

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

In the Matter of the Appeal of:

INTERNATIONAL PAPER COMPANY
1600 N. Kelsey Street
Visalia, CA 93291

Employer

Dockets. 14-R2D5-1189 through 1191

**ERRATA TO
DECISION AFTER
RECONSIDERATION**

This errata corrects an error in the Summary Table attached to the Decision After Reconsideration. The Summary Table should reflect that the section 3314(c) citation was vacated. The corrected Summary Table is attached.

This errata also corrects a typographical error, located within the last full paragraph of page 4 of the Decision After Reconsideration. The bolded word should be added to the below sentence within that paragraph:

“During his interview, Swisher told Chun, in paraphrase, that she did **not** feel anything until her hand was struck by the blades.”

The remainder of the decision is unaffected.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JUN 11, 2015

AMENDED SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

INTERNATIONAL PAPER COMPANY
Docket No(s). 2014-R2D5-1189 through 1191

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

IMIS No. 316726421

Site: 1600 n. Kelsey Street, Visalia, CA 93291
Date of Inspection: 01/17/2014

Date of Citation: 01/21/2014

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
14-R2D5-1189	1	1	342(a)	Reg	Failure to timely report serious injury.	x		\$5,000	\$3,750	\$3,750
14-R2D5-1190	2	1	3314(c)	S	Failure to ensure power source was de-energized or disengaged and block or lock out moveable parts. ALJ vacated violation.		x	\$5,060	\$0	\$0
14-R2D5-1191	1	3	3943(c)	S	Failure to replace damaged fan guard. ALJ vacated violation. Board affirmed the violation and classification and penalty assessed by DOSH.	x		\$18,000	\$0	\$18,000
Sub-Total								\$28,060	\$3,750	\$21,750

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$21,750

NOTE: Payment of final penalty amount should be made to:

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

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.
Please call (415) 703-4291 if you have any questions.

POS: 6/11/2015

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Dockets. 14-R2D5-1189 through 1191

**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 decision issued by the ALJ under submission on its own motion, renders the following decision after reconsideration.

JURISDICTION

On January 17, 2014, the Division commenced an inspection of International Paper Company (Employer), through Associate Safety Engineer Ronald Chun (Chun), at Employer's place of employment located in Visalia, California. Chun commenced the investigation following a report of serious injury.

On March 21, 2014, upon completion of the investigation, the Division cited the Employer for three violations of Title 8¹ of the California Code of Regulations, including: a violation of section 342(a) [failure to timely report a serious workplace injury]; a violation of section 3314(c) [failure to stop and de-energize machinery prior to adjusting operation]; and, a violation of section 3943(c) [failure to adequately guard moving parts of machinery]. Employer timely appealed the citations.

A hearing was held before Administrative Law Judge, Kevin Reedy (ALJ). At the hearing, Employer was represented by Anthony Muia, Employer's Plant Manager, and the Division was represented by Jerry Walker, District Manager. Prior to completion of the hearing, the Division and Employer stipulated to settlement of the 342(a) claim.

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

On February 2, 2015, the ALJ issued a Decision vacating both the section 3943(c) and the section 3314(c) citations. With regard to the section 3943(c) citation, the ALJ determined that the Division failed to establish that the fan guard was inadequate, *i.e.* that there was a hole or opening in the guard. The ALJ made a specific finding of fact that, “The fan blade guard was not damaged prior to the accident.”

On February 23, 2015, the Board took this matter under reconsideration on its own motion to determine whether the ALJ appropriately evaluated the facts when it vacated the section 3943(c) citation.

ISSUES

The ALJ vacated the section 3943(c) citation [failure to adequately guard moving parts of machinery] finding that “[t]he fan blade guard was not damaged prior to the accident.” The Board took this matter under submission to determine whether the evidentiary record supported the ALJ’s factual finding and to determine whether the record supported the ALJ’s decision to vacate the citation.

EVIDENCE

After the Board’s independent review and consideration of the entire record, the Board finds:

1. The fan blade guard was damaged prior to the accident.

DECISION AFTER RECONSIDERATION

The Board has reviewed and considered the entire record in this matter. The Board has taken no new evidence. In making this decision, the Board relies upon its independent review of the entire evidentiary record in this proceeding. The Board additionally considered the Employer and Division’s Answers to the Board’s Order of Reconsideration.

The Division cited Employer for a serious accident-related violation of section 3943(c), under “Guard Standards,” which provides as follows:

An enclosure guard shall be installed so that it completely guards the moving parts.

In the citation, the Division alleges the following:

On 1/11/2014, the enclosure guard on the 6’5” metal blade standing fan involved in the injury to an employee did not completely guard the moving part (metal blade). The guard was damaged and had an opening of approximately 1 inch by 5 inches

in dimension. This allowed for the employee's hand to come in contact with the metal blade. The employee was exposed to a crush/cutting hazard. This violation contributed to the serious injury to the employee.

