BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
ANHEUSER-BUSCH, LLC dba ANHEUSER-BUSCH **15800 ROSCOE BLVD.** **VAN NUYS, CA 91406** **Employer**	**1398352** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Anheuser-Busch, LLC dba Anheuser-Busch (Employer) is a beverage maker. On March 7, 2019, while cleaning a machine called a pallet stacker, employee George Caro (Caro) attempted to remove a wood fragment that was lodged inside the machine, by reaching into the machine to dislodge and remove the wood by hand. When he did so, a pneumatic lift in the machine unexpectedly moved, crushing his arm and causing serious injury.

Following an inspection, the Division of Occupational Safety and Health (the Division) issued three citations to Employer on September 6, 2019, alleging violations of California Code of Regulations, title 8.[1] The Division withdrew Citation 1 at the commencement of the hearing. Only Citations 2 and 3 remain at issue. Citation 2 alleged a Serious, Accident-Related violation of section 3314, subdivision (c) [failure to de-energize and block or lock out a machine during cleaning operations]. Citation 3 alleged a Serious violation of section 3314, subdivision (g) [failure to develop and utilize machine-specific hazardous energy control procedures].

Employer timely appealed. The matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the Appeals Board on August 25, 2022, and January 10 and 11, 2023. Sean Paisan, of Jackson Lewis P.C., represented Employer. Lisa Wong, Staff Counsel, represented the Division. Both parties submitted post-hearing briefs. On August 17, 2023, ALJ Avelar issued a Decision affirming Citations 2 and 3, their classifications, and associated penalties. Employer's timely Petition followed. The Division filed a reply.

Employer argues that the Division failed to prove the alleged violations. Employer further argues that it established two affirmative defenses regarding Citation 2: first, that the cleaning operation fell within the "minor servicing" exception to section 3314, subdivision (c); second, that Employer established all elements of the Independent Employee Action Defense (IEAD). Employer additionally asserts that the ALJ erred in crediting the respective testimonies of Caro,

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

the injured employee, and Jesus Reyes (Reyes), the former Junior Safety Engineer for the Division who conducted the inspection. Reyes was no longer employed with the Division at the time of hearing. Employer also argues that Citation 2 was not properly classified as Serious and, if not vacated, should be reclassified as General. Employer does not contest the Accident-Related characterization of Citation 2, or the Serious classification of Citation 3. All arguments not raised in the Petition are deemed waived. (Lab. Code, § 6618.)

Upon a close review of the record, including the briefs submitted by both parties, the exhibits entered into evidence, and the hearing transcripts, we find that the ALJ correctly upheld Citations 2 and 3.

ISSUES

1. Did the Division establish, by a preponderance of evidence, that Employer failed to de-energize and block or lock out a machine during cleaning operations?
2. Did Employer demonstrate that the "minor servicing" exception to section 3314, subdivision (c), applied?
3. Did Employer establish the IEAD?
4. Was Citation 2 properly classified as Serious?
5. Did the Division establish, by a preponderance of evidence, that Employer failed to develop and utilize machine-specific hazardous energy control procedures?

FINDINGS OF FACT[2]

1. On March 7, 2019, Employer's employee, Caro, suffered a work-related accident.
2. Caro was attempting to dislodge a piece of wood from a machine called a pallet stacker, when a part of the machine unexpectedly moved, and pinned his arm against the frame of the machine, injuring him.
3. Caro's supervisor and Operations Manager, Cory Wilson (Wilson), had directed Caro to perform a 5-S Audit (Audit) of the box-making area of Line 2, which is one of Employer's numerous assembly lines.
4. An Audit is a review process of machinery in a specified area, which includes steps such as "Sort," "Standardize," and "Shine." The "Shine" step may reveal a need for cleaning.
5. Line 2 was not in operation when Caro began his Audit of the box-making area.
6. Employer's box-making system includes the pallet stacker, a robotic arm, two box folders, and various conveyor belts interconnecting these components.
7. The pallet stacker contains a pneumatic lift, which is raised and lowered by airbags located beneath the pallet stacker's lift platform.

[2] Findings of Fact numbers 1, 2, and 25 are the stipulations of the parties.

8. The pallet stacker utilizes both electric and pneumatic energy.

9. The airbags are triggered by an electric sensor eye. As a conveyor belt feeds pallets into the pallet stacker, each new pallet trips the sensor, electronically signaling the airbags to inflate and raise the lift platform. The airbags could also be electronically signaled to inflate or deflate, raising or lowering the lift platform, from a manual control panel.

10. Pallets routinely splinter and/or break during this process.

11. The Audit progressed into a deep cleaning when Caro discovered a wood fragment stuck between the pallet lift platform and the frame of the pallet stacker.

12. Employer provided Caro with an air blow gun and broom, but did not train him to avoid using his hands when clearing debris in the machinery.

13. After attempting to remove the wood fragment with an air gun and broom handle, Caro reached his hand into the pallet stacker to remove the large wood fragment stuck between the pallet lift platform and the frame of the pallet stacker.

14. Employer developed two written hazardous energy control procedures which provide different levels of de-energization for Line 2: Lockout/Tag Out Standard Operating Procedures (LOTO), as well as Safe Access to Machinery Standard Operating Procedures (SAM).

15. SAM is used for minor cleaning and servicing of machinery; LOTO is used for more intensive cleaning and servicing.

16. SAM may be used in the Line 2 box-making area.

17. SAM requires pressing the nearest emergency stop (e-stop) and does not include instructions for blocking or locking out machinery.

18. The e-stop prevents the light sensor in the pallet stacker from sending automatic signals to move the lift, and it also prevents manually selected commands from the control panel from moving the lift.

19. The e-stop does not disengage the lift from all sources of energy.

20. Caro pressed the e-stop prior to his Audit.

21. Employer's LOTO and SAM are not machine-specific and do not provide procedural steps for the Line 2 box-making machinery.

22. The e-stop functioned properly, but when Caro reached into the pallet stacker and dislodged the wooden fragment, the lift platform unexpectedly moved.

23. Another employee, Jeremey Jones (Jones), came to Caro's aid. In order to free Caro, Jones had to cut the pneumatic airbags beneath the lift platform to deflate them and lower the platform.

24. Employer expected employees to be responsible for their own safety, and Employer did not instruct supervisors to observe employees regularly.

25. Caro's injuries meet the definition of serious physical harm under the Labor Code section 6432.

26. Caro was terminated for failure to comply with Employer's hazardous energy control procedures.

DISCUSSION

1. Did the Division establish, by a preponderance of evidence, that Employer failed to de-energize and block or lock out a machine during cleaning operations?

