

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

STANISLAUS FOOD PRODUCTS COMPANY
P. O. Box 3951
Modesto, CA 95352

Employer

DOCKETS 13-R2D4-572
through 574

DECISION

Statement of the Case

Stanislaus Food Products Company (“Employer”) is a food processing company. Beginning on September 18, 2012, the Division of Occupational Safety and Health (“the Division”) through Associate Safety Engineer Robert Pike, conducted an injury investigation at 1202 D Street, in Modesto California, where employer operated a tomato-processing facility. On February 14, 2013, the Division cited Employer for three violations of the occupational safety and health standards found in Title 8, California Code of Regulations¹: Citation 1 alleged that Employer failed to provide locks and hardware to a sanitation crew leader, as required for cleaning operations, in violation of section 3314(e); the alleged violation was classified as general. Citation 2 alleged that Employer failed to ensure that the crossover-conveyor was de-energized and locked out prior to sanitation and cleaning activities, in violation of section 3314(c). Citation 3 alleged that Employer failed to guard the head pulley of the crossover conveyor, as required by section 3999(b). Citations 2 and 3 were classified as “serious.”

The Employer filed timely appeals of all citations, contesting the existence of each alleged violation, and, for Citations 2 and 3, their classifications. At the outset of the hearing, Employer stipulated that the penalties proposed by the Division were calculated correctly, in compliance with the applicable regulations and Division policies and procedures.

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

The matter was heard on November 19, 2013 in Stockton, California before Martin Fassler, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). The Division was represented by Division District Manager John Caynak. Employer was represented by attorney Ron Medeiros of the Robert D. Peterson Law Corporation. Each party presented testimony, the Division presented documentary evidence, and the parties presented oral argument after the presentation of evidence. The matter was submitted for decision at the close of the hearing. The submission date was later extended by the Administrative Judge, at his own initiative, to December 31, 2014.

Issues

1. By storing locks in the sanitation department supply area, did the Employer satisfy its obligation to “provide . . . padlocks . . . or other similarly effective means which may be required for cleaning, servicing, adjusting, repair work or setting up operations” as required by section 3314(c)?
2. Did Employer engage in cleaning of conveyor belts while the belts were moving/operating on September 9, 2012?
3. Did Employer provide its employees with extension tools or comparable alternative methods to be used while cleaning the moving conveyor belts on September 9, 2012?
4. Did Employer provide to its employees adequate training with respect to the use of extension tools or comparable alternative methods for the cleaning of conveyor belts while they were moving on September 9, 2012?
5. Was the “serious” classification of Citation 2 supported by the circumstances?
6. Was the nip point between the moving conveyor belt and the adjacent pulley guarded, by either a guard cover, similar object or by location?
7. Was the “serious” classification supported by the circumstances?

Findings of Fact

1. Employer did not provide locks to Hernandez in the area where the locks would be used, and at a time before they would be needed.
2. Employer was engaged in the cleaning of moving conveyor belts on September 9, 2012.
3. The conveyor belts needed to be moving while the cleaning was taking place on September 9, 2012, to assure that all portions of the belt were cleaned.
4. Employer did not provide to Hernandez extension tools to be used with the scouring pads that were used in cleaning or other

comparable alternative methods of cleaning the moving conveyor belts and did not provide thorough training for other methods or extension tools.

5. There was a realistic possibility of serious physical harm arising from the hazard created by the violation identified in Citation 2.
6. The nip point between the moving conveyor belt and the adjacent pulley, the point at which Hernandez suffered his injury, was not guarded by a guard or similar object or by location.
7. There was a realistic possibility of serious physical harm arising from the hazard created by the violation identified in Citation 3.

Decision

Employer failed to provide locks to employees at the location where they might be needed and prior to the time they might be needed, and thereby violated section 3314(e) as alleged in citation 1.

Section 3314(e), the safety order relied on by Citation 1, provides, in relevant part:

(e) Materials and Hardware. The employer shall provide accident prevention signs, tags, padlocks, seals or other similarly effective means which may be required for cleaning, servicing, adjusting, repair work or setting up operations . . .

This safety order is an element of section 3314. Paragraph 3314(a) states that the 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.”

The Citation 1 allegation was:

On or about September 9, 2012, Employer failed to provide locks and hardware to a sanitation crew leader, required for cleaning operations.

The dispute in this appeal concerns the meaning of the phrase “provide . . . padlocks” in the safety order.

Neither section 3314, nor section 3207 (which has numerous definitions applicable to general industry safety orders) defines “provide.”²

² Under established rules of statutory construction, which are applied by the Appeals Board in construing safety orders, in the absence of a special definition of a word, the ordinary meaning

There appear to be no decision by the Appeals Board construing this requirement to “provide . . . padlocks” in section 3314(c).

