

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

In the Matter of the Appeal of:

**A TEICHERT AND SON, INC. dba
TEICHERT WATER WORKS SERVICES
3500 American River Dr.
Sacramento, California 95818**

Employer

Inspection No.
1431672

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to the authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

A. Teichert and Son, Inc. (Employer) is a construction company. On August 30, 2019, employee Cody Simpson (Simpson) suffered injuries to his hand while repairing a horizontal directional drill (Drill 1). On September 18, 2019, in response to a report of injury, the Division of Occupational Safety and Health (Division) commenced an investigation at 1901 11th Ave. in Sacramento, California, the jobsite where the injury occurred. On February 5, 2020, the Division issued one citation to Employer, alleging a Serious Accident-Related violation of section 3314, subdivision (d) [failure to lock-out/tag-out machinery].

Employer timely appealed the citation, contesting the existence of the violation, its classification, and the reasonableness of the proposed penalty. This matter was heard by Jennie Culjat, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in Sacramento, California, on September 7 and 8, 2022, with the parties appearing remotely via the Zoom video platform. Matthew S. McMillan, Attorney, of Donnell, Melgoza & Scates LLP represented Employer. Jennifer L. Martin, Staff Counsel, represented the Division.

On December 14, 2022, ALJ Culjat issued a Decision affirming the citation and its Serious and Accident-Related classification and rejecting Employer's affirmative defenses.

Employer filed a timely Petition for Reconsideration challenging the ALJ's Decision. Employer alleges that the Decision improperly affirmed the citation, improperly denied its affirmative defenses, and improperly affirmed the classification. The Division filed an answer.

The Board took Employer's Petition under submission. Issues not raised in the Petition are deemed waived. (Lab. Code § 6618.)

In making this decision, the Board engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did the Division establish by a preponderance of the evidence that Simpson was engaged in repairing Drill 1, and Drill 1 was not locked out and no alternative effective measures were employed in violation of section 3314, subdivision (d)?
2. Did Employer demonstrate that the “minor servicing” exception to section 3314, subdivision (d), applied?
3. Did the ALJ erroneously reject Employer’s assertion of the IEAD?
4. Did the Division establish the citation was appropriately classified as “Serious”?
5. Did Employer rebut the presumption that the citation was appropriately classified as “Serious”?

FINDINGS OF FACT

1. On August 30, 2019, Simpson, an employee of Teichert, was injured when his fingers were caught in a drill rod vise¹ clamp on a Vermeer D10x15 horizontal directional drill (Drill 1).
2. On the day of the accident, Simpson had been working as a locator as part of a two-man crew operating another drill (Simpson’s Drill).
3. Michael Villasenor had been operating Drill 1.
4. Simpson saw Drill 1 wasn’t working and walked over to offer help.
5. Drill 1 had become inoperable because a drill rod vise clamp was not staying in place. It was determined that the pin that secured the drill rod vise clamp was missing.
6. Drill 1 could not operate without the drill rod vise clamp being secured in place by the pin.
7. As Simpson was walking up to Drill 1, Villasenor was standing on Drill 1’s platform looking into the vise clamp area.
8. Villasenor asked Simpson to get him a replacement pin from Simpson’s truck and pointed to where a pin was missing.
9. Getting replacement parts was a preliminary and necessary task to start the repair.
10. By asking Simpson to get a replacement part, Villasenor involved Simpson in the repair.
11. Simpson walked closer to the drill to look into the vise clamps area where Villasenor was pointing.
12. Simpson believed the vise clamp with the missing pin would need to be replaced and reached in to remove the vise clamp.
13. Villasenor was looking at Simpson as he reached into the machinery to remove the vise clamp.
14. Villasenor sat down on Drill 1’s seat, not expecting the hydraulics to activate and shut the vise clamps on Simpson’s fingers.
15. Employer’s procedure for repairing drill rod vise clamps on a Vermeer drill was to turn the drill off and remove the key.

¹ Spelled as “vice” in both the citation and the hearing transcripts, as well as on some documents admitted into evidence. Spelled as “vise” in the Drill Operator’s Manual and the underlying Decision, so the Board is using this spelling.

