

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

*In the Matter of the Appeal of:*

**SYAR INDUSTRIES INC**  
**PO Box 2540**  
**Napa, CA 94558**

Employer

**DOCKETS 13-R5D1-1876**  
**through 1880**

**DECISION**

**Statement of the Case**

Syar Industries Inc (Employer) produces rock, sand, and gravel which it uses to make hot asphaltic concrete and readymix concrete. Beginning February 26, 2013, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Richard Brockman, conducted an accident investigation at a place of employment maintained by Employer at 2301 Napa Valley Highway, Napa, California (the site).

On May 24, 2013, the Division cited Employer for alleged violations of California Code of Regulations, Title 8, three of which remain at issue: (1) failure to establish procedural steps for shutting down, isolating, blocking, and securing machinery prior to a cleaning operation; (2) failure to train authorized employees on hazardous energy control procedures and on hazards related to cleaning machinery; and (3) failure to ensure gloves not worn around moving machinery where exists an entanglement hazard<sup>1</sup>.

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<sup>1</sup> Employer withdrew its appeal of Citation 1, a reporting violation, prior to the hearing. Citation 1, and its proposed \$3,000 penalty, are therefore established. The proposed \$3,000 penalty on the citation is consistent with a regulatory \$5,000 penalty for a violation of section 342, subdivision (a), in this case a late report, which has been reduced by \$2,000 pursuant to *Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001 Decision After Reconsideration (December 4, 2012), applying Labor Code section 6319 adjustments for good faith (30%), size (0%) and history (10%), as reflected in Exhibit 8. Subsequent to the hearing, and prior to the issuance of this Decision, the parties stipulated during the briefing process that the Division would withdraw Citation 4, which alleges a violation of section 3328, subdivision (c), and Appellant 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 4, an alleged violation of section 3328, subdivision (c), and the proposed penalty of \$6,750, are vacated. Unless otherwise specified, all references are to sections of California Code of Regulations, Title 8.

Employer filed timely appeals of the citations, contesting the existence of the violations, the classifications of the violations, and the reasonableness of the proposed penalties in Citations 2, 3, and 5. Employer also asserted a series of affirmative defenses for each alleged violation.

This matter was heard by Martin Fassler, Presiding Administrative Law Judge (PALJ) for the California Occupational Safety and Health Appeals Board, at Sacramento, California on October 15, 2013. Ronald Medeiros, Attorney, of the Robert D. Peterson Law Firm, represented Employer. Douglas Patterson, Senior Engineer, represented the Division. The parties presented oral and documentary evidence. The parties submitted post-hearing briefs. The matter was submitted for decision on December 20, 2013. The submission date was extended to June 30, 2015<sup>2</sup>.

### **Issues**

1. Does exception number 2 to subdivisions (c) and (d) of section 3314 also apply to subdivisions (g) and (h)?
2. Did Employer fail to establish procedural steps for shutting down, isolating, blocking, and securing the hazardous energy of the horizontal band saw prior to the cleaning operation as required by section 3314, subdivision (g)(1)(B)?
3. Did Employer provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw as required by section 3314, subdivision (j)(1)?
4. Did Employer ensure that an employee not use gloves where there existed a danger of entanglement in the moving machinery as required by section 3384, subdivision (b)?
5. Did Employer present sufficient evidence to establish the Independent Employee Action Defense (IEAD)?

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<sup>2</sup> Prior to a Decision being issued in this matter, PALJ Fassler left the Appeals Board. Both parties stipulated that another Administrative Law Judge (ALJ) would issue a Decision based upon a review of the record. The Appeals Board assigned Kevin J. Reedy, the undersigned ALJ, to write the Decision.

6. Did the Division establish rebuttable presumptions that in each of Citations 2, 3, and 5 the violations were serious?

7. Did Employer rebut the presumptions of serious classifications in each of Citations 2, 3, and 5 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of those violations, and were the injured employee's actions foreseeable in each of those violations?

8. Was there a causal connection between the violations associated with each of Citations 2, 3, and 5 and the occurrence of employee Benedict's serious injury?

