

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

JERLANE, INC. dba COMMERCIAL
BOX AND PALLET
1249 West Washington Avenue
Escondido, California 92029

Employer

Docket Nos. 01-R3D2-4344
through 4348

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. This decision is rendered in response to a petition for reconsideration filed by Jerlane, Inc. dba Commercial Box and Pallet (Employer) in this matter.

Jurisdiction

Commencing on May 31, 2001, the Division of Occupational Safety and Health (the Division), through Associate Safety Compliance Officer Michael Loupe and Senior Safety Engineer Mariano Kramer, conducted an accident investigation at a place of employment maintained by Employer at 1249 West Washington Avenue, Escondido, California (the site). On October 10, 2001, the Division issued Employer five citations (one of which had five individual regulatory and general violations) of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ Three of the citations were classified as serious, one was classified as willful/serious and the total proposed penalties were \$86,800.

Employer filed timely appeals contesting a number of the alleged violations. Employer also raised the affirmative defenses of independent

¹ Unless otherwise noted, all section references are to Title 8, California Code of Regulations.

employee action and lack of knowledge for some citations. For all citations Employer asserted the defense of financial hardship.

A hearing was held on November 21 and 22, 2002, in San Diego, California by an Administrative Law Judge (ALJ) of the Board. On March 11, 2003, the ALJ issued a decision denying Employer's appeal in part. Employer's appeal was partially granted on the section 3203(a)(7) violation and the total penalties were reduced to \$72,100.

Employer filed a timely petition for reconsideration on April 14, 2003.² In the petition, Employer sought reconsideration of the ALJ's decision regarding the existence and classification of the section 4306(a) violation [under hung saws] and the penalty associated with it, the applicability of the Independent Employee Action and financial hardship defenses, and the remaining issues regarding the section 3203(a)(7) violation [IIPP training].

The Division answered Employer's petition on May 21, 2003 and the Board took the petition under submission on June 4, 2003. After the Board took the matter under submission, it remanded the case to the ALJ to address the issue of financial hardship relief in light of the Board's Decision After Reconsideration in *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946 Decision After Reconsideration (March 27, 2006), which was rendered while this petition was pending. A Decision After Remand issued on August 8, 2006 denying Employer financial hardship relief.

EVIDENCE

Employer manufactures and distributes pallets. On April 19, 2001, employee Alejandro Zepeda (Zepeda) severed two fingers on his right hand while operating a saw.

Zepeda usually worked in the assembly area of Employer's operation, but on the day of the accident, Octavio Cabrera (Cabrera), Employer's foreman, told him to assist another worker in the woodcutting area to cut 4' by 4's. When he finished the assignment, the other worker instructed Zepeda to return to the cutting area and make 45-degree cuts. While performing this task, Zepeda grabbed a 4' by 4' with his left hand, but the wood was poorly positioned so he pushed the wood a bit to the right with his right hand and cut off his fingers. His fingers could not be reattached.

Zepeda had operated the saw on two occasions. The first occasion was when Cabrera showed him how to make two cuts; the second occasion was at the time of his accident. Zepeda was never shown how to make corner cuts.

² We decline to grant Employer's request for oral argument pursuant to Title 8, Section 393(a).

He was aware of Employer's policy that employees were to receive training on a machine before using it, but it was not until after his accident that he received training on the saw in question.

Safety Compliance Officer Michael Loupe (Loupe) opened an accident investigation at Employer's site on May 31, 2001. Loupe spoke with one of the owners of the company, John Mason (Mason). He also interviewed Zepeda and the foreman, Octavio Cabrera.

Loupe opined that the saw in question was a "cut off saw" and Division Senior Safety Compliance Officer Mariano Kramer (Kramer), who accompanied Loupe during his initial inspection of the site, opined that the saw meets the definition of a "jump saw" under the American National Standard Institute provision on Woodworking Machinery, Safety Requirements, ANSI O1.1, section 2.2.1.4. (1992).³ Loupe conceded that both descriptions fit the saw in question (hereinafter "the saw").

Loupe explained that in the rest position the saw blade remains underneath the table. When the foot pedal is depressed the blade protrudes vertically through a slit, the hood guard drops down to within four inches of the cutting surface, and then the blade rises up and cuts the wood. After the wood is cut, the blade retracts back down under the table.

Loupe and Kramer observed the saw in operation and both concluded that the saw was inadequately guarded above the table, because the hood guard left part of the blade exposed. Both men informed Mason of this deficiency, and Mason assured them that the saw would not be used until the problem was corrected.

On July 6, 2001, Loupe returned to Employer's site and observed the saw in operation with the same hazardous condition. At that time, Loupe posted an order prohibiting use. A few days later Loupe returned to Employer's site and observed that the hood had been retrofitted with an attachment. Although Employer had attempted to abate the exposure hazard, Loupe believed that the attachment would have to be removed or opened in order to make 45-degree cuts in the wood. If the attachment were removed, an employee's hands or fingers would again be exposed to the blade.

Loupe testified that Cabrera told him during the investigation that he

³ Section 2.2.1.4 defines a "jump saw." The Board notes that the ANSI standard is not incorporated by reference in section 4306 and is not part of the regulation. The standard was introduced to assist in defining the saw in question and support the applicability of section 4306, which pertains to cut-off and jump saws. Employer may not be required to meet the standard's requirements, nor may Employer defend its actions based on the standard's specifications, except to the extent they are incorporated by reference into the Title 8 safety orders. Because we see no findings in the decision that are based on the ANSI standard, we find no error in the decision's reference to it.

(Cabrera) had no recollection of the guard ever being part of the cutting cycle and that the guard on the saw only worked sporadically for the six months prior to the accident. On the day before and the day of the accident, the saw guard was not working at all. Cabrera told Loupe that he was aware that something was wrong with the air system that operated the hood, and that it was missing an element that allowed the air system to work. Cabrera also told Loupe that the problem with the saw had been a topic at safety meetings at which Mason was present.

At hearing, however, Cabrera testified that he did not recall making many of the statements Loupe attributed to him and did not recall concerns regarding hazards related to the saw being raised at safety meetings. He did recall being told that the saw was not working properly and that cuts were not straight. Cabrera testified that he had operated the machine thousands of times prior to Zepeda's injury, that the yellow guard was not coming down, and that the guard was not working on the day of the accident.

Zepeda's co-worker, Simon Aguaro, testified that he worked for Employer for four years and that, for his first two years of employment, he operated the saw. During that time, the guard did not come down when the pedal was pressed. On at least one occasion when Mason was present, he mentioned at a safety meeting that the guard did not function. Aguaro stated that Mason responded that the problem would be fixed.

Mason testified that the guard had stopped working approximately three years prior to the accident but was never taken out of service. Mason conceded that the guard did not go up and down, but he believed the guard was operating effectively at the time of Zepeda's accident. He asserted that, even with the guard in the down position, the operator could control any momentary exposure to the blade by pressing the foot pedal. In addition, he contended that the saw was guarded while in the rest position or by the roof top guard located over the top of the saw.

Mason maintained that Zepeda told him after the accident that he thought the saw had self-activated prior to his accident. He stated that he informed the Division inspectors as much. Mason stated that he immediately took the saw out of service and sent it for evaluation to find out if the saw had self-activated. He learned that the saw did not self-activate but that a valve should be replaced. In the accident report he prepared on April 25, 2001, Mason concluded that Zepeda was injured when he pushed a 4' by 4' through the saw and accidentally stepped on the foot pedal, which activated the saw. Mason further concluded that Zepeda needed additional training with respect to the saw blade.

Mason testified that he did not recall hearing complaints about the guard at any of the safety meetings. According to Mason, at the time of Zepeda's injury or the inspection, he had no knowledge of a dangerous or unsafe condition on the saw. He became concerned after Zepeda was injured and took all necessary steps at that time to address his concern by sending the saw for troubleshooting.

Mason further represented that Loupe told him that, if Employer was actively working on getting a guard to correct the exposure gap, he could continue to operate the saw. He was surprised to learn that Loupe had placed an order prohibiting use on the saw during his second visit on or about July 5, 2001, given Loupe's prior representation that he could continue to use the saw if he was working on correcting the problem. Mason denied that the saw was used until after the new guard was in place. It was Mason's opinion that he was not in violation of any safety order because he was not aware that the saw posed a safety hazard or violated a safety order until the time of the opening conference on May 31, 2001.

Issues for Reconsideration

1. Did Employer raise newly discovered material evidence which it could not, with reasonable diligence, have discovered and produced at the hearing?;
2. Does the evidence justify the findings of fact and do the findings of fact support the ALJ's decision?
3. Is penalty relief based on financial hardship warranted?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the petition for reconsideration and the Division's response thereto. In light of all of the foregoing, we find that the ALJ's decision issued March 11, 2003 and the decision after remand issued August 8, 2006, were proper, and were based on substantial evidence in the record as a whole. We therefore adopt the ALJ's decision and decision after remand in their entirety. A copy of the ALJ's decision and decision after remand are attached and incorporated into our decision by reference.

In addition, we address some of the arguments raised in Employer's

petition that were not specifically addressed in the ALJ's decision, or which we believe warrant further response.

1. Employer has not presented newly discovered material evidence.

In an apparent effort to discredit the injured worker, Zepeda, Employer contends that it learned, post-hearing, that Zepeda "falsified documents, including his Social Security card and matters set out under penalty of perjury on the INS-Form I-9 that he signed in order to obtain his employment." Employer contends that it received a memorandum from American Staff Resources on November 25, 2002 indicating discrepancies between the information provided by some of Employer's workers, including Zepeda, and the Social Security Administration's database. When confronted with this information, Zepeda was unable to provide accurate information and left his employment. Employer states that it could not have known of Zepeda's "deceit" prior to the hearing and suggests that the testimony should be reconsidered in light of this new information. We disagree.

We have only the materials provided by Employer from which to consider Employer's claim, and we conclude that Employer had cause to question the validity of Zepeda's work eligibility documentation in advance of the hearing. Specifically, the form has spaces for an employee to check whether he is: (1) A citizen or national of the United States; (2) a Lawful Permanent Resident; or, (3) an Alien authorized to work. Although none of these boxes is checked, a number is listed under item (3), "Alien authorized to work" and that portion of the form is signed by Zepeda. While this would suggest that Zepeda was an "Alien authorized to work," later on the form, in section 2, which is to be completed and signed by the employer, it reads "Resident Alien." The certification for this section, made under penalty of perjury, is signed by John Mason and dated April 20, 2000. Mason's declaration submitted with Employer's petition for reconsideration further states that Zepeda presented him with a Resident Alien card, an illegible photocopy of which is included with the declaration.

