BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **ANGELUS BLOCK CO., INC.** **3435 S. RIVERSIDE AVENUE** **BLOOMINGTON, CA 92316** **Employer**	Inspection No. **1113026** **DECISION**

Statement of the Case

Angelus Block Co., Inc., (Employer) manufactures pavers. On December 15, 2015, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Robert Salgado (Salgado) and Associate Safety Engineer Robert Delgado (Delgado), commenced an accident investigation of a work site located at 3435 South Riverside Avenue, Bloomington, California.

On June 15, 2016, the Division cited Employer for the following alleged safety violations: failure to keep clear the work space about electric equipment; failure to guard energized parts of electrical equipment; failure to legibly mark a disconnecting means to indicate its purpose; failure to remove or maintain an abandoned or discontinued circuit; failure to provide a cover for a conduit fitting; failure to locate a disconnecting means in sight from its controller; failure to include all written elements of a hazardous energy control procedure; failure to maintain machinery and equipment in safe operating condition; failure to implement an effective injury and illness prevention program (IIPP); failure to train authorized employees on hazardous energy control procedures; failure to stop and de-energize machinery or equipment during cleaning, servicing, and adjusting operations; failure to maintain equipment as recommended by the manufacturer; and failure to guard parts of a machine creating a hazardous reciprocating, running, or similar action.

Employer filed timely appeals of the citations. For all citations, Employer appealed the existence of the violations and the reasonableness of the penalties. For Citations 2, 3, 4, 5, and 6, Employer appealed the classifications of the citations. Additionally, Employer asserted a series of affirmative defenses for all of the citations.[1]

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board. On June 24 and 25, 2021, December 7 to 9, 2021, and January 12, 2022, ALJ Grimm conducted the hearing from West Covina, California, with the parties and witnesses appearing remotely via the Zoom video platform. Eugene F. McMenamin, attorney with Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Clara Hill-Williams, Staff Counsel, represented the Division. The matter was submitted on April 10, 2023.

Issues

1. Did Employer store a ladder within the working space of an electrical panel?

2. Did Employer guard the electrical parts of an electrical panel?

3. Did Employer legibly mark the circuit breakers inside an electrical panel?

4. Did Employer remove or maintain the conductors of an abandoned or discontinued circuit?

5. Did Employer cover a conduit fitting above an electrical panel?

6. Was a disconnecting means located out of sight from the controller location?

7. Did Employer's hazardous energy control procedure include separate procedural steps for each machine or piece of equipment?

8. Did Employer maintain the cubing controller display screen in a safe operating condition?

9. Did Employer establish, implement, and maintain effective procedures for identifying and evaluating work place hazards?

10. Did Employer train employees on hazardous energy control procedures?

11. Did Employer stop and de-energize machinery capable of movement during cleaning, servicing and adjusting operations?

12. Did Employer inspect and maintain machinery and equipment as recommended by the manufacturer?

13. Did Employer guard all parts of a machine that create a hazardous reciprocating, running, or similar action?

14. Did Employer prove the Independent Employee Action Defense (IEAD) for Citation 4?

15. Are the proposed penalties calculated in accordance with the penalty-setting regulations?

Findings of Fact

1. An extension ladder had been placed in front of an electrical panel until it was to be used again.

2. The circuit breakers in the panel next to panel HV-4 were not labeled to indicate their purpose.

3. A junction box above the panel next to panel HV-4 did not have a cover.

4. The cubing machine controller contains a switch that disconnects the power supply.

5. Employer has a written hazardous energy control procedure. Employer's written hazardous energy control procedure does not include separate procedural steps for each of the machines and pieces of equipment affected by the hazardous energy control procedure.

6. The wear and tear of the display screen on the cubing machine controller would not cause injury.

7. Employer has a fence around the Dry Side. The fence has interlock gates for entry and exit.

8. Jose Vega Montoya (Montoya) worked as an operator of the Dry Side for four to five years before becoming an operator for the Wet Side.

9. Montoya climbed on Patternmaker A and walked along the conveyor to get past the Dry Side fencing.

10. Montoya did not stop and de-energize the product pusher prior to entering the fenced area.

11. Montoya deliberately circumvented Employer's hazardous energy control procedure.

12. Montoya was cleaning a sensor for the centerline conveyor when the product pusher struck him.

13. Patternmaker A is a conveyor that is 3 feet, 2 inches high.

14. An employee could not slip, fall, slide, trip, or any other unplanned movement over Patternmaker A, through the fence opening, and into the path of the product pusher.

15. Patternmaker B is a conveyor that is 3 feet, 2 inches high.

16. An employee could not slip, fall, slide, trip, or any other unplanned movement over Patternmaker B, through the fence opening, and into the path of the product pusher.

17. The front right corner of the cuber controller is nine inches from the fence.

18. There is a 21-inch opening in the fence on the right side of the cuber controller.

19. An employee could not slip, fall, slide, trip, or any other unplanned movement through the 9-inch opening on the side of the cuber controller, then through the 21-inch opening, then around a conveyor, and into the path of the product pusher.

20. Employer trained and tested all employees on hazardous energy control procedures.

21. Employer has a progressive discipline program.

Analysis

1. Did Employer store a ladder within the working space of an electrical panel?

California Code of Regulations, title 8, section 2340.16,[2] provides:

(c) Clear Spaces. Working space required by this section shall not be used for storage. When normally enclosed live parts are exposed for inspection or

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

servicing, the working space, if in a passageway or general open space, shall be suitably guarded.

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer used work space about electrical equipment (electrical panel next to electrical panel HV-4) to store a 24-foot reach ladder.