Citation 2 alleged a Serious, Accident-Related violation of section 3314, subdivision (c), which provides:

> (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.
>
> […]
>
> EXCEPTION […]:
>
> 1. Minor tool changes and adjustments, and other minor servicing activities, which take place during normal production operations are not covered by the requirements of Section 3314 if they are routine, repetitive, and integral to the use of the equipment or machinery for production, provided that the work is performed using alternative measures which provide effective protection.

The Division alleged:

> Prior to and during the course of the inspection, the power source was not deenergized [sic] on Line 2 Box-making Pallet Stacker, nor was it locked out to prevent inadvertent movement during cleaning operations. As a result, on or about March 7, 2019, an employee was seriously injured when his arm was crushed between the frame of the machine and the pallet lift platform.

The Board has stated that the "clear purpose" of this safety order "is to keep employees away from the danger zone created by moving machinery." (*Stockton Steel Corporation*,

Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002).) The safety order therefore "imposes two primary safety requirements prior to cleaning, adjusting and servicing machinery: (1) machine parts capable of movement must be stopped, and (2) the power source must either be de-energized or disengaged. If the two primary requirements are not effective to prevent inadvertent movement, another requirement applies -- the parts capable of movement must be mechanically blocked or locked in place." (*Rialto Concrete Products, Inc.*, Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), citing *Macco Constructors, Inc.*, Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993).)

a. Was the pallet stacker stopped?

The pallet stacker was not in operation when Caro began his Audit, and therefore was not moving. The ALJ found that the pallet stacker was not stopped as required, because it did in fact move when Caro dislodged the wood fragment. This interpretation somewhat conflates the requirement for stopping the machine with the requirement for de-energizing it.

However, although the pallet stacker was stopped in the sense that it was not actively operating, the safety order requires, "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" (§ 3314, subd. (c) [emphasis added].)

b. Was the pallet stacker's power source de-energized or disengaged?

The dispute centers on this factor. There is no question that moveable parts of the pallet stacker were not mechanically blocked or locked out, and that the pneumatic lift unexpectedly moved during cleaning or servicing operations.

i. Employer argues that the e-stop de-energized the pallet stacker.

Employer's main argument is that the e-stop completely de-energized the pallet stacker, effectively preventing any inadvertent movement, and the accident could only have occurred if Caro did not press the e-stop. (Petition, pp. 7-8, 12.) Employer therefore contends that Caro was untruthful when he testified that he pressed the e-stop. (*Id*.) Employer argues that in a post-injury interview, Caro admitted he did not verify that power to the pallet stacker was disengaged, by attempting to restart it after pressing the e-stop. (Exhibit S). Employer asserts that this "is compelling evidence that Caro did not perform SAM," and did not press the e-stop. (Petition, p. 8.)

There are two problems with this argument. First, it is speculative. Caro's previous admission that he skipped a step in the SAM procedure does not prove Employer's contention that Caro was lying when he testified that he pressed the e-stop. In the same meeting in which Caro admitted not verifying that the machine was de-energized, he also stated that he did press the e-stop. (Hearing Transcript [HT] Day 3, p. 377; Exhibit S.) His statements on that point never changed, and he was emphatic in his testimony that the e-stop was pressed before the accident. (HT Day 2, pp. 216, 227, 228, 242.) The ALJ therefore credited Caro's testimony that he pressed the e-stop before starting his Audit of the pallet stacker. We agree with the ALJ's assessment of Caro's credibility.

Second, Employer's argument tacitly acknowledges a *prima facie* violation of section 3314, subdivision (c). Employer's argument presumes that the pallet stacker was not de-energized as required. If Caro did not press the e-stop, the machine was not de-energized. If Caro did press the e-stop, then either the e-stop did not completely de-energize the machine, or the e-stop alone was insufficient to prevent the machinery from inadvertently moving.

ii. The ALJ found that the pallet stacker was not de-energized.

The pallet stacker utilized both electric and pneumatic energy. (Decision, p. 8.) As pallets were fed into the machine by conveyor belt, electronic commands from the sensor eye and manual control panel signaled airbags to raise or lower an internal lift platform. (HT Day 1, p. 41; HT Day 3, pp. 278-279, 298-299, 308-309; Exhibits BB, CCC.) Pneumatic energy from the airbags under the lift platform physically raised and lowered the platform. (HT Day 1, pp. 36, 41; HT Day 3, pp. 298, 304.)

Section 3314, subdivision (c), requires that every "power source" which could cause machinery parts to move must be "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." Section 3314, subdivision (b), defines "locked out" as, "The use of devices, positive methods and procedures, which will result in the effective isolation or securing of prime movers, machinery and equipment from mechanical, hydraulic, pneumatic, chemical, electrical, thermal or other hazardous energy sources." (Emphasis added.) Pneumatic energy sources must therefore be de-energized, and, if necessary, blocked or locked out.

The record indicates that the e-stop de-energized the pallet stacker's signaling module, so that the lift did not move in response to "automatic signals from the light sensor and manual commands from the control panel." (Decision, p. 8; Exhibit R; HT Day 3, pp. 298-299, 304-305.) In other words, the e-stop prevented the sensor and the control panel from electronically communicating with the lift. There is no evidence, however, to suggest that the e-stop controlled the airbags, or that the e-estop prevented the lift platform from potentially moving due to the release of stored pneumatic energy.

Employer engaged both its own electricians and an external company, Brighton Engineering Project (BEP), to investigate whether the e-stop had malfunctioned. (Decision, pp. 7-8; Petition, p. 8; HT Day 3, pp. 385-387; Exhibit R.) Both investigations found that the e-stop's electronic sensor system and connections were functioning properly. (Exhibit R; HT Day 3, pp. 385-388.) These investigations failed to entirely replicate the possible circumstances of the accident, however. (Decision, p. 8; Exhibit R.) As noted, Employer contends that Caro did not press the e-stop, and therefore must have triggered the lift's sensor eye when he reached into the machine, but "BEP did not break the light beam or test for movement at the touchscreen control panel." (Decision, p. 8.) The record also indicates that these investigations focused solely on the pallet stacker's electrical system, and did not examine whether any other sources of energy were involved in the accident, or indeed examine the airbags at all. (Decision, pp. 7-8; Petition, p. 8; Division's Reply, p. 6; HT Day 3, pp. 385-387; Exhibit R.)

