submission date to July 14, 2015.

### **Issues**

1. Was Employer required to comply with the cited safety orders, where Employer's on-site supervisory employees admittedly exercised control over workplace safety on their assigned production lines?
2. Did Employer violate section 3203, subdivision (a), by failing to effectively implement procedures, including periodic inspections, to identify workplace hazards related to a Sabitech Dough Divider (Divider) operated by its employees?
3. Did Employer violate section 3203, subdivision (a), by failing to train employees on how to lock out the Divider during cleaning?
4. Did Employer violate section 3203, subdivision (a), by failing to ensure that supervisors were familiar with the safe operation of the Divider and the hazards attendant to cleaning it?
5. Did Employer violate section 3314, subdivision (j)(1)<sup>3</sup> by failing to train its employees on procedures for, and hazards attendant to, cleaning the Divider?
6. Did Employer violate section 4184, subdivision (b) by failing to guard the Divider's cutting mechanism?

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<sup>2</sup> Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Recording is signed by the undersigned ALJ.

<sup>3</sup> Section 3314, subdivision (j) was re-lettered as subdivision (l) by the Legislature as of October 1, 2014, after this matter was heard but before Decision was rendered. All references herein shall be to subdivision (j) as it existed before the 2014 legislative amendment.

7. Did Employer violate section 3314, subdivision (c), by failing to de-energize or disengage the Divider's power source while it was being cleaned?
8. Did the Division correctly classify Employer's alleged violations?
9. Did the Division properly characterize Employer's alleged violation of section 3314, subdivision (c) as accident-related?
10. Did the Division propose reasonable penalties for Employer's alleged violations?

### **Findings of Fact**

1. Employer directly employed Jose Saavedra (Saavedra), Afram Nono (Nono), Barbgés Kilinyan (Kilinyan) and Jesus Orozco (Orozco), and leased them to Global Bakery Company (Global) on June 1, 2012.
2. Nono was Saavedra's direct supervisor at the time of the accident. Nono directed Saavedra's work, exercised responsibility for Saavedra's safety, and had the power to stop Saavedra's work for safety reasons.
3. Saavedra sustained serious injuries on June 1, 2012,<sup>4</sup> while cleaning the Divider.
4. Although Saavedra was not assigned to the sanitation team responsible for cleaning machines at Global's facility, his supervisors knew that he regularly assisted in cleaning the Divider by hand, without extension tools.
5. Employer only inspected the Divider once, over one month before the accident, to ensure that both of its hinged interlock gate systems ("gate")<sup>5</sup> were functioning properly.
6. Nono was not familiar with the operation of the Divider, and did not inspect it prior to the accident to ensure the gates were functioning.
7. Employer failed to train employees Saavedra and Orozco in how to lock-out or tag-out the Divider prior to the date of accident.
8. One of the Divider's two gates was malfunctioning on the date of accident, in that it did not prevent the cutting mechanism from coming down when the gate was open.
9. The Divider's controls were not locked out or tagged out during the entire time that Saavedra was cleaning the Divider's cutting mechanism on the accident date.

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<sup>4</sup> This finding of fact results from a stipulation between the parties at hearing.

<sup>5</sup> The gate at issue is one of two guarding mechanisms on the Divider that was used to protect against inadvertent contact with the cutting mechanism. At hearing, the gate was described and depicted as a hinged door with vertical bars which, when opened, was supposed to cause the cutting mechanism to immediately cease operation. (See Exhs. 2, 3.)

10. The Divider's power source was not de-energized, and its cutting mechanism was not blocked during the entire time that Saavedra was cleaning the Divider.
11. The malfunctioning gate made it possible for employees to stick their hands into the cutting mechanism while the Divider was running, exposing them to the risk of an amputation injury.
12. Failing to train employees on how to lock-out or tag-out the Divider exposed employees engaged in cleaning the Divider to the risk of amputation injury from the cutting mechanism inadvertently coming down.
13. Saavedra's injuries were caused by Employer's failure to de-energize the Divider's power source while Saavedra was cleaning it.
14. The Division correctly applied the Board's regulations in calculating the penalties for the Citations. Citation 1, Items 1 and 2 are properly reduced to \$560 each by applying low Severity.<sup>6</sup>

### **Analysis:**

#### **1. Was Employer required to comply with the cited safety orders, where Employer's on-site supervisory employees admittedly exercised control over workplace safety on their assigned production lines?**

"All Employers are obligated to provide a safe and healthful workplace for their employees." (*Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011), citing Cal. Labor Code, § 6400.) The Board has previously found this duty is non-delegable. (*Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).) A primary employer is the employer who loans or leases one or a number of employees to another. (*Staffchex*, Cal/OSHA App. 10-2456-2458, Decision After Reconsideration (Aug. 28, 2014), citing *Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal. App. 4<sup>th</sup> 684, 693-694.) "Primary employers are responsible for complying with training and monitoring Safety Orders." (*Kelly Services*, *supra*, Cal/OSHA App. 06-1024; see *Sully-Miller Contracting Co.*, *supra* [observing that "the primary employer's general training responsibilities include 'general safe and healthy work practices and. . .specific instruction with respect to hazards specific to each employee's job assignment.'"]<sup>7</sup>.) The Board recently reaffirmed a primary

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<sup>6</sup> This finding of fact results from a stipulation between the parties at hearing.

