BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
SIERRA FOREST PRODUCTS **P.O. BOX 10060** **TERRA BELLA, CA 93270** **Employer**	**1291481** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Sierra Forest Products (Employer), is a lumber-processing company. Employer operates several pieces of machinery used for surfacing or "planing" lumber products, including machinery known as a "Coastal Planer." On December 29, 2017, employee Lucio Meza (Meza) was operating the Coastal Planer. While attempting to clear a jam in the Coastal Planer, Meza lowered the machine's guard, and used his hand to try removing a jammed piece of wood. Meza's fingers were exposed to the machine's cutting blades, and he suffered an amputation injury as a result (the accident).

On January 30, 2018, the Division of Occupational Safety and Health (Division) initiated an accident investigation of Employer's worksite. On June 26, 2018, the Division issued Employer one citation alleging one Serious, Accident-Related violation of California Code of Regulations, title 8.[1] In Citation 1, Item 1 (the Citation), the Division alleged a General violation of section 3314, subdivision (c) for "fail[ure] to ensure that the Coastal Planer equipment, which was capable of movement, was stopped and the power source de-energized or disengaged prior to an employee conducting an unjamming operation."

Employer timely appealed the Citation 2, contesting both the existence of the violation, its Serious classification, and the reasonableness of the Division's abatement requirements. Employer also asserted various affirmative defenses.

Employer's appeal was set for an evidentiary hearing before Administrative Law Judge Christopher Jessup (ALJ Jessup), who presided over nine days of hearing. Hearing dates were held in person on November 28, 2018, and September 24-25, 2019. Additional hearing dates were held via videoconference on May 25-27, 2021, and June 9, 16, and 17, 2021.

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

On January 7, 2022, ALJ Jessup issued a Decision affirming the Citation, finding that Employer had violated section 3314, subdivision (c), because "the evidence establishes that the Coastal Planer is capable of movement and, at the time of the accident, it was not stopped during the cleaning, servicing, or adjusting operation comprised of unjamming the Coastal Planer and that Meza was exposed to the hazard during the unjamming process." (Decision, p. 8.) The Decision also found that Employer "failed to establish that the jam involved in the accident was a minor jam and, as such, fell short of demonstrating it was a minor servicing activity." (Decision, p. 10.) Accordingly, the Decision concluded, the "minor servicing exception" set forth in section 3314, subdivision (c), did not apply to the citation. Moreover, the Decision rejected Employer's assertion of the Independent Employee Action Defense (IEAD), reasoning that "the evidence does not support a conclusion that Meza knew he was acting against Employer's safety policy at the time of the accident." (Decision, p. 15.) Finally, the Decision found that Employer did not establish that it had abated the hazard, as its approach to abatement was not compliant with section 3314, subdivision (c). (Decision, p. 20.)

Employer then mounted two challenges to the Decision. First, on January 18, 2022, Employer filed a Petition to Stay or Suspend Abatement (Petition to Stay), to which the Division filed an Answer on January 25, 2022. On February 17, 2022, the Board denied Employer's Petition to Stay. On March 24, 2022, Employer then filed a petition for writ of mandamus in the Superior Court of California, Tulare County, seeking judicial review of the Board's denial of Employer's Petition to Stay. The Superior Court denied Employer's writ petition on December 6, 2022.[2]

Separately, on February 11, 2022, Employer filed a timely petition for reconsideration (Petition), challenging the Decision. In its Petition, Employer argues that (1) section 3314 does not apply to the facts of this case; and (2) even if section 3314 applies, Employer's use of an extension tool to clear minor jams falls within the exception to section 3314, subdivision (c). (Petition, pp. 12-14.) Employer also argues that the Decision failed to rule on the issue of abatement. (See Petition, pp. 1-10.) Finally, Employer argues that the Decision erred in rejecting Employer's assertion of the IEAD.

On March 3, 2022, the Board took Employer's Petition under consideration. The Division filed an Answer on April 1, 2022.

In making this decision, the Board has 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 Employer violated section 3314, subdivision (c)?
2. Did the ALJ erroneously reject Employer's assertion of the IEAD?

[2] On December 28, 2022, Employer also filed a Notice of Appeal in the Fifth Appellate District Court of Appeal, but abandoned that appeal on February 17, 2023.

FINDINGS OF FACT

1. On December 29, 2017, Lucio Meza (Meza) was an employee of Employer. Meza was injured while clearing a jam in Employer's Coastal Planer, suffering amputation of his fingers in a manner that included bone loss.

2. The Coastal Planer (Coastal Planer or the Planer) consists of many parts including feed rollers (rollers or feed rollers) and cutting heads (heads or cutting heads).

3. The Planer is involved in processing wood at Employer's work site and jams can occur at various places throughout the Planer during the processing. Employer had other planers at the work site.

