BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

BENICIA FABRICATION AND MACHINE, INC.

Employer

Inspection No.

1004069

DECISION

Statement of the Case

Benicia Fabrication and Machine, Inc. (Employer) is a fabrication and machine shop that builds vessels for refineries. Beginning October 17, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Shannon Lichty conducted an accident inspection at a place of employment maintained by Employer at 135 East Channel Road, Benicia, California (the site). On March 4, 2015, the Division issued citations to Employer relating to its Gear Driven Positioner Machine.

Employer filed timely appeals contesting the existence of the alleged violations\(^1\), the classification of Citation 2, and the reasonableness of the proposed penalty\(^2\) for Citation 2. Employer alleged multiple affirmative defenses for all violations\(^3\).

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on March 8, 2016. David Donnell, Attorney, Peterson Law Corporation, represented Employer. Willie N. Nguyen, Staff Counsel, represented the Division. The matter was submitted on December 16, 2016.

Before issuing a decision, ALJ Dryovage became unavailable\(^4\). ALJ Dale A. Raymond was assigned to write the decision. The decision is based upon a review of the evidence in the record. No new evidence was taken.

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\(^1\) During the hearing, the Employer withdrew its appeal to Citation 1, Item 2. As to Item 2, the parties stipulated that this agreement is not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by Employer and that Employer’s agreement to compromise this matter shall not be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

\(^2\) Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

\(^3\) Affirmative defenses for which Employer did not present evidence are deemed waived. (See section 361.3 “Issues on Appeal” and Western Paper Box Co., Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) They are not discussed.

\(^4\) The parties stipulated to have a newly assigned ALJ issue a decision based on the record.
**Issues**

1. Does section 3314 apply to adjusting the height of Employer’s Gear Driven Positioner (GDP) machine?

2. Did Employer establish written separate Lockout/Tagout procedures for adjusting its GDP Machine?

3. Was the GDP properly blocked during adjusting operations?

4. Did Employer establish an exception to section 3314, subdivision (c)?

5. Did Employer establish the independent employee action defense?

6. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as serious?

7. Did the Division establish the accident-related characterization of Citation 2?

8. Were the proposed penalties reasonable?

**Findings of Fact**

1. Associate Safety Engineer Shannon Lichty conducted an accident inspection beginning October 17, 2014.

2. An accident occurred at the site on October 9, 2014, to Welder Virgil Lee Morrow (Morrow) during the course of performing his job duties. Morrow had been employed by Employer for over 20 years at the time of the accident.

3. Employer’s GDP was a machine.

4. When the accident occurred, Morrow was adjusting the height of the legs on the GDP so that the GDP could perform the next job. The GDP was hoisted approximately ½ inch by a crane using two points of lift. Pins on each of four legs held the GDP legs in place. It was common practice for the leg height to be adjusted up and down by removing the pins that attach the legs to the machine. This was an adjusting operation.

5. At the time of the accident, Employer had a written Lockout/Blockout/Tagout procedure, but there were no separate procedural steps for the adjustment of the GDP. There were no procedures indicating that the GDP should be blocked out once the pins were removed.

6. At the time of the accident, the GDP was de-energized.

7. To remove the pins, Morrow hammered the pins out by placing his hands inside the GDP.
8. When Morrow removed all four pins, no type of device was placed underneath to keep the GDP from moving. When Morrow removed the fourth pin, the GDP shifted unexpectedly. The movement was inadvertent.

9. The unexpected movement caused the GDP to catch Morrow’s finger, pinch it, and cause it to be amputated.

10. The penalties associated with the citations were calculated in accordance with the Division’s Policies and Procedures.

**Analysis**

1. **Does section 3314 apply to adjusting the height of Employer’s Gear Driven Positioner (GDP) machine?**

   Citation 1, Item 1, alleged a violation of section 3314, subdivision (g)(2)(A). Citation 2 alleged a violation of section 3314, subdivision (c).

   Applicability of section 3314 is set forth in subdivision (a)(1), which reads, in relevant part, as follows:

   This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which … release of stored energy could cause injury to employees.

   The Division has the burden of proving the applicability of a safety order by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

   To establish applicability of section 3314, the Division must meet the following four elements: (1) the GDP was a machine; (2) lowering the height of the GDP was an adjusting operation; and (3) release of stored energy (4) could cause injury to employees.

