

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CALIFORNIA BOX II
8949 Toronto Street
Rancho Cucamonga, CA 91730

Employer

Docket No. 01-R3D3-924

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above-entitled matter by California Box II (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Between October 25, 2000, and February 20, 2001, the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 8949 Toronto Street, Rancho Cucamonga, California (the site).

On February 21, 2001, the Division issued a citation to Employer alleging a serious violation of section 3314(a) [stopping and de-energizing machinery during cleaning], of the occupational safety and health standards and orders found in Title 8, California Code of Regulations¹ for which an \$18,000 civil penalty was proposed.

Employer filed a timely appeal from the citation contesting the existence and classification of the violation and the reasonableness of the proposed civil penalty.

On May 7, 2002, Jack L. Hesson, a Board Administrative Law Judge (ALJ) heard the appeal in San Bernardino, California. Employer was represented by Attorney Stephen M. Miles. Albert Cardenas, Staff Counsel, represented the Division. On August 15, 2002, the ALJ issued a written decision denying the appeal and assessing a civil penalty of \$18,000.

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

On September 13, 2002, Employer petitioned the Board for reconsideration of the ALJ's decision. The Division filed an answer on October 11, 2002. On October 31, 2002, the Board took Employer's petition under submission and stayed the ALJ's decision.

EVIDENCE

Employer manufactures and labels corrugated cardboard boxes. A printing press with in-running rolls (rolls) is used to print labels on the boxes. A reservoir above the rollers holds the ink used by the press. It has a pneumatically operated system designed to release small quantities of the ink onto the rollers automatically as boxes are labeled by the press.

When press operator Juan Rosas and his helper took a work break on October 4, 2000, Rosas turned the press off using the power controls on the press. When the press is turned off, the valve on the ink release system is supposed to be kept closed by pneumatic pressure in the system but, in this instance, a malfunction allowed the valve to open and a substantial quantity of ink to drain out of the reservoir onto the upper and lower rolls and related parts of the press during the break.

Rosas and his helper discovered the ink spill when they returned from their break and wiped up as much of the ink as they could with waste paper while the press was still turned off. Then Rosas switched the press power control to jog mode, which enables the operator to cause the rollers to advance or roll inward for a short distance and at a reduced rate of speed by tapping the jog button. The jog button is close enough to the in-running rolls so that an employee can have one hand on the button and reach the surfaces of the rollers and their pinch point with the other.

Rosas put a cleaning agent on a rag. According to his testimony, at the time of the accident, Rosas was attempting to wipe ink off the lower roller with the cleaning rag. Only a fraction of the surface of the roller was reachable with the rag when the roller was stationary. He said he would clean as much of the roller's surface as he could reach with the rag he held in his right hand while the roller was stationary, jog the rollers forward enough to expose a part of the roller surface he had not yet cleaned with the rag by tapping the jog button with a finger on his left hand and removing the finger from the button, clean that portion of the roller while it was stationary and repeat that process. This, he said, was the procedure he had been trained by Employer to follow and that he always used to remove spilled ink from the rollers.

While Rosas was attempting to clean the lower roller with the rag, the rollers advanced, pulling the rag and his right hand into the pinch point, causing a serious hand injury. He testified that he was not depressing the jog button when the accident happened and that a malfunction had caused the rollers to advance. Rosas stated that the jogger had malfunctioned some weeks

before the accident, that he had reported the malfunction, and that a maintenance mechanic had worked on the jogger button.

Rosas had been working for Employer for approximately five years when the accident happened. He was an experienced press operator who had received certain safety information and training from Employer. Some of the safety materials pertain to machine operating safety.

For example, the "Safety Rules" on page 20 of Employer's "Employee Handbook" (Employer Exhibit C) state that an employee should, "Start operating any machine only after safety procedures and requirements have been explained (and you understand them)"; that "Machinery shall not be started until a check has been made that all is clear and safe"; and, that "Loose clothing, jewelry or rings must be removed before operating machinery." There are no written rules or procedures for cleaning a printing press safely. However, Rosas acknowledged that he had received general machine cleaning safety training.

The parties stipulated that, if called as a witness, Rosas' supervisor, Dennis Bourgouin, would have testified in accordance with a five page declaration he executed on April 25, 2002. The declaration was received as Bourgouin's testimony.

