BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1595696**
PRODUCERS DAIRY FOODS, INC. **250 E. BELMONT AVENUE** **FRESNO, CA 93701** **Employer**	**DECISION**

Statement of the Case

Producers Dairy Foods, Inc. (Employer), produces dairy food. Beginning May 10, 2022, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Hector Bermudez (Bermudez), conducted an inspection arising from an injury occurring at Employer's dairy processing facility at 250 E. Belmont Avenue, in Fresno, California (the site).

On September 15, 2022, the Division issued two citations to Employer alleging two violations of California Code of Regulations, title 8.[1] Citation 1 alleges Employer failed to provide hazardous energy control training. Citation 2 alleges Employer failed to ensure guarding of a sprocket chain drive. Employer filed timely appeals of both citations on the grounds that no safety orders were violated and that the penalties were unreasonable, and additionally raised the ground of incorrect classification as to Citation 2. Employer also asserted several affirmative defenses, including Independent Employee Action.

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on January 9 and 10, 2024. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Victor Lai, Employer's General Counsel, represented Employer. Lauren Ocadiz, Staff Counsel, represented the Division. At the hearing, Employer withdrew its appeal of Citation 1, and the parties stipulated to several facts, including the calculation of the proposed penalty. Thus, only Citation 2 remained on appeal with limited issues. The matter was submitted on June 24, 2024.

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

Issues

1. Did Employer fail to guard a chain drive?

2. Did Employer establish any of its pleaded defenses?

3. Did the Division establish the rebuttable presumption that Citation 2 was properly classified as Serious?

4. Did Employer rebut the presumption that the violation was Serious?

5. Did the Division establish the citation's Accident-Related characterization?

6. Is the penalty for Citation 2 reasonable?

Findings of Fact[2]

1. Aide Gonzalez (Gonzalez), a filler machine operator, was employed by Employer at the site at the time of her injury.*

2. Gonzalez sustained a serious injury as defined by section 330, subdivision (h), and Labor Code section 6302, subdivision (h).*

3. The machine involved in Gonzalez's injury contained a chain drive of the type regulated by section 4075, subdivision (a).*

4. Employer consented to the Division's inspection at the site.*

5. The Division timely served Employer with the 1BY and Employer responded to the 1BY.*

6. The proposed penalties were calculated in accordance with the Division's policies and procedures.*

7. Gonzalez was assigned to operate the H5 Filler Machine (the H5), and another machine simultaneously during her shift when she was injured.

8. The H5 housed two unobstructed chain drives that ran inches away from a seven-by-14-inch gap, near the infeed, at Gonzalez's chest level.

[2] Asterisks denote Findings of Fact which are the stipulations of the parties.

9. The chain at issue was located seven feet or less above the floor at working level.*

10. The H5 assembled and filled paper dairy cartons which got stuck at various points in the production line at the rate of 50 to 100 times every shift.

11. Gonzalez was trained to remove jammed cartons at the infeed area by inserting her hand in the gap after turning off only one of the two intake switches.

12. Turning off only one of two intake switches permitted the other intake mechanism, both chain drives, and the entire H5, to remain powered and running.

13. An emergency stop button (e-stop) or removal of the intake guard shut power off to the H5 entirely, but Gonzlez was not trained to use these features for infeed jams.

14. Ken Gauer (Gauer), Employer's plant manager, observed plant floor operations for one to two hours every shift.

15. Mike Ruiz (Ruiz), Gonzalez's supervisor, observed Gonzalez's work at least three to four times per shift.

16. Ruiz observed Gonzalez clear jammed cartons at the infeed of the H5 consistent with her training and he did not stop or correct her.

17. Contact with a running sprocket and chain drive mechanism while attempting to clear an infeed jam resulted in amputation of Gonzalez's finger.

Analysis

1. Did Employer fail to guard a chain drive?

Citation 2 alleges a violation of section 4075, subdivision (a), which requires:

(a) All gears, sprockets and sprocket chain drives located 7 feet or less above the floor or working level shall be guarded.