4. Each jam is unique and the severity of the jam, whether minor or major or something in-between, is unknown at the time that the jam occurs. Employer defines the severity of the jam by the method used to resolve the jam.

5. Employer's procedures for unjamming the Planer include the following steps: stopping the rollers, though not necessarily the heads; opening the guard panel to the Planer to allow an employee to examine the situation inside the Planer; and proceeding with a series of escalating attempts to unjam the Planer.

6. The series of escalating attempts to unjam the Planer range from using the rollers and extension tools to clear a jam to using Lockout/Tagout to have more access to the Planer to clear a jam.

7. The Coastal Planer can be stopped and the power source can be de-energized or disengaged during the clearing of all jams. The Planer does not need to be in operation for clearing jams. Employer prefers to keep the cutting heads energized during some unjamming activities due to concerns about operational downtime, not operational necessity.

8. During the unjamming process that resulted in Meza's injury, Meza had not stopped or de-energized the cutting heads while clearing the jam.

9. Employer has a lockout/tagout (LOTO) policy and requires LOTO for some, but not all, jams on the Planer.

10. Employer's written policy requires the use of extension tools for clearing minor jams without stopping the Planer's cutting heads.

11. Employer's policy and the practices actually employed do not provide a method for diagnosing which jams are minor or major other than through the escalating series of attempts to unjam the Planer.

12. The cutting heads are inset with large, sharp metal blades and it takes approximately seven minutes and 30 seconds for the heads to stop spinning on their own when the power to the heads is turned off due to the momentum of the heads.

13. Employer's employees have used sticker sticks, an extension tool made of wood and supplied to employees for clearing jams, to slow down the heads so that they will stop more quickly.

14. At the time of the accident, Employer made sticker sticks available to employees to use for unjamming the Planer. However, employees also used their hands to remove some wood from the Planer.

15. Meza used his hand rather than an extension tool during the unjamming process that resulted in his injury.

16. Meza's training on the Coastal Planer and another planer at the work site took place approximately five years prior to the accident. Meza was primarily trained on the other planer, which had a different configuration than the Coastal Planer. Meza was trained by David Arellano (Arellano) and Octavo Ortiz (Ortiz) in how to operate the planers.

17. Using hands to clear jams while the Planer was energized was against Employer's safety policy. However, Meza was not trained according to that safety policy. Meza's training included the instruction that he was permitted to use his hands to retrieve wood from a planer in certain instances. Meza observed a trainer using the trainer's hands, instead of the extension tool, to retrieve wood from a planer.

18. At the time of the accident, Meza was not aware that using his hands was against Employer's safety policy.

19. Meza did not receive further training after his initial training on the planers. However, he was occasionally present to operate the planers to cover breaks or fill in as needed during the five-year period after his training ended.

20. Meza had operated the Coastal Planer for approximately a year prior to the accident.

21. After the beginning of the hearing in this matter, Employer obtained, made available, and trained employees on the use of, an alternate extension tool that allows employees to grab pieces of wood with the tool, unlike the sticker stick which is a piece of wood without moving parts.

22. Extension tools used to clear a jam can become a hazardous projectile if they come into contact with the Coastal Planer's cutting heads while in motion.

23. Wood in the Coastal Planer can be ejected in certain circumstances and poses an ejection hazard to employees.

24. After Employer filed this Petition for Reconsideration, Employer undertook additional abatement measures, which the Division accepted as adequate to abate the hazard alleged in the Citation.

25. Employer had over 100 employees and the penalty herein was calculated in accordance with the penalty setting regulations set forth in California Code of Regulations, title 8, sections 333 through 336.

DISCUSSION

1. Did the Division establish, by a preponderance of evidence, that Employer violated section 3314, subdivision (c)?

In the Alleged Violation Description (AVD) for the Citation, the Division stated that Employer violated section 3314, subdivision (c), when it "failed to ensure that the Coastal Planer equipment, which was capable of movement, was stopped and the power source de-energized or disengaged prior to an employee conducting an unjamming operation."

To establish the Citation, the Division must prove, first, that the cited regulation applies, and second, that Employer violated it. In order to analyze these questions, it is necessary first to review the facts developed in the hearing in this matter.

A. Relevant Facts Developed At Hearing

Employer's Lumber-Processing Operations

As a lumber processor, Employer takes unprocessed or raw wood, which Employer then cuts, shapes, and smooths into saleable units. As part of these processes, Employer's operation includes a sawmill department and a planer department.

The sawmill department involves cutting the raw lumber/logs into smaller portions, which are then placed in drying kilns to remove as much moisture as necessary. Once that process is completed, the wood is transported via forklift to the planer department.