Other title 8 safety orders require employers to “provide” protective or safety equipment to employees. By deciding appeals in which the meaning of those safety orders is considered, the Appeals Board has explained the meaning of “provide” in the workplace safety context. In *R. E. Williams & Sons Inc.* Cal/OSHA App. 76-1065, Decision After Reconsideration (May 10, 1977),³ the Appeals Board upheld a citation of an employer for a failure to provide a ladder to workers using a scaffold, in violation of section 1637(l). That section stated:

A safe and unobstructed means of access, such as a walkway, stair, or ladder shall be provided to all scaffold platforms.

In *R. E. Williams* the employer brought a portable ladder to the work site, but the ladder was in a basement at the time of the Division’s inspection, and was not set up to provide access to the scaffold platform. Instead, an employee was observed climbing up and down a scaffold by using the framework and braces, rather than a portable ladder. The Board held:

The fact that a ladder had been provided at the job site does not satisfy the requirements of . . . [section] 1637(l) when, as in this case, such ladder is not in place to provide safe and unobstructed means of access.

In *Ritter Plastering Inc.*, Cal/OSHA App. 91-041, DAR (Feb. 11, 1992), the Board sustained a citation to an employer who had provided a ladder for access to a scaffold on the east side of a building, but had not provided a ladder to a scaffold on the north side of the building, and employees working on that north side were unaware of the ladder in place on the east side. The Board sustained the citation for a violation of section 1637(n)(1), with this analysis:

Here the ladder was not resting in a basement but was attached to the scaffold along the east side of the building wall and did provide direct access to many of the scaffold platforms. However, Employer’s supervisor, the injured employee and a co-worker all testified that employer did require employees to utilize

of the word will apply. Typical dictionary definitions of “provide” define the word as meaning “to furnish, supply, or equip.” For the purpose of this definition, more specific guidance is needed.

³ Later references in this decision to Decisions After Reconsideration will use the acronym “DAR.”

the ladder as a means of accessing work platforms on the north side of the building. The employees did not even know the ladder was there . . . Employer disregarded the ladder as a means of access, and expected employees to use other means. Therefore, the Board finds the ladder on the east wall did not provide a safe and unobstructed means of success to the scaffold within the meaning of section 1637(n)(1).

In *Emerald Produce Co., Inc.* Cal/OSHA App. 96-2679, DAR (May 4, 1999), the Board considered the appeal of a citation of an employer for a failure to provide potable water and single-use drinking cups for a group of agricultural employees, in violation of §3457(c)(1)(C). The Division investigator had observed at the work site a 15-gallon water jug, and the absence of single-use cups. The field foreman's only source of cups was a supervisor who was absent from the site. The employer-owner testified that supplies are left with second level supervisors to distribute to foreman as needed. In these circumstances, the Board upheld the citation writing:

The Board holds that when single-use cups are missing at the point of employee use, a failure to provide a facility required by section 3457 has been established . . . In this case, since no cups were provided at the point of employee use, the \$750 minimum civil penalty applies.⁴

These decisions establish the proper approach for construing a safety order that requires an employer to "provide" safety equipment or supplies to employees. To comply, the employer must make the required supplies and equipment available to employees at the point of employee use, and the supplies/equipment must be available prior to the time of their use, so that employees may use them when they are needed.

The citations at issue in this case grew out of an inspection of a tomato cannery/warehouse operated by Employer. The plant includes a number of conveyor belts; the belts involved here carry tomatoes that rest directly on the belt (are not in containers of any kind).

⁴ The Board's decision cited here was the second DAR in the matter. In the initial DAR (June 25, 1998), the Board had held that when single-use cups are missing at the point of employee use, a rebuttable presumption arises that a failure to provide a facility required by section 3457 has been established. But, the Board held, an employer may rebut that presumption by showing that the absence was a temporary breakdown in its maintenance efforts, if it can show it made a reasonably diligent effort to check and replenish supplies. That view was challenged in a petition to the Superior Court for a writ of mandate. The Court granted the petition and issued a writ and returned the case to the Board for further analysis. In the post-writ DAR, the Board abandoned the approach that would find the absence of the required material established only a rebuttable presumption of a violation.

The processing season lasts three months each year, with the plant generally running seven days a week, 24 hours a day. Each day, all processing, including the conveyor movement of tomatoes, is halted for approximately 90 minutes, to allow for the cleaning of equipment. During that time, the conveyor belts, although not carrying tomatoes, are in operation, to allow all portions of the belt to be exposed and cleaned. The cleaning process generally involves the use of high power water-spray hoses and nozzles, and, at times, the application of a chemical cleaning agent, referred to as O-130.

In addition, once every third week, the plant shuts down for 24 hours for a thorough cleaning of all equipment. For a portion of that time, Employer halts the movement of the conveyor belts, and the belts involved here are locked, to prevent movement.