The Division offered the theory that the lift platform moved due to a release of pneumatic energy when Caro dislodged the wood fragment. (HT Day 1, p. 51.) This theory has support in the record. Under this theory, even if the e-estop was pressed, and functioning correctly, stored pneumatic energy in the airbags could still cause the platform to move independently. Caro testified that he was attempting to remove a piece of a broken pallet, 2x4 inches in thickness and approximately three to four inches in length, from the four-inch gap between the lift platform and the machine's frame. (HT Day 2, pp. 230-233; Exhibit 9.) Caro testified that this chunk of wood "was wedged in between" the front edge of the platform and the frame. (HT Day 2, pp. 231-232.) The wood was stuck so tightly in this gap that Caro was unable to dislodge it with an air gun or a broom handle. (*Id*., pp. 228-229, 232, 233-234.) When removed, the wood fragment apparently caused a release of stored pneumatic energy, which caused the platform to unexpectedly lurch upwards.

In addition, the record contains evidence that when they arrived at the scene of the accident, both Jones and Wilson verified that all e-stops on the machine were pressed, and the lift was stopped. (HT Day 1, pp. 49, 50, 58.) In order to free Caro's arm, Jones had to puncture the airbags, allowing air to escape, and the platform to lower. (HT Day 1, pp. 50-51, 58; HT Day 2, p. 182.) This indicates that the lift was controlled by pneumatic energy, and the e-stop did not control that pneumatic energy.

In the alternative, if the e-stop was not pressed, as Employer theorizes, Caro would have tripped the sensor eye when he reached into the machine, which would have triggered the airbags that caused the platform to raise. (HT Day 2, pp. 184-186, 229-230; HT Day 3, p. 299.) Under either theory, the lift platform's power source had not been completely de-energized or disconnected as required.

Moreover, pressing an e-stop button is not the same as disengaging or de-energizing power at its source. (*Simpson Timber Co.*, Cal/OSHA App. 77-1038, Decision After Reconsideration (June 9, 1980); *California Cascade Industries*, Cal/OSHA App. 79-945, Decision After Reconsideration (Dec. 15, 1980).) Employer concedes, "The e-stop is not considered zero-energy under the SAM *not* because pressing it does not de-energize but because it does not prevent someone from opening the e-stop while someone else is in the machinery." (Petition, p. 9 [emphasis in original].) For this reason, the Board has previously suggested that the use of an emergency stop button alone is not an adequate measure for de-energizing or disengaging the power source(s) of machinery. (*Chicken of the Sea International*, Cal/OSHA App. 01-281, Denial of Petition for Reconsideration (Feb. 28, 2003).)

The ALJ therefore concluded, "the Lift is found to have remained energized." (Decision, p. 8.) We agree.

c. Was the pallet stacker capable of inadvertent movement?

Employer argues that mechanically blocking or locking out the pallet stacker's moving machinery parts was unnecessary, because de-energizing the pallet stacker with the e-stop effectively prevented any inadvertent movement. (Petition, p. 12.) As discussed above, however, the record demonstrates that the pallet stacker was not fully de-energized. Regardless of what source of energy caused the lift platform to move, it did move.

The Board has held that when the employer's procedure for de-energizing mechanical equipment is not sufficient to prevent machinery parts from inadvertently moving, "mechanical blocking is required to prevent inadvertent movement of machinery and equipment during a cleaning operation." (*Rialto Concrete Products, Inc*., *supra*, Cal/OSHA App. 98-413.) The Board has interpreted "inadvertent movement" to mean "*any movement, which is not intended*. The additional blocking requirement is applicable in a situation where, as here, the mode of de-energizing does not *completely eliminate the possibility of movement* during cleaning operations (italics added)." (*Id*., citing *Simpson Timber Company*, *supra*, Cal/OSHA App. 77-1038.)

Here, it is undisputed that the lift platform moved, and this movement was unintended. The ALJ therefore found, and we agree, "Whether due to stored pneumatic energy or otherwise, the Lift remained capable of inadvertent movement and required blocking." (Decision, p. 8.)

For the reasons discussed, the ALJ correctly concluded, "The preponderance of the evidence shows that Employer failed to ensure the Lift was stopped, de-energized or disengaged from power, or blocked." (Decision, p. 8.)

The burden accordingly shifts to Employer to prove either the "minor servicing" exception to section 3314, subdivision (c), or the IEAD.

2. Did Employer demonstrate that the "minor servicing" exception applies?

The Board has long recognized that there is an inherent danger in working around energized machinery, and the danger is present however the activity around the energized machine is characterized. (*Dade Behring, Inc*., Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008), citing *Stockton Steel Corporation*, *supra*, Cal/OSHA 00-2157.) Employer asserts, however, that Caro's task falls within the "minor servicing" exception to the requirements of section 3314, subdivision (c).

The Board has 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 hearing." (*Fed Ex Ground, Inc*., Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020), citing *Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.) In addition, "Exceptions are to be strictly construed in order to justify a freedom from the general rule." (*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.)

Under this exception, section 3314 provides Employer must establish, by a preponderance of the evidence, that Caro was performing work which (1) was a minor servicing activity; (2) took place during normal production operations; (3) was routine, repetitive, and integral to the use of the equipment for production; and (4) was performed using alternative measures which provided effective protection. As these requirements are stated in the conjunctive, the exception is defeated unless Employer satisfies all four elements.

a. Was Caro engaged in a minor servicing activity?

Employer asserts that Caro was performing a 5-S Audit of the box-making area when the accident occurred, and that the "Shine" step of the Audit procedure "allows the employee an opportunity to do 'minor cleaning' if deemed necessary." (Employer's Closing Brief, p. 6.)

Employer appears to argue that if Caro was engaged in a 5-S Audit when he discovered the large wood fragment in the pallet stacker, he must also have been engaged in a 5-S Audit when he attempted to remove the wood fragment, and because the "Shine" step contemplates only "minor cleaning," Caro's actions to remove the wood fragment necessarily fell within the category of "minor cleaning." The implication is that any cleaning associated with the 5-S Audit is a "minor servicing activity." This argument is not only unsupported by the basic rules of logic, it is unsupported by the record.

Employer did not submit documentation establishing the 5-S Audit requirements. Employer's argument is based on the testimony of Scott Shaeffer (Shaeffer), Employer's assistant operations manager. Shaeffer testified that the Audit procedure does not require the employee doing the Audit to actually engage in cleaning, but rather to identify areas that require cleaning. (HT Day 3, pp. 335-336.) Shaeffer stated that the procedure "ask[s] the auditor if there are such areas that have cleaning opportunities. And then the auditor will rate their area based on the answer to the question on the audit." (*Id*.) Shaeffer further testified that "the employee certainly can shine the equipment during the audit," referring specifically to activities such as "dust[ing] …and things of that nature," but that employees are "not doing major cleaning of the equipment during the 5-S Audit." (*Id*., pp. 336-337.) This suggests that if an employee is engaged in deep cleaning of machinery, that employee is not engaged in a 5-S Audit.