We note that "Resident Alien" cards are issued to lawful permanent residents,⁴ which, given that Zepeda referred to himself as an "alien authorized to work," should have given Employer pause. We are aware that Zepeda testified at the hearing through an interpreter and it is clear to us that Zepeda has, at best, limited English fluency. Nonetheless, the I-9 form for Zepeda that was supplied by Employer is in English and the space for a preparer/translator to attest to their participation in completing the form is blank. We think it unlikely that Zepeda could read and complete the form without assistance,

⁴ See, e.g., www.uscis.gov, the website for the United States Citizenship Information Service, an agency within the United States government. This information is provided under "About the Form I-9", which is included under "Employer Information."

which may or may not explain the apparent inconsistency between the information provided in the two sections of the form. If Employer provided Zepeda with language assistance, then Employer failed to properly complete the form.

Given the inconsistency on the form I-9, we find that Employer could have learned, with reasonable diligence, of a problem with Zepeda's documentation, and any duplicity associated with it, in April 2000, well in advance of the hearing on this matter. We therefore decline to recognize the evidence submitted with Employer's petition as "newly discovered." See, *Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing *R.D. Engineering & Construction, Inc.*, Cal/OSHA App. 98-1938, Decision After Reconsideration (Aug. 29, 2001); section 390.1(a)(4).

In addition, we are unable to properly review the copies of Zepeda's work authorization documents provided by Employer because they are illegible in whole or in part. We further find that Employer failed to establish an evidentiary foundation that would allow the Board to meaningfully consider the documents submitted (e.g., no foundation was laid to demonstrate that the memorandum from American Staff Resources is admissible under an exception to the hearsay rule).

More importantly, however, we do not believe that Employer's "newly discovered evidence" is material. We do not agree that any dishonesty associated with Zepeda's submission of employment eligibility documentation renders Zepeda an inherently untrustworthy person. We would no sooner draw such a broad conclusion about Zepeda than we would conclude that Employer is inherently careless for failing to note the discrepancy on the I-9 form until an outside agency alerted it to a problem. We decline to engage in such gross over-generalizations and instead adhere to our established rule of deferring to an ALJ's witness credibility determinations barring substantial evidence that the determinations are unwarranted. *Rudolph and Sletten, Inc.*, Cal/OSHA App. 01-478 Decision After Reconsideration (March 30, 2004); *River Ranch Fresh Foods-Salinas, Inc.* Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003). We see no such evidence here.

2. Does the evidence justify the findings of fact and do the findings of fact support the ALJ's decision?

a. The ALJ's Witness Credibility Determinations Are Sound.

Much of Employer's petition questions the credibility determinations made by the ALJ and suggests that the testimony should have been weighed differently. Employer makes much of inconsistencies between different witnesses' testimony and between statements made to the Division versus

testimony on the stand. While such inconsistencies exist, it is the job of the ALJ to weigh competing accounts. “[W]e will not disturb credibility findings made by the ALJ who was present at the hearing and able to directly observe and gauge the demeanor of the witness and weigh his or her statement in light of his or her manner on the stand.” *River Ranch Fresh Foods-Salinas, Inc.*, *supra* at p. 6. Here, we have thoroughly reviewed the tapes and exhibits from the hearing and agree with the ALJ’s credibility determinations.

We also agree with the ALJ that Cabrera’s statements to Loupe are authorized admissions that constitute exceptions to the hearsay rule and are binding on Employer. (See *Macco Constructors, Inc.*, Cal/OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986); Evidence Code § 1222.) The fact that Cabrera contradicted those admissions when he testified does not alter their status as admissible exceptions to the hearsay rule. Rather, it creates the need for another credibility determination, which the ALJ performed and with which we concur. We further note that some of Cabrera’s initial admissions⁵ are corroborated in some respects by the testimony of Aguaro and Mason.

b. The Record Substantiates the Section 4306(a) Violation and the Serious, Accident-Related and Willful Classifications.

We concur with the ALJ’s analysis substantiating the section 4306(a)⁶ violation as well as the serious, accident-related and willful classifications, and we adopt her findings and conclusions in this Decision After Reconsideration. We also address some of the specific arguments raised in Employer’s petition.

Employer’s petition contends Employer could not have known that the deficient guard posed a serious danger because no injuries occurred during the 19 years that the saw was in operation and because the Division failed to post an order prohibiting use (OPU) after Zepeda’s injury, which, Employer argues, indicates that the Division, itself, failed to appreciate the danger posed. We find these arguments unpersuasive.

The Division inspectors credibly testified that they did not post an OPU at the time of the May 31, 2001 inspection because they relied on Mason’s

⁵ Loupe credibly testified that Cabrera told him that he could not recall the hood ever being part of the cutting cycle. He also told Loupe that the guard had worked only sporadically for the six months prior to Zepeda’s accident, that the hood had not worked on the day before or the day of Zepeda’s accident, and that the saw was missing a vital part. Moreover, at the hearing, Cabrera corroborated his prior statements that the guard was not coming down or working on the day of Zepeda’s accident. Cabrera also told Loupe that Mason was present at safety meetings when employees told Mason of the unsafe condition of the saw.

⁶ This section states, “All saws shall be effectively guarded above and below the table or roll case. The saw blade shall be fully enclosed when in the extreme back position, and the swing frame shall not pass the vertical position when at its extreme forward limit. A positive stop shall be furnished so that the saw cannot pass the front edge of the table.”

assurance that the saw would not be used until the violative condition was corrected. We do not question the Division's discretion to trust an Employer's word, and find no reason to question the veracity of the Division's testimony. In contrast, we share the ALJ's suspicion of Employer's position that the Division allowed it to continue to use a saw that had just caused an amputation, so long as Employer was working hard to fix the guard.

Moreover, the fact that an employer has been fortunate enough to avoid an injury for an extended period does not mean it could not have known of the hazard. On the contrary, the Board has held that unguarded machine parts that are in plain view constitute a serious hazard because an employer can detect them through the use of reasonable diligence. *New England Sheet Metal Works*, Cal/OSHA App. 02-2091, Decision After Reconsideration (Dec. 6, 2005); *Chicken of the Sea International*, Cal/OSHA App. 01-281, Decision After Reconsideration (Feb. 28, 2003). A machine is in plain view if it is located in an employer's facility and is of sufficient size to be easily detectable and recognizable. *Id.* There is no question that Employer's unguarded saw blade was in plain sight.

We also concur with the ALJ's analysis sustaining the willful classification of the violation and we believe that Employer's petition supports this finding, as well. Although Employer's petition continues to assert that the nature of the violation was not discussed with it during the Division's May 31, 2001 opening conference, the petition also defends Employer by asserting: "Employer took steps to conform the hood guard as per the inspectors' recommendations [which] only establishes that he was cooperating with their suggestions of May 31, 2001." Employer's efforts to comply with the Division's suggestions made at the opening conference indicate that Employer *was* informed of the hazard at that time. Employer, however, did not take these steps until after Loupe's July visit to the workplace, all of which supports the willful classification. We concur with the ALJ that the inspector's inability to specifically identify the safety order at issue during the opening conference, as Employer claims, is not controlling; they identified the violative condition, yet Employer opted to continue to operate the saw despite the Division's admonition.

Because we sustain the willful classification of the violation, we deny Employer's appeal of the assessed penalty and uphold the ALJ's finding that the proposed penalty of \$70,000 is reasonable. ⁷

⁷ While we agree that the penalty is properly assessed, we note that section 336(h), which pertains to penalties for willful violations, requires that the penalty be multiplied by 5, not 10 as originally proposed by the Division. Multiplying \$15,750 by 5 results in a total penalty of \$78,750, which is still beyond the maximum penalty of \$70,000 established by section 336(h). Thus, the \$70,000 penalty remains appropriate.

c. The Independent Employee Action Defense Does Not Apply.

We further concur with the ALJ's analysis of the Independent Employee Action Defense and adopt her findings and conclusions in this Decision After Reconsideration. Employer's petition, however, claims that it successfully asserted the defense because: it had an established safety program that included training; and Zepeda's testimony demonstrates that it effectively communicated its policy. This, alone, does not support the defense. Zepeda's lack of experience in using the saw in question to cut wood is undisputed and element one of the defense requires the employer to prove that the employee was experienced in the job being performed. *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980). Because failure to prove any one of the elements of the defense renders the defense inapplicable, Employer cannot successfully assert it here. *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After Reconsideration (Sept. 27, 1990); *Central Coast Pipeline Construction Company, Inc.* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).

d. The Record Supports the Decision's Findings on the Section 3203(a)(7) violation.

We adopt the ALJ's findings and conclusions regarding the section 3203(a)(7) violation in this Decision After Reconsideration.

3. Penalty Relief Based on Financial Hardship is Unwarranted

At the hearing, Employer testified that the company's monthly gross income is \$160,000 with monthly payroll for 25 employees between \$45,000 and \$50,000. Monthly rent is approximately \$8,400. Employer has two small business loans and another business loan totaling \$260,000. Monthly payments for these loans total \$4,000. Mason provided no documentation to support the company's financial condition.

Mason could not state whether the company could afford to make payments over time. He added that bankruptcy would be likely if the company were forced to pay the penalties.

Subsequent to the ALJ's decision being rendered in this matter, the Board issued a Decision after Reconsideration (DAR) in which we addressed the issue of financial hardship. In *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (March 27, 2006), we held that, in each case, an ALJ or the Board itself must determine whether the evidence rebuts the presumption that the penalties proposed by the Division are reasonable. The weight given to such evidence or components of the evidence should be determined on a case by case basis, although the trier of fact must always be

mindful of certain basic principles, such as whether the penalty ultimately imposed furthers the remedial purposes of the Act, or whether it strikes an appropriate balance between punishment and remediation. There is no fixed formula for making that determination.

We further held that correction of unsafe working conditions should be encouraged, and punishment as the sole inducement for change is disfavored. In some cases, an employer's distressed financial condition may warrant assessing a lower penalty to induce safety efforts and future compliance than would be the case if the same employer were not under such hardship. Such economic factors should not, therefore, be disregarded as irrelevant to the issue of "reasonableness of the proposed penalty."

In *Stockton Tri*, we stated that similar principles are to guide the Board and the ALJs in determining whether an installment payment plan will effectuate the purposes of the Act. The burden of proof is on the employer requesting financial relief. Each applicant must present sufficient factual information to enable an ALJ or the Board to make a proper decision. The ALJ must exercise discretion in determining the adequacy of necessary information to permit granting of financial relief and/or a reasonable installment payment program.

Further, the Board or the ALJ may consider additional factors such as: the employer's conduct in addressing worker safety; the installment payment amount in relation to the total penalty amount; the employer's financial condition; the size of the employer; abatement and continuing efforts to correct violations and maintain a safe work environment.

