

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
PO Box 4349
Visalia, CA 93291

Employer

DOCKETS 15-R2D5-0315
and 0316

DECISION

Statement of the Case

International Paper Company (Employer) manufactures and distributes paper products. Beginning August 26, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ronald Chun (Chun), conducted an accident inspection at a place of employment maintained by Employer at 1600 North Kelsey Street, Visalia, California (the site). On December 11, 2014, the Division cited Employer for two violations of California Code of Regulations, title 8, one of which remains at issue: failure to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation.¹

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalty. Employer also alleged certain affirmative defenses.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Fresno, California on June 2, 2015. Anthony Muia, Plant Manager, represented Employer. Jerry Walker, District Manager, represented the Division. The

¹ Unless otherwise specified, all references are to sections of California Code of Regulations, title 8. The parties stipulated on the record that the Division would withdraw Citation 1, an alleged violation of section 3314, subdivision (d), and Employer would agree to waive any rights it may have pursuant to Labor Code section 149.5 to petition for or recover costs or fees, if any, incurred in connection with this appeal. Good cause having been established Citation 1, and the proposed penalty of \$5,060, are vacated.

parties presented oral and documentary evidence. The matter was submitted for decision on August 14, 2015.

Issues

1. Did Employer violate section 3314, subdivision (c), by failing to stop and de-energize the power source of a cup blanker machine² prior to an unjamming operation?
2. Did Employer present sufficient evidence to establish the Independent Employee Action Defense (IEAD)?
3. Did the Division establish a rebuttable presumption that the violation was serious?
4. Did Employer rebut the presumption of a serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?
5. Was there a causal connection between the violation and the occurrence of employee Alex Martinez's (Martinez) serious injury?
6. Was the proposed penalty reasonable?

Findings of Fact:

1. Placement Pros is the primary employer of Martinez, and International Paper Company is the secondary employer.
2. The cup blanker is machinery capable of movement.
3. Employer has an actual practice of checking the warp³ of the paper while the blanker machine is operating. The standard procedure used by the blanker operators is to not turn off the machine when checking the cut blanks on the stacker rods near the cutting area. Martinez checked the warp of the paper on the blanker machine using a procedure he had learned from his trainer.

² The blanker machine is used to produce finished blanks in the manufacture of paper cups.

³ The operator removes paper blanks from the stacker rod closest to the cutting area to make sure that the paper blanks are being cut straight. When distortions in the cut blanks are noted by the operator, adjustments to the blanker machine are then made to correct the warp, using the blanker machine's controls.

4. While Martinez was checking the warp of the paper during the production process, cut blanks on the stacker rods fell from the vertical to horizontal position, creating a jam.
5. Martinez did not stop and de-energize the cup blanker machine prior to performing an unjamming operation.
6. Martinez sustained serious physical harm while attempting to set the paper blanks straight on the stacker rods, when his hand was pulled into the cutting area of the blanker machine by the pressure created from the tension block⁴, causing a partial finger amputation.
7. The proposed penalty is reasonable.

Analysis:

1. Did Employer violate section 3314, subdivision (c), by failing to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation?

Section 3314, subdivision (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 section 3314 applies, in relevant parts, are set out in provisions of section 3314, subdivision (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

⁴ The tension block pushes the already-cut blanks against the punch.

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:

Prior to and during the course of the investigation, the cup blanker machine which was capable of movement was not stopped and the power source de-energized or disengaged prior to employees unjamming blanks on the stacker rods. As a result, on or about 6/17/14, an employee of Placement Pros (primary employer) working in the International Paper Company (secondary employer) facility was attempting to unjam the blanks on the stacker rods of machine #5 when he sustained a partial finger amputation as his hand was pushed into the die cutting area when the die block was inadvertently released. The employee was exposed to the shear hazard of the blanker die and punch assembly of the machine. The violation contributed to the serious injury to the 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 unjamming operation.

It is not in dispute that the cup blanker machine⁵ is capable of movement, and that Martinez failed to stop and de-energize the power source of a cup blanker machine (Exhibits 2, 3, 4, and A⁶) prior to an unjamming

⁵ The cup blanker machine is used to cut paper blanks during for the manufacture of paper cups. The machine is loaded with paper which passes through the machine to cutting devices where the blanks are stamped out. The blanks move from the cutting areas onto stacker rods during this process. A tension block at the front of the stacker rods provides pressure on the blanks to keep the stack of blanks near the cutting area in order to maintain alignment on the stacker rods. While production continues and the number of blanks on the stacker rods increases, the cut blanks are then unloaded from the stacker rods by hand to carts, where they are then moved on to the next process in the manufacture of finished cups.