Employer had two sets of hazardous energy control procedures: SAM and LOTO. Shaeffer testified that SAM was used for "routine tasks" such as the 5-S Audit, while LOTO "would involve a deeper level of de-energizing the equipment" and was used for "more invasive" tasks. (HT Day 3, pp. 328-329.)

Caro did not make the same distinction between conducting an Audit and engaging in deep cleaning. In his interview with the Division, he referred to the procedure as "5-S cleaning." (HT Day 2, p. 122; Exhibit 21.) In his hearing testimony, Caro described a 5-S Audit both as "five standards for cleaning a certain line, a certain section of the line," and as a monthly "thorough cleaning." (HT Day 2, p. 170.) Caro testified that he was "cleaning line 2 box-making" on the date of the accident. (*Id.*, p. 201.) Caro testified that, to his knowledge, the 5-S Audit was an "audit on cleaning," which involved "both" an audit as well as "deep cleaning." (*Id.*, pp. 202-203.) Caro further testified that he was engaged in deep cleaning when he attempted to remove the wood fragment. (*Id*., pp. 203, 224.)

The removal of a wood fragment, large enough to require measures beyond the use of an air gun or broom handle to dislodge it, goes beyond Employer's own characterization of the minor cleaning under the 5-S Audit procedures. Moreover, the task of clearing jams from machinery is specifically listed as a permissible task to be performed under the SAM procedure, which does not require blocking or locking out machinery. (Exhibit NN.)

The ALJ therefore reasoned, and we agree, that even if the Audit which Caro initially began performing could be considered a minor servicing activity, it became a deep cleaning procedure, and was thus no longer a minor servicing activity, once Caro attempted to remove the large wood fragment that could not be dislodged with the usual means of an air gun or broom handle. (Decision, pp. 9, 10.)

b. Did the work occur during normal production operations?

Line 2 was not in operation at the time Caro began the Audit and attempted to remove the wood fragment from the pallet stacker; no production of box-making was underway. (HT Day 2, pp. 123, 210.) Section 3314, subdivision (b), defines "normal production operations" as, "The utilization of a machine or equipment to perform its intended production function." Therefore, the pallet stacker was not in normal production operation at the time Caro attempted to remove the wood fragment from the machine.

c. Was the task routine, repetitive, and integral to the operation of the pallet stacker?

Employer argues, first, that the 5-S Audit was a "routine task," and that Caro was performing this routine task when he attempted to remove the wood fragment from the stacker. (Employer's Closing Brief, pp. 6-7, 11-12.) Second, Employer argues that it was normal for wooden pallets to splinter and break in the pallet stacker, and that removing those wood fragments was "routine, repetitive, and integral to the use of the machine." (*Id*., p. 12.)

First, Shaeffer testified that the Audit was a "routine task." (HT Day 3, p. 337.) The record indicates that such Audits were performed on a monthly basis. (HT Day 1, p. 46.) In that sense, the Audits were routine, although it is less clear that a monthly task can be considered repetitive. A "repetitive" task is defined as one which "involves actions or elements that are repeated many times and is therefore boring."[3] The term "repetitive" implies a task that is repeated more often than once a month. Moreover, as discussed, when Caro attempted to remove the large wood fragment from the machine, he was engaged in deep cleaning, rather than an Audit.

Second, both Shaeffer and Caro testified that pallets regularly splintered or broke in the pallet stacker, and the resulting wood fragments had to be removed. (HT Day 2, pp. 185, 233; HT Day 3, pp. 299-300.) The record therefore indicates that the task of removing the wood fragments was routine and repetitive. Caro also testified that the wood fragment here was "stuck" or "wedged" between the lift platform and the frame of the pallet stacker, so tightly that he could not remove it with an air gun or broom handle. (HT Day 2, pp. 228, 231, 232-233, 234.) When he removed the fragment, the lift platform unexpectedly moved. This suggests that the wood fragment prevented the lift platform from moving, and removing it was therefore integral to the operation of the pallet stacker.

This element is satisfied. However, Employer bears the burden of proof to establish each element of the exception to the safety order by a preponderance of the evidence. (*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.) Because Employer failed to establish all four elements, the defense fails.

d. Was the work performed using alternative measures which provided effective protection?

[3] https://www.collinsdictionary.com/us/dictionary/english/repetitive

Finally, Employer argues that Caro failed to follow the procedures on which he had been trained, and under that training, Caro should have used a "grabber tool," i.e., an extension tool, to remove the wood, but "inexplicably" did not do so. (Employer's Closing Brief, p. 12.)

The Board has explained that where an employer seeks to identify extension tools as its alternative protective measure, it must demonstrate that it both provided the tool and trained employees to safely use it. (*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203. See also *Lights of America*, Cal/OSHA App. 89-400, Decision After Reconsideration (Feb. 19, 1991); *City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998); *Sacramento Bag Manufacturing Co.*, Cal/OSHA App. 91-320, Decision After Reconsideration (Dec. 11, 1992).)

Here, Caro testified that he had never been trained not to use his hands to dislodge wood fragments from the pallet stacker. (HT Day 2, pp. 234, 237-238.) Caro testified that, according to his understanding of his training, "you use the air gun first, and then if you can, dislodge it with any kind of equipment before sticking your hand into the machine." (*Id.*, p. 237.) He testified that although it was both "easier" and "safer" to use a tool to remove wood debris, "if I couldn't get it out with a tool, I would get it out with my hand." (*Id*., p. 238.) Caro also testified that although there was a grabber on the premises, there was no grabber immediately available in his work area. (*Id.*, p. 235.)

This testimony demonstrates that Caro was not effectively trained on the use of the grabber. It also suggests that Employer failed to "provide" the grabber, by failing to make a grabber readily available in the box-making area where employees frequently needed to remove wood debris from the machinery. Labor Code section 6403 provides, "No employer shall fail or neglect: (a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe." To "provide" a tool, as that term is used in the Labor Code, combined with the directive of the California Supreme Court that "the terms of the legislation are to be given a liberal interpretation for the purpose of achieving a safe working environment" (*Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303, 313), may reasonably be interpreted to mean that an employer must do more than simply having a tool somewhere on the worksite; it includes an affirmative obligation to make the tool readily available or accessible when needed.

In addition, Employer provided no evidence that it trained employees specifically on the use of grabber tools. The ALJ therefore concluded, "the grabber was not an alternative measure providing effective protection." (Decision, p. 10.) We agree.

For the reasons discussed, we find that Employer failed to establish all elements of the minor servicing exception to section 3314, subdivision (c).