16. Drill 1 was energized at the time of Simpson's injury.
17. Villasenor inadvertently activated Drill 1 when he sat on the operator seat and activated the seat sensor, either accidentally bumping a control switch, or the switch had been left engaged, causing the vise clamps on Drill 1 to engage while Simpson was reaching in to remove the vise clamp.
18. Simpson suffered a partial amputation of his right index finger and laceration of his right middle finger, with both injuries requiring surgery and a hospital stay of three days.
19. Although Simpson was experienced as a locator on a Vermeer drill, he was not adequately trained to safely repair drill rod vise clamps.
20. Simpson had repaired drill rod vise clamps approximately 12 times without de-energizing the Vermeer drill.
21. The on-site foreman, Marco "Tony" DeAnda did not supervise employees when they repaired machinery on the job.
22. Employer did not adequately supervise Simpson when repairing drill rod vise clamps.
23. The proposed penalty for Citation 1 was calculated in accordance with the Division's policies and procedures.²

ANALYSIS

- 1. Did the Division establish by a preponderance of the evidence that Simpson was engaged in repairing Drill 1, and Drill 1 was not locked out and no alternative effective measures were employed in violation of section 3314, subdivision (d)?**

The Division cited Employer for a violation of Section 3314, subdivision (d), which refers to "Repair Work and Setting-Up Operations." The applicability of section 3314 is set out in subdivision (a) which provides, in relevant part:

- (1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.

The Board has stated that the "clear purpose" of section 3314, subdivision (a) "is to keep employees away from the danger zone created by moving machinery." (*Stockton Steel Corporation*, Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002).) The Citation alleged a violation of Section 3314, subdivision (d), which states:

- (d) Repair Work and Setting-Up Operations.

Prime movers, equipment, or power-driven machines equipped with lockable controls or readily adaptable to lockable controls shall be locked out or positively sealed in the "off" position during repair work and setting-up operations. Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to

² This finding of fact was a stipulation by the parties.

lockable controls shall be considered in compliance with Section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy. In all cases, accident prevention signs or tags or both shall be placed on the controls of the equipment, machines and prime movers during repair work and setting-up operations.

The alleged violation description states:

“Prior to and during the course of the investigation, at a jobsite located at 1901 11th Ave. Sacramento, CA the employer did not ensure the Vermeer D10x15 horizontal directional drill was locked out or use an alternative measures which provide effective protection, during the repair of the drill rod vice clamp. As a result, on or about August 30, 2019, an employee whose hand was in the vice clamp, suffered a serious injury when the drill clap [*sic*] inadvertently closed.”

In this case, to prove the applicability of section 3314 and the cited subdivision, the Division must first establish that at the time of the accident, Simpson was engaged in repair work.

a. Did the Division establish that Simpson was engaged in repairing Drill 1?

The Decision found that “Simpson was engaged in repairing the Drill at the time of the accident.” (Decision, p. 5. [noting that Simpson “testified that the vise clamps were dislodged, needed to be replaced, and he attempted to remove the vise clamp.”].) Contrary to this, Employer’s Petition argues that Simpson was not engaged in a “repair” at the time of the accident, but rather, “foolish tinkering” and “*admitted* horseplay,³” and argues that Simpson was not involved in preliminary tasks necessary to complete the repair of Drill 1.

There was no testimony or documentary evidence introduced at the hearing that suggested that Simpson was engaged in horseplay or foolishness at the time of the accident or at any other time while working for Employer.⁴ Jason Lenaburg, a safety professional and manager with Employer, investigated the accident and his team videotaped a Vermeer drill from two different angles as Villasenor, the only other witness besides Simpson, described how the accident happened. (Exhibits I and J.) Both investigation videos make no mention of frivolity or horseplay. Neither Employer’s post-hearing brief nor the Decision make any mention of horseplay. From the review of the record, the Board finds no allegation of horseplay was made until Employer’s

³ [Petition, p. 5, 4 [emphasis in original].] Employer does not cite evidence of this alleged admission, and the Board was not able to find it in the record.

⁴ In particular, the following documents are where horseplay might have been referenced, but instead the documents refer to Simpson “working on” or “fixing” the Vermeer drill: Employer’s Safety Incident Report (Exhibit 19), Employer’s Form 5021, First Report of the Accident (Exhibit 20), Form 5021, Doctor’s first report of the accident (Exhibit 21) and the Division investigator’s notes from interviewing Chris Chaptk (Exhibit 40).

Petition. The Board finds Simpson was not involved in horseplay or foolish tinkering at the time of the accident.