The Division had the burden of proving this violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed 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." (*Sunrise Growers Frozsun Foods*, Cal/OSHA App. 09-2850, Decision After Reconsideration (Mar. 27, 2014), *citing*, *Lone Pine Nurseries*, Cal/OSHA app. 00-2817, Decision After Reconsideration (Oct. 30, 2001), *Leslie G. v Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied.) An inference is a deduction about the existence of a fact that may be logically and reasonably be drawn from some other fact or group of facts found to exist. (See, Evidence Code section 600, *Ajaxo Inc. v. E*Trade Group Inc.*, (2005) 135 Cal. App. 4th 21, 50.)

Within his Decision, the ALJ determined that the Division failed to meet its burden of proof with respect to the section 3943(c) citation. The ALJ vacated the citation, finding that "[t]here is insufficient evidence to draw an inference that the guard was damaged prior to the accident, that the fan guard was inadequate, or that the fan was not completely guarded." After an independent review of the record, the Board concludes that the ALJ's decision was in error in this respect. The evidence in the record, and reasonable inferences drawn therefrom, demonstrates that the Division met its burden of proof and established, by a preponderance of the evidence, that a gap (or opening) existed in the fan guard prior to the incident, thereby establishing a violation of section 3943(c).

Here, Leslie Ann Swisher (Swisher) worked at Employer's worksite in Visalia, California as a Cup Room Group Leader. On January 11, 2014, Swisher painted the floor of Employer's Cup Room.² After painting the floor, Swisher used fans to dry the floor. To maximize airflow onto the floor, Swisher decided to adjust one of the fans. Swisher attempted to adjust a large industrial fan mounted atop a pedestal. The fan was approximately six feet tall and had a guard surrounding the fan blades.³ The bottom of the fan was near Swisher's chest level and the top of the fan was approximately a foot above her head. While the fan was still operating, Swisher walked behind the fan and grabbed the bottom of the fan guard (or grill) with her left hand. She then

² Exhibit 2 shows a picture of the area where Swisher was painting, which was taken by Chun.

³ Exhibits 3 through 5 show pictures of the subject fan involved in the incident, which were also taken by Chun.

reached for the top of the fan with her right hand. As she laid her right hand on the top of the fan she suddenly felt pressure and stinging.⁴ She pulled her hand back and saw that it was mangled and bloody. She suffered a partial amputation of her index finger, a reattachment of her middle finger, and a laceration down to the bone in both her ring and pinky finger. Swisher was not looking directly at her hand when the incident occurred. Following the accident, Swisher observed an opening in the fan guard. Swisher testified that the area where she observed the opening in the guard is where she would have placed her right hand. The opening in the guard was estimated to be approximately one inch by five inches across.⁵

Swisher's testimony supports an inference that the hole in the guard preexisted the accident. Had the fan guard been complete and intact, Swisher would have first felt the guard with her hand and would have needed to insert her fingers through the guard grill, or would have needed to depress the guard, before contacting the fan blades. However, Swisher never testified that she felt the guard prior to contacting the fan blades, much less testified that she manipulated any portion of the fan guard prior to contacting the fan blades. Swisher's testimony indicates she almost immediately felt pressure and stinging when she attempted to adjust the fan with her right hand. This supports an inference that Swisher inadvertently placed her hand in a preexisting opening, or gap, in the guard when she tried to adjust the fan, and thereafter her hand contacted the metal blades.

The finding that there was an opening or gap in the guard prior to the incident is also supported by the testimony of Ronald Chun (Chun). Following the accident, Chun⁶, an Associate Safety Engineer with the Division, opened an investigation of the incident. And as part of his investigation, he interviewed Swisher. During his interview, Swisher told Chun, in paraphrase, that she did feel anything until her hand was struck by the blades. Although hearsay, this statement is admissible under section 376.2 to supplement and explain Swisher's other testimony during the hearing.

Chun also offered additional testimony supporting a finding that the hole in the guard preexisted Swisher's injury. Chun physically inspected the

⁴ Swisher said she "[g]rabbed the bottom of the fan with my left hand... pulled the bottom of the fan with my left hand towards me a little bit. As I did that, I put my right hand up and laid it...on the back of the fan on the top.and that's when I felt the pressure and I pulled my hand back..."

⁵ Employer's witness, Nathan Story (Story), estimated that the opening in the fan guard was about 3 x 4, or 4 x 4 inches at the largest opening point.

⁶ Chun has worked for the Division for approximately seven years, conducting complaint inspections and accident investigations. Chun has engaged in over 480 inspections for the Division, including inspecting both serious-accident and fatal matters. Prior to working for the Division, Chun worked for a box manufacturing company as a safety environmental coordinator. He did inspections of his employer's facility, trained employees on safety, and worked to ensure compliance with applicable Title 8 safety standards. He received training in all aspects of safety when he worked for the box manufacturer.

workplace, and he inspected the fan. Chun concluded that Swisher's hand could not have contacted the fan blades if the opening in the guard had not existed. He stated that Swisher could not have manipulated (or depressed) an intact fan guard to such an extent that her hand would contact the blades, due to the substantial metal wiring on the guard. Chun also observed that the damage to the fan guard seemed inconsistent with Swisher's hand merely contacting the fan blade—there was significant damage to portions of the guard extending from the top of the guard section to the bottom.