   **First Element**

   The first element requires the Division to establish that the GDP was a machine. Section 3941 defines “machine” as “The driven unit as distinguished from the driving unit which is defined as a prime mover.” The Appeals Board has held that this definition applies to section 3314.6 (*Performance Mechanical, Inc.*, Cal/OSHA App. 91-820, Decision After Reconsideration (June 17, 1993).) Employer did not dispute that the GDP was a machine, and Employer referred

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5 Employer stipulated that the injury was serious, but did not stipulate that the injury was caused by the violation.
6 Section 3941 is found in Group 6 of the general industry safety orders. Section 3314 is part of Group 2.
to the GDP as a machine\(^7\). The GDP was not the driving unit itself. It is found that the GDP was a machine within the meaning of section 3314. Therefore, the first element is met.

Second Element

The second element requires the Division to establish that employees were adjusting the GDP. “Adjusting” is not defined in the safety orders.

When a term is not defined in the safety orders, the California Supreme Court has directed the Appeals Board to liberally interpret legislation to promote healthful and safe working environments. (Carmona v. Division of Industrial Safety (1975) 13 C.3d 303.) The Appeals Board has extended this doctrine to apply to safety orders. (Golden West Homes, Riverside Division, Cal/OSHA App. 78-1095, Decision After Reconsideration (Nov. 19, 1984).) The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (AC Transit, Cal/OSHA App. 08-0135, Decision After Reconsideration (June 12, 2013) citing County of Sacramento v. State Water Resources Control Bd. (2007) 153 Cal. App. 4\(^{th}\) 1579, 1586 and California Highway Patrol, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).) When interpreting the language of a regulation, the Appeals Board first looks to the ordinary and usual meaning, and if the plain, commonsense meaning of the words is unambiguous, the plain meaning controls. (Chevron U.S.A. Inc., Cal/OSHA App. 13-0655, Decision After Reconsideration (Oct. 20, 2015), citing Borikas v. Alameda Unified School Dist. (2013) 214 Cal.App.4th 135, 146; AC Transit, Cal/OSHA App. 08-0135, Decision After Reconsideration (June 12, 2013), citing Flannery v. Prentice (2001) 26 Cal.4\(^{th}\) 572, 577 and Nolan v. City of Anaheim (2004) 33 Cal.4\(^{th}\) 335, 340.) The dictionary is a proper source for defining words in safety orders. (See AC Transit, Cal/OSHA App. 08-0135, Decision After Reconsideration (June 12, 2013).)

The dictionary defines “adjust” as “to change the position of (as for better fit or appearance), [as in the phrases] <adjusting the hat on his head> <adjusting the pillows on the couch>.” (Webster’s Third New International Dictionary unabridged (1986), meaning 3b, p. 27.) “Adjusted” is defined as “accommodated, altered or revised to suit a particular set of circumstances or requirements.” (Webster’s Third New International Dictionary unabridged (1986), meaning 1a, p. 27.)

The Board has broadly interpreted the terms “servicing or adjusting” as used in section 3314, subdivision (c). (Dade Behring, Inc., Cal/OSHA App. 05-2203, Decision After

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\(^7\) Safety Supervisor, Michael Spangler (Spangler) admitted that the GDP was a machine. As Safety Supervisor, Spangler was a member of management. Statements by management are authorized admissions and attributed to Employer. (Webcor Construction, Inc. dba Webcor Builders, Cal/OSHA App. 06-2095, Decision After Reconsideration (Mar. 27, 2012), citing Evidence Code 1222; Bill Nelson General Engineering Construction, Inc., Cal/OSHA App. 09-3769, Denial of Petition for Reconsideration (Oct. 7, 2011).) Evidence Code 1222 provides that evidence offered against a party is not made inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make statements concerning the subject matter of the statement. Evidence Code 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth.
Reconsideration (Dec. 30, 2008).) Actions in preparation for performing a servicing or adjusting operation come within the meaning of section 3314, subdivision (c). (Id.)

The height of the GDP could be changed by altering the length of the four legs on which it rested. That is precisely what Morrow was doing at the time of the accident. He and Safety Supervisor Michael Spangler (Spangler) described the procedure as “adjusting” the height of the GDP legs. This activity falls within the dictionary definition of “adjusting” in section 3314. Thus, it is found that Morrow was engaged in an adjusting operation. This interpretation is consistent with the directive to liberally interpret safety orders to protect employee safety. Therefore, the second element is met.

Third Element

The third element requires the Division to establish the existence of stored energy which the GDP could release.