Pages 3 and 4 of Bourgouin's declaration include these paragraphs:

8. A specific safety rule associated with operation of the Printer is that, in the rare instance where hand cleaning of the Printer is necessary, the Printer should never be wiped down when in operation or simultaneously wiped down while activating the power to the Printer in jog mode.

9. Mr. Rosas is aware of this safety rule and during my supervision of Mr. Rosas, I have only observed him properly implementing the safety rules applicable to the Printer. Specifically I have observed Mr. Rosas properly jog the lower roller forward, and then proceed to wipe the stationary roller. Once the exposed section of roller is clean, I have observed Mr. Rosas properly jog forward an additional section of the lower roller and proceed on in accordance with safety instructions.

11. I have never observed Mr. Rosas, or any other employee of California Box II, simultaneously activate the Printer in jog mode while wiping down the lower roller. In the rare instances when a malfunction has required cleaning of the lower roller and when I was notified of the malfunction, I have supervised the proper cleaning of the lower roller.

Elsewhere in the declaration Bourgouin states that the rollers do not have to be capable of movement while an employee is performing the specific

cleaning task of wiping spilled ink from one of the rollers and that Employer does not provide employees with extension tools to clean the rollers while they are moving so they will not engage in that dangerous practice. Bourgoiu disputes Rosas' testimony that he (Bourgoiu) observed the ink spill before Rosas and his helper began cleaning it up.

He also declares that he did not know Rosas would violate the safety rule described in paragraph 8, above, and could not have known Rosas would do that by exercising reasonable diligence. In support thereof, Bourgoiu points to his alleged unawareness of the ink spill, Rosas' training and experience, Bourgoiu's past observations of Rosas complying with the safety rule, and Bourgoiu's inability to immediately supervise all employees at the large site.

Mahmood Chaudry (Chaudry), the Division Compliance Officer who investigated Rosas' accident testified that from his interviews with Employer's representatives and employees and examination of the press, he concluded that the rollers had to be capable of movement when spilled ink was being wiped up with a rag from around the rollers. Therefore, he determined that Employer had violated section 3314(a) by not providing Rosas and other press operators with extension tools to use to do the wiping and with training to use the tools.

Chaudry testified that based upon his examination of the press, his experience and training in such matters and the serious partial finger amputation injury Rosas sustained, he determined that it was substantially probable that the violation could result in a serious injury. Therefore, the violation was classified as serious.

ISSUES

1. Did the Division prove that section 3314(a) applied?
2. Did Employer prove that it neither knew of the violation nor could have known of it by exercising reasonable diligence?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. Section 3314(a) is Applicable and the Division Established a Violation of the Safety Order.

Section 3314(a) reads in part as follows:

(a) Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement during cleaning, servicing or adjusting operations unless the machinery or equipment must be capable of movement during this period in

order to perform the specific task. If so, the employer shall minimize the hazard of movement by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement.

Compliance Officer Chaudry's belief that the rollers had to be capable of movement during that specific cleaning task was incorporated in the citation but proven wrong at the hearing, as explained below. Employer suggests that the citation was defective because it alleges a violation of section 3314(a) on the theory that Employer should have provided extension tools instead of stopping the press and disengaging the power source. We reject that suggestion.

Unless citation defects prejudice an employer by failing to notify the employer of the offense charged so the employer can prepare and present a defense to it, the defects do not invalidate the citation. (See, e.g., *DSS Engineering Contractors*, Cal/OSHA App. 99-1023, Decision After Reconsideration (June 3, 2002), *Adia Personnel Services*, Cal/OSHA App. 90-1015, Decision After Reconsideration (March 12, 1992) and *Gaehwiler Construction, Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985).)

The first paragraph of the citation correctly alleges a violation of section 3314(a) and quotes the entire safety order. The second paragraph specifically references the date and time of the accident related violation, the press on which the violation occurred, and states that, "the employee was simultaneously jogging and wiping ink from the pull strap when his right hand got caught between the rollers." It then describes the violation as a failure to provide Rosas with extension tools or other means of protection against the continual movement of the rollers, and training in their use.

The citation provided Employer with notice of the requirements of section 3314(a), the applicable standard, and clearly identified the hazard of employee exposure to movement of the rollers while engaging in the cleaning operation task of wiping ink off the rollers as the condition or practice upon which the Division's allegation of a section 3314(a) violation was premised. Employer did not show that its defense was substantially prejudiced by the mistakes in the citation, and the well-conceived Trial Brief with exhibits attached that Employer filed and served on April 26, 2002, before the May 7, 2002, appeal hearing, tends to support a contrary inference. We conclude that the citation is valid and enforceable.