Because this matter was pending reconsideration on issues including financial hardship relief when the Board's DAR in *Stockton Tri Industries, Inc.* issued, the Board remanded the case to the ALJ to evaluate whether financial hardship relief should be granted in light of that DAR. The ALJ issued a Decision after Remand, dated August 8, 2006, in which she applied the reasoning in *Stockton Tri* and concluded that financial hardship relief was unwarranted because Employer's testimony demonstrated its ability to pay the penalty and Employer presented no documentation to rebut the presumption that the proposed penalty was reasonable.

We agree with the ALJ that Employer failed to meet any of the conditions or criteria we have set forth for granting financial relief. Employer has not demonstrated that its financial obligations are so dire that payment of the penalties would impact its ability to continue to operate its business. Employer's evidence demonstrates it was generating in excess of \$1.9 million in annual revenue. Given the sales volume, the reported expenses do not appear to be unusual or unreasonable. The likelihood of being able to generate

sufficient funds to pay a fine is most probable. A threat of bankruptcy does not rise to the level of inability to pay based on an employer's debt ratio to income or an actual discontinuance of business operations.

We are also mindful that where a willful serious violation has been sustained, it cannot be said that Employer has shown the requisite concern for employee safety to support a penalty reduction based on financial hardship. The evidence and the ALJ's findings are ample for the Board to determine that Employer expressed a callous approach to employee safety, especially after being notified of the existence of a hazard that could cause serious injuries. Employer's request for penalty reduction based on financial hardship is denied.

Decision After Reconsideration

Employer's appeal is denied. We affirm the decision of the ALJ on all substantive issues and deny Employer's request for financial relief.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: August 20, 2007

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

JERLANE, INC. DBA COMMERCIAL
BOX AND PALLET
1249 West Washington Avenue
Escondido, California 92029

Employer

DOCKETS 01-R3D2-4344
through 4348

**DECISION
AFTER REMAND**

Background and Jurisdictional Information

Commencing on May 31, 2001, the Division of Occupational Safety and Health (the Division), through Associate Safety Compliance Officer Michael Loupe and Senior Safety Engineer Mariano Kramer, conducted an accident investigation at a place of employment maintained by Jerlane, Inc. dba Commercial Box and Pallet (Employer) at 1249 West Washington Avenue, Escondido, California (the site). On October 10, 2001, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.⁸

<u>Citation</u>	<u>Section</u>	<u>Classification</u>	<u>Penalty</u>
1-1	342(a) [report of serious injury]	Regulatory	\$ 350
1-2	3203(b)(1) [IIPP – records]	Regulatory	350
1-3	461(a) [air tank permit]	Regulatory	350
1-4	3320 [warning signs]	General	525
1-5	2340.22(a) [identification of equipment]	General	525
2	4306(a) [under hung saws]	Serious Willful	70,000
3	4070(a) [machine guarding]	Serious	6,300
4	4310(a)(1) [band saws]	Serious	6,300
5	3203(a)(7) [IIPP – training]	Serious	7,875

Employer filed timely appeals raising various challenges and affirmative defenses to the alleged violations. Employer also asserted the defense of financial hardship for all citations and items.

⁸ Unless otherwise noted, all section references are to Title 8, California Code of Regulations.

Historical Background

This matter came on regularly for hearing on November 21 and 22, 2002, at San Diego, California before Barbara J. Ferguson, Administrative Law Judge for the California Occupational Safety and Health Appeals Board. Attorney Michael Olson represented Employer. Staff Counsel David Pies represented the Division. The matter was submitted on February 23, 2003 and a Decision issued on March 11, 2003, a copy of which is attached hereto.

In that Decision the undersigned found that sufficient evidence was presented by the Division to support the serious willful citation and that the \$70,000 was reasonable under the circumstances. With respect to the other citations, the undersigned vacated two of the serious citations and one general citation based on findings that the Division had not satisfied its burden of proof. The undersigned also reduced the classification of one of the serious citations to a general violation and reduced the penalty based on lack of evidence to support the serious classification. The remaining regulatory and general citations were sustained.

Employer's claim of financial hardship was rejected on the ground that Employer did not provide any financial documentation to support its claim that penalty relief was warranted. Furthermore, Employer could not state at the hearing whether payments over time were or were not feasible. Thus, a penalty of \$72,100 was found to be reasonable and was assessed against Employer.

Thereafter, Employer filed a Petition for Reconsideration.

On July 5, 2006, the Appeals Board remanded this matter to the undersigned for further proceedings with respect to Employer's claim of financial hardship in light of the Board's recent Decision After Reconsideration in *Stockton Tri Industries, Inc.*, Cal-OSHA App. 02-4946 (March 27, 2006). Pursuant to the Order of Remand, and based on a review of the facts and findings as a result of the prior hearing, and in consideration of the Appeals Board directive in *Stockton Tri Industries, Inc.*, the undersigned finds as follows.

Findings and Reasons for Decision After Remand

Stockton Tri Industries does not change or alter the findings in this particular case because Employer provided no documentation at the hearing to substantiate its claim of financial hardship. Moreover, Employer's testimony at the hearing regarding the financial condition of the company did not establish an inability to pay the proposed penalties. Therefore,

Employer did not rebut the presumption that the proposed penalties were reasonable. The previous assessment of \$72,100 in penalties is deemed reasonable under the circumstances and is reaffirmed.

In *Stockton Tri Industries, Inc.*, Cal-OSHA App. 02-4946, Decision After Reconsideration (May 27, 2006), the Appeals Board held that a determination as to whether an employer is entitled to penalty relief based on financial hardship should be based on the merits of each particular case. In that regard, the Appeals Board overruled the guidelines for penalty relief established in *Dye & Wash Technology*, Cal-OSHA App. 00-2327, Denial of Petition for Reconsideration (July 16, 2001), which guidelines were referenced in the prior Decisions in this case. In lieu of such guidelines, the Appeals Board emphasized the discretion of the administrative law judges to provide penalty relief for those particular cases where the proposed penalties appear to be solely punitive rather than remedial as contemplated by the California Occupational Health and Safety Act of 1973 (the Act), Labor Code § 6300.

The purpose of the Act is to ensure safe and healthful working conditions for all working men and women in this State by the implementation and enforcement of effective safety standards, education and training. The penalties contemplated under the Labor Code are not for the purpose of exacting

retribution from an employer; but rather, designed to encourage employers to comply with the purpose of the Act. *Lefty's Pizza Parlor*, Cal-OSHA App. 74-581, Decision (Feb.24, 1975).

In *Stockton Tri Industries, supra*, the Appeals Board reaffirmed the holding in *Lefty's Pizza Parlor* and emphasized that each appeal based on financial hardship is to be determined on a case-by-case basis. To be entitled to penalty relief the employer must rebut the presumption that the proposed penalty is reasonable in light of the remedial purpose of the Act. Additionally, consideration should be given as to whether the proposed penalty strikes an appropriate balance between punishment and remediation. *Stockton Tri Industries, supra*.⁹

In order to rebut the presumption that a proposed penalty is reasonable as intended by the remedial nature of the Act, an employer must present sufficient, credible evidence to establish financial hardship. Such financial hardship should not be merely accumulated debt, although such debt is a factor that should be considered when determining ability to pay the proposed penalty. To the contrary, true financial hardship for purposes of penalty reduction is shown in situations where an employer's income is inadequate to sustain its business operations, i.e., pay the employer's ongoing debts such as payroll, taxes, vendors, etc. Only upon review of the employer's financial documents can a determination be made, on a case-by-case basis, whether a proposed penalty should be reduced according to the employer's ability to pay, or eliminated in its entirety where, as in *Lefty's Pizza, supra*, an employer has permanently closed its business.

At the hearing in this matter John Mason (Mason) testified that the company's monthly gross income was \$160,000. Monthly rent paid by the company was approximately \$8,400, with payroll between \$45,000 and \$50,000. Monthly payments for three business loans totaled \$4,000. Based on the figures provided by Mason, after payment of rent, payroll and loans, Employer was left with **\$97,600 each month** to pay whatever other expenses and debts were owed by the company.¹⁰ And although Mason suggested that

⁹ In its Decision After Reconsideration in *Stockton Tri Industries*, the Appeals Board did not refer to any particular aspects of the employer's financial condition in concluding that the employer had demonstrated financial distress. The Appeals Board merely referred to the employer's willingness to provide more safety measures for its employees in determining that the proposed penalty of \$12,600 contravened the purpose of The Act. It is assumed that the Appeals Board deferred analysis of the employer's financial documents to the administrative law judge.

¹⁰ It should be noted that this monthly balance exceeds the penalty assessed.

payment of the penalties would likely force the company into bankruptcy, his testimony at the hearing with respect to gross income in relation to debts did not support that contention.

Employer did not provide any documentation to establish the company's financial condition. Such documentation could have confirmed Mason's testimony or revealed a different financial picture than what Mason testified to at the hearing. The Appeals Board has held that where a proposed penalty is at issue at a hearing, evidence relevant to the reasonableness of the penalty shall be considered *if* appropriately presented by the parties. *Liberty Vinyl Corporation*, Cal-OSHA App. 78-1276, Decision After Reconsideration (Sept. 24, 1980) [emphasis added] The burden is on the employer to establish that penalty relief is warranted. *Paige Cleaners*, Cal-OSHA App. 96-1145, Decision After Reconsideration (Oct. 15, 1997). In this case, Employer did not present any financial records to support its claim of financial hardship. Nor was Mason's testimony helpful in this regard.

In addition, Mason could not definitively state whether Employer could afford to pay the penalty over time in monthly payments. Thus, Employer was not amenable to payments over time that may have alleviated any purported financial stress.

Employer did not rebut the presumption that the proposed penalties were reasonable based on its financial condition. To grant penalty relief in this case where Employer provided no financial records, and testimony on its behalf at the hearing indicated its ability to pay the proposed penalties, would constitute an arbitrary and capricious act in contravention of the exercise of reasonable discretion. Accordingly, I find that penalty relief is not warranted for this Employer.

Decision

It is hereby ordered that the penalty amount of \$72,100, as assessed in the Decision and the attached Summary Table issued March 11, 2003, is reaffirmed.

