

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MARUCHAN, INC.
15800 Laguna Canyon Road
Irvine, CA 92618

Employer

DOCKET 15-R3D1-3431

DECISION

Statement of the Case

Maruchan Inc. (Employer) is a ramen soup manufacturer. Between February 6, 2015 and July 31, 2015, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Thurman R. Johns (Johns), conducted a safety inspection as a result of an amputation injury report at a place of employment maintained by Employer at 15800 Laguna Canyon Road, Irvine, California (the site). On August 3, 2015, the Division cited Employer for one violation alleging failure to ensure that the garnish dispenser was de-energized or locked out prior to an employee attempting to unblock the garnish distribution discs, which resulted in a serious injury.¹

Employer filed a timely appeal contesting the existence of the alleged violation, the classification, and the reasonableness of the proposed penalty. Employer also pleaded several affirmative defenses.

This matter came regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on May 25, 2016. Jose Velazquez, Senior Operations Manager represented Employer. Richard Fazlollahi, District Manager, represented the Division. The undersigned, on its own motion, extended the submission date to August 27, 2016.

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

Issues

1. Did Employer violate section 3314, subdivision (c), by failing to ensure it de-energized the garnish dispenser or properly locked out the garnish dispenser plates prior to cleaning, servicing and adjusting operations?
2. Did the Division cite an inapplicable safety order?
3. Did Employer carry its burden of proof to establish all the elements of the Independent Employee Action Defense (IEAD)?
4. Did Employer establish lack of knowledge as a defense?
5. Did the Division establish the proposed penalty is reasonable?

Findings of Fact

1. On February 4, 2015 a serious accident occurred involving an Employer controlled employee, Kelvi Figueroa (Figueroa), resulting in a right index finger amputation injury.
2. The garnish dispenser was capable of movement prior to cleaning, servicing and adjusting operations.
3. Employer did not de-energize the garnish dispenser or lock out the garnish dispenser plates prior to Figueroa unblocking the garnish dispenser plates.
4. Figueroa engaged in the cleaning, servicing and adjusting operations of the garnish dispenser by unblocking the garnish plates.
5. The Division cited Employer for the correct and applicable safety order.
6. Employer did not demonstrate all the elements of the IEAD.
7. Employer did not demonstrate lack of knowledge of a serious violation.
8. The Division correctly classified Citation 1, Item 1 as Serious Accident Related because a realistic possibility of serious injury existed, and a causal connection existed between the accident and the violation.
9. The Division correctly applied the penalty-setting regulations calculating the proposed penalty for Citation 1, Item 1.

Analysis

- 1. Did Employer violate section 3314, subdivision (c), by failing to ensure it de-energized the garnish dispenser or properly locked out the garnish dispenser plates prior to cleaning, servicing, and adjustment operations?**

Citation 1, Item 1 alleges a violation of section 3314, subdivision (c).

Section 3314, subdivision (c), found under Article 7 (Miscellaneous Safe Practices) of Subchapter 7 (General Industry Safety Order) provides:

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

In citing Employer, the Division alleges:

On 2/4/2015 employer failed to ensure that locks were in place on the cup-sealer garnish distributing disc, as required by procedure. This resulted in an employee controlled by employer suffering an amputation finger injury as he attempted to unblock the garnish without de-energizing the machine.

The Division has the burden of proving a violation, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal. App. 4th 472, 483.)

In *Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), citing *Maaco Constructors, Inc.*, Cal/OSHA App. 91-674, Decision After Reconsideration May 27, 1993), the Board 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.

In order to establish a safety order violation, the Division must establish that Employer 1) did not stop the garnish dispenser mechanical parts capable

of movement prior to cleaning, servicing and adjustment operations; and, 2) failed to de-energize or disengage the garnish dispenser power source. If neither of the preceding requirements is effective, the Division must also establish Employer failed to block or lock out the garnish dispenser mechanical parts capable of movement.

The issue of whether Employer stopped the garnish dispenser mechanical parts capable of movement is not disputed. Both parties provided testimonial evidence during the hearing that immediately prior to and during the time of the accident the production line was running and the garnish dispenser plates were moving in opposing directions to facilitate dropping the garnish into the soup cups below the dispenser plates. The parties, however, did dispute whether Figueroa engaged in cleaning, servicing and adjustment operations.