Section 3314(a) is stated to be a means of protecting employees who are adjusting, cleaning or servicing machinery against the hazard of "inadvertent"² movement of parts of the machine that have that capability. Employer argues

²Webster's New World Dictionary, Third College Edition, Fourth Printing 1989, defines "inadvertent" as, "1. not attentive or observant; heedless" and, "2. due to oversight; unintentional." (page 680)

that the evidence proves Rosas was intentionally or “advertently”³ causing the rollers to revolve by jogging or holding down the power control button with his left hand while “simultaneously” wiping the lower roller with the rag in his right hand. We disagree.

Chronologically, the term “simultaneously” appears first in the record in the Division’s description of the violation in the citation (Division Exhibit 1) where the Division states that “the employee was simultaneously jogging and wiping ink from the pull strap.” That may have been what Compliance Officer Chaudry understood Rosas to say when he interviewed him through an interpreter, but it conflicts with Rosas’ under-oath testimony at the hearing that he was alternating between jogging and wiping the lower roller, not the pull strap, when the accident occurred.

Moreover, even if “simultaneously jogging and wiping” were an accurate interpretation of what Rosas said in Spanish, it would not necessarily mean that Rosas was saying that he held the power control button down to make the rollers revolve continuously as he applied the rag to the surface of the lower roller. “Jogging” means to hit the power control button and cause the rollers to revolve a short distance or interval and stop. If Rosas wanted to use the revolving movement of the roller to help him wipe off the ink with a rag, he would not have repetitively jogged the rollers, he would have held the power control button down so the rollers would move continuously and held the rag against the surface of the lower roller until the motion of the roller had wiped the excess ink off on the stationary rag.

On direct examination Rosas testified that he adjusted the vertical distance between the rollers to the “extreme”, reduced the speed of the rollers, and then “alternated with the speed control and my cloth” until the “machine malfunctioned and caught my hand.”

On cross examination Rosas testified that he reduced the rollers’ speed because the slower the speed at which a roller is set into motion by hitting the jogger, the shorter the distance it revolves or advances before stopping again. This helps the machine operator avoid jogging an uncleaned portion of the roller past the narrow space between the table and the pinch point where the roller surface is reachable with a rag.

Rosas testified that the lower roller could be wiped when it was not moving. He said he was cleaning the lower roller the same way he always cleaned the rollers; by “alternating with the speed control and my cloth.” Once he described the procedure as, “jog then clean, jog then clean.” He also described it as “hit the jogger button, wipe, hit the jogger button, wipe.” He did not testify that he intentionally kept the rollers moving by holding the jogger down as he wiped the exposed lower roller surface with the rag.

³Webster’s New World Dictionary, Third College Edition, Fourth Printing 1989, defines “advertent” as, “paying attention; heedful.” (page 19)

Rosas applied for Workers' Compensation benefits after the accident. On July 18, 2001, an attorney representing Employer in that proceeding deposed Rosas through an interpreter. The deposition was received in the record of this case as Employer's Exhibit A.

The following questions ("Q.") were asked by the attorney and answered ("A.") by Rosas during the deposition (Exhibit A, page 25, line 24 through page 28, line 20):

Q. Okay. So you were cleaning, what specifically, up with the paint thinner?

A. The rag.

Q. And what part of the machinery?

A. The lower roller.

Q. Then what happened?

A. I had the machine on the speed of five. And I turned the speed down to three so that the jogger⁴ would move more slowly. And I was cleaning when the machine turned on.

Q. Did it suddenly turn on?

A. Yes.

Q. Did anybody activate an on switch on the machine?

A. No.

Q. But the machine was working at the speed of three before it suddenly turned on, correct?

A. Yes. I had turned the speed down from five to three.

Q. Then you say, but the machine then, after that, turned on?

A. No. What's happening is I was hitting the jogger.

Q. Hitting it how?

⁴ The deposition was conducted through an English-Spanish interpreter. Either the interpreter or the court reporter misunderstood Rosas, because the word "jagger" is used in place of "jogger" throughout the deposition transcript. To avoid confusion, "jogger" has been substituted for "jagger" in the quotations from the transcript.