The incident that led to the inspection took place on September 9, 2012, during the 90-minute clean up period.

Pedro Hernandez (Hernandez) has worked for Employer during the processing seasons for approximately 20 years, all of that time in the sanitation department. He had been a crew leader for at least six years prior to the 2012 incident. Hernandez testified that during the 2010 processing season, Employer gave him, as crew leader, locks to be used to lock out the conveyor belts when that was needed. In 2011 and 2012 Employer did not give locks to him. In the 2013 processing season, Employer again gave locks to Hernandez.

Employer maintains a supply closet within the sanitation department building. Salvador Fernandez (Fernandez), who has worked as Employer's sanitation department supervisor for 29 years, testified that the supply closet is open and contains all supplies that are needed by any of the cleaning crews, including locks for the machinery. Any crew leader - including Hernandez - is authorized to take from that supply closet any supplies that are needed, including locks; the crew leader is not required to obtain permission from Fernandez to take such supplies. All the sanitation department workers are familiar with the building, because the workers frequently take their lunch periods and other breaks there. The sanitation department building is about 250 feet away from the conveyor belt that was the site of the incidents that lead to the issuance of the citations.

When crew foremen obtain locks and keys from Employer or from the supply closet, they may be kept, prior to use, with the foreman or in a locker near the conveyor belt or belts. There are several points on the metal frame of the conveyor belts that are the subject of the pending citations, where locks may be attached, to prevent movement of the belts. Fernandez identified these points in his testimony.

In light of the Appeals Board precedent cited above, it is found that Employer in these circumstances did not “provide” to its crew leader Hernandez locks that might be needed during the cleaning of conveyor belts. During the 2012 season Employer did not distribute locks to Hernandez as crew leader; Hernandez’ testimony on this point is credited. Although locks were available to Hernandez and to other crew leaders in a supply room, they were not available to Hernandez (or other employees) at the point of employee use, prior to the daily 90-minute clean-up period. Although Employer expected the conveyor belts to be moving during the 90-minute clean-up periods, there were occasions on which employees were required to work close to the moving belts, and on these occasions, Employer expected the belts would be stopped and locked.⁵ In addition, during the 24-hour cleaning periods, there were occasions on which the belts were locked.

There was no evidence that Employer required crew leaders or other employees to obtain the locks at a time prior to the time when they might be needed, or that Employer made any effort to survey crew leaders or work locations to determine if locks had been obtained and placed in convenient positions at any time.

It is found that Employer violated section 3314(e) by its failure to “provide” locks to employees in connection with the work of cleaning moving conveyor belts.

The conveyor belt was moving while it was being cleaned on September 9, 2012. The conveyor belt had to be moving while it was being cleaned, to allow thorough cleaning. Employer did not provide suitable extension tools to Hernandez, or thorough training in how to use the tools he had while cleaning the moving conveyor belts.

The factual allegations of Citation 2 are:

On or about September 9, 2012, Employer failed to ensure that the cross-over conveyor was de-energized and locked out prior to sanitization and cleaning activities.

The citation alleges a violation of section 3314(c), which provides, in relevant part:

(c) Cleaning, Servicing and Adjusting Operations.

⁵ Fernandez testified to Employer’s preferred procedure stopping and locking of the belts when an employee needed work within the area enclosed by the belts and the conveyor frame, and thus work fairly close to the belts themselves. The best view of the area is in Exhibit 3.

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.

Section 3314(c) imposes a series of requirements when an employee engages in cleaning, adjusting, or servicing an operating machine: the employer is required to stop the machine, de-energize it, and mechanically block or lock out the machine to prevent inadvertent movement.

Section 3314(c)(1) recognizes that there are circumstances in which machinery must be moving for the employer to carry out cleaning, adjusting or servicing operations, and in those circumstances, an employer is required to take other steps to assure the safety of its employees:

If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

If an employer has complied with the requirements of section 3314(c)(1), in a situation in which machinery or equipment must be capable of movement while it is being cleaned, serviced or adjusted, the employer establishes a defense to an allegation of a violation of section 3314(c). An employer who relies on this provision in defending itself against a citation for violation of section 3314(c), must prove three things: (1) the machinery must be capable of movement during the period of cleaning etc., to allow the employer to perform the specific task; (2) the employer must have minimized the hazard created by the operating machinery by providing and requiring the use of extension tools or other methods or means to protect employees from injury due to such movement; and (3) the employer provided to its employees thorough training in the safe use and maintenance of such tools and methods.

Board decisions construing section 3314(c)(1) have required employers to satisfy both the second and third requirements to prevail with this defense. In *Thyssenkrupp Elevator Corporation* Cal/OSHA App. 11-2217, DAR (Mar. 11, 2013), the Board affirmed a citation for a violation of section 3314(c)(1).