9. Were the penalties proposed in Citations 2, 3, and 5 reasonable?

### **Findings of Fact**

1. Employer is a supplier of hot asphaltic concrete and readymix concrete.
2. On February 22, 2013, Michael Albert Benedict (Benedict), an employee of Syar Industries, sustained a serious workplace injury while performing a cleaning operation on a horizontal band saw.
3. The horizontal band saw at issue was located in the fabrication shop ("the shop.")
4. The horizontal band saw is cord and plug-connected electrical equipment.
5. Cord and plug-connected electrical equipment is exempted from the requirements of section 3314, subdivisions (c) and (d), but is not exempted from the general requirements of section 3314.
6. Employer has no written procedural steps for shutting down and cleaning the horizontal band saw.
7. Employer provided no training to Benedict on the control of hazardous energy specific to the horizontal band saw.
8. Benedict wore gloves during a cleaning operation where there existed a danger of the gloves becoming entangled in the moving parts of the running horizontal band saw.

9. Benedict failed to power down the horizontal band saw, unplug the saw, and wait for all movement to stop before performing a cleaning operation.
10. During a cleaning operation on the running horizontal band saw Benedict's gloved hand was drawn into a pinch point wherein he sustained a partial finger amputation.
11. Benedict did not know he committed a safety violation until after his finger was partially amputated.
12. The proposed penalty amounts in Citations 2 and 3 are not reasonable. The proposed penalty amount in Citation 5 is reasonable.

### **Analysis**

#### **1. Does exception number 2 to subdivisions (c) and (d) of section 3314 also apply to subdivisions (g) and (h)?**

Section 3314 under "The Control of Hazardous Energy for the Cleaning, Repairing, Servicing, Setting-Up, and Adjusting Operations of Prime Movers, Machinery and Equipment, Including Lockout/Tagout," in relevant parts, provides the following:

(a) Application.

(1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.

(2) For the purposes of this Section, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment. ...

(c) Cleaning, Servicing and Adjusting Operations.

Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations.

Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment. ...

(d) Repair Work and Setting-Up Operations.

Prime movers, equipment, or power-driven machines equipped with lockable controls or readily adaptable to lockable controls shall be locked out or positively sealed in the “off” position during repair work and setting-up operations. Machines, equipment, or prime movers not equipped with lockable controls or readily adaptable to lockable controls shall be considered in compliance with section 3314 when positive means are taken, such as de-energizing or disconnecting the equipment from its source of power, or other action which will effectively prevent the equipment, prime mover or machine from inadvertent movement or release of stored energy. In all cases, accident prevention signs or tags or both shall be placed on the controls of the equipment, machines and prime movers during repair work and setting-up operations.

EXCEPTIONS to subsections (c) and (d):

1. ...

2. *Work on cord and plug-connected electric equipment for which exposure to the hazards of unexpected energization or start up of the equipment is controlled by the unplugging of the equipment from the energy source and by the plug being under the exclusive control of the employee performing the work.* (Italics added for emphasis.) ...

Appellant, in its Post-Hearing Brief, argues that Citations 2 and 3 are invalid because the horizontal band saw was excepted from the hazardous energy control provisions of section 3314. In *Dade Behring Inc.*, Cal/OSHA App. 05-2203, Decision After Reconsideration (December 30, 2008), the Board held:

An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden-of raising and proving at the hearing. (*Kaiser Steel Corporation*, Cal/OSHA App. 75-1135, Decision After Reconsideration (June 21, 1982); *Roof Structures, Mc.*, Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983); and *The Koll Company*, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983).)

Section 3314, subdivision (g), in relevant parts, requires that a hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning of machinery and equipment. Section 3314, subdivision (j), in relevant parts, requires that authorized employees shall be trained on hazardous energy control procedures and on the hazards related to performing activities required for cleaning machinery and equipment.

Employer argues that because the horizontal band saw at issue is cord and plug-connected equipment it is not bound to comply with the requirements of section 3314, subdivisions (g) and (j). Appellant's argument is without merit. Such an approach would deny employees the protections and benefits of (1) having written hazardous energy control procedures prior to cleaning cord and plug-connected machinery and equipment, and (2) being trained on hazardous energy control procedures and on the hazards related to performing activities required prior to cleaning that machinery and equipment.