<sup>7</sup> In *Sully-Miller Contracting Company v. Calif. Occup. Safety and Health Appeals Bd.*, (2006) 138 Cal. App. 4<sup>th</sup> 684, Sully-Miller, a general contractor, had rented an equipment operator to another contractor. (*Sully-Miller Contracting Company*, 138 Cal.App. 4<sup>th</sup>, at p. 690.) Sully-Miller knew the work its employee would be performing, but did not inspect the worksite beforehand and had no system to conduct periodic inspections or to ensure such inspections took place.

employer's safety obligations in *Staffchex, supra*, Cal/OSHA App. 10-2456-2458, in which the Board affirmed citations alleging, among other things, an ineffective IIPP and failure to properly guard machinery.<sup>8</sup>

The parties stipulated that Employer employed Kilinyan, Nono, and Saavedra on the date of the accident, and that Employer was a leased employee agent for Global from April 19 up to and including June 1, 2012. Thus, Employer was Saavedra's primary employer on the date of accident. Employer, as the primary employer, was required to comply with section 3203, subdivision (a), because it is a training and monitoring Safety Order. Employer is similarly required to comply with section 3314, subdivision (j)(1), because it is a training safety order.

Employer is additionally required to comply with section 4184, subdivision (b), and section 3314, subdivision (c), because Employer has a non-delegable duty to make certain that the worksite is safe for its employees. (*Staffchex, supra*, Cal/OSHA App. 10-2456-2458, citing *Cal-Cut Pipe & Supply Co.*, Cal/OSHA App. 76-995, Decision After Reconsideration (Aug. 26, 1980).) In *Staffchex*, the Board affirmed a citation that alleged a failure to guard, where the primary employer (a staffing agency) had conducted a preliminary inspection of the workplace; had discovered a problem with a guard on a piece of equipment; and, provided a full-time supervisor on site. (*Staffchex, supra*.)

Employer's conduct in the case at bar is similar to the employer's conduct in *Staffchex, supra*, which conduct was deemed sufficient to hold the employer responsible for compliance with a guarding safety order. Employer conducted an initial inspection of the worksite before entering into a contract with Global, over one month prior to the date of injury. Furthermore, both Kilinyan and Nono supervised their respective production lines full-time, and

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(*Id.*) In affirming the Board, the Court relied heavily on the Board's analysis in *Petroleum Maintenance Company*, Cal/OSHA App. 81-594-599, Decision After Reconsideration (May 1, 1985) (*PEMCO II*), wherein the Board held that a primary employer "is required to determine with particularity the work which a contract employee will be called upon to perform for the secondary employer. It shall maintain an accident prevention program and send out only employees who are trained to do the work...." (*Sully-Miller Contracting Company*, 138 Cal.App.4<sup>th</sup>, at pp. 696-697.) The Court reasoned that the employee was performing the same work for the secondary employer as he had recently been performing for Sully Miller, and so Sully-Miller was well-positioned to respond to hazards and conditions with which it was already familiar. (*Id.*, at p. 699.)

<sup>8</sup> The Board in *Staffchex* also expressly rejected the "dual employer" defense in its Decision. Although not specifically pleaded, the parties' closing briefs contained argument regarding its application, and they presented evidence which, prior to *Staffchex*, would have been admissible regarding whether Employer could establish all the elements of the dual employer defense. In light of the Board's decision in *Staffchex, supra*, however, the defense is no longer available and will not be discussed herein.

were responsible for directing work and ensuring the safety of their employees. Nono in particular was Saavedra's supervisor on the date of the accident, and had the power to stop work if he noticed something unsafe, including a malfunctioning gate. Although Global owned the work site and the equipment, overwhelming evidence at hearing demonstrated that Employer actually controlled the day-to-day operations on the production lines, because Employer exercised direct oversight over the production employees and had the power to stop work.

In affirming the citation in *Staffchex, supra*, the Board acknowledged that the on-site supervisor did not "appear to have had the direction or authority from Staffchex to intervene with the secondary employer to quickly resolve matters of training or safety; had [the supervisor] been instructed and empowered to do so, perhaps an accident could have been avoided." Here, however, Kilinyan and Nono exercised supervision over Saavedra's work and they could have intervened with the secondary employer, and thus could have avoided the accident. Accordingly, Employer was required to comply with section 3203, subdivision (a); section 3314, subdivision (j)(1); section 4184, subdivision b); and, section 3314, subdivision (c).