The Division alleges:

> Prior to and during the course of the inspection, the employer failed to ensure that the chain drives on the infeed side of the H5 paper half filler were guarded. As a result, on or around March 25, 2022, an employee working on the infeed side of the H5 paper filler suffered a serious hand injury.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) To establish a violation here, the Division must show that a chain drive is (1) seven feet or less above the floor, (2) not guarded (3), and exposed employees to a hazard. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Decision After Reconsideration (May 26, 2017).)

(1) Height

The machine at issue, the H5, assembled half-gallon paper cartons and filled them with liquid dairy products. The Division discussed the measurements of the H5 at length, but it is sufficient that parties stipulated that the chain drives were located seven feet or less above the working floor to find that the chain drives were within the height limitations of the safety order. (Exhibit (EX) 12, 13; Joint Exhibit (JT EX) 4; Hearing Transcript Volume (TR) I 144.)[3]

(2) Guarding

"Guarded" is defined in section 3941 as:

> Shielded, fenced, enclosed or otherwise protected according to these orders, by means of suitable enclosure guards, covers or casing guards, trough or "U" guards, shield guards, standard railings or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact.

The H5 held two stacks of flat cartons; an infeed at the bottom of each stack drew in cartons one by one; a mandrel (a supporting form) then shaped and heat-sealed them; finally, filling pumps filled them and heat-sealed their tops. Two chain drives, one under each stack, conveyed the cartons through these production stages. (TR I 22 – 23.) The two stacks were mounted to the intake end of the H5, one to its left, the other to its right, with a gap in between. A vertical sprocket wheel

[3] Two volumes comprise the unofficial transcript of the audio recording which serves as the official record. Each volume corresponds in sequence to each of the two days of hearing.

under each stack guided its respective chain drive. The chain drive interlocked at the base of the sprocket wheel which directed it up and around. The chain drive thus looped to re-enter the H5 and push a new carton through production. Angled guard panels overlaid the top and bottom of these sprocket wheels and chain drives, forming a triangular tent that protruded laterally from the H5. (EX 7 Mod 1; JT EX 4, 5; TR II 69.)

The guard's top panel was 12 inches deep, measuring from the weld at the tent peak where an employee stands, toward the tent base where it stopped at the two stacks. (EX 32.) The guard's top panel stopped short of fully covering the H5's upper intake area, leaving a gap between the stacks. The gap between the stacks and above the guard formed a rectangular opening, approximately seven inches high and 14 inches wide, permitting access to the interior of the H5. (EX 9, 11; TR II 103.)

The out-running length of each chain drive loop ran approximately six inches below the top guard. After looping up the sprocket wheel, the in-running chain ran approximately one inch below the top guard. (EX 17, 14 Mod 1, 15 Mod 1.) The chain drives were located approximately 10 inches to the left and right from the center of the gap. (EX 14, 15; TR I 110, 112 – 114.) The chain drives were thus approximately three inches inside the gap.

The seven by 14-inch gap provided unobstructed access to the chain drives. The guard was thus not effective to prevent accidental contact because its top panel did not fully encase the chain drives which were only inches away from the edge of the guard.

(3) Exposure

The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent. (*Benicia Foundry & Iron Works, Inc., supra*, Cal/OSHA App. 00-2976.) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)

The Division may establish employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on "evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Dynamic Construction Services, Inc., supra*, Cal/OSHA App. 14-1471, citing

Benicia Foundry & Iron Works, Inc., supra, Cal/OSHA App. 00-2976.) Employee exposure exists where the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*Dynamic Construction Services, Inc., supra*, Cal/OSHA App. 14-1471 [citations omitted].)

Gonzalez operated the H5 on the day of her injury. She was always assigned to operate two machines simultaneously. Her duties required her to travel between them to monitor their production, bring samples to the laboratory every hour, and go outside the plant to retrieve product to refill the fillers or cartons to reload the stacks. Gonzalez's supervisor, Mike Ruiz (Ruiz), instructed her to keep up with the work which kept her running back and forth. (TR I 52.) Gonzalez was five feet and six inches tall. She worked facing the gap between the stacks. The gap and the infeed reached her chest level. (TR I 28.) Her other duties required travel near the triangular guard, the tip of which protruded approximately one foot laterally from the H5. (TR I 15 – 16, 52.)