Through this evidence, we conclude the Division met its burden of proof and established that the hole in the guard pre-existed the incident. Further, the Division's showing was of greater convincing force than that of the Employer.

Employer argues that the evidence in the record supports the ALJ's conclusion that the fan guard was fully intact prior to the incident. Employer argues that an unknown and undetected defect in the guard wires allowed Swisher to easily deflect the wires, and permitted her hand to contact the fan blades. However, Employer failed to persuasively establish that an unknown defect in the guard actually existed or that it caused the incident.

To support the argument that there was an unknown and undetected defect in the guard, Employer relies heavily on testimony suggesting that no employee saw any defect in the fan guard prior to the incident. This testimony is not persuasive. While it is true that no employee testified to observing any damage to the fan guard prior to the incident, the testimony must be viewed in appropriate context. The testimony at the hearing demonstrated that no employee actually engaged in an inspection of the fan prior to the incident. Employer did not have any formal inspection program for its fans. Swisher testified that she did not inspect the fan prior to the incident. Likewise, Nathan Story (Story), an employee witness, did not conduct any inspection of the fan prior to the incident. He only glanced at Swisher's fan for a matter of seconds before the incident. Story candidly admitted he could not be sure that there was no opening in the fan guard prior to the incident.⁷ Thus, the evidence does not preponderate in favor of a finding that the guard was intact prior to the incident.⁸

⁷ And any testimony to the effect that the hole in the guard would have been observed with only a casual passing glance was, at best, speculative.

⁸ Employer's claim that the fan had an undetectable defect in the guard may also properly be viewed with some distrust because Employer could have offered much stronger evidence. For example, to support of the assertion that an unknown and undetected defect existed in the guard wires, Employer could have brought the fan to the hearing and demonstrated the alleged defect in the fan guard, or Employer could have offered evidence as to testing of the guard materials to demonstrate the defect. That Employer chose not to offer stronger evidence in support of its case, after the Division's persuasive evidentiary showing, further weakens Employer's argument. (See, Evidence Code sections 412 and 413; see also, C.C. Myers Inc., Cal/OSHA App. 94-1862, Decision After Reconsideration (Nov. 25, 1998).) Story's testimony concerning the ease of putting his fingers through the fan grill, when trying to obtain Swisher's severed finger, did not sufficiently demonstrate that a defect in the grill existed.

In sum, after independent review of the hearing record, the Board concludes that the evidence, along with reasonable inferences drawn therefrom, preponderates to a finding that a gap (or hole) existed in the guard prior to the incident, requiring the affirmance of the section 3943(c) citation.

Classification of the Citation

The Division classified the section 3943(c) citation [failure to adequately guard moving parts of machinery] as serious and accident-related, and Employer appealed this classification.

A rebuttable presumption of a serious violation exists when the Division establishes that there is “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (Labor Code section 6432(a).) The term “realistic possibility” means that that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Here, the Division established a realistic possibility of a serious injury. As already discussed, the evidence demonstrated that a large opening existed in the fan guard prior to the incident. Undisputed evidence also demonstrated that the metal fan blades, encased within the fan guard, spun at approximately 1100 rpm. Chun credibly testified that a serious injury could be sustained in the event that an employee’s hand contacted the rotating fan blades. Further, here, there was more than a mere hypothetical realistic possibility of serious harm. Swisher actually suffered serious physical harm to her fingers. Thus, the Division established a presumption of a serious violation.

In an attempt to rebut the presumption of a serious violation, Employer argues that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.” (See, Labor Code section 6432(c).) Employer may establish this by demonstrating both of the following:

- (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...
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered. (Labor Code section 6432(c).)

Employer argues that it had a practice and procedure of inspecting its equipment, reporting safety concerns, and taking all necessary safety measures to ensure employee safety.

However, notwithstanding the foregoing, Employer did not rebut the presumption of a serious injury. While the testimony demonstrated that Employer did have a general practice of inspecting equipment and reporting safety issues, Employer did not have a practice of regularly or frequently inspecting its fans, such as the one involved in the incident. Again, both Swisher and Story stated that they did not inspect the fan prior to the incident, and indeed, there was no testimony that anyone inspected the fan. Employer failed to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer failed to take all reasonable and responsible steps to prevent the violation, requiring the serious classification be affirmed.

The Board also affirms the accident-related classification of the section 3943(c) citation. Section 336(d)(7) provides that when a serious violation of a safety order causes a serious injury to a person (*i.e.* the injury was accident-related), the Division is precluded from reducing the size of the penalty except for considerations of the businesses' size. Here, the record reflects that Swisher suffered serious injury, including an amputation, as a result of the failure to adequately guard the fan blades, due to the hole in the guard.

DECISION

In sum, the Board reverses the ALJ and affirms the section 3943(c) citation [failure to adequately guard moving parts of machinery]. The Board also affirms the serious and accident-related classification, and finds that the penalty proposed by the Division was appropriately calculated and it so ordered.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAY 29, 2015

SUMMARY TABLE DECISION AFTER RECONSIDERATION

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POS: 5/29/2015