The Division has the burden of proving a violation, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Employer manufactures pavers. It uses a series of machines and conveyors to form, dry, align, and stack pavers. (Ex. H.) The machinery and equipment that forms the pavers is known as "the Wet Side." The machinery that aligns and stacks the pavers is known as "the Dry Side." A conveyor transports the pavers from the Wet Side to the Dry Side. The Wet Side and the Dry Side have separate employees to monitor their respective operations. After the pavers are aligned and stacked, they can be transported by forklift.

Employer has fencing around much of the machinery of the Dry Side and Wet Side. (Ex. K.) Maintenance Mechanic Scott Becker (Becker) estimated the area within the fencing to be 4,000 to 5,000 square feet.

Delgado testified that he and Salgado inspected the work site as part of an accident investigation. According to Delgado, one of Employer's managers took them to an area with electrical panels related to the Dry Side. Delgado took pictures of the electrical panels. (Exs. 12-70, 12-172, 12-173, 12-174.)

Delgado testified that he observed a ladder blocking an electrical panel. The Division introduced photographs of the condition observed by Delgado. (Exs. 12-70, 12-172, and 12-174.) Delgado further testified that Employer's manager opened the electrical panel, and the Division determined the panel was in use based on the circuit breakers inside the panel. Delgado did not see any tools or employees nearby.

David Wilson (Wilson), Employer's former Environmental Health and Safety Manager, testified that he investigated why the ladder had been in front of the electrical panel at the time of the Division's inspection. He was told that it was there because employees had been doing work at that location. He believes it was there for only one day and was not typically kept in that location.

Thomas Ray (Ray), Employer's Production Manager, testified that Employer has a storage location for its ladders. He further testified that the ladder was in front of the electrical panel at the time of the Division's inspection because employees had been using it to perform maintenance work.

Employer argues that the ladder was in use and not being stored. The safety order does not define the term "storage." However, the Appeals Board has previously interpreted the term "store" to mean "to put aside, or accumulate, for use when needed." (*Oakmont Holdings dba Elegant Surface's*, Cal/OSHA App. 04-1941, Denial of Petition After Reconsideration (Feb. 8, 2007) (interpreting section 3241(c) regarding storage of materials).) Here, the ladder had been set in front of the electrical panel when observed by Delgado. There were no signs that it was being used, such as employees or tools nearby. Thus, the ladder had been "put aside . . . for use when needed" because it was placed in front of the electrical panel until it was to be used again. Therefore, the ladder was stored in front of the electrical panel.

Accordingly, Citation 1, Item 1, is affirmed.

2. Did Employer guard the electrical parts of an electrical panel?

Section 2340.17, subdivision (a), pertains to guarding of energized parts of electric equipment:

> Except as elsewhere required or permitted by these orders, energized parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by use of approved cabinets or other forms of approved enclosures or by any of the following means:
>
> (1) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.
>
> (2) By suitable permanent, substantial partitions or screens so arranged that only qualified persons will have access to the space within reach of the energized parts. Any openings in such partitions or screens shall be so sized and located that

> persons are not likely to come into accidental contact with the energized parts or to bring conducting objects into contact with them.

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on December 15, 2015, the employer failed to guard energized parts of electrical equipment (electrical panel HV-4, 480V) against accidental contact.

Delgado testified that he observed an electrical panel with its panel door slightly open. Delgado identified this electrical panel as HV-4. HV-4 is located to the left of the electrical panel and ladder discussed above. Exhibits 12-70 and 12-174 show the location and the open panel door. Exhibit 12-174 shows a tag near the top of the panel that appears to say "HV-4."

Delgado further testified that the panel door was missing a bolt, which allowed the panel door to be open. According to Delgado, the open panel door exposed employees to the electrical parts in the panel. In contrast to his testimony regarding the electrical panel behind the ladder (discussed above), Delgado did not testify that Employer's manager opened HV-4 or that the Division evaluated circuit breakers inside HV-4.

Wilson testified that HV-4 was not energized and contained only "dead wiring."

Importantly, the cited safety order applies to electrical equipment that is energized and operating at 50 volts or more. The Division did not introduce evidence that HV-4 was energized or that it was operating at 50 volts or more. Thus, the Division did not establish that the cited safety order required Employer to guard HV-4.

Accordingly, Citation 1, Item 2, is vacated.

3. Did Employer legibly mark the circuit breakers inside an electrical panel?

The Division cited Employer for a violation of section 2340.22, subdivision (a), which provides:

> Each disconnecting means required by this Safety Order for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.

Citation 1, Item 3, alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to legibly mark the electrical equipment (panel next to HV-4) to indicate its purpose.

Delgado testified that this citation concerns the electrical panel to the right of HV-4, which is the panel that had a ladder in front of it. (Exs. 12-172 and 12-174.) Delgado testified that Employer's manager opened this panel and that the Division evaluated the circuit breakers. Delgado further testified that the panel was not legibly marked to indicate its purpose: "What does it do . . . What machine, you know, is connected to these breakers . . . Or what area is this breaker connected to?"

Wilson testified that he investigated the panel. He testified that it contains individual circuit breakers that are labeled: "It's just like a home power panel where you have breakers within it that control different circuits in your home. That one is -- the labels are on the inside of the door that indicates what each breaker controls."

Delgado testified credibly that he examined the inside of the panel and that it was not labeled. Although Wilson testified that he investigated the panel and found labels inside, he was not present for the Division's inspection. He did not testify that the labels were present at the time of the Division's inspection. The labels found by Wilson could have been added after the Division examined the electrical panel. The weight of the evidence indicates labels were not present when examined by the Delgado.

