

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

NBC UNIVERSAL
100 Universal City Plaza
Universal City, CA 91608,

Employer.

DOCKETS 13-R4D3-0528
through 0530

DECISION

Background and Jurisdictional Information

At all relevant times, NBC Universal (hereinafter referred to as Employer) was engaged in the entertainment industry. On August 21, 2012, the Division of Occupational Safety and Health (Division) opened an accident investigation at Employer's studio lot in Universal City, California. On February 5, 2013, the Division cited Employer for the following alleged violations of the California Code of Regulations¹.

<u>Cit/Item</u>	<u>Alleged Violation</u>	<u>Type</u>	<u>Penalty</u>
1-1	3314(j) [Employee not trained in hazardous energy control related to cleaning/clearing the Bel-O-Vac machine]	General	\$ 600
2-1	4601(a) [Unguarded points of operation]	Serious	\$ 7,200
3-1	3314(c) [Employee did not LOTO machine before trying to clean/clear it]	Serious	\$18,000

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

Employer filed timely appeals contesting the violation in Citation 1, Item 1, and appealing on all grounds in Citations 2 and 3. Additionally, Employer raised multiple affirmative defenses including lack of employer knowledge and independent employee act (IEAD).

A formal evidentiary hearing was convened on November 20, 2013, at Van Nuys, California, before Administrative Law Judge (ALJ) Sandra L. Hitt. Robert Peterson, of the Robert D. Peterson Law Corporation, represented Employer. Melissa Peters, Staff Counsel, represented the Division. The parties asked that they be allowed to submit closing briefs and this request was granted. The closing briefs were given a due date of January 10, 2014. On January 11, 2014, the ALJ issued a Notice of Intent to Take Official Notice which extended the submission date (for Decision) to January 31, 2014.

Introduction

These citations all relate to a machine used by Employer to mold plastic duplicates using heat and pressure (suction). The machine, called a Bel-O-Vac, is approximately 4' high x 8' long x 5' wide² and consists of a lower table (where the mold is affixed), an upper table or frame (which holds a plastic sheet) and a heating element.³ The lower table moves up and down. The upper frame moves in and out. The machine is operated pneumatically. Duplicates are made by: (1) affixing a mold to the lower table of the machine (typically by taping it in place), (2) putting a plastic sheet into the upper frame and sending that frame into the heating element, (3) bringing the upper frame out of the heating element and raising the lower table (with the mold) to meet with the heated plastic sheet, (4) engaging the vacuum which sucks the plastic into the negative mold and (5) letting the piece cool down and popping it out of the mold.⁴

Summary of Evidence

All Dockets

Jeffrey Cobos, the injured employee, testified. On the date of the accident, he was the shop foreman. He “supervised the guys in the shop.” He was responsible for safety, and although he could not discipline employees, he could recommend discipline. Cobos’ supervisor was Doug Miller. Miller also testified that Cobos was the shop foreman and could assign (distribute) work and had responsibility for employees’ safety. Doug Miller gave Cobos the work orders for the shop and Cobos assigned this work to the shop employees.

² Bel-O-Vac 55 X103 refers to the forming area (measured in inches). Exhibits 13, 20 and 5.

³ Testimony of Cobos and Exhibit 5

⁴ Testimony of Cobos.

Cobos stated that there had been “30 guys” in the shop before, but at the time of the accident, there were three. On the date of the accident, Cobos, Eric (plasterer) and Ryan (laborer) were in the shop.

Cobos testified that when he was hired by Employer (around January, 2010), there was a different vacuform machine. Cobos had worked on a vacuform machine previously, at another studio. Cobos testified that he was in the shop when the new Bel-O-Vac machine arrived. It had safety screens⁵. On the date of the accident, it did not have safety screens⁶. Cobos testified that his supervisor [Miller] removed the guards on the machine. Cobos said the guards (safety gates) were removed from the machine because “it would slow production.” He explained that the machine was “totally useable [with the guards] just too slow.” Cobos stated that he and Miller were the only ones who worked on the vacuform machine “probably for safety.”

Cobos testified that he worked in the staff shop where duplicates were made from molds (“you duplicate what they give you”). Cobos described the molding process as one in which a mold was placed on the bottom tray of the Bel-O-Vac and a plastic sheet was placed on the top frame and sent into a heating element. “The table with the mold on it goes up and pushes into it [the heated plastic] and you put the vacuum on and it sucks it into the negative mold, then it cools down and you pop it [the molded piece] out.” Cobos confirmed that the Bel-O-Vac was pneumatically operated with an air tank.

