

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

INTERNATIONAL PAPER COMPANY
1600 N Kelsey Street
Visalia, CA 93291

Employer

DOCKETS 14-R2D5-1189
through 1191

DECISION

Statement of the Case

International Paper Company (Employer) manufactures and distributes paper products. Beginning January 17, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ronald Chun, conducted a safety inspection at a place of employment maintained by Employer at 1600 North Kelsey Street, Visalia, California. On March 21, 2014, the Division cited Employer for three violations of Title 8, California Code of Regulations, §342(a) failure to report serious workplace injury; §3314(c) failure to stop and de-energize power source of fan prior to adjusting operation; and §3943(c) failure to adequately guard moving parts of fan.¹

Employer filed a timely appeal of each of the citations, contesting the existence of the violation and the reasonableness of the proposed penalty in Citation 1, and also contesting the existence of the violations, the classifications, and the reasonableness of the proposed penalties in Citations 2 and 3.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Fresno, California on July 30, 2014.² Anthony Muia, Plant Manager, represented Employer. Jerry Walker, District Manager, represented the Division. The parties presented oral and documentary evidence. Subsequent to the hearing, Margaret Rosenthal, Attorney at Law, of the law firm Baker and Hosteller LLP,

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

² Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ.

substituted-in as representative for Employer. Employer and the Division each submitted post-hearing briefs. The matter was submitted for decision on September 8, 2014. The submission date was extended to January 7, 2015, by the Administrative Law Judge.

In regard to Citation 1, Item 1, a reporting violation, the parties, prior to the taking of testimony, agreed to settle that item and stipulated to the following:

- 1) On January 11, 2014, an employee of Employer sustained a serious and reportable workplace injury.
- 2) Employer made late notification to the Division on January 12, 2014.
- 3) The proper penalty reduction for a late report, under the circumstances, and pursuant to *Central Valley Engineering & Asphalt* Cal/OSHA App. 08-5001 Decision After Reconsideration (December 4, 2012), applying Labor Code Section 6319 adjustments for good faith (15%), size (0%) and history (10%), is \$1,250.

Pursuant to *Central Valley Engineering & Asphalt*, supra, Citation 1, Item 1, a violation of §342(a), is affirmed and a penalty of \$3,750 is assessed as set forth in this Decision and in the attached Summary Table.

Issues

1. Was an employee required to stop and de-energize the power source of a floor fan prior to placing her hand on the blade guard of the running fan for the purpose of changing the angle of the fan's air output?
2. Is *changing* the angle of a fan in order to change the direction of the air output an "adjusting" operation under § 3314(c)?
3. Was the fan blade guard on the standing fan damaged or inadequate prior to the accident?

Findings of Fact:

1. The employee did not stop and de-energize the standing fan prior to changing the angle of the fan's air output.
2. The fan blade guard is not a portion of the fan capable of "movement."

3. The injured employee was not performing an “adjusting” operation at the time of the accident.
4. The fan was making no unusual noise before the accident on January 11, 2014, and was making a loud noise after that accident.
5. The fan blade guard was not damaged prior to the accident.
6. The fan blade guard, in an undamaged condition, would provide adequate guarding.

Analysis:

- 1. Section 3314(c) does not contemplate situations in which hands are placed on the blade guard of a running fan to change the direction of the fan’s air output. Employer’s appeal is granted.**

Section 3314(c), under “Cleaning and Servicing Operations,” provides the following:

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.

The circumstances in which §3314 applies, in relevant parts, are set out in provisions of §3314(a) as follows:

- (a) Application.
 - (1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.
 - (2) For the purposes of this Section, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment.

In the citation, the Division alleges the following:

On 1/11/2014, the International Paper Company's 6 foot, 5 inch standing fan was not stopped and the power source de-energized during an adjusting operation where an employee was attempting to change its angle. The employee was exposed to a crush/cutting hazard of the powered metal fan blade. This violation contributed to the serious injury of an employee.

The elements of the violation are these: (1) Machinery or equipment (2) capable of movement (3) was not stopped and the power source de-energized (4) during an adjusting operation.

In 2004, the Standards Board amended §3314 (operative-January 6, 2005) to re-organize and modify the control of hazardous energy addressed by the safety order. The current language in subdivision (c) is substantially similar to the previous subdivision (a). In interpreting the similar prior version of the safety order, the Board has stated that "[t]he clear purpose of section 3314(a) is to keep employees away from the danger zone created by moving machinery." (*Stockton Steel Corporation*, Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002).) The Board has interpreted the operative language in the safety order as follows:

[The] Section ... imposes two primary safety requirements prior to cleaning, adjusting and servicing machinery: (1) machine parts capable of movement must be stopped, and (2) the power source must either be de-energized or disengaged. If the two primary requirements are not effective to prevent inadvertent movement, another requirement applies--the parts capable of movement must be mechanically blocked or locked in place. *Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), citing *Maaco Constructors, Inc.*, Cal/OSHA App. 91-674, Decision After Reconsideration May 27, 1993.)