“Stored energy” or “potential energy” is not defined in the safety orders. “Potential energy” is a synonym for “stored energy.” (The Cambridge Advanced Learner’s Dictionary and Thesaurus, Cambridge University Press (2016).) The Scientific and Technical Dictionary defines “potential energy” as “The capacity to do work that a body or system has by virtue of its position or configuration.” (McGraw-Hill Dictionary of Scientific and Technical Terms, Sixth Edition (2003) p. 1650.)

The GDP is lifted approximately ½ inch off the floor. Associate Safety Engineer Shannon Lichty testified that the GDP had stored energy by virtue of its position due to gravity. Manufacturing Manager Randy Reffner (Reffner) testified that the GDP had stored energy due to its position. Both Spangler and Reffner testified that the hazard associated with this stored energy was that the GDP could fall. They testified that lowering the height of an object releases stored energy. Thus, lowering the height of the GDP, which constitutes adjusting the GDP, releases stored energy. Therefore, the third element is met.

Fourth Element

The fourth element requires the Division to establish the possibility of potential injury to employees from the release of stored energy by the GDP.

The GDP weighed between 1,000 and 2,500 pounds. It was too heavy for one employee to move. Employees worked close enough to the GDP in the course of their duties to be exposed to the hazard of the GDP falling on them. Morrow had to reach inside and underneath the GDP in order to remove the pins from the legs. Since he was underneath the GDP, it could potentially fall on him in the event of a release of stored energy. Associate Safety Engineer Shannon Lichty (Lichty) testified that there was a realistic possibility that injuries such as amputation and broken bones would occur if the GDP fell on a body part. Here, Morrow suffered an amputation as a

8 Reference.com states, “Stored energy, or potential energy, is the amount of energy an object has due to its position in space.” (https://www.reference.com>Science>Measurements.) The amount of stored or potential energy is mass times gravity times height of an object. (Id.)
result of inadvertent movement of the GDP, more fully discussed below. Therefore, the fourth element is met.

Employer asserted the defense that the safety order did not apply to the facts. Employer contends that the use of a crane made the activity a hoisting operation; and, therefore, section 3314 is inapplicable. This logic is incorrect.

Hoisting and adjusting are not mutually exclusive. Hoisting is use of an apparatus for raising or lowering a load by the application of a pulling force. (Section 4885) Here, the GDP was being lifted and held up by a crane with the use of slings while the legs were being adjusted. The GDP was being hoisted and adjusted at the same time. In order for Employer’s argument to apply, a more specific but inconsistent hoisting order must apply, and Employer must show that it is in compliance with the more specific order. (The Herrick Corporation, Cal/OSHA App. 99-786, Decision After Reconsideration (Dec. 18, 2001) p. 6, citing Wetsel-Oviatt Lumber Company, Cal/OSHA App. 94-1462, Decision After Reconsideration (Apr. 12, 2000); JD2, Incorporated, Cal/OSHA App. 02-2693, Decision After Reconsideration (Aug. 16, 2004), citing W & S Roofing, Inc., Cal/OSHA App. 74-248, Decision After Reconsideration (Oct. 30, 1974).) However, Employer did not cite an applicable hoisting order and went so far as to state that it was not alleging that a more specific safety order applied. Therefore, Employer’s argument fails.

Accordingly, it is found that all four elements set forth in section 3314, subdivision (a) have been met; and, therefore, section 3314 applies to the instant facts.

2. Did Employer establish written separate Lockout/Tagout procedures for adjusting its GDP?

Section 3314, subsection (g)(2)(A) states:

(g) 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, ... 
(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.

The Division alleged:

Prior to and during the course of the inspection, including, but no [sic] limited to October 17, 2014, the employer failed to establish LOTO procedures for the adjustment of the Gear Driven Positioner machine.
It is not sufficient for an employer to have general written procedures for lock out and tag out of its machines. Separate written procedural steps are required for each machine. (*Newman Flange & Fitting Company*, Cal/OSHA App. 07-2581, Decision After Reconsideration (Oct. 5, 2011).)

To establish a violation of section 3314, subsection (g)(2)(A), the Division must prove that there were no separate written procedural steps for the GDP.

Employer’s employees were required to adjust the height of the GDP to set it up for the next job. It was a common practice that continued through the October 17, 2014 inspection.

Employer had written Lockout/Blockout/Tagout procedures in effect at the time (Exhibit 11, section 11). These procedures had a list of machines with separate procedural steps to lock out and tag out each machine listed. The GDP was not included in the list and there were no separate procedural steps for its lockout/blockout/tagout.