Accordingly, Citation 1, Item 3, is affirmed.

4. Did Employer remove or maintain the conductors of an abandoned or discontinued circuit?

The Division cited Employer for a violation of section 2340.24, which provides:

> When a circuit is abandoned or discontinued, its conductors shall be removed from the raceways, or be maintained as if in use.

Citation 1, Item 4, alleges:

> Prior to and during the course of the investigation, including but not limited to, on December 15, 2015, the employer failed to remove circuits abandoned or discontinued or maintain as if in use above the electrical equipment (panel next to HV-4).

Delgado testified that this citation concerns the electrical panel to the right of HV-4, which is the panel that had a ladder in front of it. (Exs. 12-172 and 12-174.) Delgado testified that Employer's manager opened this panel and that the Division evaluated the circuit breakers. He testified: "The same panel . . . I believe it had wires based on the picture coming out, dusty, dirty. It was not discontinued or maintained in safe use or that it was being in use such as an outlet, for example."

Wilson testified that he investigated the panel and found whip cabling coming out of the top of the panel. He further testified the circuits were de-energized and discontinued, and therefore there was no hazard.

Here, the evidence did not address conductors, which is the subject of the safety order. Delgado's testimony referred first to wires, but then an outlet. He seemed to have trouble recalling the condition referenced by the citation. With respect to the photographs taken by Delgado, it is not clear that they depict any abandoned or discontinued circuit or any conductors. (Exs. 12-70, 12-172, 12-173, and 12-174.)

Accordingly, Citation 1, Item 4, is vacated.

5. Did Employer cover a conduit fitting above an electrical panel?

The Division cited Employer for a violation of section 2473.2, subdivision (a), which provides:

> All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

Citation 1, Item 5, alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to provide a cover for a conduit fittings above the an electrical equipment (panel next to HV-4).

Delgado testified that this citation concerns the electrical panel to the right of panel HV-4, which is the panel that had a ladder in front of it. (Exs. 12-172 and 12-174.) Delgado testified that a conduit fitting above the panel was missing a cover, exposing the wires of the conduit.

Wilson testified that he investigated the junction box for the conduit and found it missing a cover. He testified that it was 10-12 feet above the ground. He further testified the lack of a cover did not pose a threat because the conduit was inaccessible due to its height above the ground.

The parties do not dispute that the junction box was missing a cover. The dispute is whether employees could access the junction box given its height. However, the testimony and photographs show that Employees were using a ladder in that area, and the ladder enabled access to the electrical equipment above the panel. (Exs. 12-70, 12-172, 12-173, and 12-174.)

Accordingly, Citation 1, Item 5, is affirmed.

6. Was a disconnecting means located out of sight from the controller location?

The Division cited Employer for a violation of section 2530.102, which provides:

> An individual disconnecting means shall be provided for each controller. A disconnecting means shall be located in sight from the controller location:

Citation 1, Item 6, alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to provide employees with means for individually disconnecting the Cubing Machine controller of the Tiger Machine Dry side in sight location (main power located outside at different area approx. more than 100 feet away).

Section 2300 defines a "controller" as: "A device or group of devices that serves to govern, in some predetermined manner, the electric power delivered to the apparatus to which it is connected." It defines a "disconnecting means" as: "A device, or group of devices, or other means by which the conductors of a circuit can be disconnected from their source of supply."

The cubing machine is part of the Dry Side. It aligns and stacks pavers to be placed on a pallet. The cubing machine has a controller located outside the fence that encircles the Dry Side. (Ex. 12-17.) The controller has a switch that disconnects the cubing machine from its power supply. (Ex. 12-120.)

Delgado testified that the basis for Citation 1, Item 6, is that there was a second power source of the controller:

> [T]here was another power source directly controlling the Tiger machine dry side that was outside of the facility, which did not meet this regulation. It was not in plain sight. The main power was located outside at a distance of approximately more than a hundred feet away. This – the standard was not met.

(Tr. vol. 3, 409:2-8.) Employer's witnesses did not dispute that the building's main power shut-off is outside the building.

The testimony and the photographs indicate that the cubing machine controller has a switch that disconnects the power supply. This switch is "in sight from" the controller because it is on the controller itself. Thus, Employer satisfied the cited safety order with respect to the cubing machine controller because it has an individual disconnecting means that is in sight from the controller. With respect to the building's main power shut-off, the Division did not provide legal authority for the proposition that a building's main power shut-off need be in sight from a controller in the building. Moreover, a building can have more than one controller inside, as is the case here. Therefore, the Division's argument implies that a building's main power shut-off must be in sight from all controllers in the building. This is a further constraint for which authority was not provided.

Accordingly, Citation 1, Item 6, is vacated.

7. Did Employer's hazardous energy control procedure include separate procedural steps for each machine or piece of equipment?

The Division cited Employer for a violation of section 3314, subdivision (g)(2)(A), which provides in relevant part:

> Hazardous Energy Control Procedures. A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.
>
> (1) . . . .
>
> (2) The employer's hazardous energy control procedures shall be documented in writing.

> (A) The employer's hazardous energy control procedure shall include separate procedural steps for the safe lockout/tagout of each machine or piece of equipment affected by the hazardous energy control procedure.
>
> EXCEPTION to subsection (g)(2)(A): The procedural steps for the safe lockout/tagout of prime movers, machinery or equipment may be used for a group or type of machinery or equipment, when either of the following two conditions exist:
>
> > (1) Condition 1: (A) The operational controls named in the procedural steps are configured in a similar manner, and (B) The locations of disconnect points (energy isolating devices) are identified, and (C) The sequence of steps to safely lockout or tagout the machinery or equipment are similar.
> >
> > (2) Condition 2: The machinery or equipment has a single energy supply that is readily identified and isolated and has no stored or residual hazardous energy.