The Appeals Board has long recognized that there is an inherent danger in working around energized machinery. *Stockton Steel Corporation*, Cal-OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002) citing *Sacramento Bag Mfg. Co.*, Cal-OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992). The regulation is specific in that Exception 2 only applies to subdivisions (c) and (d) of section 3314. The regulation must be read in the context of its entirety. Adopting Appellant's position would exclude cord and plug-connected electric equipment from protections ensured by subdivisions (g) and (j) of section 3314, both of which relate to the control of hazardous energy. Furthermore, the requirements of subdivisions (g) and (j) of section 3314 are consistent with the applications set out in subdivision (a) of section 3314. Employer has provided no Appeals Board authority to support its position. Appellant has failed to establish that exception number 2 to sections subdivisions (c) and (d) of section 3314 applies to section 3314 in its entirety. Therefore, exception number 2 to subdivisions (c) and (d) of section 3314 does not apply to subdivisions (g) and (h).

**2. Did Employer fail to establish procedural steps for shutting down, isolating, blocking, and securing the hazardous energy of the horizontal band saw prior to the cleaning operation as required by subdivision (g)(1)(B) of section 3314?**

Subdivision (g)(1)(B) of section 3314, under the section entitled "The Control of Hazardous Energy for the Cleaning, Repairing, Servicing, Setting-Up, and Adjusting Operations of Prime Movers, Machinery and Equipment, Including Lockout/Tagout," in relevant parts, provides the following:

(g) Hazardous Energy Control Procedures. A hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment.

(1) The procedure shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including but not limited to, the following:

(A) ...

(B) The procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy ...

Citation 2 alleges as follows:

The employer did not have established procedural steps for shutting down isolating, blocking and securing the hazardous energy of the horizontal band saw prior to cleaning the machine, which resulted in a serious injury to an employee on February 22, 2013, when this same employee began cleaning the machine before the blade had stopped.

The safety order has three elements: (1) a hazardous energy control procedure shall be developed and utilized by the employer when employees are engaged in the cleaning, repairing, servicing, setting-up or adjusting of prime movers, machinery and equipment; (2) the procedure shall clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy, and the means to enforce compliance, including but not limited to; (3) the procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy.

Associate Safety Engineer Richard Brockman (Brockman) conducted the accident investigation. During the opening conference with Employer Equipment Superintendent Peter Fraccia (Fraccia), Fraccia told him that Employer did not have a procedure for any of the machinery in the shop for isolating hazardous energy or lockout/blockout. Fraccia also told Brockman that there was no written procedure cleaning out the bandsaw. Michael Albert Benedict (Benedict), the injured employee, when interviewed by Brockman, told Brockman that there hadn't been such a procedure for machinery in the shop.

Exhibit 7 is Employer's Lockout/Tagout/Blockout Program. Brockman testified that there is no reference in that program to the procedural steps necessary to control the hazardous energy associated with shutting down and

cleaning the bandsaw. According to Brockman, there is no reference to the bandsaw in Exhibit 7.

Employer foreman Joe Pagano (Pagano) testified that no specific lockout/tagout/blockout hazardous energy control procedure existed for the horizontal bandsaw. According to Pagano, the general policy is that you “don’t work on equipment when it’s energized.” Pagano referred to a general policy, but no written policy. John Steven Walker (Walker), Syar Risk Manager, testified that Employer has no written policy for the control of hazardous energy associated with cord and plug-connected equipment; the only such policy is verbal, which is communicated through safety meetings. Employer provided no specific document which referred to the horizontal band saw which outlined the rules associated with using that saw, and the hazards associated with such use. Pagano, according to Brockman, stated that many employees use the horizontal band saw. Pagano testified that the pink-colored sign<sup>3</sup> attached to the right-hand sheave guard door on Exhibit 4 was not affixed to the saw prior to the accident on February 22, 2013.

The Division established that Employer failed to develop and utilize a written hazardous energy control procedure for employees engaged in cleaning the bandsaw. This omission subjected employees to the hazard of uncontrolled hazardous energy. Therefore, by a preponderance of the evidence, a violation of subdivision (g)(1)(B) of section 3314 is sustained.

**3. Did Employer provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw as required by subdivision (j)(1) of section 3314?**

Subdivision (j)(1) of section 3314 under the section entitled “The Control of Hazardous Energy for the Cleaning, Repairing, Servicing, Setting-Up, and Adjusting Operations of Prime Movers, Machinery and Equipment, Including Lockout/Tagout,” provided the following:

(j) Training.