It was established at the hearing that Vermeer drill rod vise clamps and the pins that hold the clamps in place were frequent wear parts that could only be repaired by replacement for the drill to resume functioning. Replacing a worn or damaged part that is not part of routine scheduled maintenance constitutes a “repair” as the word is used in section 3314. (*Wetsel-Oviatt Lumber Company*, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000).)

Employer also argued Simpson was not involved in the repair because at the moment of the accident, the repair had not yet begun because Simpson did not have the parts or the tools to do the repair. The Board has long held that preparatory work is a part of any action around machinery covered by section 3314. (Regarding servicing, *see Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991), regarding cleaning *see AG Labor, Inc.* Cal/OSHA App. 96-169, Decision After Reconsideration (May 24, 2000) regarding repairing *see Miller Brewing Company*, Cal/OSHA App. 81-1313, Decision After Reconsideration (Dec. 20, 1984).) The Board’s inclusion of preparatory work in section 3314 coverage “is compelled by the requirement that the Occupational Safety and Health Act of 1973, and safety orders issued in pursuant thereof, be liberally construed. (*Carmona v. Division of Industrial Safety*, 13 Cal.3d 303, 313; *Bendix Forest Products, Corp.*, 25 Cal.3d 470.)” *Miller Brewing Company*, Cal/OSHA App. 81-1313, Decision After Reconsideration (Dec.20, 1984).

On the day of the accident, Simpson had been working as a locator as part of a two-man crew operating another drill (Simpson’s Drill). Simpson saw Drill 1 wasn’t working and walked over to offer help. When Drill 1 broke down, Villasenor, Drill 1’s operator, first spoke with DeAnda, the on-site foreman. Villasenor told DeAnda there was something wrong with Drill 1, but that he had it under control and would fix it. As Simpson walked up, Villasenor was standing on Drill 1’s platform looking into the vise clamp area. One of the vise clamps was missing a pin, and pursuant to his plan to fix Drill 1, Villasenor asked Simpson to get him a replacement pin from Simpson’s truck and pointed to where a pin was missing. Villasenor’s examination of the machine and request for replacement parts indicates that the repair of the machine was in progress. The examination of the machine and acquisition of replacement parts were preliminary and necessary tasks of the repair. By asking Simpson to get a replacement part, Villasenor involved Simpson in the repair. Simpson came closer to the vise clamp area of Drill 1 to see where Villasenor had pointed and was reaching into the machinery to remove the vise clamp that was missing a pin when Villasenor sat down on Drill 1’s seat, unexpectedly activating the hydraulics and shutting the vise clamps on Simpson’s fingers.

The evidence established that prior to the accident Villasenor asked Simpson to get a pin from his truck and that neither Villasenor nor Simpson expected Drill 1’s vise clamps to shut when Villasenor sat down. Simpson testified the vise clamp with the missing pin that Villasenor had pointed at was dislodged, and that Simpson thought that vise clamp would need to be “swapped out.” Simpson was reaching into the vise clamp area when Villasenor sat down. Determining what replacement parts were required was necessary preparatory work for, and a part of, the repair of Drill 1. The Decision correctly held that “once the decision was made to fix the Drill, the repair commenced.” Villasenor had already decided to repair the drill and told his foreman that. Pursuant

to that decision, Villasenor brought Simpson into the repair when he asked him to fetch a pin to repair Drill 1, thus it was established Simpson was working on repairing Drill 1 when the accident occurred.

b. Was it established that Drill 1 was not locked out and no alternative effective measures were employed in violation of section 3314, subdivision (d)?

Under section 3314, subdivision (d), a violation can be established by showing any one of the following three types of deficiencies:

1. For prime movers, equipment, or power-driven machines equipped with lockable controls or readily adaptable to lockable controls, that the operator/employee fails to lock out or positively seal the controls in the “off” position during repair work and setting-up operations.
2. For machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls, the operator/employee fails to take positive means such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, machines, and prime movers from inadvertent movement or release of stored energy.
3. For all machines, the operator/employee fails to place accident prevention signs or tags or both, on the controls of the equipment, machines, and prime movers during repair work and setting-up operations.

Beginning with the first of the three potential types of deficiencies described in section 3314, subdivision (d), there was no evidence that the Vermeer Drill had lockable controls; therefore, it is not clear that this requirement applies. However, we do observe that the machine required a key to operate. Even if we assume, *arguendo*, that the key indicated that the machine’s controls were lockable, the evidence preponderates to a finding that the operator failed to lock out the controls. There was no dispute that the machine was energized at the time of the accident,⁵ which meant Villasenor had not turned the machine off with the key.