Citation 1, Item 7, alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to include in its hazardous energy control procedures separate steps for the safe lockout/tagout of each machine or piece of equipment of the Tiger Machine (identified by the employer as the Dry Side) affected by the hazardous energy control procedure.

An exception to a safety order is an affirmative defense, by which the employer may demonstrate that it is in compliance with an authorized exception to the general rule. (*DISH Network California Service Corporation*, Cal/OSHA App. 12-0455, Decision After Reconsideration (Aug. 28, 2014).)

In addition to the cubing machine, the Dry Side includes two conveyors. One conveyor is known as "Patternmaker A" while the other conveyor is known as "Patternmaker B." Each of these conveyors brings pavers to the centerline conveyor. Each of these conveyors has a controller which can be seen in photographs. (Exs. H, J, K, and M.)

Delgado testified that the Division received Employer's hazardous energy control procedure. He further testified that the hazardous energy control procedure does not include separate procedural steps for each machine or piece of equipment on the Dry Side.

Ray acknowledged that Employer's hazardous energy control procedure does not include separate procedural steps for each machine or piece of equipment affected by the hazardous energy control procedure. However, Ray testified that the procedure is specific to using the interlock gates in the fencing that encircles the machines and equipment affected by the hazardous energy control procedure.

Wilson testified that the hazardous energy control procedure covers "all of the machines because they were all similar in nature, and it required the positioning of a lock on the gate once it had been opened."

The parties do not dispute that the facility has various machines and pieces of equipment. The Dry Side involves the cubing machine, the centerline conveyor, the product pusher and more. There are at least three separate controllers—one each for the cubing machine, Patternmaker A, and Patternmaker B. The testimony of Delgado, Ray, and Wilson establishes that Employer's hazardous energy control procedure does not include separate procedural steps for each machine and piece of equipment covered by the procedure. Therefore, Employer's hazardous energy control procedure does not comply with subsection (g)(2)(A).

The testimony of Ray and Wilson raises the exception to subsection (g)(2)(A) of section 3314. The exception authorizes one set of procedural steps to be used for a group or type of machinery or equipment under specified conditions. The relevant conditions require: "(A) the operational controls named in the procedural steps are configured in a similar manner, and (B) the locations of disconnect points (energy isolating devices) are identified, and (C) the sequence of steps to safely lockout or tagout the machinery or equipment are similar." (§ 3314, subd. (g)(2)(A).) The Division did not dispute Wilson's testimony that the machines are similar in nature. However, Wilson's testimony does not indicate that the hazardous energy procedure identifies the locations of disconnect points. Therefore, Employer did not establish compliance with the exception to subsection (g)(2)(A).

Accordingly, Citation 1, Item 7, is affirmed.

8. Did Employer maintain the cubing controller display screen in a safe operating condition?

The Division cited Employer for a violation of section 3328, subdivision (g), which provides:

> Machinery and equipment in service shall be maintained in a safe operating condition.

Citation 1, Item 8, alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to maintain in safe operating condition the Tiger machine's Cubing Control Display panel.

As discussed above, the cubing machine is a machine on the Dry Side. The controller for the cubing machine is outside the Dry Side fencing. The controller has a display screen that shows the status of the cubing machine. Delgado testified that the display screen of the cubing machine controller suffered from wear and tear. Delgado photographed the display screen. (Exs. 12-17 and 12-120.)

The photographs show the display screen is worn at the spot where Employer leaned a wooden stick against it. Delgado testified "This [citation] is classified as General because it's the display panel, not so much the function, the display panel. And the display panel itself wouldn't cause physical harm or death." Although the evidence establishes that the display screen suffered from wear and tear, Delgado's testimony that the display panel would not cause physical harm indicates that the condition of the display does not create a hazard. Thus, the evidence does not indicate the condition of the display panel is unsafe.

Accordingly, Citation 1, Item 8, is vacated.

9. Did Employer establish, implement, and maintain effective procedures for identifying and evaluating work place hazards?

The Division cited Employer for a violation of section 3203, subdivision (a)(4)(A), which provides in relevant part:

> Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
>
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> (A) When the Program is first established . . . ;

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Citation 2 alleges:

Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the implementation of the employer's written IIPP procedures for identifying and evaluating workplace hazards did not result in a comprehensive evaluation of the hazards present at the site.

Instance 1: As a common unsafe practice, the employer permitted the use of a piece of lumber/wood which the employer positioned against the Cuber controller to physically hold/push and bypass the reset button of a sensor(s).

Instance 2: As a common unsafe condition, the employer failed to identify unguarded entries to the zone of danger.

Section 3203(a)(4) requires that employers include procedures for identifying and evaluating work place hazards in their IIPP. These procedures must include "scheduled periodic inspections to identify unsafe conditions and work practices." (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) The safety order does not require Employer to have a written procedure for each hazardous operation it undertakes. (*Ibid.*)

Implementation of an IIPP is a question of fact. (*Papich Construction Company Inc*., Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).)

Instance 1

The parties introduced photographs and testimony of a stick leaning against a button on the display panel of the controller for the cuber system. The parties do not dispute that this practice occurred. However, the Division contends that the button restarts the operation of the product pusher, which could create a hazard if the stick causes the product pusher to restart while an employee is in the zone of danger while servicing the Dry Side. Employer disputes the function of the button. Employer also contends that its fencing and its hazardous energy control procedure prevent an employee from being exposed to a hazard from the product pusher.