**2. Did Employer violate section 3203, subdivision (a), by failing to effectively implement inspection procedures to uncover a workplace hazard related to the Divider?**

Section 3203, subdivision (a), provides in pertinent part that "every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program ["IIPP"] (Program)...in writing and, shall, at a minimum... [i]nclude procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices...[w]hen the Program is first established; [w]henever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and [w]henever the employer is made aware of a new or previously unrecognized hazard." (Cal. Code Regs, tit. 8, § 3203, subd. (a)(4).)

In the citation, the Division alleges in relevant part:

On June 28, 2012, at the time of the inspection, the division determined the employer's Injury and Illness Prevention Program (IIPP) to be deficient in the following elements.

-(a)(4)- On June 1, 2012, an employee was seriously injured while cleaning a Sabitech Dough Divider (Serial: 26127293809, Model: DIV040SS-PBM) machine at the job site. The employee was trying to remove dough near the cutting mechanism of the Divider when the machine was switched on by another employee and the interlock failed to disengage the cutting mechanism. The employer did not conduct adequate inspection to identify this unsafe work condition, as required by this subsection.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Cambrio Manufacturing Co.*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) To establish the violation, the Division must prove that flaws in a program amount to a failure to “establish”, “implement” or “maintain” an “effective” program. Whether Employer failed to implement its IIPP is a question of fact. (*Ironworks Limited*, Cal/OSHA App 93-024, Decision After Reconsideration (Dec. 20, 1996).)

The Board has previously held that merely having a written IIPP is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) A single, isolated failure to “implement” a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, OSHAB 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fisher Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).) On the other hand, the Board has also held that an IIPP can be proved not effectively maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003); *Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Although occurrence of an accident alone is not proof that an employer has failed to identify and evaluate hazards (see *Michigan-California Lumber Co.*, Cal/OSHA App. 91-759, Decision After Reconsideration (May 20, 1993)), the Board has held that “[w]hat is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures

are to include ‘scheduled periodic inspections.’” (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445-3448, Decision After Reconsideration (Oct. 11, 2013).)

The term “periodic”, which is undefined in the safety order, is susceptible to two common meanings. On the one hand, it has been defined to mean “occurring, appearing, or recurring at regular intervals”. (*Webster’s New World Dictionary* (3<sup>rd</sup>. College Ed., 1991), page 1004.) On the other hand, it has also been defined as “occurring from time to time; intermittent.” (*Id.*) It is well established that safety regulations must be liberally construed to achieve the important purpose of creating a safe working environment. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313.) Thus, construing “periodic” to mean “occurring, appearing, or recurring at regular intervals” more adequately provides for the creation of a safe working environment.

Here, the evidence establishes that Employer did not have an inspection procedure in place. Employer’s managerial employees all admitted that they did not inspect the Divider routinely; in fact, Kilinyan (Saavedra’s regular supervisor) and Nono (Saavedra’s supervisor at the time of the accident) admitted they did not inspect the Divider’s gates at all. Even Employer’s safety manager Justin Marshall (Marshall) testified that he only inspected the Divider once, before Employer executed its service contract with Global over one month before the date of injury.<sup>9</sup> One inspection, by definition, does not “recur[] at regular intervals”. The only further inspection of the Divider’s gates took place immediately following Saavedra’s accident (See Exh. 7.) Employer failed to implement a periodic inspection program to identify and evaluate hazards relating to the Divider. Thus, the Division established a violation by the preponderance of the evidence.

### **3. Did Employer violate section 3203, subdivision (a), by failing to train employees on how to lock out the Divider during cleaning?**

Section 3203, subdivision (a)(7) provides in pertinent part that an employer must implement IIPP procedures for “[p]rovid[ing] training and instruction...[t]o all employees given new job assignments for which training has not previously been received.”

In the citation, the Division alleges in relevant part:

On June 28, 2012, at the time of the inspection, the division determined the employer’s Injury and

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<sup>9</sup> Marshall testified that a further “walkthrough” was performed by Employer at Global’s facility on May 7, 2012, but he did not know who performed the walkthrough, or whether the Divider’s gates were specifically inspected. (See Exh. B.)

Illness Prevention Program (IIPP) to be deficient in the following elements.

...

-(a)(7)(C)- On June 1, 2012, an employee was seriously injured while cleaning a Sabitech Dough Divider (Serial: 26127293809, Model: DIV040SS-PBM) machine at the job site. The employee was cleaning the dough near the cutting mechanism of the Divider with his hand when another employee re-energized the machine. The Divider was not stopped and the power source de-energized or disengaged and the moveable parts mechanically blocked or locked out to prevent inadvertent movement. The Division determined that the employer did not ensure that employees engaged in cleaning operations of the Divider were adequately trained on hazardous energy control procedures, as required by this subsection.