Cobos testified that at the time of the accident he was removing a plastic sheet that had fallen into the (Bel-O-Vac) machine. He recalls that he had approximately 26 vacuforms to make that day and he was working on the last piece when the accident occurred. He had pushed the button for the lower table to come up and for the vacuum to come on, when he saw the plastic slip. He pushed the button to bring the top frame out so he could remove the plastic, but the plastic had fallen back so he had to reach in a little further. It was necessary for the frame to come out in order to remove the melted plastic. Cobos stated that this [removal of melted plastic] had happened many times. He also testified that on the prior occasions when he had to remove a piece of melted plastic, he “did it the same way;” he did not see any reason to de-energize the machine. This time, Cobos reached in “waist deep” to retrieve the plastic and “got crushed” [between the machine’s upper and lower tables]. Cobos screamed loud enough for Ryan (Marcos), the laborer, to hear him; Marcos pressed a button and released him from the machine.⁷ Cobos was taken to Cedars Sinai Medical Center. Cobos testified that as a result of his

⁵ The safety screens were at the front of the machine.

⁶ The terms “safety screens”, “safety gates”, and “guards” are used interchangeably herein.

⁷ Marcos told inspector Zwaal that when he went to assist Cobos, he saw Cobos’ legs dangling from the machine.

accident, he was hospitalized for two nights and three days, suffered a broken rib, cracked sternum, tore his bicep from his shoulder, and injured his back and neck.

Cobos acknowledged that he had been issued a red lock for the purpose of locking out the machine's controls, but stated that there was nowhere to place the lock in order to effect LOTO on the machine. Cobos testified that he never used his red lock to lock-out the Bel-O-Vac.

Cobos denied that he had been trained in the control of hazardous energy for the Bel-O-Vac or reviewed any LOTO instructions for that machine. Cobos testified that he had previously seen Miller clear plastic sheets from the Bel-O-Vac machine, but denied that he had ever seen Miller use LOTO while clearing the machine.

Doug Miller testified. He is a plasterer and the shop supervisor of the "staff shop." He ordered the Bel-O-Vac. According to Miller, the machine is manufactured without safety gates. Miller requested a special order and paid extra to have the machine made with "swing-type" safety gates. Miller testified that the way the gates were designed, the machine was unusable, so Employer removed the gates. Miller also discussed the machine with Claude [Kaloustian] an NBC employee in the safety department. Kaloustian developed a written LOTO program for the Bel-O-Vac. Miller testified that this procedure was discussed between Kaloustian, Cobos and Miller. Miller also testified that they were not allowed to operate the Bel-O-Vac until the LOTO policy was in place and everyone had been trained on it. Miller described the machine as one with an upper table (clamping frame) and a lower table (where the mold is taped). He testified that it takes about 14 seconds for the lower table to rise to meet the top frame, and in order for someone to get pinched (between the upper and lower tables), "someone would have to be determined, or do something absent-minded or untoward."

On August 21, 2012, Lorenzo Zwaal, Division Safety Engineer, conducted an accident inspection on Employer's studio lot. Zwaal testified that when he arrived at the accident site, "nothing had been touched--there was caution tape around⁸." During this inspection, Zwaal observed that the guard gates were completely missing from the Bel-O-Vac machine⁹ and the interlock sensors (which prevent entry into the machine if the gates are open) had been turned off. Zwaal explained that the point of operation on this machine was where the upper and lower tables came together. Zwaal also noted that the machine had been altered to add an air tank.¹⁰ There was no Lock-out/tag-out (LOTO)

⁸ This was one week after the date of the accident (August 14, 2012).

⁹ The machine in question was variously referred to as "Bel-O-Vac", "vacuform", "vacuform machine", "thermal vacuum machine", and "thermal vacuum forming machine."

¹⁰ Pneumatic pressure is exerted by the pressure of the lower plate rising to the top plate or

policy posted by the machine. During his investigation, Zwaal learned that the power source for the Bel-O-Vac had not been disengaged at the time the injured employee tried to clean it.