The planer department trims the lumber, and then pushes it (using mechanically controlled rollers) through a series of blades that surface (i.e., smooth) the top, bottom, and sides of the lumber.[3] The lumber is then placed on a grading table where graders measure the wood, identify and measure its characteristics (i.e., the size of any knots, the slope of the grain, any defects), and then assign a grade mark indicating the lumber's quality. The lumber then gets sorted, stacked, and prepared for shipping. To that end, the planer department has the following roles:

[3] Throughout the nine days of hearing testimony, witnesses referred to the cutting portion of the planer machines as "blades" and "knives." For clarity and consistency, the Board uses only "blades" throughout this Decision After Reconsideration.

"**Planers**," who maintain the planer machines, sharpen its blades, change the machine heads, and perform "lockout" duties, i.e., shutting down the machine when needed.
"**Feeders**," who operate the planer machines using a foot pedal to move a conveyer that "feeds" lumber into the planing machine's cutting heads;
"**Graders**" who assess and evaluate the lumber after planing; and
"**Banders**," who tally the finished units, secure them with banding, and prepare them for shipment.

Meza's Background and Training

Meza, the injured employee, worked for Employer since 2009, performing various roles. Meza worked first as a forklift driver, later as a Bander. Eventually, Meza learned to operate the planer machines (i.e., he worked as a Feeder). However, Meza received no formal training on the duties of a Feeder. Instead, Meza learned the role by watching and receiving instruction from others, including David Arellano (Arellano) and Octavo Ortiz (Ortiz). Most of that experience and instruction pertained to the wood planer, which was configured differently from the Coastal Planer.

In or around 2012, Meza became certified as a Grader. As Meza describes that role: "Lumber comes out from the planers, you look at the board, you flip the board, and then you grade it, you put a grade mark on it." To become a Grader, Meza received on-the-job training, studied the grade book, and passed a certification test. Graders are also responsible for tracking when and why any downtime occurred.

Meza remained a Grader for Employer from 2012 through the end of 2017. However, when staffing needs required it, Meza regularly performed other roles for Employer, e.g., as a Planer or as a Feeder. As he testified, "one day I would be sharpening….the knives that we use on the planers….another day, I would be fixing a ripped belt or sprockets."

Employer's Procedures for Clearing Jams

Jams are a frequent occurrence for Employer's machines, including the Coastal Planer. Sometimes there are as many as 10 or 15 in an hour. Employer tries to clear jams efficiently to limit downtime, i.e., the time where no lumber is moving through the Coastal Planer, which Employer tracks with a running clock during each shift. According to John Goodson (Employer's superintendent), Employer's goal is to limit downtime to 15% of production time.

David Arellano worked for Employer as a Planer. At the time of the accident, he had done so for approximately 15 years. He has trained other employees, including Meza, on operating and clearing jams from planer machines. He also testified he is responsible for locking out the planer's source of electrical power, whenever necessary.

As Arellano testified, a wide range of jams occur on the planer machines, from "minor" to "major" jams. Determining the severity of the jam depends on what is required to clear it. Minor jams are usually cleared by the Feeder; the Planer is responsible for clearing jams where the entire machine must be de-energized.

Some minor jams, sometimes referred to as "plug ups," can be cleared using the infeed and outfeed rollers (i.e., moving them back and forth) until the piece of wood causing the jam has cleared. For those jams, the Coastal Planer still requires power, because the rollers must be moved. Notably, the Coastal Planer has a guard that prevents loose knots or other pieces of wood from becoming projectiles, which happens frequently. When the rollers are energized, this guard is opened, and cannot be closed until the rollers are stopped.

For more difficult plug ups, employees stop the infeed and outfeed rollers, raise the top head of the machine, open the guard, and attempt to clear the wood. Once the rollers are stopped, the guard can be swung open by hand, enabling the Feeder to reach into the machine. Once the rollers are stopped, the Feeder opens the guard to analyze where the plug up is located, e.g., under the top head, or between the side heads. Once the plug up is located, the Feeder typically uses an extension tool (essentially a wooden stick, sometimes referred to as a "sticker stick") to push or pull the piece of lumber that is jamming the machine. The machine's rotating blades remain energized and moving during this process.

Again, for most of these plug-ups—i.e., jams that cannot be cleared using the rollers—the Feeder uses the extension tool to reach in and clear the jam. However, Feeders sometimes use their hands as well. For example, as Meza testified, a Feeder might use the extension tool to move the jammed wood close enough for them to reach it, and then grab it. Meza observed other employees, including those who trained him on the Feeder role, using their hands in this manner "quite a few times." As he testified, "It's a little bit more dangerous but you take that chance. It saves downtimes, more production." Even David Arelleno, who provided Meza the most training on working as a Feeder, admitted that he used his hands to remove wood from the Coastal Planer while the machine was still on and the blades still energized.[4] Arellano also testified that he told Meza it was okay to use his hands to clear jams on some portions of the Coastal Planer, including portions near the roller, but not by the blades.