(1) Authorized employees shall be trained on hazardous energy control procedures and on the hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting prime movers, machinery and equipment.

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<sup>3</sup> The sign reads as follows: “Do not open until blade has completely stop (sic) and machine is unplugged.”

Citation 3 alleges as follows:

The employer did not provide training as required for a hazardous energy control procedures and on the hazards related to performing activities required for cleaning, repairing, servicing, setting up and adjusting prime movers, machinery and equipment in the welding shop, which resulted in serious injury to an employee on February 22, 2013, when this same employee began cleaning the machine before the blade had stopped.

The safety order has three elements: (1) Authorized employees; (2) shall be trained on hazardous energy control procedures; and (3) on the hazards related to performing activities required for cleaning, repairing, servicing, setting-up and adjusting prime movers, machinery and equipment.

Employer provided no documentation that the injured worker received training specific to the horizontal band saw. Employer did not have a training program which specifically included the horizontal band saw, including any procedures related to the control of hazardous energy associated with that saw. Thus, Benedict did not receive training specific to the horizontal band saw and in relation to the control of hazardous energy.

Foreman Pagano testified that if it was necessary to open the covers on the horizontal band saw, for any reason, cleaning or for any other purpose, Employer's policy was to unplug the machine, make sure that it was off, and then proceed. Pagano had no recollection of any meeting with Benedict where this procedure, specific to the horizontal band saw, was communicated to Benedict. Pagano recalled that Benedict did understand this process, referring to a plug-in grinder, on which Benedict replaced a grinding disc, after having unplugged the machine.

Different machines present different hazards when addressing issues related to the control of hazardous energy, even within the plug and cord-connected category of machinery. Pagano used the example involving a grinder. The machine at issue is a horizontal band saw. Employer provided no evidence that it trained its employees on the control of hazardous energy specific to any of its cord and plug-connected equipment, including the horizontal band saw. Therefore, Employer failed to provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw as required by subdivision (j)(1) of section 3314. The violation is sustained.

**4. Did Employer ensure that an employee not use gloves where there existed a danger of those gloves becoming entangled in**

**the moving machinery as required by subdivision (b) of section 3384?**

Subdivision (b) of section 3384, under the section entitled “Hand Protection,” in relevant parts, provides the following:

Hand protection, such as gloves, shall not be worn where there is a danger of the hand protection becoming entangled in moving machinery or materials.

NOTE: 1. As used in subsection (b) the term entangled refers to hand protection (gloves) being caught and pulled into the danger zone of machinery/equipment. Use of hand protection around smooth surfaced rotating equipment does not constitute an entanglement hazard if it is unlikely that the hand protection will be drawn into the danger zone.

Citation 5 alleges as follows:

An employee cleaning metal cuttings from around the saw blade of a horizontal band saw was seriously injured on February 22, 2013, after his gloved hand was drawn in to the moving blade.

The safety order has three elements: (1) hand protection, such as gloves; (2) shall not be worn where; (3) there is a danger of the hand protection becoming entangled in moving machinery or materials. It is undisputed that Benedict, while wearing gloves, opened a metal sheave guard to clean metal cuttings from around the blade of the horizontal band saw, whereupon his gloved hand was drawn in to a pinch point between the moving saw blade and the sheave (See Exhibit 3, location designated “point of injury.”) As a result of the glove becoming entangled in the machine Benedict suffered a partial finger amputation. As such, the violation is established.

**5. 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 three requires Employer to demonstrate that it effectively enforces its safety program, and element four requires that employers have a policy of sanctions which it enforces against those employees who violate its safety program. Risk Manager Walker testified that a system for disciplining employees is included in its Injury and Illness Prevention Program (IIPP), referencing Exhibit B.

Exhibit 10 is a collection of 14 documents entitled "Syar Industries Inc. Safety/Discipline." According to Walker, Employer uses this documentation for safety discipline. Walker testified that the use of these documents is "sometimes sort of misleading for the employees." Syar uses these forms instead of doing verbal warnings because, according to Walker, "... it's extremely difficult to get any union employee to do any sort of discipline of another union employee. I essentially encourage the managers to do that by kind of disguising this as not hard core discipline."