Zwaal testified about the likelihood of a serious injury under these circumstances, but in view of the analysis below, his testimony on this issue need not be considered in any detail. Zwaal testified that he did not wait 15 days to issue the serious citations after sending the required 1BY letter. He gave as his reason for this that he “must have received verbal confirmation” from Employer that Employer was not going to respond to the 1BY letter. Zwaal testified that at no time during the 15 day period or thereafter did Employer respond to the 1BY letter.

Findings and Reasons for Decision

Docket 13-R4D3-0528

Citation 1, Item 1, General § 3314(j)

The Division did not establish a general violation of § 3314(j).

The Division did not establish a violation of §3314(j), (failure to train an employee in hazardous energy control for the Bel-O-Vac machine). Employer produced a LOTO procedure for the vacuform machine (Exhibit 6), and an undated document entitled “Vaccuform Machine Alternative Procedures For Routine Operations” (Exhibit 7). Cobos had been provided with a red lock to be used for LOTO. Employer also produced a sign-in sheet, signed by Cobos, for “make-up LOTO training” dated March 29, 2012 (Exhibit 8).

While Cobos claimed that he had not been trained in hazardous energy control for the Bel-O-Vac machine, Employer presented more evidence on this point (Miller’s testimony plus Exhibits 6, 7 and 8) and thus prevailed. The LOTO procedure for the vacuform machine¹¹ (Exhibit 6) is dated February 17, 2012. Miller testified that he, Kaloustian and Cobos discussed the LOTO procedure. The Sign in sheet for the “make-up LOTO class” is dated March 29, 2012. As the LOTO procedure for the vacuform machine had been available for approximately six weeks at that time, it is reasonable to infer that the LOTO procedure for that machine was taught in the March 29, 2012, class which Cobos attended. Employer adduced enough evidence on this point to shift the burden of production back to the Division for rebuttal. This the Division did not do. Thus the Division did not meet its burden to establish a violation of Section 3314(j).

“clamping frame.”

¹¹ Also spelled vaccuform.

Docket 13-R4D3-0529

Citation 2, Serious § 4601(a)

The Division could not establish a serious violation of § 4601(a) because the Division did not comply with the requirements of Labor Code § 6432(b)(1)(E).

The Division established a general violation of § 4601(a).

The proposed penalty must be re-calculated for a General Violation.

The Violation

Section 4601(a) provides: “Thermo-setting plastic molding presses shall be guarded by any one of the methods covered in Section 4208.” Section 4208 sets forth several different ways in which the point of operation can be “guarded” to prevent the operator’s hand or other part of the operator’s body from reaching into the point of operation while the machine is in motion, including gates, two-handed controls, and interlock devices.

The alleged violation description for Citation 2 states: “The Division determined that points of operation located at the vacuum form machine were not guarded (Bel-O-Vac 53X103 Model E Class, Vacuum Forming Machine) as required by this subsection.”

The point of operation on the Bel-O-Vac is where the upper and lower tables come together. It is uncontroverted that, on the date of the accident, the Bel-O-Vac machine was not guarded so as to prevent the operator’s hand or any part of the operator’s body from reaching into the point of operation. The injured employee did reach (waist deep) into the point of operation and was crushed between the upper and lower tables of the machine. When the Bel-O-Vac arrived, the machine had safety screens on it, but these safety screens were missing on the date of the accident.¹² What is more, on the date of the inspection, the interlock sensor detects had been defeated.

Employer did not argue that the machine was guarded in compliance with Section 4208. Rather, in its closing brief, Employer argued that the Division had failed to establish that the Bel-O-Vac 53X103, Model E class Vacuum Forming Machine was a thermo-setting plastic molding press. This argument fails.

¹² Testimony of Cobos and Exhibit 5.

Although Employer argued that no one referred to the Bel-O-Vac as a thermo-setting plastic molding press during the hearing, Zwaal referred to the Bel-O-Vac as a *thermal vacu-machine*.¹³ What is more, Employer asserted in its post-hearing brief that the machine in question was referred to as a “thermal vacuum machine” and a “thermal vacuum forming machine.” The injured employee, Cobos, testified that he worked in the “staff shop” where duplicates were made from molds. Cobos described the molding process as one in which a mold was placed on the bottom table of the Bel-O-Vac machine and a plastic sheet was placed on the top frame and sent into a heating element. “Then it cools down and you pop it [the molded piece] out.” The Bel-O-Vac was pneumatically operated with an air tank.¹⁴