3. Did Employer establish the Independent Employee Action Defense?

Employer next argues that it established all five elements of the IEAD with regard to the violation of section 3314, subdivision (c), as alleged in Citation 2. The IEAD is an affirmative defense that requires the employer to prove each of the following five elements, by a preponderance of the evidence:

(1) The employee was experienced in the job being performed;
(2) The employer has a well-devised safety program;
(3) The employer effectively enforces the safety program;
(4) The employer has a policy of sanctions which it enforces against employees who violate the safety program; and
(5) The employee caused the safety violation which he knew was contrary to employer's safety rules.

(*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2007).) The IEAD is premised upon an employer's compliance with its non-delegable statutory and regulatory responsibilities for ensuring safety in the workplace. (*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203, citing *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).)

a. Was the employee experienced in the job being performed?

The first IEAD element is satisfied when an employer shows that the employee had "sufficient experience" with performing the specific task that resulted in the alleged violation, "enough times in the past to become reasonably proficient." (*West Coast Communication*, Cal/OSHA App. 11-2801, Decision After Reconsideration (Feb. 4, 2011); *Solar Turbines, Inc.*, Cal/OSHA App. 90-1367, Decision After Reconsideration (July 13, 1992).)

Caro had worked for Employer for two years at the time of the accident, and had worked on the box-making production lines for all that time. (HT Day 2, pp. 168-169, 197.) Caro testified that he had cleaned the pallet stacker before, and was experienced in cleaning machinery in the box-making area. (*Id*., pp. 193, 203.) He also testified that he was experienced in conducting the Audit process of the box-making lines. (*Id*., p. 203.)

The ALJ found that this element was not established, reasoning that even if Caro was experienced at the task of performing Audits and cleaning machinery on the box-making line, Employer failed to demonstrate Caro was trained on "machine-specific procedural steps to control hazardous energy of the Lift inside the pallet stacker," and therefore failed to demonstrate that Caro was experienced with hazardous energy control procedures. (Decision, pp. 13-14.)

We need not reach this issue. Even if we were to disagree with the ALJ on this point, and find that Employer satisfied the first element, the record supports the ALJ's determination that Employer failed to prove elements two, three, and five.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to demonstrate it has a well-devised safety program, which includes training employees in matters of safety respective to their particular job assignments. (*FedEx Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016).) The Board has held that this element should be analyzed "by taking a realistic view of the employer's written program and policies, as well as the actual practices at the workplace." (*Glass Pak*, Cal/OSHA App. 03-750, Decision After Reconsideration (Nov. 4, 2010).)

Employer argues that it has a robust safety program which included extensive training on its SAM and LOTO procedures. (Employer's Closing Brief, pp. 13-14.) Caro testified that he had been trained on Employer's SAM and LOTO procedures, and that he felt the training prepared him to perform those procedures safely. (HT Day 2, p. 199.) Employer also presented Caro's training records, and its hazardous energy control training materials. (Exhibits RR, SS, TT, UU, VV.)

However, as discussed above, Caro testified that he had never been trained not to use his hands to dislodge wood fragments from the pallet stacker. (HT Day 2, pp. 234, 237-238.) Caro's safety training cannot be considered effective if he did not know, at a minimum, not to reach into machinery with his hands without blocking or locking out movable machinery parts. Caro also testified that, to his knowledge, there were no LOTO procedures for the box-making area, and thus none for the pallet stacker. (HT Day 2, pp. 172, 174-175.) Employer presented the LOTO procedures for the box-making area at hearing. (Exhibit DDD.) It stands to reason that Caro could not have been effectively trained on these LOTO procedures, if he did not know that such procedures existed.

Also, as will be discussed with regard to the violation of section 3314, subdivision (g), alleged in Citation 3, Employer did not have machine-specific hazardous energy control procedures for the pallet stacker and other box-making machinery. The IEAD is premised upon an employer's compliance with non-delegable statutory and regulatory duties regarding workplace safety. The Board has therefore held that a lack of machine-specific LOTO and hazardous energy control procedures defeats this element of the IEAD, when it is asserted as a defense to section 3314, subdivision (c). (*Blue Diamond Growers*, Cal/OSHA App. 10-1281, Denial of Petition for Reconsideration (Oct. 17, 2012); *Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.) The Board has reasoned that an employer's failure to comply with the legal requirement to develop machine-specific hazardous energy control procedures is a "material deficiency" in an employer's safety program. (*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.) Employer cannot establish the second IEAD element.

c. Did Employer effectively enforce the safety program?

Under the third IEAD element, the employer has the burden to show that it enforces the safety policies and procedures promulgated in its IIPP and training programs, and promotes a safe working environment. (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.) In relevant part, this element requires the employer to demonstrate that it provided an adequate level of supervision to detect and correct hazardous conditions and practices. (*Fed Ex Ground, Inc*., *supra*, Cal/OSHA App. 1199473; *City of Los Angeles Water and Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 4, 1988).) An employer's failure to exercise a level of supervision necessary to ensure safety has been consistently recognized as negating the IEAD. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd.* (1985) 167 Cal.App.3d 1232, 1243; *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.)

While it may be true that one-to-one supervision is neither practical nor required, supervision must be adequate. (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).) Here, the record indicates that Employer failed to provide an adequate level of supervision to detect and correct the unsafe practice of Caro omitting steps in the

SAM procedure. Employer also offered no evidence that it observed or supervised employees during 5-S Audits. (Decision, p. 14.) Caro testified that he was working alone when the accident occurred. (HT Day 3, p. 266.) Caro was working on Line 2, while Wilson, Caro's supervisor, was working on Line 7. (HT Day 2, p. 205.) Line 2 was approximately a five-minute walk from Line 7, so Wilson was unable to observe Caro when he performed the Audit and the SAM procedures. (*Id*.)

Christopher Harden (Harden), Employer's senior Environmental Safety and Health manager, testified that employees "are properly trained on operations, on safety, and they're then the owners of that operation, owners of their territories that they work in […] which includes the area, the equipment, and so on. And they have to maintain the safety within that territory." (HT Day 3, p. 388.) This suggests, as the ALJ pointed out, that Employer shifted the responsibility for safety to employees, rather than exercising effective supervision. (Decision, p. 15.)

As noted, Caro had worked on the box-making production lines for two years at the time of his injury. He testified that he performed a 5-S Audit and deep cleaning in that area at least once a month. (HT Day 2, p. 169.) At any time in that two year period, adequate supervision would have discovered whether or not he was performing these tasks safely and correctly. The ALJ correctly concluded that Employer failed to establish this element.

d. Did Employer have a policy of sanctions which it enforced against employees who violated the safety program?