Section 3314, subdivision (a)(2) states:

For the purposes of this Section, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment.

The Board has overruled cases which previously interpreted the safety order as excluding service work during normal operations (e.g., clearing a jam) as well as cases which required the physical working on, or altering of, a machine as a precondition to that work being considered "cleaning, servicing, or adjusting" under § 3314. (*Sacramento Bag Mfg., Co.*, Cal/OSHA App. 91-320, DAR (Dec. 11, 1992).) The Board has recognized that "[i]t is always dangerous to work around energized machinery" and "[t]his danger is present however the activity around the energized machine is characterized." (*Stockton Steel Corporation*, Cal/OSHA App. 00-2157 DAR (Aug. 28, 2002), citing *Tri-Valley Growers*, Cal/OSHA App. 93-1971, DAR (Sep. 12, 1994).)

Johns testified based on his investigation he determined while Employer operated the garnish production line, a line worker informed Figueroa the garnish was not falling into the soup cups. Figueroa then, without stopping the garnish dispenser, attempted to unblock the garnish dispenser plates using his index finger to push excess garnish build up through the garnish plate holes.² During cross-examination, Employer attempted to rebut Johns' testimony by establishing that because Figueroa was not mechanically servicing the garnish dispenser, he did not engage in cleaning, servicing, and adjustment operations. Board precedent, however, recognizes service work such as clearing a jam is covered in the safety order.

² Johns provided testimony regarding pictures he took during his investigation, Exhibits 3C and 3D, to illustrate the process of how the garnish builds up in the garnish dispenser plates and is prevented from dropping into to soup cups below.

In this instance unblocking a garnish build up preventing a machine from performing its function is akin to clearing a jam on a piece of machinery. Figueroa did not need to mechanically service the garnish dispenser in order to qualify as engaging in cleaning, servicing, or adjusting operations. Based on the credible evidence presented at the hearing, Figueroa's actions demonstrate he attempted to unjam the garnish dispenser. This is precisely the activity section 3314, subdivision (a)(2) and Board precedent contemplate.

The Division, therefore, established Employer did not stop the garnish dispenser while in operation prior to cleaning, servicing and adjustment operations.

In determining the existence of the second element, the Division bears the burden of demonstrating Employer failed to de-energize or disengage the power.

Johns credibly testified that, in his opinion, if Employer had de-energized the garnish dispenser power source, the garnish dispenser would not be capable of movement or operational for production. Employer did not rebut Johns' testimony. The Division, therefore, established Employer did not de-energize the garnish dispenser prior to cleaning, servicing, and adjusting operations.

Section 3314, subdivision (b) defines locked out as:

The use of devices, positive methods and procedures, which will result in the effective isolation or securing of prime movers, machinery and equipment from mechanical, hydraulic, pneumatic, chemical, thermal or other hazardous energy sources.

When a machine capable of movement is not de-energized prior to cleaning, servicing, and adjusting operations, the Division must demonstrate the Employer did not properly mechanically block or lock-out the moveable parts capable of inadvertent movement as defined above by section 3314, subdivision (b). During the hearing, the parties stipulated at the time of the accident the key locks on the top cover of the garnish dispenser plate were in the open position and not properly locked out to prevent inadvertent movement. This is precisely the type of action lock-out devices and procedures as defined in section 3314, subdivision (b) are intended to prevent. The Employer, therefore, did not properly lock out the garnish dispenser at the time of the accident.

2. Did the Division cite an inapplicable safety order?

The Division must show that employees of the cited employer were exposed to the hazard addressed by the safety order for the violation to be

sustained. (*Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) When the Division cites the wrong or an inapplicable safety order, the appeal must be granted. (*Bostrom-Bergen Metal Products*, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003); *Carver Construction Co.*, Cal/OSHA App. 77-378, Decision After Reconsideration (Mar. 27, 1980); *Johnson Aluminum Foundry*, Cal/OSHA App. 78-593, Decision After Reconsideration (Aug. 28, 1979); *Varsity International Corporation*, Cal/OSHA App. 77-485, Decision After Reconsideration (May 9, 1979).) The Board has recognized as a defense to a citation that an employer may show that a more specific safety order applies, and it complied therewith. (*Davis Brothers Framing, Inc.*, Cal/OSHA App. 05-635, Decision After Reconsideration (Apr. 8, 2010).).