BARBARA J. FERGUSON
Administrative Law Judge

Dated: August 8, 2006
BJF:ml

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

DOCKETS 01-R3D2-4344
through 4348

**JERLANE, INC. dba COMMERCIAL
BOX AND PALLET**

1249 West Washington Avenue
Escondido, California 92029

Employer

DECISION

Background and Jurisdictional Information

Commencing on May 31, 2001, the Division of Occupational Safety and Health (the Division), through Associate Safety Compliance Officer Michael Loupe and Senior Safety Engineer Mariano Kramer, conducted an accident investigation at a place of employment maintained by Jerlane, Inc. dba Commercial Box and Pallet [Employer] at 1249 West Washington Avenue, Escondido, California (the site). On October 10, 2001, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹¹

<u>Classification</u>	<u>Section</u>	<u>Citation</u>	<u>Penalty</u>
Serious Willful	4306(a) [under hung saws]	2	\$ 70,000
Serious	4070(a) [machine guarding]	3	6,300
Serious	4310(a)(1) [band saws]	4	6,300
Serious	3203(a)(7) [IIPP - training]	5	7,875

¹¹ Unless otherwise noted, all section references are to Title 8, California Code of Regulations.

Regulatory	342(a) [reporting serious injury]	1-1	\$ 350
Regulatory	3203(b)(1) [IIPP – records]	1-2	350
Regulatory	461(a) [air tank permit]	1-3	350
General	3320 [warning signs]	1-4	525
General	2340.22(a) [identification of equipment]	1-5	525

Employer filed timely appeals contesting the existence of the alleged violations for Citation 1, Items 2 and 5, and Citations 2 through 5; the classification of the alleged violations for Citations 2 through 5; the reasonableness of the abatement requirements for Citation 4; and the reasonableness of the proposed civil penalties for all citations. Employer also raised the affirmative defenses of independent employee act and lack of knowledge for Citations 2 and 4. For all citations Employer asserted the defense of financial hardship.

This matter came on regularly for hearing on November 21 and 22, 2002, at San Diego, California before Barbara J. Ferguson, Administrative Law Judge for the California Occupational Safety and Health Appeals Board. Attorney Michael Olsen represented Employer. Staff Counsel David Pies represented the Division. The matter was submitted on February 23, 2003.

Law and Motion

During the hearing the Division moved to change the classification for Citation 3 from serious to general and reduce the proposed civil penalty to \$525. The Division's motion was based on testimony given at the hearing that even though an employee was working in the vicinity of the Chamfer machine at the time of the inspection, the machine was not in operation at the time because it had just been serviced. Good cause appearing, the Division's motion was granted.

Summary of Evidence

Docket 01-R3D2-4345

Citation 2, § 4306(a), Willful Serious

Employer is in the business of manufacturing and distributing pallets. On April 19, 2001, employee Alejandro Zepeda severed two fingers on his right hand while operating a cut off saw.

A. The Investigation

Safety Compliance Officer Michael Loupe (Loupe) opened an accident investigation at Employer's site on May 31, 2001. At that time Loupe spoke with one of the owners of the company, John Mason (Mason). Loupe also interviewed the injured employee, Alejandro Zepeda (Zepeda), the foreman, Octavio Cabrera (Cabrera), and another employee, Geraldo Rodriguez (Rodriguez). In addition to the interviews, Loupe took photographs of the cut off saw in question as depicted in Exhibits 3 through 5. Loupe recalled that Mason told him during the opening conference that the saw was in the same condition as it was on the day of Zepeda's accident.

According to Loupe the manufacturer refers to Saw Number 10, the saw involved in the accident, as a "cut off saw". Upon research, Loupe learned that the American National Standards Institute refers to the same type of saw as a "jump saw". Based on the design and dynamics of both saws, Loupe was of the opinion that both descriptions fit Saw Number 10 (hereinafter "the saw").

Loupe explained that Exhibit 3 shows the saw from the front as if one were going to start operation. The photograph depicts 4' by 4' pieces of wood to the side of the saw that have been cut or are waiting to be cut. A jig, which is clamped to the roller, helps to ensure that the wood is cut to the desired size each time. The yellow object in the photograph is the hood, which purpose is to guard the blade. Loupe explained that in the rest position the blade remains underneath the table. When the foot pedal is depressed the blade protrudes from the slit, the hood drops down to within four inches of the cutting surface, and then the blade rises up and cuts the wood. After the wood is cut the blade retracts back down under the table. The saw is used for straight and angle cuts.

As part of his investigation Loupe observed the saw in operation. He found that although the hood covered the top of the blade, there remained a four-inch gap at the side of the blade at the front of the saw that was not covered by the hood. (Exhibit 4) Loupe was of the opinion that this four-inch gap exposed employees to injury. Loupe stated that Mason was informed of this deficiency, and that Mason assured him that the saw would not be used

until the problem was corrected. Loupe further stated that he provided Mason with names of companies who could correct this problem.

Another concern Loupe had about the saw was that at the beginning of the cycle the blade would come down to clamp the piece of wood with such force that it would make a loud bang. Loupe was of the opinion that not only would a worker suffer an amputation if his hand was over the cutting plane at that time, but would also suffer collateral orthopedic injuries due to the force of the blade.

Senior Safety Compliance Officer Mariano Kramer (Kramer) accompanied Loupe during his initial inspection of the site. Kramer referred to ANSI Standard 011 pertaining to woodworking standards to identify the saw. Specifically, Kramer referred to § 2.2.1.4 of Standard 011, that defines a jump saw as a “machine that utilizes a work support means, a powered arbor on an arm that pivots about a point located behind the saw arbor at approximately the same height and work hold down means. At rest position, the saw blade is below the workpiece.” (See Exhibit 9.) Based on this definition, Kramer concluded that the saw in question was a jump saw. According to Kramer, the saw runs at between 1700 and 3600 rpm’s with an activation time of one to two seconds.

Kramer also concluded that the saw was not effectively guarded above the table after he observed the activation of the blade and hood. Specifically, Kramer stated that the width of the blade is 12 inches. The blade would be effectively guarded if the wood were 12 inches wide. However, wood that is only four inches wide leaves another 8 inches of the blade exposed outside of the hood. Kramer recalled informing Mason that because of this exposure the saw was not effectively guarded. He also recalled that Mason promised that the saw would not be used until the hazard was corrected.

During his interview Zepeda told Loupe that he usually works in the assembly area with the nailers. On the day of the accident, Cabrera told him to assist Niento in the woodcutting area to cut the wood 4’ by 4’s to 48 inches. Zepeda returned to the assembly area after he had finished cutting the wood. Niento then instructed him to return to the cutting area and make 45-degree angle cuts on the 4’ by 4’s that he had just cut to 48 inches. While attempting to cut the first 45-degree angle, he cut two fingers off. He was then taken to the front office by another employee to receive medical attention. A second employee carried Zepeda’s amputated fingers to the front office. Unfortunately, the fingers could not be reattached.

Cabrera told Loupe during one of his interviews that he had no recollection of the guard ever being part of the cutting cycle. Based on this

information, Loupe decided to make further inquiries. Thereafter, Loupe returned to the site and reinterviewed Cabrera who told him that the guard on the saw only worked sporadically for the six months prior to the accident. On the day before and the day of the accident, the saw guard was not working at all. Cabrera told Loupe that he was aware that something was wrong with the air system that operated the hood, and that it was missing an element that allowed the air system to work. Cabrera also told Loupe that the problem with the saw had been a topic at safety meetings when Mason was present.

Loupe then spoke with Javier Rendon (Rendon), who told him that the guard had not been working effectively for the past year and a half. Rendon stated that he had raised the problem with the saw at safety meetings. According to Rendon, he had told another employee, Simon Aguaro (Aguaro), about the problem with the saw. Loupe next interviewed Aguaro who told him that he could not recall the guard ever working during the three to four years he had worked on the saw. Aguaro also told Loupe that at two safety meetings he had told Mason about the problem with the guard on the saw. Mason responded that the saw would be fixed.

Zepeda also told Loupe that he could not recall the hood over the blade ever working. However, he could not recall specifically if the hood was working on the day of his accident. Zepeda stated that the day after the accident he was called back to work to answer questions about the accident. At that time Zepeda noticed that the saw had been partially dismantled and appeared to be ready to be shipped out for repairs.

On July 6, 2001, Loupe returned to Employer's site and observed the saw in operation with the same hazardous condition. At that time Loupe posted an order prohibiting use and advised Cabrera that no one was to use the saw. A few days later Loupe returned to Employer's site and observed that the hood had been retrofitted with an attachment. (See Exhibits 5 and 6.) Although Employer had abated the exposure hazard created by the four inches of the blade that was not guarded, Loupe still had some concern regarding the new attachment. In Loupe's opinion, the attachment would have to be removed or opened sufficiently in order to cut the angle to make a 45-degree cut. In so doing, employee's hands or fingers would be exposed to the blade.

Loupe also spoke with the front desk secretary and obtained copies of work invoices for the saw. The secretary provided Loupe with an invoice from Rupe's Hydraulics that indicated trouble shooting and maintenance on the saw at the request of Mason on May 21, 2001. (See Exhibit 7.)

Thereafter on July 8, 2001, Loupe interviewed Jack Rupe (Rupe) who informed him that he had, in fact, generated the invoice and had worked on the

saw. Rupe identified the saw in question from a photograph. According to Loupe, Rupe told him that the saw was missing a vital air regulator element that allowed the hood to function properly. The configuration used on the saw did not meet the manufacturer's specifications. Due to this configuration, the guard was not functioning. Rupe told Loupe that the manufacturer recommended part for the saw, which he eventually ordered, allowed the guard to go up and down as part of the cutting cycle.

The Division issued a willful serious citation to Employer for a violation of § 4306(a). Based on employee interviews, Loupe concluded that the guard on the saw had not been operable and was a safety hazard for up to four years prior to Zepeda's accident. Loupe further concluded that Mason was aware of the safety hazard as a result of employees raising the problem at safety meetings. In addition, at the time of the opening conference Mason assured Loupe that the saw was in the same condition as it was at the time of the accident even though repairs to the air regulator had been made. Lastly, Mason assured the Division that the saw would be taken out of service until it was repaired but had failed to do so. According to Loupe, Employer's conduct warranted the willful classification.

Loupe classified the citation as serious based on his opinion and experience that if an accident were to occur on the saw, the expected injury would be amputation or serious disfigurement. The penalty was calculated by assessing likelihood at high, with a 30 percent adjustment for size, resulting in \$15,750. The penalty was multiplied by 10 based on the willful classification, resulting in more than a \$70,000, the maximum penalty allowable for a willful violation. Accordingly, the civil penalty was assessed at \$70,000.

B. Testimony at the Hearing

Zepeda testified that prior to the accident he had operated the saw on two occasions. The first occasion was when Cabrera showed him how to make two cuts; the second occasion was at the time of his accident. Zepeda added that he was never shown how to make corner cuts. He was aware of Employer's policy that they were to receive training on a machine before using it. Prior to his accident he had been trained in the use of the nail gun, the machine that smashes pallets, and the radial saw. It was not until after his accident that he received training on the saw he used to cut wood on the day of his accident.