As discussed above, section 3314 applies to Employer’s operations with the GDP. As discussed below, blocking out is required to prevent the inadvertent movement from release of stored energy. Even if Employer met the requirements of section 3314, subdivision (c), exception 1, Employer is required to have separate written procedural steps describing the alternative procedure. There were none.

Therefore, the Division established a violation of section 3314, subdivision (g)(2)(A) by a preponderance of the evidence.

3. **Was the GDP properly blocked during adjusting operations?**

Section 3314, subdivision (c) states:

(c) Cleaning, Servicing and Adjusting Operations.
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 shall be placed on the controls of the power source of the machinery or equipment.

The Division alleged:

Prior to and during the course of the inspection, including, but not limited to October 17, 2014, the employer failed to ensure the Gear Driven Positioner machine was properly blocked during adjusting operations. As a result on 10/09/14 an employee suffered a serious injury.
Section 3314, subdivision (c) requires that (1) machine parts capable of movement must be stopped, (2) the power source must either be de-energized or disengaged, and, if the two primary requirements are not effective to prevent inadvertent movement, then the parts capable of movement must be mechanically blocked or locked in place. (*Dade Behring, Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008), citing *Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), citing *Macco Constructors, Inc.*, Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993); *Simpson Timber Company*, Cal/OSHA App. 77-1038, Decision After Reconsideration (June 9, 1980).)

“Inadvertent movement” within the context of section 3314 means any movement that was not intended. (*Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001); *Simpson Timber Company*, Cal/OSHA App. 77-1038, Decision After Reconsideration (June 9, 1980).)

In order to establish a violation of section 3314, subdivision (c), the Division must prove the following three elements: (1) an adjusting operation was being performed; (2) stopping the GDP and de-energizing the power source was not effective to prevent inadvertent movement; and (3) that the moveable parts were not mechanically blocked out to prevent inadvertent movement.

First, as discussed above, Morrow was performing an adjusting operation on the GDP within the meaning of “adjusting operation” for purposes of section 3314. The first element is met.

Second, it was undisputed that the GDP was stopped and de-energized at the time of the accident, but that the GDP moved regardless. The movement was not intended. As defined above, inadvertent movement is any movement that is not intended. Therefore, stopping the GDP and de-energizing it was not effective to prevent inadvertent movement. Reffner testified that the GDP was balanced on two points. Leaning on the GDP or a sudden movement would cause the GDP to go out of balance and move inadvertently. Tapping or hammering the pin, with or without using a bolt, could change the GDP’s balance. Thus, the second element is met.

Third, it was undisputed that nothing was placed below the GDP, such as a jack or block, or alongside the GDP to prevent inadvertent movement. The third element is established.

Employer argued that blocking out the GDP is impossible; therefore, section 3314 does not apply. Employer argued, for example, that any blocking would have to be adjusted within a 1/16 inch tolerance after each pin was taken out of the turntable leg. The Board has long held that an employer’s belief that compliance is impossible or unwise is not a defense. (*C. W. Forcum Construction*, Cal/OSHA App. 83-183, Decision After Reconsideration (Dec. 31, 1986); *Hampshire Construction Co.*, Cal/OSHA App. 79-949, Decision After Reconsideration (Aug. 26, 1980).) If an employer believes a safety order is unreasonable or that its own practice provides greater protection for its employees, the employer’s remedy is to petition the Standards Board for a permanent variance pursuant to Labor Code section 143, subdivision (a), or to have the safety
order repealed or amended. (City of Sacramento Fire Department, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989).)

Accordingly, the Division established a violation of section 3314, subdivision (c), by a preponderance of the evidence.

4. **Did Employer establish an exception to section 3314, subdivision (e)?**

Exception 1 to section 3314, subdivision (c) states:

> Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

The Appeals Board has long regarded exceptions to safety orders as affirmative defenses for which the employer has the burden of proof. (Chacon Steel Company, Inc., Cal/OSHA App. 85-1430, Decision After Reconsideration (Aug. 13, 1987).) The employer is required to show it satisfied the terms of the exception to prevail. (A C Transit, Cal/OSHA App. 08-4611, Denial of Petition For Reconsideration (June 10, 2011).)

Adjusting the height of the turntable legs on the GDP was routine, repetitive and integral to use of the GDP. The exception applies if Employer used alternative measures which provided effective protection.