Employer characterizes all of the above as "minor" jams, as they can be cleared without de-energizing the machine. A "major" jam is one that is unable to be cleared using those methods, and which requires de-energizing the machine. To lock out the Coastal Planer, a Planer must lock out the machine using the breaker box affixed to a nearby wall. Only Planers are permitted to lock out the machine; Feeders are neither trained nor authorized to do so. Once the machine is de-energized, it takes approximately 10 minutes for the blade head to stop rotating, though Feeders sometimes use the extension tool to slow it down more quickly. After the machine is locked out (and the blades stop rotating), the Planer then adjusts, opens, or removes parts as needed to clear the jam. This type of jam occurs only a few times a day.

The Accident

On December 29, 2017, the day of the accident, Meza's supervisor John Goodson assigned him to operate the Coastal Planer machine, filling in for an absent coworker as a Feeder. Goodson also asked Meza to work on improving downtime.

[4] Initially, Arellano denied ever using his hands to clear any jams. However, under cross-examination, Arellano admitted that he had done so "a couple of times," including when the stick tool itself became stuck in the machine.

Before the accident, several jams occurred. Meza described the process for correcting these jams as simple "unplugs," because he could clear the machine using the infeed and outfeed rollers. This type of jam happened several times during Meza's shift.

When another, more significant, jam occurred, Meza first attempted to "unplug" it. When Meza tried to back it out using the infeed roller, however, the end of the board broke off and the board remained lodged. When Meza tried to use the outfeed roller to pull it out from the other side, that side broke off too. The remaining middle piece of the board was stuck near the machine's blades. To clear that, Meza used the control panel to lift a portion of the machine known as a "chip breaker" on the infeed side. Meza also turned off the hydraulic pumps, which stops the infeed and outfeed rollers. At that point, the blade heads were still energized and spinning.

Meza opened the guard door and reached into the machine with his right hand. When Meza attempted to grab the board, the blades on the top head grabbed his glove and pulled his hand in. Several fingers on his right hand were partially amputated, with accompanying bone loss.

B. The ALJ's Decision

On January 7, 2022, following nine days of hearing, ALJ Jessup issued a Decision affirming the citation. The Decision found that section 3314 applied to this case, and that Employer had violated section 3314, subdivision (c), because "the evidence establishes that the Coastal Planer is capable of movement and, at the time of the accident, it was not stopped during the cleaning, servicing, or adjusting operation comprised of unjamming the Coastal Planer and that Meza was exposed to the hazard during the unjamming process." (Decision, p. 8.)

The Decision also found that Employer "failed to establish that the jam involved in the accident was a minor jam and, as such, fell short of demonstrating it was a minor servicing activity." (Decision, p. 10.) Accordingly, the "minor servicing exception" set forth in section 3314, subdivision (c), did not apply to the citation.

The Decision rejected Employer's assertion of the IEAD, reasoning that "the evidence does not support a conclusion that Meza knew he was acting against Employer's safety policy at the time of the accident." (Decision, p. 15.)

The Decision also addressed Employer's use of an extension tool or grabbing tool to clear "minor" jams of the Coastal Planer. Employer argued that clearing minor jams falls within the "minor servicing exception" to section 3314, subdivision (c), and the machine therefore need not be stopped, and the power source de-energized or disengaged, for clearing such jams. However, according to Employer's approach, a jam cannot be determined to be "minor" or "major" until *after* initial attempts to clear it are made. (Decision, pp. 10, 19.) "Employer's ongoing procedure for determining the severity of the jam is done by inspecting the machine and then attempting to remove the jam in an escalating series of attempts ranging from using the machine's rollers and using extension tools to relying on LOTO [Lockout/Tagout]." (*Id*., p. 19.) Thus, under Employer's approach, it could "conclude that each jam is a minor servicing activity, and thereby allow for the use of extension tools in each instance, until the jam is discovered to be more significant and requiring of LOTO to resolve." (*Id*., p. 20.) The Decision found that this was not an effective approach to abatement. (*Id*.)

Even assuming, *arguendo*, that Employer could correctly identify each "minor" jam before attempting to clear it, the Decision found the "minor servicing exception" still would not apply.

> As Employer's procedure for clearing jams includes lowering the guard so that an employee may look into the Planer while the heads are still energized, and using a tool that, if used improperly, could become a hazardous projectile, it appears that Employer's procedure does not include alternate measures that provide effective protection.

(Decision, p. 20.)

C. Is Section 3314 Applicable?

As noted, the Division cited Employer under section 3314, subdivision (c). The conditions for applicability of section 3314 are set forth in subdivision (a), which provides:

> 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.

(§ 3314, subd. (a).)