The Division did not introduce Employer's IIPP into evidence. The Division did not introduce evidence of Employer's actions to identify and evaluate hazards, such as the occurrence of inspections. Evidence of the IIPP would establish what Employer's procedures are. Evidence of Employer's actions would show Employer's conformity to its IIPP. Without evidence of the IIPP and of Employer's actions, it is not possible to determine if Employer implemented its IIPP.

The Division's argument appears to be that the cited work practice created a hazard and Employer permitted the work practice, therefore, Employer must not have implemented its IIPP procedures for identifying and evaluating hazards. However, this is not sufficient to show the alleged violation.

First, section 3203 requires an inspection when "the employer is made aware of a new or previously unrecognized hazard." This indicates that a hazard might go unrecognized even by an employer that implements its IIPP. But once the employer is "made aware" of the hazard, the employer must evaluate it. In view of this circumstance, the existence of a hazard does not establish that Employer failed to implement its IIPP.

Second, an employer could implement its IIPP but arrive at different conclusions than the Division. An employer might evaluate a work practice and determine it does not create a hazard. In view of this circumstance, the existence of a hazard does not establish that Employer failed to implement its IIPP. In the context of a different safety order that, similar to here, requires identification and evaluation of hazards, the Appeals Board previously stated:

> The law does not require perfection of a party, but good faith and diligence . . . Since one can almost always determine after an accident that if certain other steps or safeguards had been taken the accident would not have occurred, we don't find such *post hoc* reasoning helpful in determining if a violation of section 1511(b) occurred. The better inquiry is to ask, whether what the employer did before the event in question to discover and address the workplace's hazards was an exercise of reasonable diligence.

(*Security Paving, Inc.*, Cal/OSHA App. 13-0771, Denial of Decision After Reconsideration (Dec. 31, 2014).) Similar to the safety order in *Security Paving*, the safety order cited here requires procedures to identify and evaluate hazards. It does not require employers to be perfect or arrive at the same conclusions as the Division.

Moreover, the evidence does not establish that the button pressed by the stick resets any mechanical process in the Dry Side. Delgado initially testified that the button:

> [S]erves some purpose to reset the machine when it had issues. As far as those issues, that I don't remember what issues but to reset the machine for them not to go out and doing it again. . . . As far as the issues, it was a various [sic] of issues and I don't recall what they were.

(Tr. vol. 2, 251:24-252:17.) Delgado later testified that the button resets the operation of the product pusher:

> It's my understanding that the reset button resets the moving Tiger machine, moving mechanical part, the metal component that we've been describing before as the horizontal component, the clamps. It resets that and allows it to continue with its command, with its process after an error—the error is cleared, is fixed, if you will.

(Tr. vol. 4, 632:14-20.) However, Wilson testified that the button merely stops an audible alarm. (Tr. vol. 6, 963:17-964:12.). Ray testified that the button does not restart the product pusher. (Tr. vol. 6, 942:7-24.) In light of the disputed testimony and Delgado's equivocal testimony, the evidence does not indicate that the button restarts the product pusher, as asserted by the Division. Therefore, the evidence does not establish that the stick would restart the product pusher while an employee is in the zone of danger while servicing the Dry Side.

Therefore, the Division did not establish Instance 1.

Instance 2

Delgado testified that Instance 2 relates to three openings in the fence surrounding the Dry Side. The parties introduced photographs and testimony regarding the fencing, the interlock gates, and other barriers surrounding the Dry Side. As with Instance 1 above, the Division did not introduce evidence of Employer's IIPP or of Employer's actions to identify and evaluate hazards. Moreover, as discussed below in the context of guarding, these three openings do not create hazards or make the Dry Side unguarded. Therefore, the Division did not establish Instance 2.

In sum, Citation 2 is vacated.

10. Did Employer train employees on hazardous energy control procedures?

The Division cited Employer for a violation of section 3314, subdivision (l)(1), which provides:

> Authorized employees shall be trained on hazardous energy control procedures and on the hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting prime movers, machinery and equipment.

Citation 3 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to effectively train employees on hazardous energy control procedures for the Tiger Machine (identified by the employer as the Dry Side) and hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting the Tiger Machine.

The Division received Employer's training documentation, which was reviewed by Delgado. He testified:

> The employer did provide some training documents pertaining to, as I recall, general lockout/tagout procedures. No indication of any specifics for the dry side, as pertaining to one of the other violations that there was no specific lockout/tagout procedures for the dry side that were not identified. Basically, you do not have a specific program. How is it that you're going to train employees on a specific equipment? In this case, the machine, the dry side.

(Tr. vol. 4, 640:6-11.)

The Division's argument appears to be that Employer's training on hazardous energy control must be insufficient because Employer's written procedure on hazardous energy control did not contain all required written elements (see Citation 1, Item 7). However, the two safety orders have different textual requirements. Unlike the written procedure requirement under subdivision (g)(2)(A), the training requirement under subdivision (l)(1) does not reference separate written procedures for each machine. Therefore, the lack of separate written procedures for each machine affected by the hazardous energy control plan does not violate the plain language of the training requirement.

The issue with respect to the training requirement is whether Employer's training activities and materials trained employees on hazardous energy control procedures and on the hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting prime movers, machinery and equipment.