Employer’s procedure to repair Vermeer drill vise clamps was taught to employees at a half-day training at RDO Equipment Company, where underground product specialist and trainer Craig Sobrero (Sobrero) taught that the drill was to be de-energized and the key taken out of the ignition. The Operator’s Manual for Drill 1 lists Step 1 of the Lockout Procedure as “Shut off machine and remove key.” (Exhibit 22, Overview, p. 30-17). The Maintenance Manual lists the Shutdown Procedure, starting with Step 1: “Shut off the drilling fluid pump” and ending with Step 4 “Shut off engine and remove key.” After Step 4 the Shutdown Procedure states: “For your safety and the safety of others, use shutdown procedures before servicing, cleaning, unplugging, or inspecting the machine.” (Exhibit S, p. 12-1 emphasis added). However, Villasenor testified that

⁵ Decision, p. 5.

when he repaired vise clamps, he only de-energized the drill and generally did not remove the key from the ignition.

As to the second type of potential deficiency, assuming Drill 1 was not equipped with lockable controls, Employer was required to take positive means, such as de-energizing or disconnecting Drill 1 from its source of power. The ALJ correctly noted in the Decision that there was no dispute that Drill 1 was energized at the time of the accident, therefore Employer failed to comply with this requirement.

As to the third type of deficiency, it was established not only were accident prevention signs or tags (“tagout”) not placed on the controls of Drill 1 during the repair, but also Employer did not have specific tagout procedures for repairing Vermeer drill vise clamps. Neither Villasenor nor Simpson were ever taught tagout procedures for this repair, and both never employed tagout procedures when undertaking this repair.

Employer violated section 3314, subdivision (d) because Drill 1 was not locked out, no alternative effective measures were employed, and there were no accident prevention signs or tags on the controls of Drill 1 at the time of the accident. In its defense, Employer argues the “minor servicing” activity exception applies.

2. Did Employer demonstrate that the “minor servicing” exception to section 3314, subdivision (d), applied?

The minor servicing exception to section 3314, subdivision (d) provides, in pertinent part:

EXCEPTIONS to subsections (c) and (d):

1. Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

The Board has held: “An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at hearing.” (*Fed Ex Ground, Inc.*, Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020), citing *Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008).) “Exceptions are to be strictly construed in order to justify a freedom from the general rule.” (*Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203.)

Under this exception, Employer must establish by a preponderance of the evidence that Simpson and Villasenor were performing work that (1) took place during normal production operations, (2) was routine, repetitive, and integral to the use of the equipment for production, and (3) the work was performed using alternative measures which provide effective protection. As

these requirements are stated in the conjunctive, the exception is defeated unless Employer satisfies all three elements.

a. Did the work occur during normal production operations?

Sobrero testified that repairing a vise clamp and its associated pin was a relatively simple repair task that could be completed on-site in only a few minutes, and this testimony was generally reinforced by Villasenor's and Simpson's testimony. However, under the section 3314 "EXCEPTIONS to subsections (c) and (d)," for work to fall within the minor servicing exception, the work had to take place during "normal production operations." Section 3314, subdivision (b) defines normal production operations as: "[t]he utilization of a machine or equipment to perform its intended production function." Drill 1 could not function with a missing pin because the drill rod vise clamp was no longer being held in place. Drill 1 had not been able to drill. At the time of the accident, Simpson had been tasked with getting the replacement parts needed to repair Drill 1 and was involved in determining which parts were required to effectuate the repair to return Drill 1 to its normal production function. Employer failed to establish this element. Failing to prove one element defeats the minor servicing exception.

b. Was the work routine, repetitive, and integral to the use of the equipment for production?

While it was established that the repair was integral to the use of the equipment, it was not established the work was routine and repetitive. While repairing vise clamps might become routine after undertaking it several times, drill operators and locaters could not predict when a vise clamp would become misaligned, wear to the point of breaking, or a pin would go missing. It was not established that this repair was needed on a routine and repetitive basis. Simpson had stated he had completed this repair about 12 times over the preceding year, at unknown intervals.

c. Was the work performed using alternative measures which provided effective protection?