The ALJ took official notice that Dictionary.com defines thermo-setting as pertaining to a type of plastic... that sets with heating and cannot be remolded. The ALJ further took official notice that Merriam-Webster Online Dictionary, Merriam-Webster.com/dictionary/thermoform, defines thermoform as “to give a final shape to (as a plastic) with the aid of heat and usually pressure.” The evidence adduced at hearing established that the Bel-O-Vac 53X103, Model E class Vacuum Forming Machine was one in which plastic duplicates were made from molds using heat and pressure. There was enough evidence for the ALJ to determine that the Bel-O-Vac machine was properly considered a thermo-setting plastic molding press. That was sufficient to shift the burden of production to Employer for rebuttal. In *Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004) the Appeals Board held that where the Division presents evidence, which, if believed, would support a finding if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid an adverse finding. Employer did not meet this standard. Employer offered *no* evidence to challenge the Division’s position on this point, even though Employer had opportunity to do so. Where a party has the motive and opportunity to present evidence, and fails to do so, the inference may be drawn that any evidence it had would not be favorable. (See Evidence Code §§ 412 and 413). Accordingly, it is found that the Bel-O-Vac was properly designated a thermo-setting plastic molding press.

The Classification

In order to show a general violation the Division need only show that the safety order was violated and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.* Cal/OSHA App. 97-2733 (Dec. 11, 1998).)

¹³ Zwaal testified that he determined that Cobos did not receive (hazardous energy) training on the *thermal vacu-machine*.

¹⁴ Testimony of Zwaal; Exhibit 20.

Since having unguarded points of operation bears a relationship to the occupational safety and health of employees, the violation may be properly classified as general. The Division did not meet its burden to establish a serious violation, as explained below.

Labor Code Section 6432(b)(1)(E) provides that “before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider ... information that the employer wishes to provide” Labor Code Section 6432(b)(2) provides that the Division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if it delivers a standardized form to the employer containing the alleged violation description at least 15 days before issuing the citation and requests information from the employer. The Division issued the serious citations in question less than 15 days after sending the standard form (1BY) to Employer.

Labor Code Section 6432(b)(1) uses the word “shall.” Labor Code Section 15 states that “Shall” is mandatory. This provision was enacted in 1937 and has remained unchanged. The Legislature presumably knew the meaning of “shall” when it enacted Labor Code Section 6324(b)(1). (See, *e.g.* *Stafford v. Realty Bond Service Corp.*, (1952) 39 Cal.2d 797, 805.) The Appeals Board (Board) has consistently interpreted the word “shall,” as used in the Labor Code, to be mandatory, leaving no discretion. (See, *e.g.*, *Central Valley Engineering & Asphalt, Inc.*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 14, 2012) p. 3; *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (July 14, 2006).) “Shall” means that compliance with the requirements listed in Labor Code § 6432(b)(1) is required before the Division may issue a violation classified as serious. It should be noted, however, that Labor Code Section 6432(b) does *not* state that the sending of the 1BY at least 15 days before issuance of the citation is the *only* way to satisfy the requirement to “make a reasonable attempt to determine and consider...information that the employer wishes to provide...”

Zwaal testified he did not wait the full 15 days before issuing the serious citations because he “must have received verbal confirmation” from Employer that Employer was not going to respond to the 1BY letter. On January 23, 2013, the Division faxed, and Employer received, standardized 1BY forms for Citations 2 and 3. The citations were issued on February 5, 2014 and delivered to Employer on February 7, 2013, 15 days after the Division sent the 1BY letter to Employer.¹⁵ At no time during the 15 day period or thereafter did Employer respond to the 1BY letter. This would lend credence to Zwaal’s testimony that he “must have received verbal confirmation” from Employer that Employer was not going to respond. However, this is not enough. Zwaal’s testimony on this

¹⁵ Exhibit 1, jurisdictional documents.

point amounts to little more than bare speculation. Zwaal could not testify with certainty that he received verbal confirmation that Employer did not intend to respond to the 1BY letter. He very well may have; he also could have made an error and issued the citations two days early. The Division presented no information from its investigative file to Confirm Zwaal's speculative testimony on this point. And, while it is true that Employer had an opportunity to present evidence that no such verbal confirmation was given, and chose not to do so, this was not Employer's burden. The evidence presented by the Division on this point was insufficient to support a finding of fact unchallenged, therefore, the burden of production never shifted to Employer.