A hazardous energy control procedure outlines the scope, purpose, authorization, rules and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance. (Cal. Code Regs., tit. 8, § 3314, subd. (g)(1).) Such procedures may include “lock out”, which is “[t]he use of devices, positive methods and procedures, which will result in the effective isolation or securing of . . . machinery and equipment from mechanical. . . or other hazardous energy sources.” (Cal. Code Regs., tit. 8, § 3314, subd. (b).) Employers are generally held responsible to reasonably anticipate potential hazards related to “all necessary and logically foreseeable acts” undertaken by their workers in performing their assignments. (*Ag-Labor, Inc.*, Cal/OSHA App. 96-168, Decision After Reconsideration (May 24, 2000); and *Andersen Tile Co.*, Cal/OSHA App. 94-3076, Decision After Reconsideration (Feb. 16, 2000).) Thus, an employer that knows its employee is engaging in cleaning equipment that is potentially injurious due to unexpected energization or start up (see Cal. Code Regs., tit. 8, § 3314, subd. (a)(1)), has a duty to train its employees in the control of said hazardous energy.

The evidence is undisputed that neither Saavedra nor Orozco ever received training on hazardous energy control procedures, in particular how to lock out or tag out the Divider, prior to the date of accident, despite the fact that both were expected to operate and clean the Divider as part of their

assigned duties.<sup>10</sup> Critically, Employer's Exhibit B, its Worker's Comp Incident Report, states that Nono had instructed Saavedra and two coworkers to clean dough out of the Divider's cutting mechanism on the date of accident. Furthermore, it was evident from the testimony and evidence adduced at hearing that neither Global nor Employer had hazardous energy control procedures relevant to the Divider in place, let alone that either actually provided training on said procedures. (See Exh. B.) Thus, the Division established a violation by a preponderance of the evidence.

**4. Did Employer violate section 3203, subdivision (a), by failing to ensure that supervisors were familiar with the safe operation of the Divider and the hazards attendant to cleaning it?**

Section 3203, subdivision (a)(7), requires an employer to provide training and instruction "[f]or supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed."

In the citation, the Division alleges in relevant part:

On June 28, 2012, at the time of the inspection, the division determined the employer's Injury and Illness Prevention Program (IIPP) to be deficient in the following elements.

...

-(a)(7)(F)- On June 1, 2012, a supervisor was supervising employees engaged in operating and cleaning a Sabitech Dough Divider (Serial: 26127293809, Model: DIV040SS-PBM) Machine. The supervisor was not familiar with the safe operation of the machine nor with the hazards that employees under his immediate direction and control may be exposed to, as required by this subsection.

Nono admitted during an interview with Christian, and at hearing, that he did not know much about the Divider because it was not part of the line he normally supervised. Nono was the supervisor for production line 2, Saavedra's line, when Saavedra was injured. Therefore, Employer had a duty to provide Nono with training to familiarize him with the safe operation of the Divider and the hazards to which his employees may be exposed, including the hazard of

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<sup>10</sup> Saavedra testified that coworker Noel Fernandez showed Saavedra how to lock out the machine after the date of the incident.

amputation during cleaning that could result from inadvertent movement or release of stored energy.<sup>11</sup> Employer failed to provide any such training. Thus, the Division established a violation by the preponderance of the evidence.

**5. Did Employer violate section 3314(j)(1) by failing to train its employees on procedures for, and hazards attendant to, cleaning a dough divider used at Employer's work site?**

Section 3314, subdivision (j)(1) at all relevant times provided:

Authorized employees shall be trained on hazardous energy control procedures and on the hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting prime movers, machinery and equipment.

In the citation, the Division alleges:

On June 1, 2012 an employee was seriously injured while cleaning a Sabitech Dough Divider (Serial: 261272938098, Model: DIV040SS-PBM) at the job site. The employee was cleaning the dough near the cutting mechanism of the Divider with his hand when another employee re-energized the machine. As a result, one of the dividing blades initiated, causing an amputation of the employee's right thumb. The Division determined that employees were not trained in hazardous energy control procedures and on the hazards related to performing cleaning activities on the Dough Divider.

In order to meet its burden, the Division has the burden of establishing that (1) authorized employees (2) were not trained on hazardous energy control procedures and/or on (3) the hazards related to performing activities required for cleaning. With respect to the first element, the Supreme Court has long recognized that an Employer who, "by a long course of acquiescence, holds out an officer or agent as having authority to do certain things...cannot after he has acted repudiate his acts." (*Nicholson v. Randall Banking Co.* (1900) 130 Cal. 533, 539.) By logical extension, an Employer's acquiescence to an employee performing certain functions outside that particular employee's alleged scope of

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<sup>11</sup> Kilinyan, who was the line 2 supervisor for approximately 1 month before the accident, testified he never helped clean the Divider, which suggests that he too was unfamiliar with its safe operation and the hazard attendant to cleaning the cutting mechanism.

employment forecloses the Employer from arguing the employee lacked authorization for his actions. Thus, although Employer offered evidence that Saavedra's normal duties did not specifically include cleaning the Divider, nonetheless Employer's on-site supervisors Kilinyan and Nono had actual knowledge that Saavedra regularly helped clean the Divider. There was no evidence that they reprimanded him or otherwise tried to correct his behavior<sup>12</sup>. Accordingly, the Division established that Saavedra was an authorized employee.