Employer pointed out that the procedure with the GDP being hoisted by a crane had been used for over 33 years and there had been no prior accidents. The citation, as issued, stated that the violation had been abated. Employer believed that this meant that the Division accepted a three point lift as satisfactory abatement of the 3314 subdivision (c) violation. Employer argued that these facts proved they used an alternative measure which provided effective protection.

Here, the accident occurred because the GDP was held with only two points of lift. Employer admitted, through Spangler and Reffner, that three points of lift are needed to prevent inadvertent movement. Employer’s accident report (Exhibit 8), which Spangler reviewed and approved, reported the hoist was rigged with only two points and that two points were insufficient to stabilize the GDP. With only two points, the GDP could rotate, as Spangler and Reffner testified. With only two points, the GDP did not balance when the GDP was lifted. Reffner testified that adjustments had to be made so that the GDP was balanced and level, and when the GDP was balanced and level, the pins would come out easily without need of hammering. Reffner testified that they used tag lines if the load was not stable, but no tag lines were used here.
Therefore, it is found that two points of lift do not provide effective protection. Employer did not meet its burden of proof to establish that it used an alternative that provided effective protection as required by exception 1 to section 3314, subdivision (c).

5. Did Employer establish the independent employee action defense?

Employer argued that Morrow’s failure to rig the GDP with three points was an independent employee action. If he had used a three point lift as he was supposed to do, then the exception to section 3314, subdivision (c) would have been established.

To establish the independent employee action defense as set forth in *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980), an employer must prove all five of the following elements:

1) The employee was experienced in the job being performed.
2) The employer has a well-devised safety program which includes training employees 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 against employees who violate the safety program.
5) The employee caused a safety infraction which he or she knew was contra to the employer’s safety requirements.


Morrow had been employed as a welder with Employer for 24 years. He was experienced in the job being performed. He rigged an overhead crane three to five times a day. Morrow testified that he always used a two point lift for the job in question.

Reffner was Morrow’s supervisor. Reffner observed Morrow rigging the GDP using only two points instead of three. Although Reffner testified this was unacceptable, Reffner did not take action to correct or discipline Morrow. Morrow was not disciplined in connection with the instant accident. Under these circumstances, it cannot be found that Employer effectively enforced its safety program or that Morrow knew he caused a safety infraction. Employer did not meet the third, fourth, or fifth elements.

Since a single missing element defeats the independent employee action defense, the defense fails.

6. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as serious?

Labor Code section 6432, subdivision (a) states:
(a) There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: […]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

[...]  

(g) A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Labor Code section 6432, subdivision (e), provides that “serious physical harm” means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in (1) Inpatient hospitalization for purposes other than medical observation.

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (Langer Farms, LLC, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

The hazard associated with the violative condition is that a machine will inadvertently move because it is not blocked, and that the inadvertent movement will catch or pinch a body part. Lichty testified that, in her opinion, that amputation (as happened here) or serious physical harm resulting in hospitalization are realistic possibilities as a result of an accident resulting from the violative condition.

Lichty is current in her Division-mandated training⁹. Thus, under Labor Code section 6432, subdivision (g), Lichty is competent to give this opinion. Further, Lichty has a Bachelor of Arts degree in Environmental Studies with a minor in Occupational Health and Safety, was a construction equipment mechanic in the Army for seven years, worked 11 years for the City of Sacramento as an Environmental Health and Safety Specialist, and has performed approximately 70 accident-related inspections for the Division, several of which involved lack of blocking. When in the Army, she worked around and with cranes almost daily. She revised safety polices and performed safety inspections for the City of Sacramento.

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⁹ Exhibit 13
Employer did not offer any evidence in rebuttal. Thus, Lichty’s opinion is credible based on her education, experience, and training. Her opinion is credited. It is found that serious physical harm as a result of the hazard addressed in Citation 2 is a realistic possibility.

Accordingly, the Division established a rebuttable presumption that Citation 2 was properly classified as serious, and Employer did not rebut that presumption. Therefore, the serious classification is established.

7. **Did the Division establish the accident-related characterization of Citation 2?**

A violation is accident-related where there is a causal nexus between the violation and the serious injury. ([*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016) p. 11.]) In [*MCM Construction, Inc.*, *supra*], the Board held that “The violation need not be the only cause of the accident, but the Division must make a ‘showing [that] the violation more likely than not was a cause of the injury. ([*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011); [*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003); [*Davey Tree Surgery Company*, Cal/OSHA App. 99-2906, Decision After Reconsideration (Oct. 4, 2002).]’]