The Board held that the employer had not established either. The Board noted:

If a machine must be in operation for the work to be done, additional tools or “other methods or means to protect employees from injury” must be provided. (§ 3314(c)(1)). No tools were provided. The evidence does not provide sufficient detail about Employer’s training of its escalator servicing personnel to conclude that such training amounted to “other method or means to protect employees from injury Accordingly, we affirm the violation and penalty proposed in the citation.

Similarly, in *MK Auto Inc.* Cal/OSHA App. 12-2893. DAR (Jul 23, 2014), the Board upheld a citation for violation of section 3314(c), rejecting an employer’s argument that it had complied with section 3314(c)(1). The record supported a conclusion that the employer (an auto repair shop) had not required the use of extension tools or other devices, as required by section 3314(c)(1). In addition, although the injured employee was a trained mechanic, there was no evidence that the employer had trained him on the use of extension tools or other methods or means to minimize the hazards of working on the operating motor. Therefore, the Board held, “since the conditions of the exception in section 3314(c)(1) were not met, the section does not provide a defense.”

In this case, the incident referred to in Citation 2 involved an operation that satisfied the first condition of section 3314(c)(1) – that is, the work required the conveyor belts to be operating for the cleaning to take place, to assure that all segments of the belts were cleaned. The incident took place during the daily cleaning of conveyor belts on September 9, 2012.⁶ A series of conveyor belts - seen in exhibits 3, 4, 5 and 6 - were in operation, and were being cleaned by Hernandez (and perhaps by others cleaners).⁷ If Employer can establish that it satisfied the other conditions specified by section 3314(c)(1), Employer would have a valid defense to the citation.

The evidence establishes, however, that Employer did not require its employees to use extension tools during the cleaning operation, and Employer did not provide adequate training for its employees in this respect.

⁶ The photographs were taken by Pike during his investigation which began on September 18, nine days after the injury accident. Although tomatoes are seen in the photographs, the belts were not carrying tomatoes at the time of the incident.

⁷ There were several references during testimony to cleaning crews, but there was no testimony about whether other crew members were working with Hernandez at the time of the incident.

Employer provided to its sanitation crews at least four pieces of equipment for the cleaning of conveyor belts: a hose for the spraying of water at high pressure; a device for the spraying of a cleaning material, identified as O-130; small green scouring pads; and long-handled brushes, with 60-inch long handles and 12-inch long brushes.⁸ The basic or essential cleaning method was the spraying of water at high pressure.

The scouring pads are used, Fernandez testified, to remove food debris or grease that is not removed by use of the sprayed water and the O-130 cleaning material. To use the pad, a double dose of the O-130 is applied to a grease spot and then a worker rubs the scouring pad on the material to remove it. There was no evidence to suggest that an extension tool was provided for use with the scouring pads. The description of the pads' use – direct rubbing of spots not earlier removed by other means – indicates that this procedure was carried out by employees working in close proximity to the spot to be removed, and that extension tools were not used for this procedure.

Fernandez testified that Employer instructs its sanitation crews to use the long-handled brushes to clean areas which they should not get close to, areas in which they might get hurt. But, Fernandez stated, sanitation crews do not use long-handled brushes when the conveyors are running, as the belts were at the time of the incident.⁹

At the time of the incident that led to the citation, Hernandez was kneeling or bending within the “U”-shaped area most easily seen in Exhibit 3; the long arms of the “U” are formed by a long straight conveyor on one side, and an elevator conveyor on the other. Fernandez found Hernandez in this position when he arrived at the accident scene, a few minutes after the accident occurred. A shorter conveyor, perpendicular to the first two, forms the short base of the “U.” Hernandez was holding the green scouring pad in his right hand. As he reached to clean some material from a point on the belt near one of the belt pulleys, the green scouring pad was caught between

⁸ Fernandez referred to “scouring pads” and at times referred to “Scotch” pads. Hernandez, who testified through an interpreter, referred to “sponges.” I credit Fernandez’s description of the objects as scouring pads.

⁹ The high-powered hoses, which are used to clean the conveyor belts as they are running, might be considered to be “extension tools,” but they are not depicted in any exhibit. Fernandez testified that the hoses are 75 to 100 feet long, but there was no testimony about the length of the nozzles used. Fernandez testified that workers using these hoses stand a “long distance” from the conveyors, but provided no specifics. Therefore, there is insufficient evidence to support a finding that they are extension tools for the purpose of section 3314(c)(1).

the moving belt and a “roller” or pulley; his hand was then pulled into the area between them and was seriously injured. Hernandez marked on Exhibit 3 the point at which his hand was caught between the belt and the pulley (also called a “roller”). Hernandez confirmed the location of the injury accident.