The Division did not introduce the training documentation it received from Employer. Becker testified that all employees are trained and tested on hazardous energy control procedures. For its part, Employer introduced some training documentation. (Ex. A.) Moreover, Employer introduced evidence that its hazardous energy control procedure is sufficient to safely perform the work even if it does not satisfy the requirement for written elements. Ray and Wilson testified that the procedures are the same for each machine because each of the machines is similar in nature. The Division did not dispute that each machine is similar in nature. Ultimately, the Division bears the burden of proof. It did not establish that Employer's training on hazardous energy control procedures and related hazards was insufficient.

Accordingly, Citation 3 is vacated.

11. Did Employer stop and de-energize machinery capable of movement during cleaning, servicing and adjusting operations?

The Division cited Employer for a violation of section 3314, subdivision (c), which provides:

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

Citation 4 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to stop and de-energize or disengage the power source and block out the moveable mechanical part of the Tiger Machine (identified by the employer as the Dry Side) to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations at the workplace. As a result, at or about 2:11 pm on December 15, 2015, an employee sustained a fatal injury when caught between the product pusher of the center conveyor of the Tiger Machine and a steel structural member of the machine.

On December 15, 2015, Montoya was working as an operator of the Wet Side. Ruben Alamilla (Alamilla) was working as an operator of the Dry Side, along with Tomas Valdez

(Valdez). Alamilla testified that Montoya came to the Dry Side and the two employees talked.[3] Alamilla then left the area in order to carry out a task involving a forklift. Alamilla returned about eight to ten minutes later and the Dry Side was not in operation. He found Valdez and asked about the status of the Dry Side. Alamilla and Valdez started looking for Montoya. Alamilla saw Montoya inside the fencing and lying on the ground with what appeared to be blood. Alamilla went to get help. Montoya was taken by ambulance to a hospital. Montoya's injuries were fatal. There are no witnesses to the accident.

Montoya was found near a component of the Dry Side called the centerline conveyor. The centerline conveyor transports pavers to a component called the tier table. The centerline conveyor stops once the pavers are near the edge of the tier table. At this juncture a third component, the product pusher, comes down from above the centerline conveyor and pushes the pavers onto the tier table.

Becker testified that the Dry Side has 20-25 sensors that regulate many of its processes. In particular, the centerline conveyor stops when pavers are near the tier table because the pavers block a light beam that is sent from one side of the centerline conveyor to a detection sensor on the other side of the conveyor. When pavers are not present to block the beam from reaching the sensor, the centerline conveyor continues to move. However, the sensor can get dirty such that the dirt obstructs the sensor from receiving the beam. This causes the centerline conveyor to stop as if pavers are blocking the beam and waiting to be pushed onto the tier table by the product pusher. When this happens, operators must clean the sensor. Montoya was found on the ground near this sensor for the centerline conveyor. His hard hat was found with a long crack in it. (Ex. 12-136.)

Becker and Ray testified that their investigation led them to believe Montoya climbed onto a conveyor known as Patternmaker A, which enabled him to pass to the interior of the fencing. A footprint matching the tread of Montoya's boots was found on a conveyor, known as Patternmaker A, that leads into the fenced area near the centerline conveyor. The footprint did not match the boots of Alamilla or Vasquez. Immediately after the accident there was confusion regarding how Montoya entered the fenced area. There was a report that the safety gate was locked in an open position in accordance with Employer's hazardous energy control procedures. However, Employer later concluded that employees had opened and locked open the safety gate during the rescue of Montoya. (Ex. C.)

Delgado testified that Montoya's incident did not involve an accidental contact:

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[3] Alamilla testified that Montoya often came to the Dry Side because he liked to help other employees. Ray testified that Montoya had been an operator for the Dry Side prior to becoming an operator for the Wet Side.

Q. Now, isn't it true that on the dry side, the two pattern maker conveyors function as barriers to entry into the interior except through the fencing?
A. No. If you're referring to guarding by location, no. Those are not guards or guarding by location.
Q. How—why do you say that?
A. Because it prevents from accidental contact. This was not an accidental contact.

(Tr. vol. 4, 660:9-17.)

Based on the foregoing evidence, it is found that Montoya entered the fenced area in order to clean the sensor near the centerline conveyor and the product pusher. Montoya climbed onto Patternmaker A, which enabled him to pass to the interior of the fencing. He went to the sensor, which was attached to a vertical steel structural member. The product pusher was moving and trapped his head against the steel structural member. The force between the product pusher and the steel structural member caused fatal injuries.

In sum, machinery capable of movement was not stopped, de-energized, disengaged, mechanically blocked, or locked out while Montoya was performing cleaning operations in the path of movement. Accordingly, the Division met its burden with respect to the elements of section 3314, subdivision (c).

12. Did Employer inspect and maintain machinery and equipment as recommended by the manufacturer?

The Division cited Employer for a violation of section 3328, subdivision (b), which provides:

> Machinery and equipment in service shall be inspected and maintained as recommended by the manufacturer where such recommendations are available.

Citation 5 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the Employer failed to maintain in service the equipment of the Tiger Machine (identified by the employer as the Dry Side) as recommended by the available manufacturers' (Tiger Machine Co. LTD) recommendations (Operation & Service Manual . . .)

> Instance 1: The employer modified the equipment by the use of a piece of lumber/wood which the employer positioned against the cuber controller to physically hold/push and bypass the reset button.
>
> Instance 2: The employer failed to ensure that the circuit breaker serving the Tiger machine dry side was not locked out in the off position while an employee was working.
>
> Instance 3: The guard did not prevent an employee from entering the zone of danger.
>
> As a result, at or about 2:11 pm on December 15, 2015 an employee sustained a fatal injury when the employee was caught between the product pusher and a steel structural member when the employee entered the unguarded zone of danger that was not locked out.