Employer argues that section 3314 does not apply here, because it "does not apply to an operation where the energization of a machine is intentional and not unexpected." (Petition, p. 12.) Since Employer intentionally left the planer machine energized, Employer argues, there was no "unexpected" energization, and therefore section 3314 does not apply. (*Ibid*.) Further, Employer argues, by applying the safety order to these circumstances, the Decision ignored "binding" precedent in *Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2217, Decision After Reconsideration (Apr. 18, 2017) (*Thyssenkrupp*). In *Thyssenkrupp*, the Board held that section 3314, subdivision (c), does not apply to an operation where an employer intentionally energizes a machine as part of the maintenance or repair process, because there is no "unexpected energization." (*Id*.) According to Employer, this means that *any* time a machine is intentionally energized, section 3314's lockout/tagout rules do not apply. (Petition, pp. 12-13.)

In response, the Division argues that Employer's interpretation of section 3314 is both absurd and inconsistent with the remainder of the safety order. Employer's view "would lead to absurd results that would allow employers to circumvent LOTO requirements by not de-energizing their machinery during servicing activities, essentially providing no protection for their employees." (Answer to Petition, p. 7, citing *Sierra Forest Products*, Cal/OSHA App. 09-3979, Denial of Petition for Reconsideration (Oct. 9, 2012) [the Board must "avoid a construction that would produce absurd consequences"], and *Webcor Construction LP dba Webcor Builders*, Cal/OSHA App. 08-2499, Decision After Reconsideration (Oct. 12, 2009) [same].) Moreover, the Division contends, Employer's construction ignores the minor servicing exception to section 3314, subdivision (c). (Answer to Petition, pp. 6-7.) As the minor servicing exception provides:

> 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.

(§ 3314, subd. (c), Exception 1.) According to the Division, this exception shows that section 3314 "is intended to apply to work activities on moving machinery and equipment unless the employer can carry its burden to prove the affirmative defense provided by the exception." (Answer to Petition, p. 7 [emphasis in original].) In other words, where machinery is intentionally energized, and maintenance must be performed, section 3314's lockout/tagout requirements apply unless the employer can establish that the maintenance falls within an applicable exception.

The Division also cites authority construing the parallel federal safety order. According to the federal Occupational Safety and Health Review Commission ("Commission"), the federal LOTO regulation applies to the servicing of machinery that is intentionally energized, notwithstanding its reference to "unexpected energization." (Answer to Petition, pp. 7-8, citing Commission authority.) For example, in *Burkes Mechanical*, the Commission applied the federal LOTO regulation, even though the employees were aware the machinery was energized while employees were cleaning it. (*Burkes Mechanical, Inc*., OSHRC Doc. 04-475, Decision by the Commission (Jul. 12, 2007). *See also Dayton Tire, Bridgestone/Firestone*, OSHRC Doc. No. 94-1374, Decision by the Commission (Sep. 10, 2010); *J.C. Watson Co.*, OSHRC Doc. No. 05-0175-0176, Decision by the Commission (May 6, 2008).)

Ultimately, the Board finds Employer's construction of section 3314 to be too restrictive.

The regulation's text does not support Employer's reading. Section 3314, subdivision (a), 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." (§ 3314, subd. (a).) Employer asserts that this does not apply to machinery or equipment that (for any reason) is deliberately left energized. (Petition, p. 12.) However, Employer's reading is inconsistent with other parts of the safety order. Under section 3314, subdivision (c), "machinery or equipment capable of movement shall be stopped *and the power source de-energized or disengaged* during cleaning, servicing and adjusting operations." (§ 3314 (c) [emphasis added].) Similarly, under section 3314, subdivision (d), machinery "shall be locked out or positively sealed in the "off" position during repair work[.]" In other words, the safety order explicitly requires employers to shut down equipment or machinery, stop any moving parts, and de-energize or disengage the power source during maintenance operations. (§ 3314, subds. (c), (d).) Yet, under Employer's narrow reading, employers can eschew those safety measures—during the same maintenance operations—by deliberately leaving the machinery or equipment on, with parts still moving and the power source energized or engaged.

The Board declines to endorse Employer's overly narrow construction of the safety order, and affirms that section 3314 applies in this case. (*See Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 311-314 [safety orders "are to be given a liberal interpretation for the purpose of achieving a safe working environment"]; *Dept. of Industrial Relations v. Occupational Safety and Health Appeals Board* (2018) 26 Cal. App. 5th 93, 106.)[5]

[5] To the extent that any portion of the Board's Decision After Reconsideration in *Thyssenkrupp* may be construed as inconsistent with this result, the Board expressly disapproves it.

D. Did Employer Establish The Minor Servicing Exception of Section 3314, Subdivision (c)?

Employer argues that, even if section 3314 applies, its approach to clearing jams[6] falls within the minor servicing exception. (Petition, pp. 4-6, 13-18.) As that exception provides:

> 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.

(§ 3314, subd. (c), Exception 1.) To invoke this exception, Employer must demonstrate two elements apply. First, Employer must establish that the unjamming activity here, or the use of its Alternative Method, was a "minor servicing activity." Second, Employer must establish that the Alternative Method was performed using alternative measures that provide effective protection.