Zepeda further testified that it was Niento who distributed the work and who told him to cut the 4' by 4's on the day of his accident. He had made approximately 8 cuts on the 4' by 4's by cutting them in half. He then grabbed a 4' by 4' with his left hand in order to make a 45 degree angle cut. Zepeda

stated that the wood was too far inside so he pushed the wood a little bit to the right with his right hand. It was at that point that he cut his fingers.

Aguaro has worked for Employer for four years cutting wood and nailing pallets. He testified that for his first two years of employment he operated the saw. During that time period the guard did not come down when the pedal was pressed. On at least one occasion at a safety meeting, at which Mason was present, Aguaro mentioned that the guard did not function. Mason responded that the problem would be fixed. Aguaro could not recall any repairs to the saw except for routine maintenance such as replacement of belts.

Mason testified that the guard had stopped working approximately three years prior to the accident but was never taken out of service. Mason conceded that the guard did not go up and down, but he believed the guard was operating effectively at the time of Zepeda's accident. According to Mason, even with the guard in the down position, the operator could control any momentary exposure by pressing the foot pedal. In addition, the saw was guarded while in the rest position or by the roof top guard located over the top of the saw.

According to Mason, Zepeda told him after the accident that he thought that the saw had self-activated prior to his accident. Mason stated that he immediately took the saw out of service and sent it to Rupe to find out if the saw had self-activated. Rupe reported back to him that the saw did not self-activate but that a valve should be replaced. In the accident report prepared by on April 25, 2001, Mason concluded that Zepeda was injured when he pushed a 4' by 4' through the saw and accidentally stepped on the foot pedal, which activated the saw. Mason further concluded in his report that apparently Zepeda needed additional training with respect to the saw blade. (See Exhibit B.)

Mason did not recall Aguaro complaining about the guard at any of the safety meetings. However, he did recall learning at safety meetings that the in-feed/out-feed conveyors on the saw were not aligned, that the blade would not come up when the pedal was depressed, and that the air regulator was broken. He replaced the air regulator with an in-line regulator. According to Mason, at the time of Zepeda's injury or the inspection, he had no knowledge of a dangerous or unsafe condition on the saw. He became concerned after Zepeda was injured and took all necessary steps at that time to address his concern by sending the saw to Rupe for troubleshooting.

Rupe testified that he recalled the saw being brought into his shop for service but could not recall speaking with Mason directly. He was provided with the manufacturer's manual at the time of service. Rupe explained that the saw has a pneumatic valve. When the foot pedal is depressed, the valve pulls the guard down and then the saw is raised to the upright position. Rupe found

that the guard was functioning but not in the manner called for by the manufacturer. Rupe also stated that the guard had not been altered.

Rupe performed troubleshooting on the saw in an attempt to determine why the valve was not working. Because he could not determine the problem with the valve, he replaced it. Rupe further explained that the missing pilot air regulator, as noted on his invoice, merely regulates pressure and is not required to operate the machine or related to the guard function. Rupe added that the date on the invoice, May 21, 2001, reflected the date of service on the saw.

With respect to his discussions with Loupe and Kramer during the opening conference, Mason recalled that Loupe asked him if the saw had been altered, such as a guard removed. Mason informed Loupe and Kramer that he had sent the saw out for service because it had self-activated. Mason also recalled that Loupe told him that if he was actively working on getting a guard to correct the exposure gap, he could continue to operate the saw. Mason stated that he contracted with ProTech Systems to provide the type of guard required by Cal-OSHA. (See Exhibit J.) He was then surprised to learn that Loupe had placed an order prohibiting use on the saw during his second visit on or about July 5, 2001, based on Loupe's prior representation that he could continue to use the saw if he was working on correcting the problem. Mason denied that the saw was used until after the new guard was in place. It was Mason's opinion that he was not in violation of any safety order because he was not aware that the saw posed a safety hazard or violated a safety order until the time of the opening conference on May 31, 2001.

Cabrera testified that he has worked for Employer for approximately 19 years. He currently holds the position of foreman, which duties include receiving and distributing work orders. He also trains other employees. Cabrera stated that Niento, who does not have a job title, works in the assembly department and performs different duties at different times. He assigns Niento work orders each day. Niento then spreads the work around by assigning work to other employees. He did not know if Niento disciplined employees. He was aware that Niento had worked with Zepeda before the accident. Although he assigned Zepeda to assist Niento on the day of the accident, he denied telling Zepeda to work on the saw. Cabrera did not witness Zepeda's accident.

According to Cabrera the Employee Training/Retraining Checklist reflects that Zepeda was trained on the arm saw, the pallet disassembler, the nail gun and the saw that cuts wood. (See Exhibit F.) Cabrera added that Zepeda was not trained on the saw upon which he was injured.

Cabrera stated that 4' by 4's are cut in six different places at the site, but that 40 to 50% of the 4' by 4's are cut on the saw upon which Zepeda was injured because it cuts more accurately than the radial arm saw. The wood is taken from trucks by forklifts and placed beside the saw to be used as depicted in the Division's photograph, Exhibit 3.

Cabrera could not recall Zepeda or Aguaro voicing any concerns regarding hazards with the saw at safety meetings. Nor could he recall telling Loupe during his investigation that the saw had a vital piece missing or that the saw was discussed at safety meetings. He could recall, however, being told that the saw was not working properly and that cuts were not straight. He also recalled that normal repairs had been made to the saw. As far as prior injuries, Cabrera remembered telling Loupe that several years ago an employee was injured on the saw when the wood was not placed in the correct position. Under cross-examination, Cabrera stated that he had operated the machine thousands of times prior to Zepeda's injury, that the yellow guard was not coming down, and that the guard was not working on the day of the accident.

On recall Mason testified that Niento had worked for the company for 15 years and was not a foreman. Mason identified the lead person for the day shift as Pedro.

Findings and Reasons for Decision

The Division established a willful, serious violation of § 4306(a) based on Employer's knowledge that the saw was not effectively guarded for some time prior to Zepeda's accident. The maximum proposed civil penalty of \$70,000 is deemed reasonable and is assessed against Employer.

A. Employer Was In Violation Of § 4306(a).

The Division has the initial burden to show by a preponderance of the evidence the applicability and violation of the particular safety order. (See *Howard J. White, Inc.*, Cal-OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Preponderance of the evidence means that the thing to be proved is more likely than not to be true. (See *Gaehwiler Construction Company*, Cal-OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985).) It is sufficient to sustain a violation of a safety order if the Division establishes that employees were exposed to a hazard from which the cited safety order was designed to protect. (See *General Motors Corp.*, Cal-OSHA App. 77-573, Decision After Reconsideration (Aug. 9, 1978).)

Section 4306(a) requires that all saws be effectively guarded above and below the table. The Division persuasively made its case that the saw was not effectively guarded based on the testimony of Cabrera and Aguaro. Cabrera, Employer's foreman, told Loupe that he could not recall the hood ever being part of the cutting cycle. He also told Loupe that the guard had worked only sporadically for the six months prior to Zepeda's accident, that the hood had not worked on the day before or the day of Zepeda's accident, and that the saw was missing a vital part. Moreover, at the hearing, Cabrera corroborated his own statements to Loupe when he testified that the guard was not coming down and not working on the day of Zepeda's accident.

Cabrera also told Loupe that Mason was present at safety meetings when employees told Mason of the unsafe condition of the saw. Cabrera's statements to Loupe constitute authorized admissions that are binding on Employer. (See *Macco Construction*, Cal-OSHA App. 84-1106, Decision After Reconsideration (Aug. 20, 1986); Evidence Code § 1222.)

Aguaro, a four-year employee, also testified that during his first year of employment when he worked on the saw, the guard did not go down when he pressed on the pedal. Aguaro further testified that at least one of the safety meeting when Mason was present, there were discussions about the guard not going down when the pedal was pressed. According to Aguaro, Mason responded that the problem would be fixed.

On the other hand, Mason testified that it appeared that the saw blade had self-activated based on Zepeda's version of how the accident happened. Employer's position is not credible for the following reasons. First, the accident investigation report prepared by Mason does not mention that Zepeda told him that the blade self-activated. To the contrary, Mason concluded in his report that the accident occurred because Zepeda had "reached through the path of the blade with his hand [and] . . . used his hands to support the material." (See Exhibit B.) According to Mason, Zepeda merely needed more training on how to use the saw.

Second, Zepeda did not testify that the blade self-activated. Zepeda described the accident as happening when he pushed the wood too far in one direction and then he attempted to correct the problem with his right hand. Hence, Zepeda's account of the accident is consistent with the conclusion Mason reached immediately after his investigation and reflected in his accident report. Mason's testimony at the hearing is not credited.

Notwithstanding that the guard was not functioning effectively, the evidence also supports a finding that the guard was inadequate. Whether the gap was eight inches as testified by Kramer, or four inches as described by

Loupe,¹² the gap exposed a significant part of the blade to employees when the hood did function properly. Thus, the gap presented a hazard to those employees who operated the saw.

Section 4306(a) was designed to protect employees from exposure to a saw blade that rises from a rest position underneath a table to a vertical operating position, such as the saw upon which Zepeda sustained his injuries. Based on the statements and testimony of Cabrera and Aguaro, as well as the gap in hood coverage after Employer repaired the hood malfunction, it is undisputed that the saw in question was not effectively guarded as required by § 4306(a). A violation of § 4306(a) is sustained.

**B. The Violation Of § 4306(a) Is Found To Be Serious,
Accident-Related.**

The burden was on the Division to establish the serious classification of the violation. A serious violation is deemed to exist in the workplace if there is a substantial probability that death or serious harm could result if a violation would occur. “Substantial probability” does not refer to the probability that an accident will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident occurs as a result of the violation. (See *California Agri-Systems*, Cal-OSHA App. 78431, Decision After Reconsideration (Nov. 17, 1980; Labor Code § 6432.)

Where the Division presents evidence to show a substantial probability of serious injury and the employer does not contradict or rebut the evidence, it can be inferred that a serious violation was established. (See *Associated Ready Mix*, Cal-OSHA App. 95-3794, Decision After Reconsideration (Dec. 6, 2000); *Massive Prints, Inc.*, Cal-OSHA App. 98-1789, Decision After Reconsideration (July 30, 2001).) In this case, the Division established the substantial probability of a serious injury, such as finger amputation, without an adequate guard over the blade. Employer did not dispute the substantial probability of serious injury.¹³

An employer may still prevail even where there is a substantial probability of serious harm if the employer can show that it did not know, or with the exercise of reasonable diligence could not have known, of the existence

¹² It is reasonable to infer that the four-inch gap to which Loupe referred was at the front of the machine where an employee stands during operation. If a second four-inch gap was located on the other side of the hood, the total gap would be eight inches as described by Kramer.