Instance 1

The parties introduced photographs and testimony of a stick leaning against a button on the display panel of the controller for the cuber system. Although the parties do not dispute that this practice occurred, they dispute the function and consequences of this practice.

Importantly, the Division did not introduce the manufacturer's recommendations referenced in the citation. Delgado testified that the recommendation exists and that he saw it. However, it is critical to know the exact wording of a recommendation and the context in which it appears. Textual variations and lack of context can be misleading. Thus, Delgado's generalized testimony is not sufficient to establish what the alleged recommendation is and its significance. Therefore, the Division did not establish that Employer failed to maintain machinery and equipment as recommended by the manufacturer.

Instance 2

The parties introduced photographs and testimony of a switch on the cuber controller that is a disconnecting means, which can be switched off and locked out. As with Instance 1, the Division did not introduce the manufacturer's recommendations. Delgado's generalized testimony is not sufficient to establish what the alleged recommendation is and its significance. Therefore, the Division did not establish that Employer failed to maintain machinery and equipment as recommended by the manufacturer.

Instance 3

The parties introduced photographs and testimony of three openings in the fence around the Dry Side. As with Instances 1 and 2, the Division did not introduce the manufacturer's recommendations. Delgado's generalized testimony is not sufficient to establish what the alleged recommendation is and its significance. Therefore, the Division did not establish that Employer failed to maintain machinery and equipment as recommended by the manufacturer.

Accordingly, Citation 5 is vacated.

13. Did Employer guard all parts of a machine that create a hazardous reciprocating, running, or similar action?

The Division cited Employer for a violation of section 4002, subdivision (a), which provides:

> All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

Citation 6 alleges:

> Prior to and during the course of the investigation, including, but not limited to, on December 15, 2015, the employer failed to adequately guard (fully enclose) all parts of the Tiger Machine (identified by the employer as the Dry Side) which create a hazardous action including but not limited to reciprocating, running, or similar action(s). As a result, at or about 2:11 pm on December 15, 2015, an employee sustained a fatal injury after entering the zone of danger and was caught between the product pusher of the center conveyor of the Tiger Machine and a steel structural member.

Section 3941 contains definitions that apply to the safety order at issue. Of particular relevance for the analysis of the guarding of the Dry Side are the definitions of "guarded" and "accidental contact":

> Guarded. Shielded, fenced, enclosed or otherwise protected according to these orders, by means of suitable enclosure guards, covers or casing guards, trough or

> "U" guards, shield guards, standard railings or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact.
>
> Accidental Contact. Inadvertent physical contact with power transmission equipment, prime movers, machines or machine parts which could result from slipping, falling, sliding, tripping or any other unplanned action or movement.

In light of these definitions, the Appeals Board has held that the purpose of a guard is to prevent accidental or unintended contact with a hazard. (*Pacific Westline, Inc.*, Cal/OSHA App. 10-0278, Decision After Reconsideration (Dec. 20, 2010).)

Delgado testified that the basis of this citation is that there were three openings in the fence around the Dry Side. The first opening is location where Patternmaker A (conveyor) enters the fenced area. The second opening is where Patternmaker B (conveyor) enters the fenced area. The third opening is on the side of the controller for the cubing machine. Delgado testified that the Dry Side would have been guarded but for the three openings he identified.

Opening 1

The first opening identified by Delgado relates to Patternmaker A, a conveyor that brings materials to the Dry Side. Patternmaker A is the conveyor that Montoya climbed in order to access the fenced area. The fence around the Dry Side has an opening for Patternmaker A to pass into the fenced area. (Exs. I, 12-109, 12-110.)

Delgado estimated the height of Patternmaker A to be 3 feet, 2 inches. Ray testified that there is not a gap on the side of the conveyor between it and the fence. Ray further testified that the conveyor is guarded underneath.

The Division did not indicate that the junction of the fence and Patternmaker A fails to remove the hazard of accidental contact with the hazardous actions alleged in the citation. To the contrary, the photographs and testimony indicate the junction forms a barrier sufficient to prevent a person from accidentally passing through the fence opening. It is not realistic that an employee could slip, fall, slide, trip, or any other unplanned action or movement onto the conveyor, along it for several feet, down to the ground on the other side of the fence, and several more feet to the product pusher. With respect to Montoya's incident, the evidence indicates his actions were deliberate and calculated to circumvent Employer's hazardous energy control procedure and guarding.

Opening 2

The second opening identified by Delgado relates to Patternmaker B, a conveyor on the opposite side of the centerline conveyor from Patternmaker A. The fence has an opening for Patternmaker B to pass into the fenced area. (Ex. 12-112.) As with Patternmaker A, Patternmaker B forms a barrier with the fence. The Division did not indicate how an employee could pass through this opening other than climbing onto the conveyor and walking along the conveyor to the other side of the fence. It is not realistic that an employee could slip, fall, slide, trip, or any other unplanned action or movement over the conveyor and through the fence opening to the hazardous action of the product pusher.

Opening 3

The third opening identified by Delgado relates to an opening in the fencing on the right side of the controller for the cuber. (Ex. 12-140.) The photographs show that the fence opening is approximately 21 inches. (Ex. 12-138.) Before reaching the fence opening, an employee would have to pass between the front right corner of the controller and the fence. The distance between the fence and the front right corner of the controller was measured to be approximately nine inches. (Exs. 12-137, 12-139.)

Ray testified that after the 21-inch fence opening an employee would have to get around a conveyor before reaching the product pusher. The conveyor is visible in the photographs of the opening. (Exs. 12-137, 12-138, 12-139, and 12-140.)