As noted, there are essentially three types of jams in the Coastal Planer: (1) jams that can be cleared merely by using the control panel to move the infeed and outfeed rollers; (2) jams that can be cleared by using the control panel to stop the rollers, lowering the guard, and using an extension tool to clear the jam; and (3) jams that require adjusting or opening up the parts of the planer to clear the jam. (See Petition, p. 14.) Employer's position is that jams in the second category qualify for the "minor servicing exception" to lockout/tagout requirements because they are cleared with the Alternative Method. Thus, "it is not necessary for an employee to place their hands near the planer." (Petition, pp. 13-14.)

It is undisputed that Meza used his hands to clear the jam at issue here, and in fact suffered a serious injury as a result. Thus, Employer's argument—that use of the Alternative Method qualifies for the minor servicing exception—is inapplicable to these facts. (See *Fed Ex Ground, Inc.*, Cal/OSHA App. 1199473, Decision After Reconsideration (April 20, 2020) [where the alternative approach used for servicing a machine fails to provide effective protection, the minor servicing exception does not apply].)

Additionally, even if Meza had utilized Employer's Alternative Method, Employer's argument here would be unpersuasive. Under the plain language of the minor servicing exception, it only applies when the servicing activities involved are performed "using alternative measures" that "provide effective protection." (§3314, subd. (c).)

Therein lies the fatal flaw in Employer's position; Employer failed to establish that the Alternative Method was *only* used during a "minor servicing activity." The Board agrees with the

[6] For ease of reference, we refer to Employer's approach to unjamming the Coastal Planer—using an extension tool, while the cutting heads remain energized, in a first attempt to clear the jam that might be a "minor" jam—as Employer's "Alternative Method."

Decision's conclusion that, for an "alternative measure" to qualify for this exception, "it is essential that Employer establish that the alternative method is only used during minor servicing activities or minor tool changes and adjustments." (§3314, subd. (c).) Employer argues that "minor" jams may be cleared by lifting the top head of the planer, and using "an extension tool/sticker stick to push the lumber from the output side of the top and bottom heads back towards the feed area." (Petition, pp. 13-14.) However, Employer utilizes this method for jams that, it is subsequently determined, cannot be cleared without de-energizing the machine and adjusting or removing parts. In other words, Employer's approach was to use the Alternative Method for *all* jams, even those that might not qualify as "minor" jams.

Employer argues that "trained and experienced employees are able to determine the severity of the jam, and the proper unjamming procedure, when the guard is lowered to examine and inspect the cause of the jam." (Petition, p. 7.) This claim is not undisputed. As the Decision notes, both Arellano and Goodson testified that one cannot know whether a jam is minor or major before attempting to clear it, because that determination is based on the method used to resolve the jam. (Decision, p. 19.) However, even assuming, *arguendo*, that employees are able to discern the severity of a jam, Employer acknowledges that "[s]ometimes, escalating steps are required if a piece of lumber breaks further," up to and including de-energizing and locking out the machine. (*Id*, p. 10.) In other words, Employer admits that employees are using the Alternative Method, even for clearing jams for which the Alternative Method turns out to be unsuitable.

Employer also argues that the Alternative Method provides effective protection as an alternative to de-energizing the machine. (Petition, pp. 14, 16-18.) Employer describes the concern that the Alternative Method exposes employees to an ejection hazard as "rank speculation." (*Id*., pp. 16-17.) However, multiple witnesses testified that, when the guard is lowered, there is nothing to protect employees from the potential ejection of pieces of wood, or even of a portion of the machine's blades. Additionally, if an employee uses the extension tool from certain angles, the Divisions' expert testified that the extension tool itself can become an ejection hazard because "it can be kicked back." Even Employer's witness, Goodson, testified in apparent agreement that the extension tool "could actually become a projectile."[7] Thus, the Board finds that Employer failed to establish that the Alternative Method provides "effective protection" within the meaning of section 3314's minor servicing exception.

Employer's final argument is not legal, but practical in nature. According to Employer, Meza's injury occurred because Meza used his hands and failed to use the extension tool. (Petition, p. 17.) While the use of one's hands to clear jams is admittedly an unsafe practice, Employer argues that the risks attributed to the Alternative Method (such as the ejection hazards) are speculative, as no injury has occurred while using the Alternative Method "for over 50 years." (Petition, pp. 17-18.) This argument is not persuasive. The Board has long held that violations are "not based on previous history of accidents or injuries resulting from the exposure but rather on the existence of the danger which may cause injury." (*Home Depot USA, Inc.*, Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017) [other citations omitted].)