The fourth IEAD element requires the employer to show that it applies a policy of sanctions – for example, progressive discipline or other punishment – to employees who violate the safety program. (*Synergy Tree Trimming, Inc., supra*, Cal/OSHA App. 317253953)

Employer presented evidence of discipline for employees who violated safety rules, including LOTO and SAM procedures. (Exhibits A, B.) Caro himself was terminated after the accident, for failing to follow those procedures. (HT Day 2, pp. 195-197; HT Day 3, pp. 387-388.)

The record therefore indicates that Employer satisfied this element.

e. Did the employee who caused the safety violation know the action was contrary to Employer's safety rules?

The fifth IEAD element "requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc*., *supra*, Cal/OSHA App. 317253953.) The Board has held that inadvertence, as opposed to "conscious disregard of a safety rule," does not establish the fifth element of the IEAD. (*Id*.)

Employer argues that Caro knew failing to verify de-energization of the pallet stacker violated the SAM procedure. (Employer's Closing Brief, pp. 15-16.) However, Employer presented no evidence that this omission was intentional. Employer failed to establish this element.

For the reasons discussed, we affirm the ALJ's finding that Employer failed to establish all required elements of the IEAD. Citation 2 is affirmed.

4. Was Citation 2 properly classified as Serious?

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

When determining whether a citation is properly classified as Serious, Labor Code section 6432 requires application of a burden shifting analysis. Labor Code section 6432, subdivision (a), places the initial burden on the Division to establish a rebuttable presumption that a violation is serious.

The Division's initial burden has two parts. First, the Division must demonstrate the existence of an "actual hazard created by the violation." (Labor Code, § 6432, subd. (a).) Second, the Division must demonstrate a "realistic possibility that death or serious physical harm could result from that actual hazard created by the violation." (*Id*.) The term "realistic possibility" means "that the Division's demonstration must be within the bounds of reason, and not purely speculative." (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).)

Here, Caro's arm was crushed, resulting in multiple fractures that required surgery and eight days of hospitalization. (HT Day 2, pp. 170-171; Exhibit 13.) The parties stipulated that he suffered serious physical harm. (HT Day 1, p. 8.)

Reyes testified that a lack of effective hazardous energy control procedures for the pallet stacker created the hazard of injury resulting from inadvertent movement of the lift platform during cleaning or servicing. (HT Day 1, pp. 43-44.) Reyes further testified that a "high" possibility existed that serious injuries such as crushing could result from inadvertent movement of the lift platform. (*Id*., p. 44.)

The ALJ found, "The actual hazard of failing to stop the movement of a Lift capable of fracturing pallets is injuries such as crushing or fractures, which did cause serious physical harm. Unanticipated movement of a machine due to a release of hazardous energy presents a realistic possibility of crushing and fracture injuries." (Decision, p. 17.) The ALJ therefore concluded that the Division met its burden to establish a rebuttable presumption that Citation 2 was properly classified as Serious. (*Id*.) We agree.

Employer argues that because Reyes was no longer employed by the Division at the time of the hearing, he was not current in his Division-mandated training, and therefore was neither competent nor qualified to testify as to any element of the alleged violation, pursuant to Labor Code section 6432, subdivision (g). (Petition, pp. 11-12.) This subdivision provides that a Division safety engineer whose mandated training is current at the time of hearing "shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation." (Lab. Code, § 6432, subd. (g).)

Employer appears to misapprehend the standard set forth in Labor Code section 6432, subdivision (g). The statute does not specify that *only* witnesses who are current in their Division-mandated training are competent to testify regarding Serious citations.

The Board recently addressed this question, in *Shimmick Construction Company, Inc*. There, the Board reasoned that a witness who is not current in his or her Division-mandated training "may still offer opinion testimony regarding the serious classification, provided there is otherwise a valid evidentiary foundation for the opinion." (*Shimmick Construction Company*, Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022), citing *Forklift Sales of Sacramento, Inc*., Cal/OSHA App. 05-3477, Decision After Reconsideration (Jul. 7, 2011) and *Sherwood Mechanical, Inc*., Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).) The Board further reasoned, "In addition, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification." (*Shimmick Construction Company, Inc*., *supra*, Cal/OSHA App. 11192534, citing *Home Depot USA, Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).)

To meet its initial burden, the Division must produce "some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MDB Management*, *Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) Although Reyes cannot be deemed presumptively qualified to testify as to the Serious classification, that does not require a different outcome here. The pneumatic lift was undisputedly strong enough to crush wooden pallets. It could, and did, cause crushing and fracture injuries as a result of unexpected movement. There is no doubt that unexpected movement of a machine that generates such force presents a "realistic possibility" of serious physical harm. The Division demonstrated that an actual hazard existed as a result of the violation, and that Caro was seriously injured as a result, which is sufficient to establish the rebuttable presumption.

b. Did Employer rebut the presumption that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (c), provides that an employer may rebut this presumption by demonstrating that it "did not know, and could not, with the exercise of reasonable diligence, 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, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

The factors listed in section 6432, subdivision (b), in turn, include:

> (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
>
> (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
>
> (C) Supervision of employees exposed or potentially exposed to the hazard.
>
> (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
>
> (E) […]

Employer argues that Caro was trained in its LOTO and SAM procedures, and "Employer did not know that Caro would reach into the machine without following proper procedures." (Employer's Closing Brief, p. 17.) However, as discussed with regard to the IEAD, and as discussed below, neither the SAM nor LOTO for the box-making area provided machine-specific procedural steps, including steps for mechanically blocking or locking out the pallet lift platform. (Exhibits NN, DDD.) Without such procedures in place, Caro could not reasonably have been trained on them. Caro did not even know there was a LOTO procedure for the box-making area. (HT Day 2, pp. 172, 174-175.) The ALJ correctly concluded, "Employer could not have properly trained Caro, and thus falls short of establishing it provided effective training." (Decision, p. 18.)

As also discussed with regard to the IEAD, the record indicates Caro was not adequately supervised. Employer knew, or should have known, of the likelihood that employees might overlook steps in the six-step SAM procedure, and that a "reasonable and responsible employer would anticipate the likelihood of skipped steps and would direct a supervisor to perform periodic or spot monitoring of the employee. Such observation would [provide] opportunities for correction, but Employer did not provide such supervision." (Decision, p. 18.)

Finally, Employer knew that pallets frequently splintered and broke in the pallet stacker, requiring removal of wood debris. (HT Day 3, pp. 299-300.) Employer therefore knew that the pallet lift moved with enough force to break wooden pallets. Employer also reasonably knew that removing the wood fragments sometimes required reaching into the pallet stacker. Employer's SAM for the box-making area lists "Clear Jams" as among its approved tasks. (Exhibit NN.) Yet, as the ALJ noted, Employer's SAM and LOTO procedures did not provide procedures for blocking the pallet stackers's lift platform during this task. (Decision, p. 18.)