With respect to the second and third elements, the evidence is undisputed that Employer failed to train Saavedra on hazardous energy control procedures related to cleaning the Divider.<sup>13</sup> Saavedra did not know how to lock out or tag out the Divider prior to the date of injury because he had never been trained in that procedure.<sup>14</sup> (See Exh. B.) Additionally, Orozco, the Divider's operator who by his own admission re-energized the Divider immediately before Saavedra was injured, gave unrebutted testimony that he did not receive lock out or tag out training until after the date of accident. Thus, the Division established a violation by a preponderance of the evidence.

**6. Did Employer violate section 4184, subdivision (b) by failing to guard the Divider's cutting mechanism?**

Section 4184, subdivision (b), provides:

(b) All machines or parts of machines, used in any industry or type of work not specifically covered in Group 8, which present similar hazards as the machines covered under these point of operation orders, shall be guarded at their point of operation as required by the regulations contained in Group 8.

In the Citation, the Division alleges the following:

On June 1, 2012, an employee of [sic] was seriously injured while cleaning a Sabitech Dough Divider (Serial: 26127293809, Model: DIV040SS-PBM) machine at the job site. The cutting mechanism of

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<sup>12</sup> In fact, Saavedra testified that his supervisor had previously instructed him to clean the Divider.

<sup>13</sup> Kilinyan himself admitted he did not train Saavedra in how to lock out or tag out the Divider, nor had Kilinyan received such training prior to the DOI.

<sup>14</sup> Whether such a policy even existed on the DOI was the subject of conflicting testimony at hearing. Regardless, the evidence was undisputed that the policy, even if it existed, was not adequately communicated to Orozco or Saavedra.

the Divider is guarded by a hinged interlock gate system. At the time of the incident, the employee was trying to remove dough near the cutting mechanism of the Divider when the mechanism was switched on by another employee and the interlock failed to disengage the cutting mechanism. The Division determined that the interlock on the hinged gate of the Divider was not functioning so that it would disengage the Divider cutting mechanism while the gate was open, as required by this subsection.

In order to meet its burden, the Division must establish that 1) a machine or part of a machine, 2) not specifically covered in Group 8, 3) that presents similar hazards as the machines covered under those orders, 4) was not guarded at its point of operation as required by the Group 8 regulations. As noted above, safety orders are to be liberally construed for the purpose of creating a safe working environment. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.) Thus, the Board “has interpreted section 4184(b) broadly to include any machine that ‘grinds, shears, punches, presses, squeezes, draws, cuts, rolls, mixes, or acts similarly... and is used in any industry or type of work not specifically covered in Group 8.’” (*Sonoma Grapevines, Inc.*, Cal/OSHA Ap. 99-875, Decision After Reconsideration, (Sep. 27, 2001).) Points of operation are defined as “[t]hat part of a machine which performs an operation on the stock or material and/or that point or location where stock or material is fed to the machine. A machine may have more than one point of operation.” (Cal. Code Regs., tit. 8, § 4188.)

The parties did not dispute the first three elements; rather, as to the fourth element, the witnesses offered conflicting accounts about whether both of the Divider’s gates were functioning on the date of injury, and thus, whether the point of operation was guarded as required by the safety order. Kilinyan, for instance, denied any knowledge of a malfunction, and stated that in his experience, every time either gate was open, the Divider stopped.<sup>15</sup> Marshall performed a Risk Management Evaluation of Global’s facility in April, 2013. (See Exhibit 7.) According to Marshall, the interlocks were working during his inspection; otherwise, he would have made a notation in his evaluation report. Similarly, Rico Rose (“Rose”), Employer’s Regional Safety Manager, testified

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<sup>15</sup> Kilinyan’s testimony is at odds, however, with his admission that he did not inspect the gates if the machine was running. If Kilinyan did not inspect the gates, he has no basis for determining whether they were functioning properly. His testimony, consequently, is not credible.

that he responded to Global's facility on the date of injury and observed that the Divider's gates were functioning as designed.

Saavedra, however, testified that one of the gates (the rear gate) had not been functioning for approximately one and a half months prior to the date of injury.<sup>16</sup> In addition, Orozco (the Divider's operator) testified that he had previously seen Kilinyan stick something in the allegedly malfunctioning gate to keep it open while the Divider was running. Critically, Rose believed that Saavedra had "jimmied" the allegedly malfunctioning gate when the incident occurred because Rose found the gate to be functioning when he inspected it after the incident, and Employer's Worker's Comp Incident Report (Exhibit B) indicated "Machine guard was bypassed". There was sufficient circumstantial evidence presented to create a reasonable inference that one could bypass the subject gate to reach into the cutting mechanism while the Divider was still operating, as well as evidence that Saavedra was in fact able to bypass the gate while cleaning the Divider. A guarding device that can be readily bypassed does not, by definition, satisfy the requirement of the safety order. Thus, the Division established a violation by the preponderance of the evidence.<sup>17</sup>

**5. Did Employer violate section 3314, subdivision (c), by failing to de-energize the Divider's power source while it was being cleaned?**

Section 3314, subdivision (c), states that:

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

In the citation, the Division alleges the following:

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<sup>16</sup> It is notable that the time period testified to by Saavedra closely matches the time period between when Global and Employer entered into contract, and the DOI.