[7] Testifying for Employer, Goodson stated that there is no ejection hazard caused by the use of an extension tool. However, he subsequently qualified that testimony as to the use of the extension tool *from one side of the machine*. Goodson testified that the Division's witnesses "were both correct in saying that a wooden tool entered from the other side . . . could actually become a projectile."

E. Did the ALJ erroneously reject Employer's assertion of the IEAD?

Employer challenges the Decision's rejection of the Independent Employee Action Defense (IEAD). 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;
> (3) The employer effectively enforces the safety program;
> (4) The employer has a policy of sanctions which it enforces against employees who violate the safety program; and
> (5) The employee caused the safety violation which he knew was contrary to employer's safety rules.

(*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) In the Decision, ALJ Jessup found that Employer failed to establish any of the IEAD's five elements. (Decision, pp. 14-15.) Employer's challenge with regard to each element is addressed below.

Element 1: Was the employee experienced in the job being performed?

As to the first element, an employer must show the employee in question 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 to be 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 (July 13, 1992).)

The Decision denied this element was established, because Meza had not operated the Coastal Planer for approximately one year prior to the accident, and was trained on such work approximately five years prior to the accident, primarily on a different planer. (Decision, p. 13.)

However, as Employer notes, Meza received essentially the same on-the-job training as other Feeders, watching and receiving instruction from others, including Arellano and Ortiz. Meza worked on the planer machines, usually the wood planer, periodically from 2012 to 2017. Employer also presented uncontradicted testimony that Meza had operated the planer more recently than the one-year timeframe suggested in the Decision.

The Board has reviewed the record in detail, and found Meza had operated Employer's planer machines successfully, albeit intermittently, over the course of several years. The evidence does not indicate that Meza's experience left him unfamiliar with operating the Coastal Planer or uncertain about the job duties of a planer. While Meza's experience may have been intermittent in nature, the Decision gives too little credit to Meza's past work in operating Employer's planers. The Board concludes that Employer established that Meza had sufficient experience to be "reasonably proficient" in operating the Coastal Planer.

Element 2: Did Employer have a well-devised safety program in place?

Under the second element, the employer must also prove that it has a well-devised safety program, with training on safety matters relevant to employees' particular job assignments. "This

element should be analyzed by taking a realistic view of the written program and policies, as well as the actual practices at the workplace." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The Decision rejected the second element, because Employer's safety program was directly in contravention of the lockout/tagout requirements section 3314, subdivision (c), as its lockout/tagout policy required the use of extension tools while the planer machines are energized with the guard lowered. (Decision, p. 14.)

In response, Employer essentially argues that its safety program (including its use of the Alternative Method for clearing jams) was compliant with section 3314, subdivision (c), because it required the use of the extension tool and prohibited the use of one's hands to clear jams. For the reasons set forth above, the Board disagrees. Employer failed to establish that the use of one's hands was clearly prohibited, that the Alternative Method was only used for minor jams, and that the Alternative Method provided "effective protection." In other words, for the same reasons Employer's Alternative Method did not comply with section 3314, subdivision (c), Employer did not establish that it had a well-devised safety program in place. Thus, having failed to establish the second element, Employer is not entitled to the IEAD.

Element 3: Did Employer effectively enforce its safety program?

Under the third element, the employer must show that it effectively enforces its well-designed safety program. (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017). As noted above, Employer did not have a well-designed safety program, so it would be irrelevant if Employer effectively enforced it.

However, even if Employer's safety program (including its use of the Alternative Method for clearing jams) were compliant with section 3314, subdivision (c), Employer did not effectively enforce any rule against using one's hands to clear jams. The evidence is clear that employees sometimes used their hands to clear jams. Meza observed other employees, including those who trained him on the Feeder role, using their hands in this manner "quite a few times." Even Arelleno, who trained Meza, admitted that he used his hands to remove wood from the Coastal Planer while the machine was still on and the blades still energized, including when the extension tool itself became stuck in the machine. Arellano even testified that he told Meza it was okay to use his hands to clear jams on some portions of the Coastal Planer, including portions near the roller, but not by the blades. So, Meza "[took] that chance" of using his hands despite knowing it's "a little bit more dangerous."

The above evidence makes clear that, even if Employer had a compliant, well-devised safety program, it did not effectively enforce it. Thus, the Board concludes that Employer failed to establish the IEAD's third element.

Element 4: Did Employer enforce a policy of sanctions against employees who violate its safety program rules?

The fourth element of the IEAD requires the employer to show that it enforces a policy of sanctions against employees who violate its safety program (including verbal coaching, retraining efforts, or positive recognition of employees who follow safe and healthful work practices) to

ensure compliance, rather than simple written discipline or other punitive measures. (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.)