There is no evidence that Hernandez (or other employees) were trained on the safe use of the scouring pads. Hernandez testified that he had not been trained on use of the scouring pads. Nor was there testimony about employee training on the safe use of long-handled brushes (although Hernandez testified that Employer did not want them used while the belts were running). Exhibit 7 consists of five pages, each with information about training that Employer provided to Hernandez. A “Supervisor Training Agenda” for July 6, 2012 lists nine training subjects, none of which appear to have anything to do with the use of scouring pads or extension tools. A one-page typed memorandum, with a handwritten date of August 19, 2012, proposed “general sanitation personnel additional sanitation training” to be provided on August 20, 2012. The writers of the memorandum – who are identified as “JG” and “SF” (presumably Hernandez) – state that the training “will last no more than 20 minutes.” Hernandez testified that he was not certain if any training other than the August 20 training was offered in 2012; he testified that “HR” (Employer’s Human Resources office), rather than he, keeps track of the training Employer provides for its employees.¹⁰

Fernandez was the only witness called by Employer. The documents within Exhibit 7 (placed in evidence by the Division) show that Employer gave some training to Hernandez, but neither the documents nor Hernandez offered any details about the extent or nature of training provided to Hernandez or other sanitation crew workers about safety precautions for those working near operating machinery.

Employer has failed to introduce evidence that it provided to Hernandez any extension tools to be used during the daily cleaning, which took place with the conveyor belts running, and it failed to prove that it provided training to Hernandez in how to use either the long-handled brushes or the scouring pads during the daily cleaning.

¹⁰ The first page of Exhibit 7 is a chart listing numerous employee names and approximately 45 training topics and dates, from March 2010 until August 2012. The chart indicates Hernandez received training in five subject areas in 2012. One of these was “respiratory training” and two appear to be supervisor training. The August 19, 2012 session was called “shutdown training” but there is no evidence as to what was included in that session. The last page of Exhibit 7 is a list of materials included in a packet given to hourly employees in 2011. Item 8 was “Description of General Job Safety” but there was no evidence of what was included in that document.

As Employer was conducting a conveyor belt cleaning operation while the conveyor belts were running, and as Employer failed to prove that it complied with section 3314(c)(1), it does not have a valid defense to the allegation of a violation of section 3314(c). Therefore, citation 2 will be upheld.

There is sufficient evidence to support a finding that there was “a realistic possibility that death or serious physical harm” would result from the actual hazard created by the violation.

Labor Code section 6432 provides that to support a “serious” classification for a violation, the Division must first:

Demonstrate 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 . . .

(2) the existence in the place of employment of one or more unsafe . . . practices, means, methods of operations or processes that have been adopted or are in use.

If the Division presents such evidence, there is a rebuttable presumption that a “serious” violation exists in that place of employment.

In two recent Decisions After Reconsideration that considered whether the evidence provided support for a “serious” classification, the Board focused on the “actual hazard” created by the violation in the specific circumstances of the case before it. In *B & B Roof Preparation Inc.*, Cal/OSHA App. 12-2946, DAR (Oct. 6, 2014), the Board considered the possibility of a fall through the skylight at issue, a lab test of the strength of the material used in the construction of that skylight, and the deterioration of the skylight material since its installation. In *Kelly Global Logistics*, Cal/OSHA App. 12-0014, DAR (Sep. 4, 2014), the Board focused on the failure to train an employee in proper operation of the pallet jack that he had used, and the possible hazards associated with improper operation of the pallet jack in the specific setting (e.g. heavy materials falling on an employee from the pallet jack, or the pallet jack running over the operator’s foot).

The proper examination then, is whether there is sufficient evidence that there was a practice, means or method of operation, or process adopted or in use in the work place that amounted to a violation, and which created a realistic possibility of a serious injury occurring as a result.

Here, the “practice” or “method of operation . . . adopted or in use” in the work place was the use of a scouring pad to remove debris, dirt or other unwanted material from a point on the conveyor belt near a rotating holding pulley, while the conveyor belt was moving.

Fernandez testified that Employer’s policy is that whenever a sanitation crew worker needs to work in the central “U”-shaped area, the conveyor belts must be stopped and locked out. Hernandez testified that he had not been specifically instructed to sanitize the area of the conveyor belt that he was reaching toward at the time of the accident, but he testified the area in which he was working was his normal work area, and “I always keep it clean.” Cleaning the belt and the general area was part of his job, he testified, and he had been doing that job for 16 years. Hernandez, who testified after Hernandez completed his testimony, did not dispute this aspect of Hernandez’s testimony, although he testified to Employer’s general policy, which would not permit Hernandez’s action. Hernandez testified that when he arrived at the accident scene shortly after the accident, Hernandez was within that area, with his hand still held between the belt and a pulley.

The evidence summarized above is sufficient to establish that the practice of standing within the conveyor belt frames and using a scouring pad to clean the conveyor belt while it was moving was a practice that had been in use or had been adopted at the time of the injury accident.

Was there a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation of cleaning the conveyor belt while it was moving?