As the Division did not comply with all the requirements, it follows that the violation may not issue with a classification of serious. A citation, if issued, must therefore have a different classification. In this case, that classification, as explained above, is General.

The Penalty

The Division enjoys a rebuttable presumption that its penalties are reasonable once the Division establishes that it computed the penalties adhering to the applicable regulations. (See, *Stockton Tri Industries*, Cal/OSHA App. 02-4946 Decision After Reconsideration (Mar. 27, 2006). See, also, *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317 Decision After Reconsideration (September 27, 1990); *RII Plastering, Inc.* Cal/OSHA App. 00-4250, Decision After Reconsideration (October 21, 2003).) The parties stipulated that the penalties herein had been calculated in accordance with the Division's, policies, procedures, and rules. Employer offered no evidence to demonstrate that the \$7,200 penalty for Citation 2 was unreasonable for a serious violation. However, the penalty must be re-calculated to be consistent with a general violation.

As Citation 2 was originally classified as a serious violation, the severity would be high. Cobos suffered a cracked sternum, broken rib¹⁶, and injured shoulder, back and neck. Labor Code Section 6432(a) provides, in pertinent part, that a serious violation exists where there is realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. Under Labor Code Section 6432(e)(1), the definition of serious physical harm is:

- (1) Inpatient hospitalization for purposes of other than medical observation.

¹⁶ N.B.: The accident report (Exhibit 2) indicated that there were no broken bones. Nonetheless, Cobos spent two nights in the hospital with treatment (pain medication), and suffered crushing injuries. This is consistent with the definition of "serious physical harm," under Labor Code Section 6432(e)(1).

- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree burns, crushing injuries, including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

Therefore severity is properly rated as high for this violation.

Starting with a base penalty of \$2,000, and using the Proposed Penalty Worksheet (C-10)¹⁷ to ascertain the ratings for extent and likelihood (medium), good faith (15%), history (5%) and size (0%), a penalty of \$1,600 is assessed.

The Affirmative Defenses

At hearing, Employer appeared to abandon its affirmative defenses with regard to Citation 2. In any event, the Independent Employee Act Defense is not available for a violation involving a positive guarding requirement (see, *Pacific Westline, Inc.* Cal/OSHA App. 10-0278 Decision After Reconsideration (December 20, 2010). Nor is the IEAD available where the employee alleged to have engaged in the independent act is a foreman with responsibility for employee safety. The actions of Employer's supervisors and foremen are imputed to Employer (see, *MV Transportation, Inc.*, Cal/OSHA App. 02-2930 Decision After Reconsideration (December 10, 2004). There was not enough evidence presented in support of Employer's numerous affirmative defenses to support any of them.

Docket 13-R4D3-0530

Citation 3, Serious § 3314(c)

The Division could not establish a serious violation of § 3314(c) because the Division did not comply with the requirements of Labor Code § 6432(b)(1)(E).

The Division established a general violation of § 4601(a).

The proposed penalty must be re-calculated for a General Violation.

¹⁷ Exhibit 19

The Violation

Section 3314(j) provides that 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. The alleged violation description for Citation 3 reads:

On August 14, 2012, an employee was seriously injured when he reached into the Bel-O-Vac forming machine to remove a sheet of melted plastic that had come off the upper table. At the time of the accident, the power source was not locked out, nor was the machine de-energized or effectively blocked to prevent inadvertent movement.

Zwaal determined that the attempt to clear the plastic sheet from the machine constituted “cleaning activity” and the ALJ agrees. Cobos had not utilized LOTO prior to attempting to clear the melted plastic sheet from the Bel-O-Vac on the date of the accident. Cobos testified that he had never used his red lock to lock-out the Bel-O-Vac. He also testified that on the prior occasions when he had to remove a piece of melted plastic, he “did it the same way;” he did not see any reason to de-energize the machine. It is uncontroverted that Cobos did not lock out, block out, and de-energize the Bel-O-Vac machine prior to attempting to clear it on the date of the accident. Cobos was a supervisor (foreman) with responsibility for on the job safety such that his actions are imputed to Employer. *MV Transportation, Inc.*, supra.