A review of the 14 documents in Exhibit 10 reveals that none of the documents are identified as "Safety Discipline." Walker testified that the last document in Exhibit B, for employee Mike Benedict, dated March 6, 2013, is an example of the first step in progressive disciplinary procedures at Syar Industries. This document was presented to Benedict shortly subsequent to his injury of February 22, 2013. The document is checked on the form as an "Individual Safety Meeting," and not checked "Safety Discipline," an option for which is also provided on that same form.

Employer did not demonstrate that it had implemented its safety program on the shop floor in regards to the horizontal band saw. Employer provided no specific document which referred to the horizontal band saw which outlined the rules associated with using that saw, and the hazards associated with such use. Employer has no written policy for the control of hazardous energy associated with cord and plug-connected equipment; the only such policy, according to Walker, is verbal, which is communicated through safety meetings.

Employer concedes, through the testimony of Walker, that the use of its discipline form is "misleading for its employees." Employer also concedes that it disguises part of its disciplinary process. Employer's program of discipline is illusory by its very nature. As such, Employer has not demonstrated that its employees are discouraged from using unsafe procedures, or that its employees are on clear notice as to what the safe procedures are. (*Mercury Service, Inc.*,

*supra*). Employer has not met elements three and four of the IEAD, and therefore cannot rely on independent employee action as a defense to any of the cited sections.

**6. Did the Division establish rebuttable presumptions that in each of Citations 2, 3, and 5 the violations were serious?**

Labor Code Section 6432 states:

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

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

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.

In regard to Citation 2, a violation of subdivision (g)(1)(B) of section 3314, Employer failed to establish procedural steps for shutting down, isolating, blocking, and securing a horizontal band saw (depicted in Exhibits 3 and 4) prior to a cleaning operation. The hazard created by the violation is that the machine operator would not use appropriate and designated steps for shutting down the horizontal band saw prior to engaging in a cleaning operation, thus subjecting himself to the hazard of uncontrolled energy. In this case, the finger of the operator was drawn in to the moving parts of the machinery before it had been stopped. The parties stipulated that employee Benedict sustained a serious injury that also meets the definition of serious physical harm pursuant to section 6432, subdivision (e). Associate Safety Engineer Brockman opined that the root cause of the accident was the lack of training. If Employer had provided to Benedict written instructions for shutting down the horizontal band saw prior to any cleaning operation, as part of that training, it is less likely that he would have sustained an injury. Benedict was never afforded the opportunity to read hazardous energy control procedure instructions, specific to the horizontal band saw, prior to conducting the cleaning operation. Brockman concluded that if Benedict would have been trained it would have been quite possible that the accident would not have occurred.

The realistic possibility of a serious physical harm combined with the existence of the actual hazard caused by failure to establish procedural steps for shutting down, isolating, blocking, and securing the horizontal band saw prior to the cleaning operation, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

In regard to Citation 3, a violation of subdivision (j)(1) of section 3314, Employer failed to provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw. The hazard created by the violation is that the machine operator would not use appropriate and designated steps for shutting down the horizontal band saw prior to engaging in a cleaning operation, thus subjecting himself to the hazard of uncontrolled energy. In this case, the finger of the operator was drawn in to the moving parts of the machinery before it had been stopped. As stated above, the parties stipulated that Benedict sustained a serious injury. Associate Safety Engineer Brockman opined that the root cause of the accident was the lack of training. If Employer had provided to Benedict training related to shutting down the horizontal band saw prior to any cleaning operation, it is less likely that he would have sustained an injury. Brockman concluded that if Benedict would have been trained it would have been quite possible that the accident would not have occurred.

The realistic possibility of a serious physical harm, combined with existence of the actual hazard caused by failure to train employees on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

In regard to Citation 5, a violation of subdivision (b) of section 3384, Employer failed to ensure that its employee not use gloves where there existed a danger of those gloves becoming entangled in the moving horizontal band saw.

The hazard created by the violation is that the machine operator would place his gloved hand near moving parts of the horizontal band saw while engaging in a cleaning operation, thus subjecting himself to the hazard of his gloved hand becoming entangled in the moving saw blade and sheave. It is unrefuted that the gloved finger of the operator became entangled with the machinery and was drawn in to the pinch point between the saw blade and the sheave causing a serious injury as noted above.