Cartons that got stuck in the H5 required manual extraction. (TR II 87.) Gonzalez testified that cartons got caught between the intake and mandrel at the rate of approximately 50 to 100 times every shift. (TR I 30 – 31, 54.) She reached in through the gap above the guard to remove them. Removal required turning off the intake mechanism to stop new cartons from entering. However, the chain drives and the rest of the H5 continued to run and complete production of the cartons already inside. Gonzalez explained she did not use an adjacent stop to shut the power because the cartons in mid-production would stop moving and "burn up" at the heat-seal stages. The e-stop "will mess up the whole run," requiring removal of each carton from the entire line. (TR I 63.) Gonzalez's testimony is credited.

In addition to working directly in front of and around accessible chain drives, Gonzalez regularly inserted her hand into the gap, inches away from moving chain drives. Gonzalez was actually exposed to an unguarded chain and sprocket drive that was seven feet or less above the working level. The Division thus established a violation of section 4075, subdivision (a).

2. Did Employer establish any of its pleaded defenses?

Employer pleaded several affirmative defenses in its appeals. The evidence and arguments Employer presented are discussed below in relation to the affirmative defenses of guarding by location and IEAD.

Was the chain drive guarded by location?

"Guarded by location" is defined in section 3941 as:

> The moving parts are so located by their remoteness from floor, platform, walkway, or other working level or by their location with reference to frame, foundation or structure as to remove the likelihood of accidental contact.

To be guarded by location, the "likelihood of accidental contact with moving parts is removed by their remoteness," and decreasing the likeliness of accidental contact is not enough. (*EZ-Mix, Inc.*, Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013).) "Accidental contact" is defined in section 3941 as:

> Inadvertent physical contact with power transmission equipment, prime movers, machines or machine parts which could result from slipping, falling, sliding, tripping or any other unplanned action or movement.

Section 3941 provides for two scenarios for guarding by location: (1) the moving parts may be so high up from the working level that employees would not be likely to come into contact with them accidentally; or (2) even if not remote from the working level, the moving parts may be located within the structure of the equipment such that there is unlikely to be any accidental contact.

Gauer claimed that one needed "to put a lot of work into that," requiring the insertion of an arm to reach the chain drives. (TR II 97.) The chain drives were mere inches inside a chest-high gap which was nearly the size of a legal pad, big enough in fact for an arm. Their location did not remove the likelihood of contact for operators who face the gap or travel around a pointy guard. They were literally within an arm's reach of accidental contact, thus this defense is inapplicable as it is unsupported by the facts.

Did Employer establish the Independent Employee Act Defense?

Employer reasoned that IEAD applied because although Gonzalez's training prohibited reaching around a guard, she deliberately did so. (EX A.) Guarding is an affirmative duty of an employer. (*Arriaga USA,* Cal/OSHA App. 1279492, Decision After Reconsideration (Dec. 7, 2021).) IEAD is unavailable in failure to guard cases because "such [an] administrative policy cannot substitute for mechanical protection [required by the safety order]" (*City of Los Angeles, Dept. of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration, (Dec. 31, 1986).) Here, the chain drives were unguarded, thus, the IEAD is not available.

3. 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 demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. 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.

[...]

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, among other things, the loss of any member of the body or any serious degree of permanent disfigurement. Here, the parties stipulated that Gonzalez's injury was serious as defined by the Labor Code.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) The actual hazards from failure to guard chain drives include entanglement, wounding, amputation, and death from contact with the chains and sprockets. (TR I 168.)

Gonzalez accidentally contacted the moving chain drive and suffered a partial finger amputation when she inserted her hand into the gap to pull a jammed carton out of the infeed area. (TR 1 59.) The guarding violation thus caused not only the realistic possibility of, but actual, serious physical harm. The Division thus established the rebuttable presumption that the citation was properly classified as Serious.