¹³ “Serious harm” is defined as an injury requiring hospitalization in excess of 24 hours for something other than medical observation, or loss of a limb, or serious disfigurement. (See Labor Code § 6302(h).)

of the violation. The burden of proof is on the employer to establish lack of knowledge. (See Labor Code § 6432(b).) Employer did not meet its burden in this regard.

As discussed above, the statements and testimony of Cabrera, which are imputed to Employer, show that Employer had knowledge of the existence of the violation. (See *Metalclad Insulation Corp.*, Cal-OSHA App. 83-812, Decision After Reconsideration (Sept. 11, 1987).) Moreover, Aguaro testified that Mason was present at one of the safety meetings where the inoperative guard was discussed. Aguaro's testimony was credible. Thus, the record supports a finding that Employer had knowledge of the existence of the violation.

Employer's argument that it had no knowledge that Zepeda was working on the saw in question at the time of the accident is equally unavailing. Zepeda testified that prior to the accident Cabrera had shown him how to perform straight cuts on the saw. Although formal training on the saw had yet to be provided to Zepeda, the fact that Cabrera had allowed Zepeda to work on the saw at all undercuts Employer's argument that it did not have knowledge that Zepeda would use that saw to perform his assigned work. However, for purposes of establishing the serious classification, the pivotal issue is not whether Employer knew that Zepeda would use the saw; but rather, whether Employer knew, or with the exercise of reasonable diligence could not have known, of the existence of the violation. The record supports a finding that Employer knew of the existence of the ineffective guard on the saw prior to the time Zepeda sustained his injuries.

Additionally, whether Zepeda *could* have selected another saw on that day is not relevant. Employer cannot shirk its non-delegable duty to provide a safe work environment by shifting blame to an employee for not selecting a different piece of equipment. The inescapable fact is that the saw Zepeda used had not been taken out of service despite Employer's knowledge of an ineffective guard. Moreover, it would appear that Zepeda did select the more appropriate saw based on Cabrera's testimony that the saw was the preferred saw for making angle cuts.

Employer's appeal of the reasonableness of the civil penalty automatically places in issue the determination that the injury was accident related. (See *Hudson Plastering Co., Inc.*, Cal-OSHA App. 85-1271, Decision After Reconsideration (Nov. 19, 1987).) The Division has the burden to prove by a preponderance of the evidence that the serious violation was the cause of Zepeda's injuries. (See *Obayashi Corporation*, Cal-OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001).)

The testimony of Zepeda established that his injuries were accident related. According to Zepeda, he was in the process of making a corner cut

when the blade came into contact with his fingers. Employer offered no credible evidence to dispute Zepeda's testimony in this regard. Hence, the record supports a finding that Zepeda sustained his injuries as a result of the violation.

B. The Serious Violation Was Willful

Section 334(e) defines a willful violation as,

“[A] violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.”

The Appeals Board has interpreted § 334 to embody two tests. As espoused in *Rick's Electric, Inc.*, Cal-OSHA App. 95-136, Decision After Reconsideration (Sept. 24, 1997), the first test focuses on the employer's intentional violation of a safety law. The Division can satisfy this first test by showing evidence of an earlier inspection where the violation was discussed with the employer or by showing evidence of a previous injury involving the similar circumstances. The second test requires a showing that the employer was cognizant of a hazardous condition but failed to correct it. The Division met its burden under both tests.

Both Loupe and Kramer testified that during the opening conference on May 31, 2001, they informed Mason of the dangerous exposure to the blade caused by the gap in the protective hood. They both testified that Mason assured them that the saw would not be used until the problem was corrected. Upon return to the site on or about July 5, 2001, Loupe discovered the saw in operation without correction. Loupe and Kramer's testimony was credible.

Mason, on the other hand, testified that he was surprised that Loupe issued an order prohibiting use on or about July 5, 2001, because he was not told that the machine could not be used until corrected. It is not credible that any employer would have understood that the saw could continue to operate with a gap between the hood and the blade that exposed employees to a hazardous condition. Also of note is that Mason did not deny that Loupe and Kramer explained to him at the time of the opening conference the hazard presented by the gap in the hood coverage.

The fact that Mason may not have been aware of the particular safety order that was charged as the violation, or unaware of the ANSI standard, is not dispositive on the issue of willfulness. What is of import is the fact that both Loupe and Kramer explained to Mason the hazard of the saw with a gap that exposed employees to the blade. An employer has a non-delegable duty to provide a safe work environment for its workers. (See *Southern California Gas Company*, Cal-OSHA App. 81-0259, Decision After Reconsideration (Sept. 28, 1984).) In this case, Employer knowingly and willingly failed to remove the saw from service until the attachment could be mounted on the hood.

The Division also satisfied its burden with respect to the second test for a willful violation. As discussed previously, Mason had knowledge that the hood was not operating, and therefore, not effectively guarding the blade. Mason conceded that the guard had not worked for three years prior to Zepeda's accident but that the saw had never been taken out of service. Thus, for at least three years, Employer was on notice of a defective guard but took no steps to protect its employees. The willful classification is sustained.

C. The Defense of Independent Employee Act

The defense of independent employee act is premised upon an employer's compliance with non-delegable statutory and regulatory duties. (See *Pierce Enterprises*, Cal-OSHA App. 00-1951, Decision After Reconsideration (March 22, 2002).) The Appeals Board has long held that where positive guarding is required, the independent employee action defense does not excuse an employer from providing the required guarding. (See *City of Los Angeles Department of Public Works*, Cal-OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986); *Kaiser Aluminum and Chemical Corp.*, Cal-OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985).)

The danger of an exposed saw blade is obvious and inherent. It cannot be assumed that only if employees strictly follow the established practices of their employer that no injury would occur. To the contrary, accidental contact with an exposed saw blade is to be anticipated during an employee's usual work routine. The guarding requirement set forth under § 4306(a) is designed to protect employees from amputation accidents such as the one suffered by Zepeda. Accordingly, the failure to provide adequate guarding for a saw such as the one in this case falls within the purview of required positive guarding for which the defense of independent employee act does not apply.

Even if the independent employee act defense were applicable, Employer would not be relieved of its liability. The burden is on an employer to prove the defense of independent employee act. (See *Ernest W. Hahn, Inc.*, Cal-OSHA App. 77-576, Decision After Reconsideration (Jan. 25, 1974). The failure to prove

any one of the elements negates the defense in its entirety. (See *Ferro Union, Inc.*, Cal-OSHA App. 96-1445 (Sept. 13, 2000).)

As the Appeals Board enunciated in *Mercury Service, Inc.*, Cal-OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980), the defense of independent employee act requires an employer to show that (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program which includes training employees 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 employees who violate the safety program; and, (5) the employee caused a safety infraction which he or she knew was contrary to the employer's safety program. In the case at hand, Employer did not carry its burden to show that any of the elements were satisfied.

E. Penalty Assessment

Loupe calculated the civil penalty by rating likelihood high with a 30% credit for size pursuant to the provisions of § 336. This resulted in a penalty amount of \$15,750. Then, according to Loupe, he multiplied the penalty amount by 10, which resulted in an amount in excess of \$70,000. Loupe stated that because the final penalty amount exceeded the statutory limit of \$70,000, the proposed penalty was set at \$70,000.

The penalty proposed by the Division is reasonable based on the violation found. It should be noted, however, that § 336(h) requires that the penalty be multiplied by 5, not 10.¹⁴ Multiplying \$15,750 by 5 results in a total penalty of \$78,750, still beyond the maximum penalty under § 336(h). Accordingly, the proposed penalty of \$70,000 is deemed reasonable and is assessed.

Summary of Evidence

Docket 01-R3D2-4345

Citation 3, § 4070(a), General

Loupe took photographs of the Chamfer machine on the day of his initial inspection. (Exhibits 10 and 11) At that time he observed an open area on the machine where the machine components were exposed and a pulley drive located below seven feet from the floor. (Exhibit 10) He also observed a pinch point exposure at the wheel of the machine that, in his opinion, could nip off a part of a finger resulting in amputation or serious disfigurement. The cover to the machine was leaning against a post next to the machine as depicted in his

¹⁴ Section 336(h) provides that for a serious violation that is considered willful, the proposed penalty is multiplied by five. However, the penalty cannot be less than \$5,000 or more than \$70,000.

photograph. (Exhibit 11) He learned from Mason that maintenance recently had been performed on the machine and that the maintenance man may have left the cover off.

Loupe further stated that employee Geraldo Rodriguez was working in the area of the Chamfer machine although he was not working directly on the machine. Loupe did not observe any employees operating the machine during his inspection. It was Loupe's opinion that the nip point could nip off a part of a finger resulting in amputation or serious disfigurement if an employee came into contact with the nip point. The proposed civil penalty for the general violation was set at \$525.

Mason testified that the Chamfer machine was out of service at the time of Loupe's inspection.

Findings and Reasons for Decision

The Division did not establish a violation of § 4070(a) because there was no evidence of employee exposure. Accordingly, the proposed civil penalty of \$525 is deemed unreasonable. The citation is vacated and the proposed civil penalty set aside.

Section 4070(a) provides that all moving parts of belt and pulley drives located seven feet or less above the floor or working level must be guarded. The Division contends that Employer was in violation of § 4070(a) because the pulley drive was not guarded.

To satisfy its burden of proof the Division must show that there was an employee exposed to the hazard. (See *Moran Constructors, Inc.*, Cal-OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) To find "exposure" there must be some reliable proof that employees were endangered by an existing hazardous condition or circumstance. (See *C.A. Rasmussen, Inc.*, Cal-OSHA App. 96-3953, Decision After Reconsideration (Sept. 26, 2001); *Huber, Hunt & Nichols, Inc.*, Cal-OSHA App. 75-1182, Decision After Reconsideration (July 26, 1977).)

The Division did not dispute that the Chamfer machine was not in operation at the time of the original inspection. Even with Rodriguez in the vicinity of the machine, it cannot be assumed that he was exposed to the hazard of a nip point when the machine was not in operation. No other evidence was offered by the Division to show employee exposure. As a consequence, the general violation of § 4070(a) cannot be sustained. The

citation is vacated and the proposed civil penalty in the amount of \$525 is set aside.

Summary of Evidence

Docket 01-R3D2-4345

Citation 4, § 4310(a), Serious

Loupe described the pallet disassembler as a machine with a horizontal blade that is designed to chew through metal nails. The blade and the guard run the entire width of the table top with the blade continuing underneath the table to the other side. A counterweight arm allows the guard to be lowered according to the height of the pallet. Loupe observed that the counterweight arm had been wedged back and that the blade was warped. Although Loupe could not estimate the speed of the blade, he concluded that its movement was fast enough to chew through metal nails.