A. That's what you said right now. I was touching the machine and cleaning it with my right hand.

Q. What part of the machine were you touching?

A. The lower roller.

Q. Was the jogger on at that time?

A. The jogger isn't – it's not –it's not a matter of being turned on or not. It's for intervals. If you don't touch it, it shouldn't move just to – makes a move at intervals.

Q. How often does the interval occur?

A. Every time one moves it. Every time one moves it, touches it just once.

Q. I don't understand. Are you saying that you operate the jogger or the jogger is operated by itself?

A. That's how it should be, that one operates the jogger, one should operate it.

Ms. Chegini (the attorney questioning Rosas): I'm sorry. I'm a little bit confused about this jogger. Is there a button on the jogger that you push and it turns?

The Witness (Rosas): Yes.

Ms. Chegini: So every time you push the button it turns – it turns?

The witness: Yes.

Ms. Chegini: Okay.

By Ms. Benvenuti (Rosas' attorney)

Q. So let's go back. You were cleaning the lower rollers with paint thinner?

A. Yes.

Q. And then what happened?

A. I touched the jogger and it pulled the rag from me. And due to inertia, I tried to pull the rag and it grabbed my hand.

Q. And it grabbed your right hand?

A. Yes. I don't know if – I really don't recall. Well, I don't know if it was because of the inertia that I hit it. And I hit the stop. I don't know if the machine stopped on its own. I really don't know.

Q. Okay.

A. But the machine stopped.

Q. All right. So the jogger grabbed the rag and then dragged your hand into the roller?

A. Yes.

Q. And then the roller stopped?

A. Yes.

Q. And do you have any idea how the jogger turned on?

A. No.

Employer asserts that by answering at the deposition that “I touched the jogger and it pulled the rag from me”, Rosas admitted that the activation of the jogger and resulting injurious movement of the rollers was advertent or intentional. And, Employer argues that this answer supports its view that Rosas testified at the appeal hearing that he was intentionally advancing the rollers when the accident occurred or that, at least, it is a prior inconsistent statement that reflects adversely on his credibility as a witness at the appeal hearing.

We believe that, when considered together with his other answers to questions at the deposition about whether he intentionally activated the jogger while the rag was in contact with the lower roller, the answer upon which Employer relies lends little support to its argument. The questions and answers quoted above show that Rosas first testified that he was cleaning the lower roller with the rag when the press “suddenly turned on” without “anybody activating an on switch.” Then he attempted to explain, to an uncomprehending attorney, what a jogger is and how he was “hitting it” to advance the rollers at “intervals”. He ended his testimony on the subject by stating that he “had no idea how the jogger turned on” when the rollers moved and drew his rag and hand into the pinch point.

Employer's only witness, Supervisor Dennis Bourgouin, testified by declaration that the rollers were self cleaning and only needed to be wiped off in the event of an ink spill or some other unusual occurrence. To wipe off the rollers in those instances, Employees were instructed to stop the rollers, wipe

the exposed portion of the surface, hit the jog button to advance the wiped portion of the surface and bring an uncleaned portion of the roller into reach, wipe that portion when the rollers stopped moving, and repeat that process until the entire surface of the roller had been cleaned.

Bourgouin was not at the press when the accident happened, but declared that he had observed Rosas clean the lower roller before the accident and that Rosas had jogged the rollers forward, taken his finger off the jog button so the rollers would stop moving, wiped the exposed portion of the circumference of the roller while it was stationary, removed his hand and rag from the roller, and repeated those steps, consistent with the procedure Employer approved and had trained him and other employees to follow.

Bourgouin's declaration testimony concerning the procedure Rosas and other employees were trained by Employer to follow and did follow when cleaning the rollers by hand was consistent with Rosas' testimony as to the procedure he was following at the time of the accident; wiping only after the jogged rollers had stopped revolving.

Exhibit 4 is a photograph taken from in front of the press's upper and lower in-running rolls. It shows that most of the lower roller is recessed below the table along which the flat, unfinished boxes are conveyed through the printing rollers. No more than an inch or two of the lower roller projects above the table and the bottom of the upper roller is above and in contact or nearly in contact with the top of the lower roller. Consequently, the hand of an employee reaching in from in front of the rollers to wipe the exposed portion of the lower roller with a rag would be within a few inches of the rollers' pinch point. And, if the rollers were revolving inwardly, having a rag in one's hand would substantially increase the risk of accidental contact with the pinch point between the rollers. Under these physical circumstances, the danger of reaching in toward the pinch point with a rag while the rollers are revolving is so obvious that it is difficult to believe an experienced press operator like Rosas would intentionally depart from the procedure of wiping only when the rollers were stopped.