At the time of the accident, Villasenor had neither de-energized Drill 1 nor removed the key from the ignition, both actions Sobrero had trained him to do before inspecting the vise clamp. Villasenor involved Simpson in the repair when he asked him to go get a replacement part, a preliminary and necessary task that started the repair. When Villasenor sat down on the operator's seat and that activated the drill, the lack of effective alternative measures became painfully obvious to both Villasenor and Simpson. No alternative measures were employed or in place to block the inadvertent movement of the vise clamps, movement which caused Simpson's injuries.

In *Golden State Boring & Pipe Jacking, Inc.*, (Golden State) Cal/OSHA App. 1308948, Decision After Reconsideration (Jul. 24, 2020), section 3314 applied to the machinery, which was in working order during the accident. In *Golden State, supra.*, Cal/OSHA App. 07-2581, the minor servicing exception did not apply there because, as was the case in this instance, there were no alternative measures in place to block inadvertent movement. Had alternative measures been in place, Simpson could have avoided the partial amputation of his right index finger by the unexpected closing of Drill 1's vise clamps.

Employer failed to establish that Simpson and Villasenor were servicing Drill 1 as defined in section 3314 or that effective alternative measures were in place providing protection. The Decision properly held that Employer did not establish the minor servicing exception to section 3314, subdivision (d).

3. Did the ALJ erroneously reject Employer's assertion of the Independent Employee Action Defense?

Employer challenges the Decision's holding that the Independent Employee Action Defense (IEAD) was not established. The IEAD is an affirmative defense that requires the employer to prove five elements:

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

(*Fedex Freight, Inc.*, Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Because the IEAD is an affirmative defense, the burden to prove the defense by a preponderance of the evidence rests on the employer (*Central Coast Pipeline Construction Co., Inc.*, Cal/OSHA App. 76-1342, Decision After Reconsideration (Jul. 16, 1980); *Ernest W. Hahn, Inc.*, Cal/OSHA App. 77-576, Decision After Reconsideration (Jan. 25, 1984).) The elements establishing the IEAD are conjunctive, meaning each of the five elements must be established for an employer to successfully assert the affirmative defense. (*Mercury Service, Inc.*, *supra*, Cal/OSHA App. 77-1133.)

As correctly noted in the Decision, where there are two actors who contributed to an accident, to successfully assert the IEAD, the employer must prove all elements for both employees. (*Paramount Farms, King Facility* Cal/OSHA App. 09-864, Decision After Reconsideration (Mar. 27, 2014), *Home Depot USA, Inc.*, Cal/OSHA App. 10-3284 Decision After Reconsideration (Dec. 24, 2012).) Here, Employer must establish the IEAD as to both Simpson and Villasenor.

In the Decision, the ALJ found Employer failed to establish elements 1, 2, 3 and 5 as to Simpson, and with this established, did not evaluate the IEAD elements for Villasenor. (Decision, pp. 9-12.) The Board considers Employer's challenges to the ALJ's findings as to each IEAD element below.

a. Was Simpson experienced in the job being performed?

Employer must show that the employee had sufficient experience performing the work involved in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 11-2801, Decision After Reconsideration (February 4, 2011).) Generally, the Board has found this element is satisfied upon 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 (Jul. 13, 1992).) The work to be performed here was to repair the Vermeer drill by replacing a missing pin and possibly replacing the vise clamp as well.

To determine the standard for proficiency in the safe repair of Vermeer drill vise clamps, the Decision reviewed the training provided to Employer’s employees. Simpson and Villasenor attended the March 2019 training taught by Sobrero. This training did not cover required tagout procedures to follow when repairing Vermeer drill rod vise clamps. Villasenor testified that during his eight years with Employer, when repairing vise clamps, he only de-energized the drill and generally did not remove the key from the ignition. This establishes Villasenor had a pattern of unsafely skipping the lock out/tag out (LOTO) procedures. During the year Simpson worked for Employer, he repaired vise clamps about a dozen times without ever turning the drill off, thereby only gaining experience in completing the repair in an unsafe manner. Thus the evidence established that while Simpson had some experience and Villasenor had eight years of experience repairing the Vermeer drill vise clamps, their experience was that of undertaking the repair unsafely. An employer cannot meet this element of the IEAD by showing that an employee has experience doing a job in an unsafe manner. The IEAD is premised upon an employer’s compliance with its non-delegable statutory and regulatory responsibilities for ensuring safety in the workplace. (*Dade Behring, Inc.*, *supra*, Cal/OSHA App. 05-2203.) The Decision properly found it was not established that Simpson was experienced in *safely* repairing Vermeer drill vise clamps.

b. Did Employer have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments?