In order to establish this defense, Employer bears the burden of demonstrating a more specific safety order other than section 3314, subdivision (c) applied, and it complied with that safety order. Employer presented no evidence during direct examination regarding the applicability of a more specific safety order. During cross-examination, however, Velazquez testified section 4207, subdivision (a)(4), is a more applicable safety order.³ Velazquez did not provide any credible evidence to explain why section 4207, subdivision (a)(4) is more applicable than the cited safety order. While section 4207, subdivision (a)(4) does generally address guard design requirements and the apparatus required (in this case a key) to remove said guard, it fails to address Employer's failure to use proper lock-out procedures.⁴ Johns credibly testified in his professional opinion, this accident is not a guarding issue. If Employer adhered to its own production conditions, guidelines and process (Exhibit 4) and followed its own lock-out procedure this accident would not have occurred.⁵

In weighing the evidence presented, Employer failed to meet its burden to establish the inapplicability of the cited safety order. The Division, therefore, cited Employer for the correct and applicable safety order.

³ Section 4207, subdivision (a)(4), found under Article 55 (Power Operated Presses), Subchapter 7 (General Industry Safety Orders) provides: "Every point of operation guard shall meet the following design, construction, application, and adjustment requirements: A hand tool such as a box, open end or adjustable wrench, socket or key shall be required to remove the guard." (Cal. Code Regs., title. 8, § 4207, subd. (a)(4))

⁴ The parties do not dispute the garnish dispenser plates had locks. The disputed issue is whether Employer properly locked out the garnish dispenser plates.

⁵ Johns maintains a Certified Safety Professional (CSP) designation (Exhibit 2).

3. Did Employer carry its burden of proof to establish all the elements of the Independent Employee Action Defense?

To provide relief when an employee acts against his or her employer's "best safety efforts", the Appeals Board recognized an affirmative defense in *Mercury Service, Inc.*, OSHAB 77-1133, Decision After Reconsideration (Oct. 16, 1980). Employer must establish all five of the elements set forth in *Mercury Service, Inc.* The IEAD is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (March 20, 2002).) An employer must show it has taken all reasonable steps to avoid employee exposure to a hazard, but the employee's actions serve to circumvent or frustrate the employer's best efforts. (*Paramount Farms, King Facility*, Cal/OSHA App. 09-864, Decision After Reconsideration (March 27, 2014); *Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991).)

The first element requires the employee have experience in the job performed. This requires proof that the worker had done the specific task "enough times in the past to become reasonably proficient". (*Solar Turbines, Inc.*, Cal/ OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).) On cross-examination Velazquez testified to Figueroa's general job duties.⁶ Figueroa's designated job title is "Operator" and his responsibility is limited to making sure the production line is running correctly, essentially quality control.⁷ Employer did not present evidence establishing Figueroa's proficiency in the role of Operator. Employer did not offer evidence demonstrating how long Figueroa worked in the capacity of Operator, nor did Employer provide evidence of Figueroa's past work history. Employer, therefore, did not establish the first element of the IEAD.

The second element requires the employer to have a well-devised safety program that includes training employees in matters of safety respective to their particular job assignments. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, *supra*.) The well devised safety program must contain specific procedures. (*Blue Diamond Growers*, Cal/OSHA App. 10-1281, Decision After Reconsideration (July 30, 2012).) Velazquez testified Employer cares about the safety of its employees. Velazquez testified to the general safety training

⁶ Figueroa's duties included ensuring cup lids are put into place on the line, stopping the cup dispenser equipment if a cup goes off the line, tend to the equipment that places noodles and garnish in the cups on the line, and assist with quality control for repackaging purposes.

⁷ Velazquez testified that although Employer uses the designation of Operators, which is only for book keeping purposes, in practical terms, Employer treats Operators as Machine Tenders. Machine Tenders are responsible for ensuring the line is running correctly, but not mechanical or servicing work. Mechanics are responsible for mechanical and servicing work.