The meaning of "adjust" or "adjusting" is not defined in the regulation itself. However, the context of subsections (a)(1) and (a)(2), which are cited above, makes it clear that the Standards Board is referring to adjustments of the moving parts of the machinery, or parts that come in contact with them in the normal operation of the machine. This is consistent with the Appeals Board's understanding of the meaning, as described in the citation above.

In the instant matter the employee, Leslie Ann Swisher (Swisher), was adjusting only the direction of the output of the airflow from the fan. The fan blade was adequately guarded prior to the accident. The fan blade guard is not a moveable part of the fan. As Employer, in its Post-Hearing Brief, argues, “the Employer did not have any reason to believe lockout necessary because ... the moving parts of the Fan were completely guarded and Employer was not aware of any defect in the guard.” Swisher placed her hands on the adequately guarded fan blade housing. As such, it could not be reasonably anticipated that Swisher’s hand would enter the danger zone created by moving machinery.

The Appeals Board cannot impose more specific requirements than those set by the Standards Board. (*Hylton Drilling Co.*, Cal/OSHA App. 82-216, Decision after Reconsideration (Jan. 17, 1986).) “The Board cannot impose stricter or more detailed requirements than those set in a safety order promulgated by the Standards Board.” (*Mobil Oil Corp.*, Cal/OSHA App. 00-222, Decision after Reconsideration (Apr. 29, 2002).) Repositioning a guarded fan blade casing is not an adjusting operation, within the meaning of section 3314, and therefore the Appeals Board cannot expand the meaning of that section to include the actions of the employee here. The Division has incorrectly concluded that changing the air flow direction of a fan is an adjusting operation. The Division is seeking to impose more specific requirements than those set by the Standards Board. As the employee did not perform any adjustment operation, she was not required to stop and de-energize the fan when manually changing the angle of the fan’s air output.

The Division misconstrues the meaning of the regulation relating to adjustment operations. In interpreting a statute [or regulation], the judge may simply ascertain and declare what is expressed, not insert what may have been omitted. The Division’s interpretation is not binding upon the Appeals Board. (*Lockheed Missiles*, Cal/OSHA App. 74-629, Decision after Reconsideration (April 10, 1975).) The Division, in the citation, refers to changing the angle of the direction of the air flow of the fan as an “adjusting operation.” In the instant matter, the injured employee was changing the direction of the flow of a fan while the fan was running. The employee placed her hands on the blade guard of the fan to change the angle of the air flow. The employee was not making any mechanical adjustment to the fan itself, the moving machinery. Rather, she was changing the direction of the air output from the fan by repositioning the angle of the air flow.

The adjustment of the wind flow of a fan by placing one’s hands on the blade guard is not contemplated by §3314(c). Where the Division's case presents a factual situation not within the contemplation of the cited safety order, the alleged violation must be set aside. In *Carris Reels of California*,

Cal/OSHA Appeal 95-1456, Decision After Reconsideration (Dec. 6, 2000), the Board held that §3328(e) does not, and was not intended by the Standards Board, to extend to the facts of the case. It added that unless the Division issues a citation under an appropriate safety order and presents evidence in support of the citation, the Board is unable to find a violation under several other hypothetically applicable safety orders. Section 3314(c) does not extend to the facts of the instant matter. As such, the Division failed to establish a violation of §3314(c). Employer's appeal is granted.

2. The Division, by a preponderance of the evidence, failed to establish a violation of §3943(c). Employer's appeal is granted.

Section 3943(c), under "Guard Standards," provides the following:

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

In the citation, the Division alleges the following:

On 1/11/2014, the enclosure guard on the 6'5" metal blade standing fan involved in the injury to an employee did not completely guard the moving part (metal blade). The guard was damaged and had an opening approximately 1 inch by 5 inches in dimension. This allowed for the employee's hand to come in contact with the metal blade. The employee was exposed to a crush/cutting hazard. This violation contributed to the serious injury to the employee.

To prove a violation the Division would need to prove only that the guard in place did not completely guard the moving parts of the fan.

Employer did not contest the fact that the moving blades of the pedestal fan needed to be guarded. It is undisputed that there was an enclosure guard installed on the pedestal fan and that the fan's blades were moving at the time of the injury. It is also undisputed that the employee's hand made contact with the fan blades. The only issue to determine here is whether the fan's moving blades were *completely guarded* prior to the accident.

The fan at issue is depicted in three separate photos, (Exhibits 3, 4, and 5), all taken on the day of the inspection. The fan stands about six feet high, and has three metal blades surrounded by a steel mesh guard. The metal blades spin at 1100 RPMs.

On the day of the injury, employee Leslie Ann Swisher (Swisher) had used a roller to paint the floor. Swisher was using the fan to dry the floor. The bottom of the fan was at chest-level to Swisher, and the top of the fan was about one foot higher than her head. While the fan was running, Swisher attempted to redirect the airflow of the fan by placing her left hand at the bottom of the guard and placing her right hand at the top of the guard. At this point, Swisher felt pressure and stinging. Swisher sustained a partial amputation to her right index finger, required reattachment of her middle finger, and sustained lacerations down to the bones on her ring and pinky fingers.