⁶ Martinez testified that the machine depicted in Exhibit 2 looked like the machine on which he was working at the time for the accident. Martinez later testified that the machine depicted in Exhibit A could have been the machine on which he was actually injured. Supervisor Varun Madnani testified that the functionality of the machine depicted in Exhibit 2 and the machine depicted in Exhibit A is the same.

operation. Martinez was exposed to the shear hazard of the blanker die and punch assembly of the machine. Martinez attempted to unjam the blanker machine while the machinery was in operation. The Division presented sufficient evidence through the testimony of Martinez and Chun to establish these un rebutted facts. As such, Employer violated section 3314, subdivision (c), for failing to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation.

2. Did Employer present sufficient evidence to establish the Independent Employee Action Defense (IEAD)?

There are five elements, all of which must be proved for an employer to prevail on a claim of Independent Employee Act Defense (IEAD). Those elements are: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Element one requires that the employee be experienced on the job being performed. Martinez received training on the cup blanker machine, under the supervision of trainer Maria Gutierrez (Gutierrez) for approximately one month prior to the accident. Supervisor Varun Madnani (Madnani) testified that Martinez started working on the blanker machine by himself the day before the accident. Martinez did not stop and de-energize the blanker machine during an unjamming operation. Employer's training (Exhibit C) requires that all machine motion on the blanker machine comes to a complete stop prior to removing a paper jam. According to Exhibit C, Employer's procedure for correcting a paper jam would involve stopping the machine and making sure that all machine motion had come to a stop, but would not involve de-energizing or locking out the machine. Martinez testified that no one followed the paper jam requirements listed on Exhibit C, and that he was not trained to stop the machine to remove a paper jam. As such, Martinez, through no fault of his own, demonstrated inexperience in regard to the safe use of the blanker machine.

Element two requires that the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments. Employer provided evidence that it does have a safety program which includes required training related to the hazards associated with the energized cup blanking machine (Exhibits B through H). However, Employer's safety program lacks consistency in regard to written policies and the actual work practices used to address paper jams occurring during the operation of the blanking machine. As discussed above, no one on the production floor followed the paper jam requirements listed on Exhibit C, and that Martinez was not trained to stop the machine to remove a paper jam. Therefore, Employer did not demonstrate that it had fully implemented its safety program on the shop floor in regard to the cup blanker machine.

Element five requires that Employer prove that the employee caused a safety infraction which he knew was contrary to the employer's safety requirements. Martinez provided credible and unrefuted testimony⁷ that he performed the paper unjamming operation in accordance with the actual demonstrative training provided by Gutierrez, which did not require bringing all machine movement to a stop. As such, Employer failed to establish that Martinez knew that he was acting contrary to Employer's safety requirements.

Employer has not met elements one, two, and five of the IEAD, and therefore cannot rely on independent employee action as a defense to the cited section.⁸

3. Did the Division establish a rebuttable presumption that the violation was serious?

Labor Code section 6432, in relevant parts, states the following:

(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: [...]

⁷ Employer did not call trainer Maria Gutierrez to testify as to the nature and the extent of any demonstrative training she provided to Martinez.

⁸ An analysis of elements three and four of the IEAD is not necessary as Employer failed to prove elements one, two, and five, any one of which would suffice to preclude a defense of Independent Employee Action.

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

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*)

Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (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 or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

Employer violated section 3314, subdivision (c), for failing to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation. The hazard created by the violation is that the machine operator failed to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation, thus subjecting himself to the hazard of uncontrolled energy. In this case the operator’s finger was pulled in to the moving parts of the machinery while in operation. Employee Martinez sustained a partial finger amputation, which included bone loss. Subdivision (e)(2) of section 6432 provides that the “loss of any member of the body” falls within the meaning of serious physical harm. Appeals Board decisions have recognized that partial amputation of a fingertip constitutes a serious injury. (*Southern California Edison*, Cal/OSHA App. 06-2062, Denial of Petition for Reconsideration (June 20, 2008); *Brydenscot Metal Products*, Cal/OSHA App.

03-3554, Decision [15] After Reconsideration (Nov. 2, 2007); *Ferro Union, Inc.*, Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000).⁹ As such, the amputation injury sustained by Martinez meets the definition of serious physical harm pursuant to Labor Code section 6432, subdivision (e).

Associate Safety Engineer Ronald Chun testified that the die plate and die punch created a shear hazard and a cutting/crushing hazard where, if an employee were to get his finger in the die punch area while the machine was running, he could sustain an amputation or crush injury. Martinez sustained serious physical harm as a result of exposure to these types of hazards.

The realistic possibility of a serious physical harm, combined with the existence of the actual hazard caused by the failure to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

4. Did Employer rebut the presumption of a Serious violation by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violation?

Employer appealed the Serious classification of the violation.

Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

Failure to exercise supervision adequate to ensure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if

⁹ Section 330, subdivision (h), defines “loss of any member of the body” as a “serious injury.” Labor Code section 6432, subdivision (e) now characterizes the “loss of any member of the body” as “serious physical harm.”

exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986), pp. 4-5.). A hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (See *Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration (July 30, 1987); and *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, Decision After Reconsideration (July 19, 1994).)

Employer failed to establish that it did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Here, Employer failed to establish that there was adequate supervision on the production floor. The practice of not stopping and the de-energizing of the blanker machines during paper unjamming operation, according to Martinez, is a commonplace occurrence. Reasonable diligence on the part of management would have included being aware of the practices being taught to its machine operators by training staff. As previously indicated, Martinez was trained to not power down the blanker machine during paper unjamming operations. Employer failed to exercise the necessary oversight required when addressing the control of hazardous energy. In the instant matter, the violation was committed in plain view. The exercise of reasonable diligence by Employer would have included periodic safety inspections which would have revealed the deficiencies in Employer's safety program specific to hazardous energy, especially those occurring in plain view. As such, Employer failed to rebut the presumption that the violation was properly classified as Serious.

5. Was there a causal connection between the violation and the occurrence of employee Martinez's serious injury?

In order for a citation to be classified as accident related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury". (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) (writ denied, Dec. 5, 2014, 4th Dist. Ct of App.) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).)

The record supports a finding that Employer failed to ensure that an employee stop and de-energize the power source of a cup blanker machine prior to an unjamming operation. The record also supports a finding that if the injured employee had stopped and de-energized the blanker machine prior to performing an unjamming operation he would not have sustained a partial finger amputation. The Division has met its burden to demonstrate the causal nexus between the violation of section 3314, subdivision (c), and the serious injury sustained by Martinez. As such, the Accident-related characterization of the Serious violation is sustained. Employer also appealed contesting the

reasonableness of the abatement requirements. Employer presented no evidence to support such a claim. It is found that requiring an Employer to abate a practice which can, and in fact did, result in an amputation to be reasonable.

6. Was the proposed penalty reasonable?

The proposed penalty for the violation was set at \$18,000. Where a serious violation causes a serious injury, the only penalty reduction allowable is for size. (Lab. Code § 6319, subd. (d); §336, subd. (c)(3); *Dennis J. Amoroso Construction Co., Inc.*, Cal/OSHA App. 98-4256, Decision After Reconsideration (Dec. 20, 2001).) Here, a serious violation caused a serious injury and Employer had over 100 employees. Hence, no reduction is available for size. Therefore, the \$18,000 proposed penalty was properly calculated and is found reasonable.

Conclusions

In Citation 2, the evidence supports a finding that Employer violated section 3314, subdivision (c), by failing to stop and de-energize the power source of a cup blanker machine prior to an unjamming operation. Employer failed to present sufficient evidence to establish the Independent Employee Action Defense. The Division established the causal nexus between the violation of section 3314, subdivision (c), and the serious physical harm sustained by the injured employee. The assessed penalty is reasonable and correctly calculated.

ORDER

It is hereby ordered that Citation 2 is upheld and the associated penalty of \$18,000 is sustained as indicated above and as set forth in the attached Summary Table.

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

Dated: August 21, 2015

KR:kav

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 15-R2D5-0315 and 0316

Date of Hearing: June 2, 2015

Division's Exhibits

Exh. No.	<u>Exhibit Description</u>	
1	Jurisdictional documents	ADMITTED
2	Photo of cup blanker machine	ADMITTED
3	Photo of die cutting area of cup blanker machine with tension blocker missing	ADMITTED
4	Close-up photo of die cutting area with piece of paper shown on lower right side	ADMITTED
5	Copy of Cal/OSHA "Notice of Intent to Classify Citation as Serious"	ADMITTED
6	Cal /OSHA 10 Proposed Penalty Worksheet	ADMITTED

Employer's Exhibits

A	Photo of cup blanker machine	ADMITTED
B	"Employee Not Authorized Acknowledgement IES/ZES"	ADMITTED
C	Cup blanker machine lockout producers	ADMITTED
D	"Blanker Operator Week 1 Practical Application"	ADMITTED
E	"Operating Systems Work Instruction Blanker – Handling Blanks"	ADMITTED
F	"Operating Systems Work Instruction Blanker - Location of Pinch Points"	ADMITTED
G	"Blanker Operator Week 2 Practical Application"	ADMITTED
H	"Blanker Operator Week 3 Practical Application"	ADMITTED
I	"OSHA Blanker Investigation Review Blanker #5 Oscar Robles 08/26/14"	ADMITTED
J	Cal/OSHA Worksheet	ADMITTED
K	Close-up photo of cup blanks on blanker machine	ADMITTED

Witnesses Testifying at Hearing

Alex Martinez
Ronald Chun
Varun Madnani

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