On the day of his initial inspection Loupe observed an employee leaning over the table manipulating a pallet through the machine. Loupe added that Employer warned employees not to wear loose clothing while working near the machine. Loupe believed this warning was insufficient. If an employee were to get caught in the machine, he may not be able to extricate himself from the machine in time to avoid coming in contact with the blade. Loupe identified and marked the blade, guard and the counterweight arm of the pallet disassembler on the photographs he took during his initial inspection. (See Exhibits 12 through 15.)

When Loupe returned for a follow-up visit at the site he found that the machine had been completely removed. Mason informed Loupe that he did not believe a guard was required because the manufacturer did not provide a guard. Loupe did not issue an order prohibiting use at that time because the machine had been removed.

In Loupe's opinion, if an employee were leaning over the machine and was dragged into the machine, serious injury such as disfigurement or death could occur. Accordingly, the Division issued a serious violation of § 4310(a) with a proposed civil penalty of \$6,300. In calculating the penalty, Loupe stated that Employer was given a 30% adjustment for size and a 50% abatement credit.

Mason testified that the pallet disassembler machine is similar to a band saw except that a normal band saw has the working part of the blade exposed. The pallets have a top and bottom deck board. When the pallet is placed on the pallet disassembler machine, the pallet takes up approximately the width of the machine. The pallet is then pushed through the machine twice during which time the blade severs the nails and disassembles the pallet. According

to Mason, the blade is approximately $\frac{3}{4}$ of an inch above the table and approximately $1\frac{1}{4}$ inches wide. Mason described the blade as extremely slow moving and not sharp because it has to cut the nails. He also stated that the pallet would not stay in the proper position during the disassembly process unless the counterweight was propped up. Mason conceded that the blade was not guarded.

Mason attempted to contact the original manufacturer of the machine to obtain a guard. However, he learned that the company was no longer in business. He then contacted three other manufacturers to inquiry about a guard but was told it was standard in the industry that such a machine was not equipped with a guard. In Mason's opinion, a guard on the pallet disassembler would defeat the use of the machine.

Findings and Reasons for Decision

The pallet disassembler machine is not a band saw as contemplated by § 4310(a) because it does not involve woodworking. Hence, the citation must be vacated and the proposed civil penalty set aside.

Section 4310 falls under the purview of Article 59 that pertains to woodworking machines and equipment. Specifically, § 4310(a) provides in pertinent part that band knives and band saws shall be guarded as follows:

“(1) All portions of the saw or knife blade shall be enclosed or guarded except that portion between the bottom of the guide rolls and the table. The guard shall be kept adjusted as close as possible to the table without interfering with the movement of stock. The down travel guard from the upper wheel to the guide rolls shall be so adjusted that the blade will travel within the angle or channel.”

Prior to 1986, machines or equipment under § 4310 were given a “Class A” designation. A “Class A” designation means that the order extends to all kinds of work regardless of the type of material cut.¹⁵ (See § 4188(a).) In 1986, the Legislature amended § 4310 to delete the “Class A” designation from that safety order. Thus, § 4310 is now interpreted to apply only to those machines

¹⁵ As examples, prior to 1986, § 4310 was applied to band saws that cut meat and aluminum. (See *Alpha Beta Company*, Cal-OSHA App. 79-1572, Decision After Reconsideration (April 23, 1981); *Johnson Alumimum Foundry*, Cal-OSHA App. 78-593, Grant of Petition for Reconsideration and Decision After Reconsideration (Aug. 28, 1979).)

or equipment that involve woodworking. (See *Fry's Food Stores, Inc.*, Cal-OSHA App. 84-701, Decision After Reconsideration (Aug. 17, 1987).)

Loupe specifically described the pallet disassembler as a machine that “chews nails” from the pallets. Similarly, Mason stated that the machine severs nails and disassembles the pallets. Based on the record presented, it cannot be concluded that the pallet disassembler cuts wood as contemplated under § 4310(a). To the contrary, the pallet disassembler tears up pallets after the metal nails have been ripped out. Thus, the action of the blade on the pallet disassembler is more akin to the shearing or cutting work similar to Group 8 machines as opposed to a woodworking machine.

It is incumbent upon the Division to cite the safety order that most closely addresses the alleged violative condition, practice, means, method, operation or process that led to the issuance of the citation. (See *Truecast Concrete Products*, Cal-OSHA App. 80-394, Decision After Reconsideration (Nov. 21, 1984).) The Division did not establish that § 4310(a) was the applicable safety order.¹⁶ Consequently, the citation must be vacated and the proposed civil penalty set aside.

Summary of Evidence

Docket 01-R3D2-4346

Citation 5, § 3203(a)(7), Serious

It was Loupe’s opinion that Employer failed to train Zepeda on the machine and to recognize the hazard that the saw posed. Loupe noted that Cabrera stated that he showed Zepeda how to make two or three cuts on the machine. Zepeda confirmed that no other training on the saw was provided by Employer. Loupe also emphasized that Mason concluded in his accident investigation report that Zepeda needed additional training. (Exhibit B)

Loupe classified the violation as serious based on his opinion that if training were lacking, and if an accident were to occur, there would be a likelihood of finger amputation or serious disfigurement as a result of the violation. The Division proposed a civil penalty in the amount of \$7,875 which reflected likelihood as high, a 30% adjustment for size and 50% abatement credit.

Mason did not dispute that Zepeda was not trained to operate the saw. However, it was his position that Zepeda was not authorized to work on the saw, that Zepeda acted alone when he used the saw, that there was no

¹⁶ Because I find that the pallet disassembler does not fall within the purview of § 4310(a), I need not address Employer’s challenge to the reasonableness of the abatement requirements or the defense of independent employee act.

supervisor in the area at the time of Zepeda's accident, and that Zepeda should have used the radial saw instead of the saw upon which he was injured. Mason stated he only learned that Zepeda had not been trained on the saw after he prepared his accident report.

On cross-examination Mason conceded that his accident report did not mention that Zepeda had not been assigned to work on the saw.

Findings and Reasons for Decision

The record supports a finding that Employer did not establish, implement and maintain an effective training program as required by § 3203(a)(7). However, it is not reasonable to conclude that lack of training would be the cause of serious injuries where a saw is not effectively guarded. Therefore, the serious violation cannot be sustained. The proposed civil penalty of \$7,875 is deemed unreasonable. The citation is reduced to a general violation. A civil penalty of \$525 is deemed and is assessed against Employer.

Section 3203(a)(7) mandates that an employer provide training and instruction to all employees given new job assignments for which training has not previously been received. There was no dispute between the parties that, except for the two or three straight cuts shown him before the accident, Zepeda was not trained to cut angles on the saw upon which he was injured. Employer contends, however, that because Zepeda was not authorized to use the saw, no training was required. Employer's contention is not persuasive.

To establish a failure to train violation as serious, the Division must show the probable consequences of an accident in relation to the failure to train the employee concerning a specific hazard. (See *W.F. Scott & Co., Inc.*, Cal-OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999); *Tenneco West, Inc.*, Cal-OSHA App. 79-535, Decision After Reconsideration (Jan. 24, 1985).) As the Appeals Board enunciated in *Tenneco West*, "If this hazard is so grave that it threatens the employee with death or serious injury as a substantial probability, and the employer knew, or with the exercise of reasonable diligence, could have known of the existence of the hazard in the workplace, the failure to train the employee concerning such hazard is properly classified as a serious violation." (*Tenneco West, supra.*)

As previously discussed, the record reflects that prior to the accident Cabrera showed Zepeda how to make two or three straight cuts on the saw but that Zepeda had not received formal training or any training regarding angle

cuts. The record also reflects that the saw in question, as opposed to the radial saw, was the preferred saw to make angle cuts, and that wood had been placed next to the saw ready to be cut. Equally important is the fact that on the day of the accident Cabrera assigned Zepeda to assist Niento, and that Niento instructed Zepeda to make the cuts on the saw, not once but twice that same day. Cabrera, Employer's foreman, as well as Aguaro, testified that the guard had not been working properly for some time prior to the accident. Even Mason testified that the guard had not worked for the previous three years. Thus, Employer had knowledge of the existence of the hazardous saw. Employer did not satisfy its burden to show lack of knowledge of the hazard.

Nonetheless, the Division did not show that there was a substantial probability of serious injury as a result of lack of training on the saw. A "substantial probability" means that something is more likely than not to occur. "Substantial probability" refers not to the probability that an accident will occur as a result of the violation, but rather to the probability that death or serious physical harm will result *assuming* an accident occurs as a result of the violation. (See *Findly Chemical Disposal, Inc.*, Cal-OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).)

In this case the hazard presented by the ineffective guard, and the hazard presented by the four to eight-inch gap in the guard, were not the types of hazards preventable by mere training. Alleviation of these hazards would have required taking the saw out of service until both problems were corrected. No amount of training would have adequately protected employees from the inherent hazard of an exposed blade caused by inadequate guarding. Even the most experienced worker would have been at risk under these circumstances. Consequently, the training violation under § 3203(a)(7) cannot be sustained as serious. The citation is reduced to a general violation. A civil penalty of \$525 is deemed reasonable and is assessed.

Summary of Evidence

Docket 01-R3D2-4344

Citation 1-1, § 342(a), Regulatory

Loupe testified that Employer did not report Zepeda's accident until April 23, 2001, at approximately 4:00 p.m. Zepeda sustained his injuries on April 19, 2001. The following day, absent two fingers, he returned to Employer's site to answer Mason's questions regarding the cause of the accident. In addition, it was Cabrera who took Zepeda for medical treatment. Hence, in Loupe's view, Employer was aware that Zepeda had sustained a serious injury at the time of the accident. The Division issued a regulatory violation with a proposed civil penalty of \$350.

Mason stated that on the day of the accident he reported the accident to Zenith, his workers' compensation insurance carrier. Zenith did not advise him at that time that he also had to report the accident to Cal-OSHA. It was not until April 23rd when the Zenith representative contacted him that he learned of the reporting requirement to Cal-OSHA. Mason immediately called Cal-OSHA to report the accident.

Mason also stated that at the time of the accident on April 19th, it was his understanding that Zepeda had suffered only a cut finger. It was not until Zepeda returned the following day that he learned that he had suffered an amputation.

Findings and Reasons for Decision

Employer did not timely report the accident to Cal-OSHA. A regulatory violation of § 342(a) is sustained. The proposed civil penalty of \$350 is deemed reasonable and is assessed against Employer.