For the reasons discussed above, we agree with the ALJ's finding that, "Employer did not take reasonable steps to avoid generic instruction and training, detect and correct employee error, and develop blocking procedures for the Lift. Thus, Employer failed to rebut the presumption of a Serious classification." (Decision, p. 18.) We therefore find that Citation 2 was correctly classified as Serious.

5. Did the Division establish, by a preponderance of evidence, that Employer failed to develop and utilize machine-specific hazardous energy control procedures?

In Citation 3, the Division cited Employer for an alleged violation of Section 3314, subdivision (g), which provides:

> (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) A statement of the intended use of the procedure;
>
> (B) The procedural steps for shutting down, isolating, blocking and securing machines or equipment to control hazardous energy;
>
> (C) The procedural steps for the placement, removal and transfer of lockout devices and tagout devices and responsibilities; and,
>
> (D) The requirements for testing a machine or equipment, to determine and verify the effectiveness of lockout devices, tagout devices and other hazardous energy control devices.
>
> (2) The employer's hazardous energy control procedures shall be documented in writing.
>
> (A) The employer's hazardous energy control procedure shall include separate procedural steps for the safe lockout/ tagout of each machine or piece of equipment affected by the hazardous energy control procedure.

The Division alleged:

> Prior to and during the course of the investigation, the employer did not develop and utilize machine specific hazardous energy control procedures specific to the Line 2 Box-making Pallet Stacker to prevent inadvertent movement during cleaning, repairing, servicing, setting-up or adjusting operations.

Employer's system of box-making machinery was complex, and included the pallet stacker, a robotic arm, two box folders, and various conveyor belts interconnecting these

components. (HT Day 3, pp. 293-297; Exhibits 2, ZZ, AA, AAA, CCC.) The issue is whether the Division's evidence demonstrated that Employer failed to develop machine-specific hazardous energy control procedures for the equipment and machinery that constituted the Line 2 box-making machinery.

As noted, Employer had two sets of hazardous energy control procedures for Line 2: SAM and LOTO. SAM was a hazardous energy control procedure, but not, by Employer's own description, a lockout/tag out procedure. (HT Day 3, pp. 314, 328-329, 355; Exhibits NN, RR, UU.) By its plain language, section 3314, subdivision (g), applies only to lockout/tag out procedures. Employer's SAM was not sufficient to prevent the pallet stacker's lift platform from moving, precisely because it did not include procedures for mechanically blocking or locking out all movable parts of the pallet stacker – relevant here, the pallet lift platform. Its deficiencies are therefore addressed here.

Employer argues that it did have machine-specific hazardous energy control procedures for the box-making area of Line 2. Employer argues that the pallet stacker was not itself a "machine," but merely one component of the box-making machine. (Petition, pp. 9-10.) Employer asserts that the LOTO and SAM were machine-specific, because a single electrical panel (Exhibits 2, DDD) "contains the main disconnect for the machine, including the pallet stacker portion of the machine." (Petition, p. 9.)

This argument is without support. First, Board precedent holds that a separate written procedure for each machine or piece of equipment is required. (*Langer Farms, LLC*, *supra*, Cal/OSHA App. 13-0231; *All American Asphalt*, Cal/OSHA App. 09-3871, Denial of Petition for Reconsideration (Jan. 11, 2011); *Newman Flange and Fitting Co.*, Cal/OSHA App. 07-2581, Decision After Reconsideration (Oct. 5, 2011).) Section 3941 defines a "machine" as, "The driven unit as distinguished from the driving unit, which is defined as a prime mover." The pallet stacker fits into this category. Simply because it is only one unit or component in a larger system of machinery does not mean it is not, itself, a machine. Furthermore, although the safety orders do not define "equipment," the commonly accepted definition of that term is, "supplies or tools needed for a special purpose."[4] Even if the Board were to accept Employer's argument that the pallet stacker was not an independent machine, it was certainly a piece of equipment used for the purpose of stacking pallets, and thus required its own hazardous energy control procedures.

Second, even if the main disconnect did shut down electricity to the entire box-making machinery system, it only shut down electric energy. The pallet stacker, however, also utilized pneumatic energy. Employer's SAM and LOTO failed to account for this hazardous energy source, which is specifically listed in section 3314, subdivision (b). Moreover, the evidence does not show that Employer had separate hazardous energy control procedures for any of the machines or equipment within the box-making machinery, and thus Employer could not have had procedures to address the hazardous energy in the pallet stacker. (*All American Asphalt*, *supra*, Cal/OSHA App. 09-3871.)

Employer further argues that "the Division accepted" that the box-making LOTO and SAM were machine-specific, "even from the Division's perspective," by accepting Employer's

[4] https://www.britannica.com/dictionary/equipment

abatement certification (Exhibit D), "even though the Employer did not submit a new LOTO procedure." (Petition, p. 10.) This is irrelevant. Labor Code section 6600 provides that the only abatement issue that can be raised on appeal is "the reasonableness of the changes required by the division to abate the condition." Employer's Petition does not argue that the abatement requirements were unreasonable. Instead, Employer appears to argue that the Division acknowledged the violation did not exist, by accepting Employer's abatement measures. Employer offers no legal authority in support of this proposition. If, indeed, the Division had actually concluded the violation did not exist, the more reasonable course of action would have been to withdraw Citation 3. In any event, we are not bound by the Division's determination on abatement, and conclude that a violation exists.

a. Did Employer fail to develop machine-specific SAM procedures for the box-making area of Line 2?

As noted, Employer's SAM did not include procedures for mechanically locking or tagging out machinery. It cannot satisfy the requirements of the safety order for that reason alone. Employer's basic SAM procedure contained six steps:

1. Stop Machine Cycle
2. Verify If Machine Stopped Moving
3. Apply Safety Device (E-Stop/Interlock)
4. Verify Isolation: TRY
5. Minor Servicing (Clear Jam)
6. Restore Machine To Use

(Exhibits NN, RR, UU.)

The section in Employer's SAM designated for the Line 2 box-making machinery provided cursory instructions to some, but not all, of the above steps. For example, under Step 4, the SAM states:

> VERIFY ISOLATION BY TRYING TO START MACHINE
> Verify to ensure hazardous energy has been controlled. Try to re-start the equipment:
> •

(Exhibit NN.)

The blank space following the bullet point should, presumably, contain directions on how to re-start the equipment once a safety device has been applied, in order to ensure the machinery does not move. Employer dismisses this as "the result of an editing error." (Petition, p. 10.)