From the above discussed evidence, we conclude that the movement of the rollers at the time of Rosas' accident was inadvertent. Rosas testified that the rollers moved, the jogger malfunctioned, that it had also malfunctioned a few weeks before the accident, that he had reported the malfunction, and that a maintenance mechanic had attempted to repair it. Employer presented no evidence tending to disprove Rosas' testimony. His opinion may well be correct. But even if the rollers moved because Rosas accidentally touched the jogger button with his left hand while he was wiping the rollers with his right hand or because of some other accidental act, the movement of the rollers would have been inadvertent.

Wiping the rollers was a machinery cleaning operation within the meaning of section 3314(a). (*Sacramento Bag Mfg. Co.*, Cal/OSHA App. 91-320,

Decision After Reconsideration (Dec. 11, 1992).) Rosas and Bourgoûin, both of whom are experienced and knowledgeable in such matters, testified that the rollers did not have to be capable of movement while the specific task of wiping the lower roller was being performed. Their testimony is credited and establishes that fact. Therefore, to comply with section 3314(a), Employer had to ensure not only that the rollers were stopped while being wiped but also that their power source was “de-energized or disengaged” whenever Rosas or other employees performed that task.

A preponderance of the evidence presented proves that Employer did not require employees to de-energize or disengage the power source when wiping the rollers. Rosas testified that when ink spilled he had always cleaned the rollers by wiping with one hand then jogging the rollers forward by hitting a power control switch on. If the machine had been de-energized or disconnected, there would have been no power at the press to cause the rollers to revolve when the power control on the press was jogged.

Paragraph 9 of Supervisor Bourgoûin’s declaration (quoted at p. 4, *infra.*), states in pertinent part:

Specifically, I have observed Mr. Rosas “properly jog the lower roller forward, and then proceed to wipe the stationary roller.” Once the exposed section of roller is clean, I have observed Mr. Rosas properly jog forward an additional section of the lower roller and proceed on in accordance with safety instructions.

Bourgoûin’s description of the Employer-approved procedure is additional proof that Employer allowed employees to leave the power source connected to the press while the rollers were being wiped so the jogger could be used to advance them.

Based upon the evidence discussed above, it is found that the rollers’ power source was not de-energized or disengaged when Rosas reached in to wipe the lower roller, exposing him to the hazard of inadvertent movement of the rollers. Thus, a violation of section 3314(a) was established.

2. The Violation is Properly Classified as Serious.

A violation is serious if it is substantially probable that it could result in serious physical harm or death, unless the cited employer proves that it did not know of the violation and could not have known of it by exercising reasonable diligence. (Labor Code § 6432(a) and (b))

By classifying the violation as serious in the citation, the Division alleged it was substantially probable that death or serious physical harm could result if an employee got a hand caught in the rollers’ pinch point because the rollers had not been stopped and their power source had not been disengaged during a cleaning operation, as required by section 3314(a). The fact that Rosas lost

part of a finger and suffered other hand injuries in just such an accident has some tendency in reason to prove the Division's allegation. Employer did not dispute the truth of the allegation or offer evidence to disprove it. For these reasons, it is found that serious physical harm was a substantially probable result of the section 3314(a) violation found in this case.

The violative condition or practice proven by the evidence was that Employer allowed Rosas and other employees to wipe ink from the rollers while their source of power was not disengaged. Paragraphs 9 and 10 of Supervisor Bourgouin's declaration prove that, through him, Employer knew and approved of that violative condition or practice, which exposed employees to the hazard of inadvertent movement of rollers during the wiping task. For these reasons, we find that Employer failed to prove that it did not know of the violative practice or condition and that, therefore, the serious classification of the violation is correct.

Employer's argument that it did not know Rosas would contact the lower roller with the rag while it was moving is unavailing. Employer knew Rosas would not disengage the power source when wiping the rollers. If Employer had required him to do so, the rollers would not have been capable of injurious movement while that task was being performed, and Rosas' accident would not have occurred.

DECISION AFTER RECONSIDERATION

Employer's appeal is denied. The Board affirms the ALJ's Decision and assesses a civil penalty of \$18,000.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: July 21, 2003