The realistic possibility of a serious physical harm, combined with existence of the actual hazard caused by failure to ensure that Benedict not use gloves where there existed a danger of those gloves becoming entangled in the moving horizontal band saw, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

**7. Did Employer rebut the presumptions of serious classifications in each of Citations 2, 3, and 5 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of those violations, and were the injured employee's actions foreseeable in each of those violations?**

Employer argued that, in each citation, the presumption of a serious classification was rebutted due to lack of employer knowledge despite the exercise of reasonable diligence, and that the injured employee's actions were not reasonably foreseeable by appellant.

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 insure 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 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 ).)

Regarding Citation 2: The violation of subdivision (g)(1)(B) of section 3314 is a consequence of Employer's failure to provide written instructions specific to the use of the horizontal band saw. The citation alleges that the Employer failed to provide the necessary written instructions for shutting down the horizontal band saw prior to any cleaning operation. The exercise of reasonable diligence on Employer's part would have provided for the inclusion of those written instructions specific to the horizontal band saw in its safety program. As a result of this omission, Employer failed to rebut the presumption that the violation was properly classified as serious. And the lack of such written instructions made the actions of Benedict which led to his injury reasonably foreseeable.

Regarding Citation 3: The violation of subdivision (j)(1) of section 3314 is a consequence of Employer's failure to provide necessary training. The citation alleges that Employer failed to provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw. The exercise of reasonable diligence on Employer's part would have provided for the inclusion of training specific to the horizontal band saw as part of its safety program. As a result of this omission, Employer failed to rebut the presumption that the violation was properly classified as serious. And the lack of such training made the actions of Benedict, which led to his injury, reasonably foreseeable.

Regarding Citation 5: It is not in dispute that Benedict failed to de-energize the horizontal band saw prior to opening the left front access panel guard, wherein he reached in with a gloved hand and placed his left index finger in the area where the spinning saw blade wraps around the sheave (Exhibit3, “point of injury”), where his finger was partially severed.

Employer, in its Post-Hearing Brief, argues that Benedict’s supervisor, Joe Pagano had no actual knowledge that Benedict failed to unplug the horizontal band saw prior to attempting to clean it. Pagano testified that he was approximately 50 feet away and around the corner from Benedict at the time of the accident. Brockman testified that foreman Pagano told him that he was working approximately 12 feet to the left of the horizontal band saw at the time of the accident. Pagano also told Benedict that he “doesn’t inspect the individual machines per se” in the area where the horizontal band saw is located, but that he is “in and around the shop continuously throughout the day.”

Benedict testified that Employer failed to conduct inspections specific to the machinery and points of operation, including the horizontal band saw, and that upon request by the Division, Employer could provide no records of such inspections. An adequate inspection of the horizontal band saw would have revealed that the guard panel could be easily opened, even while the saw was in operation, which exposed Benedict’s gloved hand to the hazard of becoming entangled in the machinery. As such, Employer, by failing to exercise reasonable diligence by conducting adequate inspections, failed to anticipate this specific hazard, and as such, the violation will not be excused on Employer’s claim of lack of employer knowledge of the existence of the violation.

Employer provided very little training to Benedict regarding the use of gloves around machinery. Employer provided one record of employee training, in which gloves were mentioned, dated July 6, 2010. Employer’s “Weekly Safety Meeting Report,” which covers the topic of machine guarding, has one sentence addressing the use of gloves: “Avoid work gloves, however, as they can get caught in equipment and increase your risk of injury.” (Exhibit C). Employer, in its brief, emphasizes that Benedict improperly failed to de-energize the horizontal band saw prior to the cleaning operation, and improperly lifted the guard during this process, in an attempt to shift the blame to Benedict. Citation 5 is specific to Benedict’s use of gloves while operating the horizontal band saw, and not hazardous energy or guarding violations. It did not occur to Benedict that he had committed a safety infraction until the moment immediately after his gloved finger was partially severed. As such, it does not

appear that necessary training regarding the safe use of gloves was engrained in Benedict.