In fact, Hernandez suffered a serious injury as a result of cleaning the belt while it was moving.¹¹ That injury occurred as a result of an accident of the kind that the safety regulation is designed to prevent – that is, by a hand being pulled into a pinch point within an operating machine. The occurrence of the injury and the manner in which it occurred is evidence sufficient to prove that serious physical harm was a realistically possible result of the existence of the hazard. Therefore, the Division has established a rebuttable presumption to support a “serious” classification.

Labor Code section 6432(c) provides that if the Division establishes a presumption that a violation is serious,

[T]he 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,

¹¹ Employer stipulated that Mr. Hernandez suffered a serious injury within the meaning of Labor Code section 6432 and the applicable regulations.

have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(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 . . .

Here, Hernandez' immediate supervisor Fernandez testified, but presented no evidence on these points, and Employer presented no other relevant evidence – e.g. no evidence of specific instructions or precautions during training sessions, no evidence of warning signs appropriately placed. Although the length of time that Hernandez was standing in the midst of the conveyor belts is unknown, and may have been brief, it is inferred from his testimony that he had taken similar actions previously. The place at which he stood and worked was not hidden from view.

There is insufficient evidence to rebut the presumption that the Division established in support of the “serious” classification. Therefore, the classification is upheld.

Citation 3 provided Employer with adequate notice of the factual allegation that was the basis of the citation. The pulley adjacent to the conveyor belt was not adequately guarded.

Citation 3 alleges a violation of section 3999(b). That section provides:

Belt conveyor head pulleys, tail pulleys, single tension pulleys, dip take-up pulleys, chain conveyor head drums. . . shall be guarded. The guard shall be such that a person cannot reach behind it and become caught in the nip point between the belt, chain, drum, pulley or sprocket.

Section 3941 includes a number of definitions applicable to section 3999 and other safety orders that concern the guarding of machines. Among the definitions are these:

Guarded. 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.

“Guarded by location” is also defined by section 3941:

Guarded by Location. 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.

The phrase “accidental contact,” which appears in both the definitions cited above, is also defined in section 3941, to mean:

Inadvertent contact with . . . prime movers, machines or machine parts which result from skipping, falling, sliding, tripping or any other unplanned action or movement.

Does the “guarding” requirement of section 3999(b) permit “guarding by location,” as distinct from use of a cover or other similar physical object that would guard machinery and thereby prevent contact with a pinch point?

In *All American Asphalt*, Cal/OSHA App. 09-3871, DAR (Jan. 11, 2011), the Appeals Board assumed, for purposes of argument, that the concept of “guarded by location” applied to the guarding requirement in section 3999(b), although that phrase does not appear in the section. Similarly, in *Kaiser Steel Corporation*, Cal/OSHA 78-114, DAR (Jun 16, 1983), the Board assumed (implicitly) that the “guarded by location” concept could be applied to the guarding requirement in section 4050(a), although the phrase does not appear in that section. This decision will follow the approach used in those two cases, and consider whether either form of guarding existed in this instance: that is, whether the nip point at issue was guarded by either a physical guard, or was “guarded by location.”

The citation described the violation with sufficient particularity to satisfy Labor Code section 6317.

Citation 3 alleged: “On or about September 9, 2012, Employer failed to guard the head pulley of the crossover conveyor, resulting in a sanitation crew leader to [sic] become caught in the nip point.”

Labor Code section 6317 states that “Each citation [issued by the Division] shall be in writing and shall describe with particularity, the nature of the violation, including a reference to the provision of the code, standard, rule, regulation or order alleged to have been violated.”

The Board has repeatedly held that “As long as an employer is informed of the substance of a violation and the citation is sufficiently clear to give fair notice to enable it to prepare a defense, the employer cannot complain of technical flaws.” *Gaehwiler Construction Co.*, Cal/OSHA App. 78-651 DAR (Jan. 7, 1985), citing *Certified Grocers of California Ltd.* Cal/OSHA App. 78-607, DAR (Oct. 27, 1982).

In *Certified Grocers*, the citation alleged that “Tug 8741 was observed in operation with a mounted driver and rider although no riding facility was provided,” and alleged a violation of section 3669(a)(4). Section 3669(a) provided: “Every employer using industrial trucks or industrial tow tractors shall post and enforce a set of operating rules including the appropriate rules listed below.” Paragraph (4) provided: “No riders shall be permitted on vehicles unless provided with adequate riding facilities.” Thus, the section could be read to refer to the posting of rules, rather than the actual actions. The Board rejected the employer’s contention that the citation failed to allege the violation with sufficient particularity. The Board noted that: (1) the employer’s representative was present when the Division investigator observed the violation; and (2) the Division representatives held a closing conference with employer representatives in which the Division representative reviewed the citation with them. In these circumstances, “Employer had fair notice that it failed to enforce the rule that prohibited riders on vehicles without adequate riding facilities.”¹²

The evidence presented during the hearing indicates that the pulley at issue was not the “head pulley.” Pike identified it as the “tension” or “take up pulley.” Fernandez identified it as the “holding pulley.” The Division representative acknowledged in his closing remarks that the pulley in which Hernandez’s hand became entangled was not the head pulley – he identified it instead as the “idler” pulley.