Employer argued in its brief that Citation 3 was procedurally defective because it did not describe “with particularity” the alleged violation. Employer argued that Section 3314(c) deals with machinery which is not to be in operation when it is being cleaned, whereas section 3314(c)(1) deals with machinery which must be in operation to perform the cleaning actions. Employer argues that the violation does not distinguish between these two types of circumstances and that the uncertainty was not reconciled during the hearing. This argument is rejected. Zwaal testified at hearing that the machine did not need to be capable of movement in order to clean it. Moreover, the alleged violation description states that the power sourced was not locked out, nor was the machine effectively blocked to prevent inadvertent movement. Section 3314(c) applies.

The Classification

As set forth above, and incorporated by reference herein, the Division did not comply with the requirements of Labor Code Section 6432(b)(1)(E) in

issuing the serious citations. As the Division did not comply with all the requirements, it follows that the violation may not issue with a classification of serious. A citation, if issued, must therefore have a different classification. In this case, that classification (as also explained above) is General.

The Penalty

As also set forth above, The Division enjoys a rebuttable presumption that its penalties are reasonable once the Division establishes that it computed the penalties adhering to the applicable regulations. Employer stipulated that the penalties herein had been calculated in accordance with the Division's policies, procedures, and rules. Employer offered no evidence to demonstrate that the proposed penalty for Citation 3 was unreasonable for a serious violation. However, the penalty must be re-calculated to reflect a General violation.

As this was originally classified as a serious violation, the severity rating was high. Cobos' testimony regarding his injuries demonstrated that the violation carried with it the realistic possibility of serious physical harm. Therefore severity is properly rated as high for this violation.

There were no ratings given for extent and likelihood with respect to Citation 3. The violation in Citation 3 was originally characterized as "serious accident-related"¹⁸ and thus the only credit available was for size. While credits may not be given (and the penalty may not be reduced) for extent and likelihood factors, the penalty may be increased if these factors are elevated. Since the division did not elevate the penalty for Citation 3, the only ratings that could have been applied to extent and likelihood were low or medium.

A rating of medium/moderate was determined for extent and likelihood by comparison with Citation 2. The parties stipulated that the penalties were calculated in accordance with the Division's policies, procedures and regulations, so the correctness of the ratings for extent and likelihood was established for Citation 2. Citations 2 and 3 deal with essentially the same hazard: intentional¹⁹ or inadvertent contact with a point of operation. A medium rating is appropriate for extent when there is an occasional violation of the standard. Cobos testified that he had performed the clearing operation before, and it is reasonable to infer that he performed it in a substantially similar way. The likelihood rating is dependent, to some degree, on the

¹⁸ In order to be classified as "serious accident-related" a serious violation must have resulted in a serious injury. As the Division is precluded from asserting a serious violation, it follows that the "serious accident-related" characterization must fail as well.

¹⁹ It is understood that few people actually *intend* to make contact with a point of operation and suffer an injury, rather, they think that they can react very quickly and avoid injury. The distinction being made here is between accidental (tripping or falling) contact and intentionally reaching into the machine while it is still running.

number of employees exposed to the hazard. Only two employees operated the Bel-O-Vac machine, and only three employees (plus the supervisor) worked in the shop. Thus, the likelihood factor for Citation 3 would be substantially similar to that of Citation 2. Therefore, extent and likelihood for Citation 3 are rated as medium and moderate respectively.

Starting with a base penalty of \$2,000, and using the Proposed Penalty Worksheet (C-10)²⁰ to ascertain the ratings for extent and likelihood (medium), good faith (15%), history (5%) and size (0%), a penalty of \$1,600 is determined.

The Affirmative Defenses

Employer's argument that intentional misconduct by the injured employee precludes Employer's liability for a violation of Section 3314(c), fails. First, this appears to be simply another way of arguing the IEAD. The IEAD is an affirmative defense, and as such, the Burden is on the employer to prove it. The seminal case regarding the IEAD is *Mercury Service, Inc.* Cal/OSHA App. 77-1133 (October 16, 1980). In order for an employer to perfect the IEAD, the employer must prove the following five elements of the defense:

1. The employer has a well devised safety program
2. The employer effectively enforces its safety program
3. The employer has a policy of sanctions issued to employees for violations of safety rules
4. The employee was well trained for his job.
5. The employee knew that his act was in contravention of his employer's safety rules.