Employer failed to establish that it had provided adequate training to Benedict associated with hazards related to the use of gloves. Employer failed to provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw. These examples of lack of training are other instances of the lack of the exercise of reasonable diligence by Employer, and as such, the violation will not be excused on Employer's claim of lack of employer knowledge of the existence of the violation. And the lack of training and the lack of inspections described herein made the actions of Benedict, which led to his injury, reasonably foreseeable.

**8. Was there a causal connection between the violations associated with each of Citations 2, 3, and 5 and the occurrence of employee Benedict'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).)

In regard to Citation 2, a violation of section 3314, subdivision (g)(1)(B), the record supports a finding that the lack of written instructions related to the hazardous energy associated with the band saw may have contributed to Benedict's injury. However, the record lacks sufficient evidence to support a finding that the lack of those written instructions *actually* caused Benedict's injury. The presentation of evidence indicating that the employer lacked the necessary written instructions specific to the horizontal band saw and that the employee suffered a serious injury is not sufficient to establish the required causal nexus between the violation and the injury. As such, the Division, by a preponderance of the evidence, failed to make the necessary showing that Employer's lack of written instructions caused Mr. Benedict's injuries.

In regard to Citation 3, a violation of section 3314, subdivision (j)(1), the record supports a finding that Employer failed to provide required training on hazardous energy control procedures may have contributed to Benedict's injury. The record, however, lacks sufficient evidence to support a finding that the lack of training *actually* caused Benedict's injury. The presentation of evidence that the employee lacked training specific to the horizontal band saw and that the employee suffered a serious injury is not sufficient to establish the

required causal nexus between the violation and the injury. As such, the Division, by a preponderance of the evidence, failed to make the necessary showing that the lack of training actually caused Benedict's injuries.

In regard to Citation 5, a violation of section 3384, subdivision (b), the record supports a finding that Employer failed to ensure that an employee not use gloves where there existed a danger of those gloves becoming entangled in the moving machinery. The injured employee wore gloves while performing a cleaning operation on the horizontal band saw. The glove became entangled in the machinery, which drew his finger in to a pinch point, therein causing the employee to suffer a finger amputation. The Division established the causal nexus between the violation and Benedict's injuries.

**9. Were the penalties proposed in Citations 2, 3, and 5 reasonable?<sup>4</sup>**

In regard to Citation 2, the parties stipulated that the proposed penalty would be reduced to \$18,000. Removal of the accident-related characterization allows for a reduction of the proposed penalty. Employer stipulated that the penalties associated with citations were calculated in accordance with the Division's policies and procedures. The Penalty Calculation Worksheet (Exhibit 8) reflects that extent and likelihood were both set at medium, allowing for no reduction to the penalty (section 336, subd. (c)). Reductions for size (section 336, subd. (d)(1)), good faith (section 336, subd. (d)(2)), and history (section 336, subd. (d)(3)) will be calculated using the same percentages as set forth in the Proposed Penalty Worksheet. Therefore, the gravity-based penalty will be reduced by 0% for size, 30% for good faith, and 10% for history, resulting in an adjusted penalty of \$10,800. Regulation section 336, subdivision (e), creates a presumption that an employer will correct a serious or general violation by the abatement date, and therefore the penalty is reduced 50 per cent. Therefore, a penalty of \$5,400 is found reasonable.

In regard to Citation 3, the proposed penalty was for the violation was set at \$18,000. As in Citation 2 above, the accident-related characterization was removed, allowing for the same reductions, which results in a penalty of \$5,400, which is found reasonable.

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<sup>4</sup> Employer stipulated that the penalties were calculated in accordance with the Division's policies and procedures and applicable regulations. Employer did not stipulate to the reasonableness of the penalties to the extent that the simple characterizations of the citations would be modified by the ALJ or otherwise dismissed.

In regard to Citation 5, the proposed penalty was for the violation was set at \$18,000. Where a serious violation causes a serious injury, the only penalty reduction allowable is for size. (Labor Code Section 6319, subd. (d); section 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, Item 1 the evidence supports a finding that Employer violated section 3314, subdivision (g)(1)(B), by failing to establish procedural steps for shutting down, isolating, blocking, and securing the hazardous energy of the horizontal band saw prior to cleaning operation. A penalty of \$5,400 is assessed for Citation 2, Item 1.