Despite these varying names attached to the pulley, Employer had adequate notice both before and during the hearing of the specific regulation section alleged to have been violated, of the factual allegations at issue, of the incident that led to the citation, and of the precise location of the injury accident. Investigator Pike testified that Employer safety manager George Speller accompanied Pike on his September 18 inspection of Employer’s facility after the accident. Speller pointed out to Pike the specific location of the injury accident, which had occurred nine days earlier. During the hearing, Hernandez, using a photograph taken by Pike which had been received as an exhibit, identified the pinch point at which the accident occurred- a nip point between the conveyor belt and a pulley. Hernandez testified that Employer mechanics loosened the mechanism with which he was entangled, so that his hand could be removed. Employer’s sanitation supervisor Fernandez testified that he was called to the accident location shortly after it occurred, and observed that Hernandez’s hand was entangled with a pulley. He, too, identified the location of the injury accident. In these circumstances, Employer had adequate notice of the factual allegation underlying the citation. Under the Appeals Board precedent cited above,

¹² See also *Machinery Trade Center*, Cal/OSHA App. 00-3244, DAR (Jun 3, 2002), in which the citation referred to an employee’s “cleaning” of a machine, and alleged a violation of section 3314(a). The Board held that the actions of the employee at the relevant times could have been viewed as “servicing”, but upheld the citation nevertheless.

Employer was adequately “informed of the substance of a violation and the citation is sufficiently clear to give fair notice to enable it to prepare a defense.”

The nip point was not guarded by a guard, enclosure or cover.

Section 3941 defines “guarded” as “shielded, fenced, enclosed or otherwise protected . . . by means of suitable enclosure guards, covers . . . or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact.” A guard may take various forms, as various DAR’s have recognized.

When the definition of “accidental contact” is inserted into the definition of “guarded,” the definition becomes:

Shielded, fenced, enclosed or otherwise protected . . . by means of suitable enclosure guards . . . or by the nature of the location where permitted in these orders, so as to remove the hazard of inadvertent contact with . . . prime movers, machines or machine parts which result from skipping, falling, sliding, tripping or any other unplanned action or movement.

In deciding cases in which the meaning of “guarded by location” must be analyzed, the Board takes into consideration the series of different positions in which an employee might be found while working near machinery.

In *EZ-Mix*, Cal/OSHA App. 08-1898, DAR (Nov. 26, 2014), the employee normally assigned to clean a machine had to “crawl or duck” under the bars of an inclined conveyor to get into a position where he could reach a moving belt to clean it. Once underneath, he would have to extend his reach a couple of inches over his head and use a spatula to clean the belt. In these circumstances, the Board held, the pinch point was not guarded by location, although it was clear that an employee would have to take specific actions to place himself in a position to make contact with the moving machinery. Similarly, in *C.A. Rasmussen*, Cal/OSHA App. 08-0219, DAR (Jul 9, 2012) the moving fan blades could be reached by a worker only if he climbed up on a wheel, then climbed into the machine, and then reached in to it; he had to reach in to it to perform his repair work. The moving parts were remote from floor level, alongside the machine, but were not remote from the working level of the worker assigned to replace parts of the machinery. The Board held that the moving machinery was not guarded by location.

Thus, a hazardous point of machinery is not “guarded by location,” if it is easily reachable by a worker performing some aspect of his work, even if that

point is not within the reach or access of an employee standing next to the machinery, or performing other aspects of his work.¹³

It is apparent from an examination of Exhibit 4 that between the nip point formed by the pulley roller and the moving belt, and the point at which Hernandez was kneeling or bending when he reached forward to wipe some material from the belt, there is no barrier that would prevent “inadvertent contact” with the moving belt that might “result from . . . falling, sliding, tripping or any other unplanned action or movement.” There is a metal bracket that extends out from the conveyor frame at a height of 12 to 15 inches above the floor. But between that bracket, and the moving belt above it, there is an open space that appears to be 15 to 20 inches high. Considerable tomato debris is visible on the floor in that area. It is apparent that falling, sliding and tripping are all possible, because of that debris. An employee reaching out to break a fall or to balance himself; or an employee who loses his balance unexpectedly in that area, might make inadvertent contact with the moving belt at the pinch point. In the event of a fall, slide or trip, the metal bracket could not be counted on to prevent such inadvertent contact.