The second element of the IEAD requires the employer to demonstrate it has a well-devised safety program, which includes training employees in matters of safety respective to their particular job assignments. (*FedEx Freight, Inc.*, *supra*, Cal/OSHA App. 12-0144.)

The ALJ observed in the Decision:

Employer presented evidence of its safety program, including its Injury and Illness Prevention Program (IIPP), weekly tail gate meetings, and employee training on safety topics. However, as established, Employer’s procedure for replacing vise clamps was to turn the Vermeer D10x15 off during replacement, but there was no evidence that accident prevention signs or tags were utilized as required by section 3314, subdivision (d). Again, Employer failed to establish that Exception 1 found in section 3314 applied to replacing vise clamps. It cannot be said that Employer’s safety

program was well-devised when Employer's procedure for replacing vise clamps did not comport with the safety order. Accordingly, Employer failed to establish that it had a well-devised safety program that included training to safely replace vise clamps.

The Board concurs. This element was not established.

c. Did Employer effectively enforce its safety program?

Employer bears the burden of showing that it effectively enforces its safety programs. "Enforcement is accomplished not only by means of disciplining offenders but also by compliance with safety orders during work procedures." (*Synergy Tree Trimming, Inc.*, Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017), quoting *Martinez Steel Corp.*, Cal/OSHA App. 9-2228, Decision After Reconsideration (Aug. 7, 200).) Ensuring compliance requires systematic inspections which provide "that level of supervision reasonably necessary to detect and correct hazardous conditions and practices." (*Kenko, Inc.* Cal/OSHA App. 00-672, Decision After Reconsideration (Oct. 16, 2002), quoting *City of Los Angeles, Department of Water & Power*, Cal/OAHS App. 86-349, Decision After Reconsideration (Apr. 4, 1988). See *FedEx Freight, supra*, Cal/OSHA App. 12-0144).) The Board has held that where there is lax enforcement of safety policies, an employer cannot be said to have effectively enforced its safety plan. (*Glass Pak*, Cal/OSHA App. 03-0750, Decision After Reconsideration (Nov. 4, 2010).)

Simpson testified that he had repaired vise clamps on Employer's Vermeer drills about 12 times, always with the Vermeer drill still energized, around other employees and even the foreman. Simpson and his drill operator partner had requested their foreman order replacement parts after each repair and they kept extra parts for repairing vise clamps on their truck. Given Simpson's testimony that he had *unsafely* made the repair at least 12 times, that in itself indicates a lack of adequate supervision. Foreman DeAnda testified outright that he did not know how to repair drill rod vise clamps and he made no effort to observe when his crews did this repair. Employer did not establish adequate supervision of Simpson's work, so the Board cannot conclude Employer effectively enforced its safety plan.

Employer failed to establish that it effectively enforced its safety program regarding repairing drill rod vise clamps.

d. Did Employer enforce a policy of sanctions against employees who violate its safety program rules?

The Decision held that Employer had established the fourth element of the IEAD noting the Employer's "safety program set out a sanctions policy which was enforced against employees who violated its safety program rules, despite Simpson's violations never being discovered or corrected." The Board concurs with this finding.

e. Did Simpson cause a safety infraction which he knew was against Employer's safety rules?

To establish this element, Employer must show that Simpson “knew he was acting contra to the employer’s safety requirements.” (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.) “The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer’s safety requirements.” (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.) When the record lacks evidence that the employee knew of the safety requirement that was violated, the fifth element fails. (*Paso Robles Tank, Inc.*, Cal/OSHA App. 08-4711, Denial of Petition for Reconsideration (Nov. 2, 2009).) In *Paso Robles Tank, Inc.*, the Appeals Board found that the injured employee did not know he was taking an action in violation of the safety program, given his testimony that he had taken that same action on numerous occasions.