The Division argues that "there is no evidence Meza was penalized for his actions" nor evidence that "other employees have been disciplined for safety infractions." (Division's Answer, p. 21.) Employer argues that it demonstrated that it enforced its policy against employees who violate the safety program rules, and that it specifically disciplined Meza for using his hands to clear a jam. (Petition, p. 19.) Goodson gave unrebutted testimony that Meza was issued a verbal warning for his conduct when he returned to work. Further, the Division's witness, Ronald Chun, testified that in his view Employer had appropriate sanctions and enforcement for safety violations.

Nevertheless, the Decision found it insufficient that Goodson "testified that Meza was reprimanded for the accident but was uncertain of the details." (Decision, p. 14.)

Employer did present unrebutted testimony that it enforced its safety policy, including disciplining Meza. However, multiple witnesses testified that other employees had used their hands to clear jams before Meza, and there is no evidence that any of them received any discipline or sanction. This lack of evidence undermines any argument that Employer produced "evidence of meaningful, consistent enforcement." (*FedEx Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

While Employer sanctioned Meza for his alleged violation of the policy, that single instance of discipline does not show meaningful, consistent enforcement, particularly in light of the evidence that others engaged in the same conduct without being sanctioned. The Board therefore concludes that Employer failed to establish the fourth element of the IEAD.

Element 5: Did Employer show that Mendoza caused the safety violation that he knew was contrary to Employer's safety rules?

To satisfy the fifth element, Employer must show that Meza's actions were "intentional and knowing, as opposed to inadvertent." (*Synergy Tree Trimming, Inc.*, *supra*, Cal/OSHA App. 317253953.)

Employer emphasizes that Meza was aware that the use of one's hands to clear jams was a violation of Employer's safety policies, and that clearing minor jams required the use of extension tools. (Petition, p. 19.) Meza knew this, Employer claims, "despite his self-serving denial of such during his testimony." (*Id*.) According to Goodson, right after the accident, Meza said "I'm sorry John, I screwed up. I tried to take a shortcut." Goodson testified that he instructed Meza never to put his hands in the planer machines while they were running, and no other employees have used their hands the way Meza did.

Absent relevant context, Meza's statement to Goodson might operate as an admission that Meza knew what he was doing was against Employer's policy. However, as noted above, Meza observed other employees using their hands to clear jams, including those who trained him on operating the planer machines. In fact, Meza testified that he was never instructed during his training to avoid using hands to unjam the machine; he was only instructed "to unplug it as fast as possible."

At most, Employer can point to conflicting evidence as to whether Meza knew, or believed, that it was wrong to use his hands to clear jams. However, Employer's evidence fails to overcome

the other credible testimony indicating that Meza and other employees were free to use their hands to clear jams efficiently. Accordingly, the Board finds that Employer failed to establish the fifth element of the IEAD.

In summary, Employer failed to establish four of the five elements of the IEAD. The Board therefore affirms the Decision's denial of this affirmative defense.

F. Did the Decision Fail To Rule On The Issue Of Abatement?

An Employer may challenge the reasonableness of the changes required by the Division to abate a cited hazard. (Lab. Code, § 6600.) Where a violation is found, the issue of abatement concerns "whether an employer has subsequently complied with the requirements of the safety order or eliminated the alleged violation in some other manner." (Decision, p. 18.)

At the hearing, Employer presented evidence of its efforts to abate the hazards associated with clearing jams in the Coastal Planer. In the Decision, ALJ Jessup reviewed those efforts, and found that Employer still permitted the Coastal Planer's blade heads to remain energized, with the machine's guard lowered, while an employee attempts to clear the jam. (Decision, p. 19.) According to the Decision, Employer's approach to abatement relied primarily on the minor servicing exception, but still failed to ensure that extension tools were only used for clearing "minor" jams. (*Id*., pp. 19-20.)

In its Petition, Employer had initially challenged the Decision's findings as to abatement. However, on January 6, 2023, Employer filed an Addendum to Petition for Reconsideration, indicating that Employer had undertaken additional abatement efforts, including:

> (1) A new guard that enables employees to "evaluate any jam or plug up without lowering the guard;
> (2) A new braking system on the Coastal Planer, with "electrical disconnect/lockout points" moved into the planer room, which stop the planer heads' spinning in approximately 22 seconds; and
> (3) A revised Coastal Planer Training Documentation that accounts for the new braking system, with revised unjamming procedures whereby extension tools are not utilized until "after the cutting heads are stopped and locked out."

(Addendum to Petition for Reconsideration, p. 6.)

On February 14, 2023, the Division filed a Verification of Abatement, executed by Employer and the Division. On February 17, 2023, Employer filed a Second Addendum to Petition for Reconsideration (Second Addendum), noting the Division's signed Verification of Abatement, and therefore the Board no longer needs to address the issue. The Division did not oppose.

Accordingly, the Board finds that the issue of abatement, as raised in Employer's Petition but subsequently withdrawn, is now moot. The Board expresses no opinion as to the Decision's findings, nor the Petition's challenges, as to that issue.

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 02/06/2024