4. Did Employer rebut the presumption that the violation was Serious?

Labor Code section 6432, subdivision (c), provides:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

An employer has the burden to establish that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (*National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).)

Labor Code section 6432, subdivision (b), provides factors to consider: training relevant to preventing employee exposure to the hazard; procedures for discovering and correcting the hazard; supervision of employees exposed or potentially exposed to the hazard; and procedures for communicating to employees about employer's health and safety rules and programs.

As described above, the production line began with two stacks of flat cartons. A "grabber" below each stack pulled cartons toward the infeed. There, a small tab on the chain drive caught a new carton. These tabs, called "pushers," resembled tiny bookends distributed along the chain drive. (EX 33.) The cartons were thus pushed to the mandrel and the remaining production stages.

Awareness of jammed cartons

Employer was aware that cartons got stuck in the H5 six or seven times per shift, at six or seven points on the production line. (TR I 42; TR II 87 – 88, 105, 107.) Gauer testified that his "job is to know efficiency" but conceded that these jams could occur more often because he was not an operator. (TR II 102-105.) Gonzalez testified that cartons got stuck 50 to 100 times during her shifts, which were usually eight to 12 hours long. (TR I 15, 30-31.) She testified that she reported these jams to her supervisor. (TR I 31-32.)

Awareness of chain drive hazard

Gauer provided the steps for clearing infeed jams. (TR II 81, 107.) First, both of the two infeed switches must be deactivated to halt the entry of new cartons. After cartons already inside the H5 move out of the mandrel, the guard is removed. Guard removal shuts off the entire H5. After clearing the jam, replacing the guard allows the H5 to restart. An e-stop also shuts off the H5, but its use was optional because guard removal inevitably turned it off. (JT EX 4 mod 1; TR II 46, 77 – 78, 108.)

Employer also presented Vincent Lazaro's (Lazaro) written declaration in which he describes training Gonzalez on the H5 for two weeks to, "never use her hand to reach in anywhere around the H5 filler machine including but not limited to the chain drive on the infeed side especially when it is on and moving," and "never to reach in or around the chain drive on the infeed side of the H5 filler machine while it is on and moving." (EX 28.) Lazaro's instructions differed from Gauer's. Lazaro instructed Gonzalez "to always contact the Producers maintenance team when having any problems with the H5 filler machine" and "to never remove any guards or covers for any reason including but not limited to during a carton or paper jam." He wrote in his declaration:

5. The H5 Filler machine instructions I gave to Aide Gonzalez about clearing a carton or paper jam included, but where [sic] not limited, to the below:

    a. Cycle stop the H5 filler machine.
    b. Allow the H5 filler machine to stop as product completes discharging.
    c. E-stop the H5 filler machine.
    d. Ensure the H5 filler machine is e-stopped.
    e. Clear jam.
    f. Pull or disengage e-stop on H5 filler machine.
    g. Restart H5 filler machine.

(EX 28.)

Bermudez interviewed another H5 operator, Vincent Huerta (Huerta), who claimed that he was trained not to reach into the H5 near the chain drive while it is running. Instead, he first needed to let it clear out and then turn it off. (JT EX 2.)

Notwithstanding the significant differences between Employer's three unjamming procedures, they all demonstrate that Employer was aware of the hazard of moving chain drives.

Training

Gonzalez received general and machine-specific training. (EX A; TR II 46, 53, 67.) Her general training prohibited reaching around guards. Gonzalez received several weeks of on-the-job training specifically for the H5. Lazaro and Sonny Alcantar (Alcantar) each provided approximately two weeks of training. Huerta provided Gonzalez with two more training days, and she also shadowed other operators. (TR I 16 – 18, 51.) Gonzalez's training for infeed jams differed from the three procedures described above.