Simpson testified that he had not known Employer required Vermeer drills to be de-energized to repair the vise clamps. He testified he had not known he was acting in violation of Employer’s policy. Simpson testified that during the 12 times he had repaired Vermeer drill rod vise clamps, other employees and even the foreman were around. Simpson testified that he had never de-energized his drill before repairing the drill rod vise clamps. Simpson initially testified he’d seen other employees repairing drill vise clamps without de-energizing the drill first, but when asked to identify those employees by name (and risk implicating his former fellow workers), he declined to do so. While Employer did establish that Simpson received training on LOTO procedures in general and had been present for the general safety discussions at tailgate meetings, it was not established that Simpson was aware of the specific safety rule he violated, an awareness required to satisfy the fifth element of the IEAD. (*Pacific Coast Roofing Corp.* Cal/OSHA App. 95-2996, Decision After Reconsideration (October 14, 1999); *UPS (United Parcel Service)*, Cal/OSHA App. 07-3322, Decision After Reconsideration (Mar. 27, 2012).) Beyond Simpson being unaware he should de-energize the drill before starting a repair, it appears Simpson, Villasenor, trainer Sobrero and Employer were all unaware of the tag out procedures required by section 3314, subdivision (d).

Employer failed to establish Simpson knew that repairing the Vermeer drill vise clamps without first de-energizing the drill and employing LOTO procedures violated safety rules, preventing Employer from establishing the fifth element.

A single missing element defeats the IEAD. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) The Board affirms the Decision’s holding that elements 1, 2, 3, and 5 of the IEAD were not established.

4. Did the Division establish the citation was appropriately classified as “Serious”?

To determine if a citation is properly classified as serious, the Board applies a burden-shifting analysis (Lab. Code § 6432.) To establish a “rebuttable presumption” that a serious violation exists, the Division must demonstrate that “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (Lab. Code § 6432, subd. (a).) “Serious physical harm” is defined in subdivision (e) as “any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following: (1) inpatient hospitalization for purposes other than medical observation. (2) The loss of any member of the body. [...]” (Lab. Code § 6432, subd. (e).)

The Board may consider the accident itself (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015)) and “circumstantial and direct evidence, as well as common knowledge and human experience” (*Shimmick Construction Company, Inc.*, Cal/OSHA App. 1192534, Decision After Reconsideration (Aug. 26, 2022)) in reaching its determination. When Villasenor sat down and caused Drill 1 to energize, the vise clamps snapped shut on Simpson’s hand. Simpson suffered a partial amputation of his right index finger and lacerations to his right middle finger. Both of Simpson’s injuries required surgery and he was hospitalized for three days, meeting the definition of serious physical harm set out in Labor Code Section 6432.

The Division established a rebuttable presumption that the cited violation was properly classified as serious.

5. Did Employer rebut the presumption that the citation was appropriately classified as “Serious”?

To rebut the presumption that a citation was properly classified as serious, an employer may demonstrate that “the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” (Lab. Code, § 6432, subd. (c).) This requires the employer demonstrate both that:

(1) 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. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

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

(Lab. Code, § 6432, subd. (c).)

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer’s health and safety rules and programs

As to Factor (A), it was established at the hearing that Employer’s training of employees failed to make clear the necessity of all three required steps before starting a repair in the vice clamp area: (1) de-energizing the drill, (2) removing the key, (3) following tag-out procedures

required by section 3314, subdivision (d). Simpson followed none of these steps, Villasenor completed only step (1), and Sobrero only taught steps (1) and (2). The evidence regarding Employer's training, as established in the hearing, does not support rebutting the presumption that the accident was properly classified as Serious.

As to Factor (B), it was not established that Employer had any procedures to discover and control the hazard of employees repairing the Vermeer drill rod vise clamps without de-energizing the drill, removing the key, and following the required tag-out procedures.

As to Factor (C), it was established at the hearing that foreman DeAnda did not supervise employees when they repaired Employer's machines, and did not even know how to safely complete the repair himself. This resulted in no one in a supervisory position watching or checking on employees to ensure they repaired Employer's machines safely. New employees, and here Simpson, were not more closely supervised the first few times they repaired Vermeer drills to ensure they knew, understood, and followed Employer's safety protocols, and this lack of early supervision exposed both the new employees and the established employees around them to potential hazards.

As to Factor (D), it was noted in the Decision that Employer presented evidence regarding its safety program that included its Injury and Illness Prevention Program (IIPP), weekly tailgate meetings, and employee training on safety topics. Thus, Employer did establish it had procedures for communicating to employees about its health and safety rules. However, since Employer established only one of the factors which the Board may consider to rebut the presumption the Board finds that the Decision correctly held that, on balance, Employer failed to rebut the presumption that the violation was Serious.

DECISION

For the reasons stated, the ALJ's Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair

/s/ Judith S. Freyman, Board Member

/s/ Marvin P. Kropke, Board Member

FILED ON: 07/10/2025