Swisher told Ronald Chun (Chun), Associate Safety Engineer, that she did not know or see that the fan was damaged prior to the accident, and that she did not feel anything prior to the time that her hand came in contact with the fan blades. During Chun's inspection he observed damage to the fan at issue: an opening approximately one inch by five inches. Chun testified that the tips of the fan blades were also damaged at the time of the inspection (Exhibit 3). The mesh wires on the undamaged portion of the guard were less than one-fourth of an inch apart. Chun concluded that the damaged portion of the guard was where Swisher's hand got in to the blades. Chun also testified that the guard on the fan would have been compliant with the regulation but for the damage observed on the day of the inspection. Chun believed that Swisher's finger would not have gone inside the guard if the guard had not been damaged, and the observed damage to the fan would be consistent with a hand coming in contact with the fan's blades.

Nathan Story (Story), a line maintainer (mechanic) for Employer, worked in the cup room, the site of the accident, before assuming his duties as a line maintainer. Story was present at the time of the accident. Story was five to six feet away from Swisher, and was standing near the fan at the time of the accident. Immediately prior to the accident Story did not see any damage to the fan. Story was looking at the fan from the left and back side, with the air blowing away from him. The fan was not oscillating. Story did not observe any obvious defect when he looked at the fan for a three second span of time just prior to the accident, although he could not be sure that there was no damage to the fan prior to the accident. Story would have decommissioned the fan if he had noticed any damage to the fan.

Story assisted Swisher after the accident. Story asked another employee, Chris Burscotti, to shut down the fan (which was "making a lot of noise") after the incident. The fan was not making this noise prior to the incident. Story called for first-aid, and then opened the fan guard to retrieve Swisher's fingertip. Story testified that he removed the guard by placing his fingers

through the guard at the top and center, and that it was fairly easy to pass his fingers through the guard. After the incident, Story observed a four inch by four inch opening in the fan guard.

The Division failed to meet its burden, to prove by a preponderance of the evidence, that the guard was damaged or defective prior to the accident. Neither Swisher nor Story observed any damage to the fan prior to the accident. In accordance with Employer's own procedures, a damaged fan would have been decommissioned. Subsequent to the accident the fan was observed with damage to the blade guard and to the tips of the three blades. The fan was not making any noise prior to the accident, and was making a loud noise after the accident. Such a loud noise, and the damage observed after the accident, would be consistent with metal fan blades hitting the guard. The opening in the guard existed in the location where Swisher's hand made contact with the fan blades. According to the inspector, the damage to the fan would be consistent with a hand making contact with the fan blades. Considering the above factors, the record supports a finding that the fan's moving blades were completely guarded prior to the accident.

The Division, in its post-hearing brief, argues that the fact that Swisher immediately felt pressure when she placed her hand on the top of the fan, and then noticed that her hand had been mangled, suggests that the opening in the guard existed before she extended her hand. The Division argues that if the guard was intact Swisher would have had to insert her fingers between the wires and apply force, but that she would be unable to apply such force with her hand positioned as she explained during her testimony. The Division argues that it is most probable that the fan had been damaged prior to the accident, since the fan had not been inspected, and the opening had not been detected. The Division's position may provide one plausible inference which could be drawn from the facts. The Division's inference is not sufficiently persuasive as it calls for speculation and conjecture not supported by the record. Such an inference in the instant matter would be too speculative without more definitive evidence. It is unclear how Swisher's hand entered the area within the guard. There is insufficient evidence to draw an inference that the guard was damaged prior to the accident, that the fan guard was inadequate, or that the fan was not completely guarded. As such, the Division, by a preponderance of the evidence, failed to establish a violation of §3943(c). Employer's appeal is granted.

Conclusions

Citation 1, a violation of §342(a), is affirmed pursuant to stipulation of the parties, and as set forth in this Decision and in the attached Summary Table. Regarding Citation 2, the Division, by a preponderance of the evidence,

failed to establish a violation of §3314(c). Regarding Citation 3, the Division, by a preponderance of the evidence, failed to establish a violation of §3943(c).

ORDER

Citation 1 is sustained, as modified, and a penalty of \$3,750 is assessed for the violation. Citations 2 and 3 are vacated, and their proposed penalties are set aside.

Dated: February 02, 2015

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KEVIN J. REEDY
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 Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD
INTERNATIONAL PAPER COMPANY
DOCKETS 14-R2D5-1189 through 1191
Date of Hearing: July 30, 2014

Division's Exhibits

Exh. No.	Exhibit Description	
1	Jurisdictional documents	ADMITTED
2	Photo of floor of cup room	ADMITTED
3	Photo of fan	ADMITTED
4	Photo of fan guard	ADMITTED
5	Photo of fan now removed from service	ADMITTED
6	Cal /OSHA 10 Proposed Penalty Worksheet	ADMITTED
7	Cal/OSHA 1by	ADMITTED
8	Diagram of accident site	ADMITTED

Employer's Exhibits

A	International Paper Interview Questions	ADMITTED
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Witnesses Testifying at Hearing

Leslie Ann Swisher
Ronald Chun
Nathan Story

CERTIFICATION OF RECORDING

*I, **Kevin J. Reedy**, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

Signature

Date