In this case, if the GDP had been blocked before the pins were removed, it would not have shifted when the pins were removed. If the GDP had not shifted, Morrow’s fingertip would not have been caught between parts of the GDP and it would not have been amputated. Therefore, it is found that the violation more likely than not was a cause of the injury.

Based upon the above, Citation 2 was properly characterized as accident-related.

8. **Were the proposed penalties reasonable?**

Penalties calculated in accordance with the penalty setting regulations (sections 333-336) are presumptively reasonable. ([*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).])

Employer stipulated that the penalties were calculated in accordance with the Division’s Policies and Procedures and in accordance with the relevant regulations.

Accordingly, the proposed penalties are found reasonable.

**Conclusions**

Section 3314 applies to adjustment of the height of the GDP.

In regard to Citation 1, Item 1, the evidence supports a finding that Employer violated section 3314, subdivision (g)(2)(A) by failing to have separate written procedural steps for the lockout/blockout/tagout of the GDP.
In regard to Citation 2, the evidence supports a finding that Employer violated section 3314, subdivision (c) by failing to adjust the GDP. There is a realistic possibility of serious physical harm in the event of an accident caused by the violation. Violation of Citation 2 had a nexus to Morrow’s serious injury. Citation 2 was properly classified as accident-related.

The proposed penalties are reasonable.

**Order**

It is hereby ordered that the citations are established as indicated above and as set forth in the Summary Table.

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

Dated: 12/21/2016

Dale A. Raymond
Administrative Law Judge
**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

Inspection No.: **1004069**
Employer: **BENICIA FABRICATION AND MACHINE, INC.**
Date of hearing: **March 8, 2016**

### DIVISION'S EXHIBITS

<table>
<thead>
<tr>
<th>Exhibit Number</th>
<th>Exhibit Description</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>Jurisdictional Documents</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>02</td>
<td>Proposed Penalty Worksheet</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>03</td>
<td>Notice of Intent to Classify As Serious</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>04-1 to 04-4</td>
<td>Photos</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>05</td>
<td>Accident Report</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>06-1, 06-2, 07-1 to 07-4</td>
<td>Photos of Gear Driven Positioner Machine</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>08</td>
<td>Supervisor's First Report of Injury/Illness</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>09</td>
<td>Employer's Report of Occupational Injury</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>10</td>
<td>Document Request Sheet</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>11</td>
<td>Lockout/Blockout/Tagout Policy</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>12</td>
<td>Photo of amputation</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>13</td>
<td>Certification of Training for Shannon Lichty</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
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<td>Admitted Into Evidence</td>
</tr>
</tbody>
</table>

### EMPLOYER'S EXHIBITS

<table>
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<tr>
<th>Exhibit Letter</th>
<th>Exhibit Description</th>
<th>Status</th>
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<tbody>
<tr>
<td>A</td>
<td>Application for Serious and Willful Misconduct</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>B</td>
<td>Verification of Abatement</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>C</td>
<td>Morrow-Training Record</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>D</td>
<td>Drawing by Reffner</td>
<td>Admitted Into Evidence</td>
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</table>
Witnesses testifying at hearing:

<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>Michael D. Spangler</td>
<td>Director of Safety, Health and Environment</td>
</tr>
<tr>
<td>Virgil L. Morrow</td>
<td>Welder</td>
</tr>
<tr>
<td>Shannon Lichty</td>
<td>Associate Safety Engineer</td>
</tr>
<tr>
<td>Randy Reffner</td>
<td>Manufacturing Manager</td>
</tr>
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</table>

APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: 1004069
Employer: BENICIA FABRICATION AND MACHINE, INC.

I, Dale A. Raymond, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

Dale A. Raymond
Administrative Law Judge

12/21/2016
SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of:
BENICIA FABRICATION AND MACHINE, INC.

<table>
<thead>
<tr>
<th>Citation Issuance Date: March 4, 2015</th>
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<td>Total</td>
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*You may 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.*

**PENALTY PAYMENT INFORMATION**

1. Please make your cashier’s check, money order, or company check payable to: Department of Industrial Relations
2. Write the **Inspection No.** on your payment
3. Mail payment to:
   Department of Industrial Relations (Accounting)
   Cashier Accounting Office
   P.O. Box 420603
   San Francisco CA 94142-0603

*DO NOT* send payments to the California Occupational Safety and Health Appeals Board-

**Abbreviation Key:**
G=General  R=Regulatory  Er=Employer
S=Serious  W=Willful  Ee=Employee
RG=Repeat General  RR=Repeat Regulatory  RS=Repeat Serious