<sup>17</sup> Although evidence that an Employer deliberately bypassed a safety device, or encouraged or condoned such activity, can form a basis for finding that a violation is willful (see *Owens-Brockway Plastic Containers*, Cal/OSHA App. 93-1629, Decision After Reconsideration (Sep. 25, 1997), the evidence does not support such a finding in this matter. However, the evidence did show that the gate did not adequately guard the cutting mechanism as required by the cited safety order, because on one or more occasions, including the date of injury, it was bypassed.

On June 1, 2012 an employee was seriously injured while cleaning a Sabitech Dough Divider (Serial: 26127293809, Model: DIV040SS-PBM) at the job site. The employee was cleaning the dough near the cutting mechanism of the Divider with his hand when another employee re-energized the machine. As a result, one of the dividing blades initiated, causing an amputation of the employee's right thumb. The Division determined that the Dough Divider's power source was not de-energized or disengaged and the moveable parts mechanically blocked or locked out to prevent inadvertent movement as required by this subsection.

The Board has stated that “[t]he clear purpose of section 3314(a)<sup>18</sup> is to keep employees away from the danger zone created by moving machinery.” (*Stockton Steel Corporation*, Cal/OSHA App. 00-2157, DAR (Aug. 28, 2002).) “The Board has interpreted the operative language in the safety order 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.” (*Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008), quoting *Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), and citing *Maaco Constructors, Inc.*, Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993).) The Board has previously held that merely pushing an “off” button does not satisfy the requirement that the machine be de-energized at its power source during cleaning. (See *Simpson Timber Co.*, Cal/OSHA App. 77-1038, Decision After Reconsideration (June 10, 1980); and *California Cascade Industries*, Cal/OSHA App. 79-945, Decision After Reconsideration (Dec. 15, 1980).)

Here, it was clear that Employer failed to de-energize the Divider during cleaning. Although there was evidence that the Divider was powered off temporarily for cleaning, Orozco admitted he restarted the machine while Saavedra was cleaning it, and then he heard a scream. Thus, the evidence demonstrates that Employer failed to de-energize the Divider's power source

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<sup>18</sup> Prior to 2005, the language of former subdivision (a) closely resembled the language of current subdivision (c), and analysis pertaining to former subdivision (a) is, therefore, instructive.

during cleaning operations. Therefore, the Division proved the violation at hearing by preponderant evidence.

## **6. Did the Division correctly classify Employer's alleged violations?**

“In addition to ‘directly’ appealing the classification, classification is also at issue whenever a party contests the reasonableness of the penalty. This is because the classification directly affects the proposed penalty amount.” (*Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013), fn. 3; accord *City of Los Angeles, Housing Authority [HACLA]*, Cal/OSHA App. 05-2541, Decision After Reconsideration (Nov. 15, 2011).) Here, despite the facts that the parties stipulated that the penalties were correctly calculated, the classifications were actually litigated by the parties without any objection, thereby placing the classifications at issue in the appeal. (See *Marine Terminals Corp. dba Evergreen Terminals*, supra.)

### **A. Citation 1, Item 1**

The Division classified Citation 1, Item 1 (deficient IIPP) as a General violation. A General violation is defined as “a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.” (Cal. Code Regs., tit. 8, § 334, subd. (b).) Failing to implement procedures to periodically inspect equipment to identify hazards, failing to train employees in how to lock out equipment for cleaning operations, and failing to ensure that supervisors are familiar with the safe operation of equipment used under their supervision, as well as with the hazards attendant to said equipment, all bear a relationship to occupational safety and health of employees, because each failure exposes employees to increased risk of serious physical harm while performing their assigned duties without proper safety training or supervision. Given the above, the Division properly classified Citation 1, Item 1 as a General violation.

### **B. Citation 1, Item 2**

Citation 1, Item 2, was also classified as a General violation. Citation 1, Item 2 alleged Employer failed to train its employees on hazardous energy control procedures and on the hazards related to performing activities required for cleaning the Divider. There was sufficient evidence to conclude that failing to properly train employees exposed them to heightened risk of serious physical harm while cleaning the Divider. Therefore, the Division properly classified Citation 1, Item 2 as a General Violation.

### C. Citation 2

The Division classified Citation 2 (§ 4184, subd. (b), failure to guard point of operation of machine presenting similar hazard to machines covered in Group 8) as a Serious Violation. Section 334, codified by Labor Code section 6432, subdivision (a), states in relevant parts that:

(c) Serious Violation.

(1) 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.

(2) For purposes of a serious violation, the “actual hazard” may consist of, among other things:

...

(B) 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.