Figueroa received as a new employee (Exhibit A).⁸ These topics included general instruction on machine guarding, lock out and tag out procedures, safety rules, and reporting unsafe conditions. Velazquez testified regarding a well-devised safety program with respect to employee's particular job assignment on the cup line and cup sealer machine (Exhibit 5). The instructions and procedures covered included the operation of the cup sealer, the location of the safety sensors and emergency stop buttons, when to use the emergency stop buttons, machine guarding and protection, and acknowledging he is not allowed to do any adjustments or fixes to the cup sealer. Employer, therefore, established the second element of the IEAD.

The third element requires proof that Employer effectively enforces its safety program. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (November 4, 2010) quoting *Tri-Valley Growers*, Cal/OSHA App. 94-3355, Decision After Reconsideration (September. 15, 1999).) Here, Employer did not show it enforced its procedures by presenting evidence of Employer's instructions requiring Figueroa to contact a mechanic or other appropriate staff to unblock the garnish dispenser. Employer provided no evidence of effective enforcement of its safety program. Employer, therefore, did not establish the third element of the IEAD.

The fourth element requires Employer to establish that it has a sanctions policy which it enforces against employees who violate the safety program. Employer failed to provide any evidence regarding enforcement of its safety program. To demonstrate it has a sanction policy, Employer pointed to Registration and Recognition for Training of the Operator document Figueroa signed (Exhibit 5). In this document Figueroa acknowledges, "...failure to comply with safety procedures or participation in unsafe activities, results in disciplinary action, up to and including termination".⁹ Employer did not, however, provide any evidence of actual safety program disciplinary action, either official or unofficial. Moreover, Employer did not offer any evidence of instances where it enforced its safety programs through sanctions. The parties stipulated Employer continues to employ Figueroa. Johns testified to the best of his knowledge Employer did not take any disciplinary action against Figueroa. Employer did not rebut Johns' testimony. Employer, therefore, failed to establish the fourth element of the IEAD.

⁸ Although Exhibit A is completely in Spanish, the parties (the Division's Associate Safety Engineer, Jerry Magana, present during the hearing, who is Spanish speaking, confirmed Velazquez's translation) stipulated to Velazquez's translation from Spanish to English.

⁹ A State of California certified translator reviewed this document when Employer sent the documents to the Division prior to the hearing and certified the translation of a portion of this document (the title, item 3, and item 7). Velazquez translated the portion regarding potential discipline during the hearing. The parties stipulated to Velazquez's translation.

The fifth element requires Employer to prove Figueroa caused a safety infraction which he knew violated Employer's safety requirements. Velazquez testified Figueroa acknowledged he understood that he is not allowed to do any adjustments or fixes to the equipment by printing his initials on the Registration and Recognition for Training of the Operator document (Exhibit 5).¹⁰ This document only refers to the cup line and cup sealer equipment. The document does not cover the garnish dispenser or the garnish dispenser plates. Employer did not call Figueroa to testify during hearing. It is unclear if Figueroa understood unblocking the garnish dispenser constituted a safety infraction which violated Employer's safety requirements. Employer, therefore, failed to establish the fifth element of the IEAD.

Based on the credible evidence presented, Employer failed to establish the first, third, fourth and fifth elements of the IEAD. Employer, therefore, failed to establish all five elements of the IEAD.

4. Did Employer establish lack of knowledge as a defense?

Although not specifically pleaded, Employer asserted a lack of knowledge defense to the violation during the hearing. To establish lack of knowledge, an employer must demonstrate that the violation occurred at a time and under circumstances which did not provide employer with a reasonable opportunity to detect it. (*Bryant Rubber Corp.*, Cal/OSHA App. 01-1360, Decision After Reconsideration (Aug. 21, 2003).)

As an affirmative defense, Employer bears the evidentiary burden of demonstrating circumstances that prevented Employer from detecting the violation. Here, the violation occurred during regular operations while Employer operated the production line. Employer maintains specific production conditions guidelines and process for the production line during pre-line start up, sanitation, and line shutdown (Exhibit 4). Employer did not present evidence suggesting circumstances existed at the time of the accident which indicates Employer could not have detected the violation. Employer did not provide any credible evidence to establish it did not know and could not have known of the violation. Employer, therefore, did not establish lack of knowledge as defense.