Each infeed switch solely controlled its own, respective, grabber. Gonzalez credibly testified that, to clear infeed jams, her trainers and other operators turned off only the infeed switch that controlled the grabber for the affected stack. They did not turn off both infeed switches. They did not remove the guard, nor use the e-stop. Instead, they reached through the gap directly into the H5 while it continued to run. Gonzalez testified that all trainers and operators demonstrated, observed others performing, and themselves performed the removal of infeed jams in this manner. (TR I 31, 45, 49, 51, 60.)

This procedure ensured that the rest of the H5, including the other grabber, and both chain drives, continued to run. The H5 produced an average of 1,250 product units each hour. (TR II 105.) Unless the H5 switched between products or got cleaned, it was under constant operation because Employer was always behind on orders. Gonzalez had to work quickly, and carton jams were normal for the H5. All her trainers, including Lazaro, Alcantar, and Huerta, instructed her to

keep up with the work. (TR I 20 – 21, 33, 51 – 52.) Gonzalez's testimony is credited. Bermudez's notes from his interview with Huerta reflect that he too was always in a hurry. (JT EX 2.)

Supervision

Gonzalez's supervisors were aware that she performed this procedure. Ruiz regularly walked rounds in the plant. He generally visited Gonzalez three or four times during her shift and sometimes stayed to observe her work. He inquired when the H5 was down, but he said nothing when he saw Gonzalez reach in to clear them. She reported these problems to Ruiz, who listened, but did not respond. (TR I 32 – 33, 54.) Gauer testified that he observed operations on the work floor between one to two hours every shift. (TR II 92.)

Enforcement

Gonzalez testified that she was never warned to keep her hands out when the H5 was running, nor trained to engage the e-stop to halt the entire production line for a jam is credited. (TR I 48, 51.) She explained that the e-stop caused the cartons arrested at the heat-sealing stations to burn. A complete shutdown would also require her to remove all the cartons in the production line. Gonzalez testified that Ruiz and Lazaro instructed her to call the maintenance team when the H5 stopped running, not for jammed cartons that she could herself remove. (TR I 33, 48 – 51.) She testified that she doubted that the maintenance crew would come fifty times a night for such a task. (TR I 34.)

The three different unjamming procedures that Gaur, Lazaro, and Huerta described conflicted with each other and conflicted further yet with Gonzalez's testimony. Differences notwithstanding, Employer's procedures to clear jams on the H5 demonstrated awareness that active chain drives were hazardous. Employer thus failed to rebut the Division's classification of Citation 2 as Serious.

5. Did the Division establish the citation's Accident-Related characterization?

To prove the Accident-Related characterization, the Division must show a causal nexus between the Employer's violation of a safety standard and an employee's serious injury. (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.,* citing *MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The actual hazards of an unguarded, unobstructed, and running chain drive include entanglement, cuts, amputation, and death, from chain drive and its sprocket mechanism. (TR I 168.) Employer failed to enclose the gap which permitted unobstructed contact with chain drives

that were only inches away. This created a hazard which resulted in Gonzalez's serious injury. The Division established that the serious physical harm to Gonzalez was the direct result of Employer's failure to guard the chain drives. Citation 2 was thus properly characterized as Accident-Related.

6. Is the penalty for Citation 2 reasonable?

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

The parties stipulated that the penalty for Citation 2 was properly calculated. The citation's Serious, Accident-Related classification and characterization has been affirmed. Thus, there is no change to the proposed penalty. Accordingly, the proposed penalty for Citation 2 is reasonable.

Conclusion

The evidence supports a finding that Employer violated section 4075, subdivision (a), for failure to guard chain drives seven feet or less above the floor. The citation is properly classified and characterized as Serious Accident-Related. The proposed penalty is reasonable.

Order

It is hereby ordered that Citation 1 is affirmed per Employer's withdrawal of its appeal of this citation. Its penalty is assessed as reflected in the attached Summary Table.

It is hereby ordered that Citation 2 is affirmed and its penalty is assessed as reflected in the attached Summary Table.

Dated: 07/19/2024

Rheeah Yoo Avelar
Administrative Law Judge

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