The Division did not address how these openings could lead to accidental contact with the hazardous actions of the Dry Side. Although Delgado was able to pass through these two openings, his actions were not accidental. It is not realistic that an employee could slip, fall, slide, trip, or any other unplanned action or movement through a 9-inch opening, then through a 21-inch opening, and then around a conveyor in order to reach the hazardous action of the product pusher.

Accordingly, Citation 6 is vacated.

14. Did Employer prove the Independent Employee Action Defense (IEAD) for Citation 4?

Employer asserts the IEAD to Citation 4 (failure to stop and de-energize machinery capable of movement during cleaning operations). The IEAD relieves an employer of responsibility for a violation. There are five elements to this affirmative defense, all of which must be proved by an employer in order for the defense to succeed: 1) the employee was

experienced in the job being performed; 2) the employer has a well-devised safety program that includes training 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 which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Here, Ray testified that Montoya operated the Dry Side for four to five years before becoming an operator for the Wet Side. Alamilla testified that Montoya often helped other employees. Therefore, Montoya was experienced in the job being performed.

With respect to Employer's safety program, Employer installed a fence around the Dry Side. The fence has multiple interlock gates that stop the machinery when opened. Employer has hazardous energy control procedures. Becker testified that all employees are trained and tested on the hazardous energy control procedures. Thus, Employer has a safety program that includes training related to the job assignment and that is well-devised to address the hazard.

With respect to enforcement and sanctions, Employer trains and tests employees on its hazardous energy procedures. Alamilla testified that Employer fires employees for violating safety rules. Ray testified that he walks around the facility each day. He further testified that he participates in discipline decisions with Employer's safety manager and with labor union representatives. According to Ray, Employer has a progressive discipline program. Thus, the third and fourth elements are met.

Finally, Montoya entered the fenced area without using one of the interlock gates that stop and de-energize the machinery. He climbed and walked on a conveyor in order to avoid the interlock gates and the hazardous energy control procedures. Montoya's actions took only a few seconds, whereas compliance with Employer's procedures would have taken two the three minutes according to the testimony of Becker and Ray. This was deliberate action that was calculated to circumvent Employer's safety measures. Therefore, it is found that Montoya caused a safety infraction which he knew was contra to Employer's safety requirements.

In sum, Employer established the IEAD with respect to Citation 4. Accordingly, Citation 4 is vacated.

15. Are the proposed penalties calculated in accordance with the penalty-setting regulations?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra,* Cal/OSHA App. 1092600, citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Division submitted its Proposed Penalty Worksheet (Ex. 11) and Delgado testified about the calculations used to establish the proposed penalties. Employer did not present evidence or argument that the penalties were not calculated in accordance with the penalty-setting regulations.

Accordingly, the proposed penalties for Citation 1, Items 1, 3, 5, and 7, are reasonable.

Conclusions

The evidence supports a finding that Employer violated section 2340.16, subdivision (c), for using required working space for storage. The proposed penalty is reasonable.

The evidence does not support a finding that Employer violated section 2340.17, subdivision (a), for failure to guard energized parts of electrical equipment.

The evidence supports a finding that Employer violated section 2340.22, subdivision (a), for failing to legibly mark each disconnecting means to indicate its purpose. The proposed penalty is reasonable.

The evidence does not support a finding that Employer violated section 2340.24 for failure to remove conductors of abandoned or discontinued circuits.

The evidence supports a finding that Employer violated section 2473.2, subdivision (a), for failure to cover a junction box. The proposed penalty is reasonable.

The evidence does not support a finding that Employer violated section 2530.102, for failure to provide an individual disconnecting means in sight from the controller location.

The evidence supports a finding that Employer violated section 3314, subdivision (g)(2)(A), for failing to include separate procedural steps for each machine or piece of equipment affected by the hazardous energy control procedure. The proposed penalty is reasonable.

The evidence does not support a finding that Employer violated section 3328, subdivision (g), for failure to maintain machinery and equipment in safe operating condition.

The evidence does not support a finding that Employer violated section 3203, subdivision (a)(4)(A), for failure to establish, implement, and maintain an IIPP with procedures for identifying and evaluating work place hazards, including scheduled periodic inspections.

The evidence does not support a finding that Employer violated section 3314, subdivision (l), for failure to train authorized employees on hazardous energy control procedures and the hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting prime movers, machinery, and equipment.

The evidence supports a finding that Employer established the IEAD with respect to section 3314, subdivision (c), for not stopping and de-energizing machinery capable of movement while Montoya performed cleaning operations.

The evidence does not support a finding that Employer violated section 3328, subdivision (b), for failure to maintain machinery and equipment as recommended by the manufacturer.

The evidence does not support a finding that Employer violated section 4002, subdivision (a), for failure to guard machines which create hazardous reciprocating, running, or similar actions.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty of $315 is sustained.

It is hereby ordered that Citation 1, Items 2, 4, 6, and 8, are vacated.

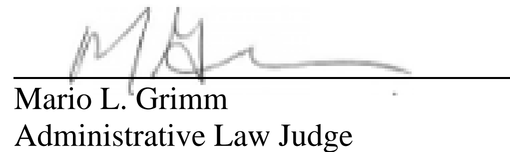
It is hereby ordered that Citation 1, Item 3, is affirmed and the penalty of $635 is sustained.

It is hereby ordered that Citation 1, Item 5, is affirmed and the penalty of $315 is sustained.

It is hereby ordered that Citation 1, Item 7, is affirmed and the penalty of $795 is sustained.

It is hereby ordered that Citations 2, 3, 4, 5, and 6, are vacated.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.



Dated**:** 05/08/2023

Mario L. Grimm
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**