“Realistic possibility” is not defined in the safety orders. However, the Appeals Board has interpreted the phrase “realistic possibility” to mean a prediction “clearly within the bounds of human reason, not pure speculation.” (*B & B Roof Preparation, Inc.*, Cal/OSHA App. 12-2946, Decision After Reconsideration (Oct. 6, 2014), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), which quotes *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (Apr. 30, 1980).)

Christian testified that the exposed sharp blades created a cutting hazard which could realistically lead to amputation, which is what happened to Saavedra. Amputation qualifies as serious physical harm as defined in section 6432, subdivision (e). Furthermore, and as noted above, there was sufficient evidence to create a presumption that the Divider was not properly guarded because at least one of the gates did not function properly and could be easily

bypassed. The Division's evidence thus created a rebuttable presumption that Employer's violation was serious.

The burden shifted to Employer to rebut the presumption of a serious violation. Section 334, subdivision (c), states in relevant part:

(3) If the Division establishes a presumption pursuant to subdivision (c)(1) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:

(A) 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. . . .

(B) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Section 334, subdivision (c)(3)(A) lists five non-exclusive factors deemed relevant, including relevant employee and supervisor training; procedures for discovering, controlling access to, and correcting the hazard; supervision of exposed employees; hazard communication procedures; and, any additional information that the employer wishes to provide before a citation is issued.

Here, Employer failed to take steps to anticipate and prevent the violation, as is evident from the fact that neither Kilinyan nor Nono ever inspected the Divider to ensure that the gates guarding the cutting mechanism were functioning properly. Thus, although Employer took some steps after the incident to institute training to prevent further injuries, Employer's failure to take reasonable preventative steps prior to the occurrence of the subject

incident does not aid Employer in rebutting the presumption that the violation should be classified as Serious. Therefore, Employer failed to rebut the presumption that Citation 2 was properly classified as a Serious violation.

#### **D. Citation 3**

The Division classified Employer's violation of section 3314, subdivision (c) (failure to de-energize or disengage Divider's power source) as a Serious violation. Orozco admitted he re-energized the power source while Saavedra was cleaning the Divider, and Christian testified that the failure to lock-out or tag-out the Divider exposed Saavedra to the hazard of exposed blades that creates a realistic possibility of amputation injury like what occurred. Christian's investigation concluded that employees were pushing the emergency stop ("E-Stop") button to stop the Divider for cleaning operations, including on the date of injury. Although the E-Stop should have kept the machine de-energized, Christian testified it was inadequate because the machine was restarted while Saavedra's hand was still in the cutting mechanism.

Christian stated that each employee engaged in the operation requiring lock-out or tag-out should be able to have control of the mechanism that would start the machine up. Christian interpreted that to mean a padlock should have been in place with three separate locks so all three employees who were working on the Divider would have had the ability to keep the Divider stopped or de-energized. Employer's failure to implement an effective lock-out or tag-out procedure meant that an employee could re-energize the Divider while other employees had their hands in the area of the cutting mechanism, which could result in an injury to an employee when the blades come down. Thus, the Division's evidence created a rebuttable presumption of a Serious violation.

As stated previously, Employer did not ensure that its employees and supervisors exposed to the Divider were properly trained in lock-out and tag-out, and the preponderance of the evidence at hearing established that no such procedure existed or was in use on the date of injury. Although Marshall testified that during his inspection of Global, he determined that Global had lock-out or tag-out procedures for the Divider, Employer failed to produce any evidence of those procedures aside from Marshall's testimony. Thus, Employer failed to rebut the presumption that its violation of section 3314, subdivision (c), was Serious.

**7. Did the Division properly characterize Employer's alleged violation of section 3314, subdivision (c) as accident-related?**

In order for a Serious violation to be characterized as "accident-related", the Division must show by a preponderance of the evidence, a causal nexus between the violation and the serious injury. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).) The parties stipulated that Saavedra received a serious injury, and the causal nexus was satisfied by substantial evidence that Orozco re-energized the Divider while Saavedra's hand was inside the cutting mechanism. Christian testified that Employer could and should have implemented procedures, such as the use of multiple padlocks, which would have prevented Orozco (or any other employee) from accidentally re-energizing the Divider while Saavedra's hand was still exposed to a cutting hazard. Preponderant testimony at hearing established that Employer's violation of the safety order caused Saavedra's injury; therefore, the Division correctly characterized the violation as "accident related".

**8. Did the Division propose reasonable penalties for Employer's alleged violations?**

The parties stipulated at hearing that the Division correctly calculated the proposed penalties for Citations 1, 2 and 3 in accordance with the Board's regulations, and that the penalties for Citation 1, items 1 and 2 should be calculated as \$560 each by applying low Severity. As noted above, the Division properly classified Citations 1, Items 1 and 2 as General violations, properly classified Citations 2 and 3 as Serious, and properly characterized Citation 3 as accident-related. In light of the evidence, and the parties' stipulations at hearing, the Division met its burden of establishing the reasonableness of the proposed penalties for Citations 1, 2 and 3.