Employer produced no evidence at hearing regarding elements two and three. Moreover, since Cobos was a supervisor for purposes of the Act, the IEAD is not available. Cobos assigned work and was able to recommend discipline. He meets the standard for a supervisor for purposes of the Occupational Safety and Health Act and his actions are imputed to his employer. *MV Transportation, Inc.*, Cal/OSHA App. 02-2930 Decision After Reconsideration (December 10, 2004):

The Appeals board has consistently held employers accountable for the acts and knowledge of its foreman. The primary test to determine whether or not an employee is a supervisor or foreman is the employee's responsibility for the safety of others. (*City of Sacramento, Department of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (February 5, 1998).)

²⁰ Exhibit 19

It appears Employer attempted to assert the *Newbery* affirmative defense (unforeseeable employee Act). *Newbery Electric Corp. v. Occupational Safety & Health Appeals Board* (1981) 123 Cal.App.3d 641. It is a matter of conjecture whether the *Newbery* defense is a variation of the Independent Employee Act Defense, or a separate affirmative defense. In any event, the facts in this case are very different from those in *Newbery*.

In *Newbery*, a supervisory employee (Kane) was assigned to complete the relocation of a street light for Southern California Edison (Edison). The base for the street light had previously been installed directly underneath high voltage power lines. Because this situation presented a danger, Newbery requested further instructions from Edison. Edison issued new written instructions requiring a new base (and light pole) to be installed 15 feet south of the old one. The new location cleared the high voltage lines by more than 10 feet, the legally required safe zone. These written instructions were given to Kane, who did not follow them. Rather, Kane placed the new base 7 to 9 feet away from the old one, which would place the light pole slightly over 4 feet from the lines, as opposed to the required 10 feet. An equipment operator who was working with Kane (but employed by a different employer) questioned Kane about the new location, as it was within 10 feet of the power lines. Kane replied that the voltage line nearest the pole was neutral. It was not. It was a 12,000 volt phase conductor. While installing the pole, Kane lost his footing and the pole slipped, breaking a wire which fell on Kane and electrocuted him. Kane had installed some 2,500 light poles, and had previously refused to install light poles in close proximity to high voltage lines. In *Newbery*, the Appeals Court held that it was unforeseeable that Kane would install a light pole within 10 feet of a high voltage line on the fatal day, in contravention of specific written instructions to install the light pole 15 feet south of the old one.

Here, in contrast, Employer had removed the safety gates from the machine and the interlock sensor detects on the Bel-O-Vac had been defeated. Cobos testified that only he and Doug Miller operated the vacuform machinery “probably for safety reasons.” Therefore it is a reasonable inference that either Cobos or Miller (both management employees for our purposes) had defeated the interlock sensors. What is more, Employer presented no evidence regarding its enforcement of its safety program. Thus Employer did not meet its burden to demonstrate that it could not have anticipated that an employee, while perhaps rushing to complete a job, would reach into the machine while it was still running to try to clear a piece of melted plastic.

Employer’s affirmative defense of “unforeseeable act” fails. Likewise the affirmative defense of lack of employer knowledge must also fail, as the employee who did not use LOTO was a foreman with responsibility for employee safety. Employer did not establish any affirmative defense to Citation 3, and Citation 3 is sustained as a general violation.

Decision

It is hereby ordered that the citations are established, modified, or dismissed as set forth above and in the attached Summary Table.

SANDRA L. HITT
Administrative Law Judge

Dated: February 25, 2014

SLH:ml

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

NBC UNIVERSAL
Dockets 13-R4D3-0528 through 0530

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
ER=Employer	DOSH=Division
EE=employee	w/d= withdrew

IMIS No. 314831819

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	AFFIRMED	VOIDED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R4D3-0528	1	1	3314(j)	G	ALJ dismissed the citation.		X	\$600	\$600	\$0
13-R4D3-0529	2	1	4601(a)	S	ALJ reduced the classification to General and adjusted the penalty accordingly.	X		7,200	7,200	1,600
13-R4D3-0530	3	1	3314(c)	S	ALJ reduced the classification to General and adjusted the penalty accordingly.	X		18,000	18,000	1,600
Sub-Total								\$25,800	\$25,800	\$3,200
Total Amount Due*										\$3,200

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

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

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

(INCLUDES APPEALED CITATIONS ONLY)

ALJ: SLH/ml
POS: 02/25/2014