In Citation 3, Item 1 the evidence supports a finding that Employer violated section 3314, subdivision (j)(1), by failing to provide required training on hazardous energy control procedures and on hazards related to performing activities required for cleaning, repairing, servicing, setting up, and adjusting the horizontal band saw. A penalty of \$5,400 is assessed for Citation 3, Item 1.

In Citation 5, Item 1 the evidence supports a finding that Employer violated section 3384, subdivision (b), by failing to ensure that an employee not use gloves where there existed a danger of those gloves becoming entangled in the moving machinery. A penalty of \$18,000 is assessed for Citation 5, Item 1.

### **ORDER**

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

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

Dated: July 24, 2015

KR:kav

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**KEVIN J. REEDY**  
**Administrative Law Judge**

**NOTE:** If you disagree with this decision, you may petition the Appeals Board for reconsideration within 30 days. The petition must comply with the requirements of Labor Code §§6614 through 6619. Please call the Appeals Board at (916) 274-5751 if you need assistance.

**APPENDIX A**  
**SUMMARY OF EVIDENTIARY RECORD**  
**SYAR INDUSTRIES INC**  
**DOCKETS 13-R5D1-1876 through 1880**  
**Date of Hearing – October 15, 2013**

**Division’s Exhibits – Admitted**

<b>Exhibit Number</b>	<b>Exhibit Description</b>
1.	Jurisdictional documents
2.	DOSH training record
3.	Close-up photo of horizontal band saw
4.	Photo of band saw showing wheel
5.	Service manual for horizontal band saw
6.	“Should I wear gloves ...?” article
7.	Syar LO/TO/BO Program
8.	Penalty Calculation Worksheet
9.	Cal/OSHA form 1B
10.	Syar Safety/Discipline forms

**Employer’s Exhibits – Admitted**

<b>Exhibit Number</b>	
A.	Syar Inspection Report – OSHA-1
B.	Syar IIPP – May 24, 2006
C.	Syar Safety meeting records

**Witnesses Testifying at Hearing**

1. Richard Brockman
2. Michael Benedict
3. Joe Pagano
4. John Steven Walker

**CERTIFICATION OF RECORDING**

*I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to write the Decision in the above-entitled matter, hereby certify that, to the best of my knowledge, the proceedings therein were electronically recorded in their entirety. The recording was monitored by former Administrative Law Judge Martin Fassler, and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

## SUMMARY TABLE DECISION

<i>In the Matter of the Appeal of:</i>  <b>SYAR INDUSTRIES INC</b> <b>DOCKETS 13-R5D1-1876 through 1880</b>						<b>ABBREVIATION KEY:</b>  Reg=Regulatory DOSH=Division G=General S=Serious ER=Employer  W=Willful R=Repeat				
IMIS No. 314452202										
DOCKET NO.	C I T N O.	I T E M N O.	SECTION NO.	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M	V A C A T I O N	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	<b>FINAL PENALTY ASSESSED BY BOARD</b>
13-R5D1-1876	1	1	342(a)	Reg	Er withdrew appeal	X		\$3,000	\$3,000	<b>\$3,000<sup>5</sup></b>
13-R5D1-1877	2	1	3314(g)(1)(B)	S	ALJ affirmed violation and reduced penalty	X		\$22,500	\$18,000	<b>\$5,400</b>
13-R5D1-1878	3	1	3314(j)(1)	S	ALJ affirmed violation and reduced penalty	X		\$18,000	\$18,000	<b>\$5,400</b>
13-R5D1-1879	4	1	3328(c)	S	DOSH withdrew - insufficient evidence		X	\$6,750	\$6,750	<b>\$0<sup>6</sup></b>
13-R5D1-1880	5	1	3384(b)	S	ALJ affirmed violation	X		\$18,000	\$18,000	<b>\$18,000</b>
<b>Sub-Total</b>								\$65,250	\$63,750	<b>\$31,800</b>
<b>Total Due</b>										<b>\$31,800</b>
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> <b>All penalty payments must be made to:</b>						(INCLUDES APPEALD CITATIONS ONLY)				
Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142						*You will owe more than this amount if you did not appeal ore or more citations or items containing penalties. Please call (415) 703-4291 if you have questions.				

**ALJ: KR**  
**POS: 07/24/15**

<sup>5</sup> See footnote 1 in the Decision.

<sup>6</sup> See footnote 1 in the Decision.