5. Did the Division establish the proposed penalty is reasonable?

The parties stipulated at the hearing if a violation of the safety is found, the Serious Accident Related classification is not in dispute. Here, the

¹⁰ Only a portion of this document is translated by a State of California certified translator. Velazquez translated the portion regarding item 11 under the "Instructions and Procedures" section. Item 11 states, "I understand that I am not allowed to do any adjustments or fixes to the equipment. The parties stipulated to Velazquez's translation.

Division established Employer violated the safety order. Therefore, by stipulation the Division correctly classified Citation 1, Item 1, as Serious Accident Related because a realistic possibility of serious injury existed, and a causal connection existed between the accident and the violation.

Penalties calculated in accordance with the penalty setting regulations (section 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).)

The Division bears the burden of demonstrating the proposed penalty in this matter was reasonable. In reference to the Division's C-10 Proposed Penalty Worksheet (Exhibit 7), Johns testified on direct examination that he calculated the proposed penalty by beginning with a base of \$18,000 for severity due to the serious classification. Due to the high likelihood of a serious injury occurring when lock-out procedures are not used, Johns increased the proposed penalty by twenty-five percent to a total proposed penalty of \$22,500. Johns further testified since a serious violation caused a serious injury, the only downward adjustment possible is for size. Since Employer maintains over 100 employees, no adjustment for size is allowable. Additionally, no abatement credit is allowed for a Serious Accident Related penalty. Employer provided no credible evidence to rebut Johns' testimony on the proposed penalty calculation.

The Division, therefore, established the proposed penalty of \$22,500 for Citation 1, Item 1 and said penalty is reasonable.

Conclusion

Employer's appeal from Citation 1, Item 1, is denied. The Division established the existence of a violation of section 3314(c) by a preponderance of the evidence.

Order

It is hereby ordered that Citation 1, Item 1 is affirmed and the final penalty is assessed as set forth in the attached Summary Table Decision.

Dated: September 20, 2016
CHW:ml

CLARA HILL-WILLIAMS
Administrative Law Judge

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

MARUCHAN, INC.
Docket 15-R3D1-3431

Date of Hearing: May 25, 2016

Division's Exhibits

Number	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Curriculum Vitae for Thurman R. Johns, CSP, Associate Safety Engineer	Yes
3A	Photo depicting work production line and garnish chute	Yes
3B	Photo depicting garnish dispenser with locks	Yes
3C	Photo depicting garnish dispenser holes	Yes
3D	Photo depicting top plate of garnish dispenser	Yes
4	Production Conditions Guidelines & Process Sheet	Yes
5	REGISTRATION and RECOGNITION FOR TRAINING THE OPERATOR	Yes
6	Maruchan, Inc. Injury/Illness Investigation Report	Yes
7	Proposed Penalty C-10 Worksheet	Yes
8	Select Staffing Sign In Sheet 1 st Shift Production dated 10/27/14	Yes

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Select Staffing training document in Spanish entitled "Lista de Instrucciones Para el empleado Nuevo" ¹¹	Yes

Witnesses Testifying at Hearing

1. Thurman R. Johns
2. Jose Velazquez

CERTIFICATION OF RECORDING

I, CLARA HILL-WILLIAMS, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

CLARA HILL-WILLIAMS

Date

¹¹ During the hearing the parties stipulated to the Spanish to English translation of Exhibit A provided by Velazquez. The English translation for the title is: "List of Instructions for New Employees".

**SUMMARY TABLE
DECISION**

In the Matter of the Appeal of:

**MARUCHAN, INC.
DOCKET 15-R3D1-3431**

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division
A/R=Accident Related	

IMIS No. 1039507

DOCKET	CITATION	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AVFCIRTED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
15-R3D1-3431	1 1	3314(c)	S A/R	Affirmed	X	\$22,500	\$22,500	\$22,500
Sub-Total						\$22,500	\$22,500	\$22,500
Total Amount Due*								\$22,500

(INCLUDES APPEALED CITATIONS ONLY)

<p>NOTE: <i>Please do not send payments to the Appeals Board.</i> All penalty payments should be made to: Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142</p>

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

**ALJ: CHW/ml
POS: 09/20/16**