Applying Board precedent here, it is found that the nip point between the moving conveyor belt and the pulley, the point at which Hernandez scouring pad and then hand were caught, is not guarded by location. It was a few feet above floor level, and it would have been easy for an employee’s hand or arm to make contact with it, as the result of falling, sliding, tripping or some other unplanned movement.

As the moving pulley was neither guarded by a guard or cover, nor guarded by location, Employer violated section 3999(b).

As to classification, the legal criteria have been set forth above, in connection with Citation 2. Labor Code section 6432 provides that to support a “serious” classification for a violation, the Division must first:

Demonstrate 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

¹³ A “guarded by location” claim may be rejected even if the moving part is not within the usual range of movement of an employees. In *Kaiser Steel Corporation*, Cal/OSHA App. 78-1194, DAR (Jun 18, 1983) the Board rejected an employer’s claim that machinery was guarded by location although it was well below the normal working level of the employee assigned to work with it. The Board credited the testimony of the Division investigator that an employee’s hair or clothing could become entangled in the revolving shaft if he were to bend, kneel or squat and reach under the table to retrieve a dropped tool or other object.

division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of . . .

(2) the existence in the place of employment of one or more unsafe . . . practices, means, methods of operations or processes that have been adopted or are in use.

If the Division presents such evidence, there is a rebuttable presumption that a “serious” violation exists in that place of employment.

The analysis for Citation 3 is very similar to that set forth above with respect to Citation 2. Hernandez’ testimony establishes that Employer had a practice of cleaning a portion of the moving conveyor belt from a position close enough to the moving belt to mean that the pulley was not “guarded.” Fernandez testified to the company’s stated preference, but Hernandez’ testimony about actual practice is credible, and there is no evidence of steps that Employer took to prevent the practice Hernandez described. As this was the practice, and it is acknowledged that Hernandez did indeed suffer a serious injury when his hand was caught in the nip point, the rebuttable presumption is thus established.

As noted above, there is insufficient evidence that Employer took “all the steps a reasonable employer in like circumstances” should be expected to take to prevent employees from working in area in which the pulley would be unguarded. Therefore, the “serious” classification is upheld.

CONCLUSIONS

Employer failed to provide locks to its employee Hernandez, who was assigned to clean the moving conveyor belt, within the meaning of “provide” in section 3314(e), as alleged in Citation 1.

Employer conducted a cleaning operation while a conveyor belt was running on September 9, 2012, as alleged in Citation 2, and did not establish that it had provided Hernandez with suitable extension tools or other methods, or appropriate training to use those other tools or methods. The evidence supports the serious classification for this citation.

Employer failed to adequately guard the nip point between the conveyor belt and the nearest pulley, as alleged in Citation 3. The evidence supports the “serious” classification for this citation.

ORDER

Citations 1, 2 and 3 are all upheld. Employer stipulated that the penalties for each citation were calculated in accordance with applicable regulations, and therefore the penalties are sustained.

Dated: January 30, 2015

MARTIN J. FASSLER
Administrative Law Judge

**APPENDIX A – STANISLAUS FOOD PRODUCTS COMPANY
DOCKET NO. 13-R2D4 – 572 THROUGH 574**

WITNESS LIST

Witnesses

1. ROBERT PIKE (called by the div. of Occupational Safety and Health)
2. Genaro Pinillos (Spanish interpreter- called by the Division)
3. PEDRO HERNANDEZ (called by the Division)
4. SALVADOR FERNANDEZ (called by EMPLOYER STANISLAUS Food Products)

EXHIBITS (all introduced by the Division)

1. Jurisdictional documents
2. Proposed penalty work sheet
3. Photograph- conveyor belts
4. Photograph
5. Photograph
6. Photograph
7. Training records

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
STANISLAUS FOOD PRODUCTS COMPANY
DOCKET NO. 13-R2D4-572 through 574

Abbreviation Key:

Reg=Regulatory W=Willful
 G=General R=Repeat
 S=Serious Er=Employer
 DOSH=Division

IMIS No. 314999616

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T I O N	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R2D4-572	1	1	3314(e)	G	Failure to provide locks and other hardware to sanitation crew leader, for cleaning operation	X		\$635	\$635	\$635
13-R2D4-573	2	1	3314(c)	S	Failure to ensure crossover conveyor was de-energized for cleaning activities	X		\$7,650	\$7,650	\$7,650
13-R2D4-574	3	1	3999(b)	S	Failure to guard head pulley of conveyor, resulting in serious injury	X		\$18,000	\$18,000	\$18,000
Sub-Total								\$26,285	\$26,285	\$26,285
Total Amount Due*										\$26,285

NOTE: Payment of final penalty amount should be made to:
 Accounting Office (OSH)
 Department of Industrial Relations
 P.O. Box 420603
 San Francisco, CA 94142

(INCLUDES APPEALED CITATIONS ONLY)

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

POS: MJF
01/___/15