**Conclusions**

As to Citation 1, Item 1, the evidence supports a finding that Employer violated section 3203, subdivision (a), by failing to: a) effectively implement procedures, including periodic inspections, to identify workplace hazards related to a Sabitech Dough Divider ("Divider") operated by its employees; b) train employees on how to lock out the Divider during cleaning; or, c) ensure that supervisors were familiar with the safe operation of the Divider and the hazards attendant to cleaning it. A penalty of \$560 is assessed for Citation 1, Item 1.

As to Citation 1, Item 2, the evidence supports a finding that Employer violated section 3314, subdivision (j)(1) by failing to train its employees on procedures and hazards attendant to cleaning the Divider. A penalty of \$560 is assessed for Citation 1, Item 2.

As to Citation 2 the evidence supports a finding that Employer violated section 4184, subdivision (b) by failing to guard the Divider's cutting mechanism. A penalty of \$6,750 is assessed for Citation 2.

As to Citation 3 the evidence supports a finding that Employer violated section 3314, subdivision (c), by failing to de-energize or disengage the Divider's power source while it was being cleaned, and that Employer's violation caused a serious injury to its employee. A penalty of \$18,000 is assessed for Citation 3.

### **Order**

Citation 1, Item 1 is sustained and a penalty of \$560 is assessed for Employer's violation. Citation 1, Item 2 is sustained and a penalty of \$560 is assessed for Employer's violation. Citation 2 is sustained and a penalty of \$6,750 is assessed for Employer's violation. Citation 3 is sustained and a penalty of \$18,000 is assessed for Employer's violation. Therefore, total penalties of \$25,870 are assessed for the reasons described herein, and as set forth in the attached Summary Table.

**DATED:** August 6, 2015

HIC:ml

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**HOWARD I. CHERNIN**  
Administrative Law Judge

**APPENDIX A**  
**SUMMARY OF EVIDENTIARY RECORD**  
**REALTIME STAFFING SERVICES, INC. dba SELECT STAFFING**  
**DOCKETS 12-R4D3-3687 through 3689**  
**Date of Hearing: Oct. 17, 2013 and June 5, 2014**

**Division's Exhibits**

<b>Exh. No.</b>	<b>Exhibit Description</b>	
1	Jurisdictional documents	<b>ADMITTED</b>
2	Photograph of Divider machine	<b>ADMITTED</b>
3	Photograph of accident site	<b>ADMITTED</b>
4	Photograph of cutting mechanism	<b>ADMITTED</b>
5	Accident Report dated June 1, 2012	<b>ADMITTED</b>
6	Contract between Employer and Global Bakery Company, dated April 13, 2012	<b>ADMITTED</b>
7	Risk Management Evaluation dated April 9, 2012	<b>ADMITTED</b>
8	Employee Training Records dated June 6, 2012	<b>ADMITTED</b>
9	Division's 1BY dated November 13, 2012	<b>ADMITTED</b>

	<b><u>Employer's Exhibits</u></b>	
A	Orientation Acknowledgment/Confirmacion de Orientacion (Eng. and Span.)	<b>ADMITTED</b>
B	Worker's Comp Incident Report	<b>ADMITTED</b>

**Witnesses Testifying at Hearing**

Jesus Saavedra  
Barbges Kilinyan  
Afram Nono  
Jesus Orozco  
Stacey Christian  
Justin Marshall  
Rico Rose

**CERTIFICATION OF RECORDING**

*I, **HOWARD I. CHERNIN**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to issue a decision in the above matter, hereby certify the proceedings therein were electronically recorded. The recording was reviewed by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
Signature

August 6, 2015  
Date

**SUMMARY TABLE  
DECISION**

In the Matter of the Appeal of:

**REALTIME STAFFING SERVICES, INC. dba SELECT STAFFING  
Dockets 12-R4D3-3687 through 3689**

Abbreviation Key:	
Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division
AR= Accident related	

IMIS No. 314830852

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	AVAILABILITY	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R4D3-3687	1	1	3203(a)	G	ALJ affirmed violation. Penalty reduced pursuant to stipulation of the parties.	X		\$750	\$560	<b>\$560</b>
		2	3314(j)(1)	G	ALJ affirmed violation. Penalty reduced pursuant to stipulation of the parties.	X		\$750	\$560	<b>\$560</b>
12-R4D3-3688	2	1	4184(b)	S	ALJ affirmed violation.	X		\$6,750	\$6,750	<b>\$6,750</b>
12-R4D3-3689	3	1	3314(c)	S A/R	ALJ affirmed violation.	X		\$18,000	\$18,000	<b>\$18,000</b>
<b>Sub-Total</b>								\$26,250	\$25,870	<b>\$25,870</b>
<b>Total Amount Due*</b>										<b>\$25,870</b>

NOTE: *Please do not send payments to the Appeals Board.*  
**All penalty payments should be made to:**

Accounting Office (OSH)  
 Department of Industrial Relations  
 P.O. Box 420603  
 San Francisco, CA 94142

(INCLUDES APPEALED CITATIONS ONLY)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: HIC/ml  
 POS: 08/06/15