Editing error or not, "The safety order requires a hazardous energy control procedure to "clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized," including, "(D) The requirements for testing a machine or equipment, to determine and verify the effectiveness of lockout devices, tagout devices and other hazardous energy control devices." (§ 3314, subds. (g)(1), (g)(1)(D).)

Employer's SAM contains none of these required elements. In addition, the only safety devices identified are the use of an e-stop, or interlock panel or door. (Exhibit NN.) No instructions are provided as to what an interlock panel or door is, where it is located, or how to use it. There is no mention at all of lockout or tagout devices.

Nor does Employer's Line 2 SAM contain any instructions at all that are specific to the various machine components or equipment that comprised the box-making system. Even if the Board were to accept Employer's argument that the components of the box-making system were, collectively, one large machine, the SAM fails to identify and provide instructions for de-energizing, isolating, and blocking or locking out the all of the various energy sources it contained; for example, the pneumatic energy in the pallet stacker's lift. The SAM therefore cannot be in compliance with section 3314, subdivision (g)(1)(B), which requires that it include "The procedural steps for shutting down, isolating, blocking, and securing machines or equipment to control hazardous energy."

We find that Employer's SAM for the box-making machinery on Line 2 failed to include all required procedural steps. (Decision, p. 12.)

b. Did Employer fail to develop machine-specific LOTO procedures for the box-making area of Line 2?

Employer's basic LOTO procedure contained nine steps:

1. Identify Energy Sources
2. Notify Others
3. Shutdown [Sic] Equipment
4. Isolate Equipment
5. LOTO The Equipment
6. Release Stored Energy
7. Verify Isolation
8. Perform Servicing
9. Release From LOTO

(Exhibit RR)

Caro testified that, to his knowledge, there were no LOTO procedures for the Line 2 box-making area, and thus none for the pallet stacker. (HT Day 2, pp. 172, 174-175.) Employer did not submit a LOTO procedure specific to the Line 2 box-making area in response to the Division's document request. (Exhibit 11; Division's Closing Brief, p. 14.) At hearing, however, Employer introduced a LOTO procedure for the Line 2 box-making area, which Shaeffer testified had been in effect at the time of Caro's injury. (Exhibit DDD; HT Day 3, pp. 310, 312.) Shaeffer testified that this LOTO procedure for the Line 2 box-making area included the pallet stacker. (Exhibits 2, DDD; HT Day 3, p. 312.) Shaeffer further testified that this document contained Employer's "entire process" for LOTO of the box-making machinery, and "it should cover everything that is required." (HT Day 3, p. 333.)

The LOTO procedure for the Line 2 box-making area fails to include all of Employer's nine basic LOTO steps, as listed above. The Line 2 box-making LOTO completely omits steps 2

("Notify Others"), 6 ("Release Stored Energy"), 8 ("Perform Servicing"), and 9 ("Release From LOTO"). (Exhibits RR, DDD.) The steps that are included do not "clearly and specifically outline the scope, purpose, authorization, rules, and techniques to be utilized for the control of hazardous energy." (§ 3314, subd. (g)(1).)

Under an item titled "Required Hardware," the Line 2 box-making LOTO states, "1 red lock & 1 white danger tag at each power source. Use 1 personal lock, 1 white danger tag per person at the lock box as well as 1 green 'Lock and Try' tag." However, that LOTO does not include "procedural steps for the placement, removal, and transfer" of the locks and tags, such as how, where, and when the locks and tags should be affixed. (§ 3314, subd. (g)(1)(C).)

Under an item titled "Energy Source Isolation," the Line 2 box-making LOTO states, "ELECTRICAL DISCONNECT: shut off, lock, and tag the disconnect switch on power panel EEP02-XP1." (Exhibit DDD.) No instructions are given as to how to perform any of these steps. Although the phrase "each power source" indicates more than one energy source, and an item titled "Types and Magnitude of Energy Sources" lists those sources as "480 VAC, Hydraulic, Potential Gravitational energy [sic]," the Line 2 box-making LOTO does not indicate the number or location of these energy sources, or what they each control. (Exhibit DDD.) In addition, the Line 2 box-making LOTO makes no mention of the pneumatic energy within the pallet stacker.[5]

Under the item titled "Potential Gravitational Energy," the only provided instruction states, "NOTE: if repairs are to take place with the scissor lift in the raised position it must be blocked so that potential gravitational energy is isolated." (Exhibit DDD.) There are no procedural steps on how to block the scissor lift.

Under the item titled "Hydraulic Energy," the Line 2 box-making LOTO states, "relieve pressure on hydraulic system using approved method: shut off hydraulic supply line and open bleed valve on cylinder or system." (Exhibit DDD.) The Line 2 box-making LOTO provides no directions on how or when to do this, or what equipment it affects.

The Line 2 box-making LOTO therefore cannot be in compliance with section 3314, subdivision (g)(1)(B), which requires that a LOTO include "The procedural steps for shutting down, isolating, blocking, and securing machines or equipment to control hazardous energy."

The only reference to Step 7 ("Verify Isolation") is a photo of a control panel which is captioned, "NOTE: These manual switches can be used during the attempt to start after LOTO. This panel is secured to the Kuka cage on the north side of the bulk material conveyors." (Exhibit DDD.) No instruction is given as to how to use the switches, what they control, or otherwise how to verify that the machinery is de-energized or locked out, as required by section 3314, subdivision (g)(1)(D).

The Line 2 box-making LOTO also does not include procedural steps that are specific to any particular machine or equipment within the box-making machinery. Again, even if the Board accepts Employer's argument that the various components of the box-making system were

[5] "Hydraulic" power means "operated by or involving the pressure of water or some other liquid" (https://dictionary.cambridge.org/us/dictionary/english/hydraulic), while "pneumatic" power means "operated by air pressure." (https://dictionary.cambridge.org/us/dictionary/english/pneumatic)

collectively one large machine, the Line 2 box-making LOTO fails to address how to safely de-energize, isolate, and lock out the various components of the machine. It fails to indicate what specific parts of the machinery its steps affect, the sources and locations of energy for the multiple pieces of equipment within the system, and how to verify that each piece of equipment is de-energized and made incapable of inadvertent movement.

The ALJ therefore concluded, "The instructions do not address all the machines in Line 2. … As such, the Line 2 box-making LOTO does not provide machine-specific procedural steps." (Decision, p. 12.) We agree.

For the reasons discussed, we find that Employer failed to develop and utilize machine specific hazardous energy control procedures specific to the Line 2 box-making area. Citation 3 is affirmed.

DECISION

For the reasons stated, the ALJ's Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member
Marvin Kropke, Board Member

FILED ON: 07/25/2024