Section 342(a) requires that every employer report a serious injury of an employee immediately after the accident. "Immediately" means as soon as practically possible but not longer than 8 hours after the employer knows, or with reasonable diligence would have known, of the serious injury. Merely reporting the accident to its workers' compensation insurance carrier does not satisfy an employer's reporting obligations under § 342(a). (See *Steve P. Rados, Inc.*, Cal-OSHA App. 97-575, Decision After Reconsideration (Nov. 22, 2000).)

Employer's contention that it had no immediate knowledge of the amputation injury suffered by Zepeda is unpersuasive. First of all, Zepeda was taken to Employer's front office by two other employees immediately after the accident. One of those employees was carrying Zepeda's severed fingers. Second, Cabrera, a foreman, was the one who took Zepeda to receive medical attention. Thus, it can be reasonably inferred that Employer had knowledge of that Zepeda sustained an amputation injury.

Further, Mason met with Zepeda the day after his accident to question Zepeda regarding the accident. Mason provided no explanation as to why he did not recognize the seriousness of Zepeda's injuries at that time. Ignorance of safety orders is not a defense to a violation. The regulatory violation of § 342(a) is upheld. The proposed civil penalty of \$500 is deemed reasonable and assessed.

Summary of Evidence

Docket 01-R3D2-4344

Citation 1-2, § 3203(b)(1), Regulatory

At the opening conference Loupe requested Employer's records reflecting periodic inspections. Subsequently, Loupe made the same request in writing to Employer. According to Loupe, Employer provided no response to his requests. Due to Employer's nonresponse, the Division issued a citation for a regulatory violation of § 3203(b)(1) with a proposed civil penalty of \$350.

Mason testified that the company had changed procedures to encompass inspection reports within the safety meeting reports. According to Mason, a safety meeting report was provided to Loupe. (See Exhibit H.) Upon cross-examination Mason acknowledged that the last inspection report was prepared in 1993. Mason also acknowledged that the safety meeting report did not address inspections or action taken to remedy unsafe conditions.

Findings and Reasons for Decision

Employer's safety rules and training records do not satisfy its obligation to conduct inspections and maintain records of those inspections pursuant to § 3203(b)(1). Accordingly, a violation of § 3203(b)(1) is found. The proposed civil penalty of \$350 is deemed reasonable and is assessed.

The record keeping requirements of § 3203(b)(1) mandate that an employer implement and maintain "records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices."¹⁷

Employer offered copies of its Quarterly Safety Meeting Documentation Forms, its Employee Training/Retraining Checklist, its General Safety Rules and its Safety Rules for Pop Saw/Up Cut Saw Operation. (See Exhibits C, D, F and H.) None of these records reflect inspections conducted by Employer or action taken to correct unsafe conditions. In this case it was within Employer's ability to produce records to show that inspections were conducted in compliance with § 3203(b)(1) and subsection (a)(4) but it failed to do so. The regulatory violation is sustained. The proposed civil penalty of \$350 is found to be reasonable and is assessed.

Summary of Evidence

Docket 01-R3D2-4344

Citation 1-3, § 461(a), Regulatory

During his initial onsite inspection Loupe noticed a 120-gallon capacity air tank housed in a shed. According to Loupe, the air tank was used to generate air pressure for the nailers. A permit was posted in the front office but had an expiration date of 1993. The Division issued a regulatory citation for a violation of § 461(a). The proposed civil penalty was set at \$350.

Mason contended that the permit for the air tank was valid. In addition, Mason recalled that Loupe called the department responsible for inspecting air tanks and was told they were behind in their inspections.

¹⁷ Subsection (a)(4) provides in part that the written Injury and Illness Prevention Program is to "include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices."

On cross-examination Mason stated that the last inspection of the air tank was in 1993, and that the permit expired in 1998.

Findings and Reasons for Decision

The air tank did not have a current permit, and thus, was not valid. A regulatory violation of § 461(a) is found. The proposed civil penalty in the amount of \$350 is reasonable and is assessed against Employer.

Except during the time that a request for a permit remains unacted upon, no air tank shall operate unless a permit to operate has been issued. (See § 461(a).) It can be reasonably inferred that the air tank was regularly operated based on Loupe's testimony that the air tank was used for the nailers, i.e., nail guns. Employer did not dispute its operation.

The Appeals Board has held that the Division does not have to present actual evidence of a direct observation of an alleged violation. It is sufficient if there is evidence presented to show that it is more likely than not that a violation existed. (See *Flamingo Textile Mills, Inc.*, Cal-OSHA App. 76-327, Decision After Reconsideration (June 8, 1978).) Mason conceded that the permit for the air tank had expired in 1998. No evidence was presented by Employer that it had made any efforts to renew the permit. Contrary to Employer's inference, it is the obligation of the Employer, not the Division, to ensure compliance with the permit requirements. In any event, Employer did not challenge the existence of the violation. Accordingly, a violation of § 461(a) is sustained. A civil penalty of \$350 is deemed reasonable and assessed.

Summary of Evidence

Docket 01-R3D2-4344

Citation 1-4, § 3320, General

Immediately adjacent to the air tank Loupe found an automotive start motor used to start the air tank when the pressure in the tank was low. Loupe saw no warning on the motor to alert employees in the area that the motor could start automatically. Loupe stated that Mason assured him that the problem would be corrected immediately.

It was Mason's testimony that he was not aware of the posting requirement. He also stated that the compressors were separate from work areas and that only maintenance personnel worked in that area. Mason further stated that only the amount of the penalty was contested and not how the penalty was calculated.

Findings and Reasons for Decision

A warning sign was not displayed warning employees of the automatic start motor. The general violation of § 3320 is sustained. The proposed civil penalty of \$525 is found to be reasonable and is assessed.

Section 3320 mandates that legible warning signs shall be conspicuously displayed at all machines driven by electric motors that are controlled by automatic starters. Mason acknowledged that a warning sign was not placed on or near the automatic starter, and in fact, Employer did not challenge the existence of the violation. Consequently, the general violation of § 3320 must be sustained.¹⁸ The proposed civil penalty is deemed reasonable and is assessed.

Summary of Evidence

Docket 01-R3D2-4344

Citation 1-5, § 2340.22(a), General

Loupe observed during his initial inspection of the assembly area that the main disconnect on the pallet disassembler was not identified. Loupe explained that the purpose of marking disconnects is to identify which disconnect goes to which machine. Loupe added that Mason assured him during his inspection that he would immediately correct the problem.

Mason testified that he understood that disconnects have to be identified unless the purpose is evident. The pallet disassembler was the only piece of machinery in that location with a conduit that runs directly to the machine. Mason added that as shown in Exhibit 14, the operator stands in front of the machine with the disconnect to the left less than two steps away. To disconnect the power, the operator only needs to pull the handle. On cross-examination, Mason changed his testimony to state that the operator actually stands at the other end, which is at the back of the machine.

¹⁸ It is questionable whether the Division established employee exposure to sustain the violation. However, since Employer did not challenge the existence of the violation, it can be reasonably assumed that the Division did not anticipate presenting a full *prima facie* case in support of the violation. Under the circumstances, due process would not mandate a further evidentiary showing than that offered by the Division.

Findings and Reasons for Decision

The Division did not satisfy its burden to show that the disconnect for the pallet disassembler was not located and arranged so the purpose was evident. Thus, the citation must be vacated and the proposed civil penalty set aside.

Section 2340.22(a) provides that:

“Each disconnecting means for motors and utilization equipment and for each service, feeder, or branch circuit at the point where it originates shall be legibly marked to indicate its purpose unless located and arranged so the purpose is evident. The marking shall be of sufficient durability to withstand the environment involved.”

Loupe correctly explained that the purpose of identifying disconnects is to show which disconnect goes to which machine. However, in this case, Mason testified that because the pallet disassembler was the only machine in the area, it was evident that the disconnect was for the disassembler. The Division did not offer sufficient evidence in its case in chief or in rebuttal to show that it was *not* evident that the disconnect was for the pallet disassembler. Additionally, the photographs of the pallet disassembler support Employer’s position in that no other machines are visible in the photographs. (Exhibits 12, 13 and 14) For this reason, the requirement of marking the disconnect for the pallet disassembler does not appear to further the purpose and intent of § 2340.22(a). Accordingly, the citation cannot be sustained. The proposed civil penalty is set aside.

Financial Hardship Defense

(All Dockets)

Summary of Evidence

Mason testified that the company’s monthly gross income is \$160,000 with monthly payroll for 25 employees between \$45,000 and \$50,000. Monthly rent is approximately \$8,400. Employer has two small business loans and another business loan totaling \$260,000. Monthly payments for these loans total \$4,000. Mason provided no documentation to support the company’s financial condition.

Mason could not state whether the company could afford to make payments over time. He added that bankruptcy would be likely if the company were forced to pay the penalties.

Findings and Reasons for Decision

Employer did not provide sufficient evidence to show that its financial condition warrants penalty reduction. A total civil penalty in the amount of \$72,100 is deemed reasonable and is assessed against Employer.

The authority to determine the reasonableness of civil penalties proposed by the Division rests with the Appeals Board. (See *Capri Manufacturing*, Cal-OSHA App. 83-869, Decision After Reconsideration (May 17, 1985; Labor Code Section 6602).) “The ultimate criteria for assessment of a penalty by the Appeals Board is imposition of a fair and equitable penalty that assures remedial elimination of a safety or health hazard by the cited employer, and encourages other employers to meet their obligation to maintain safe and healthful places of employment.” (See *Tylan Corporation*, Cal-OSHA App. 85-595, Decision After Reconsideration (Oct. 9, 1986).) The burden is on the employer to prove all issues pertaining to its financial condition. (See *Paige Cleaners*, Cal-OSHA App. 96-1145, Decision After Reconsideration (Oct. 15, 1997).)

Where a complete elimination of the penalty is sought based on financial hardship, the employer must show that the assessment of any penalty will force the employer out of business or create a substantial likelihood of forcing the employer to close its business. (See *Dye & Wash Technology*, Cal-OSHA App. 00-2327, Denial of Petition for Reconsideration (July 16, 2001).) In this case, Mason did not testify that payment of any portion of the penalty would force Employer out of business. Thus, the issue is whether Employer is entitled to a penalty reduction.

An employer who seeks a penalty reduction based on financial hardship must show: (1) that payment of the penalty will jeopardize the employer’s ability to continue operating its business, including maintaining and improving health and safety for its employees; (2) that it has abated all of the violations and demonstrated a sincere commitment to employee safety and health; and (3) that the employer is unable to pay the proposed civil penalty over time by installment payments reasonable for the circumstances. In addition, the employer must demonstrate a long history of commitment to employee health and safety. (See *Dye & Wash*, *supra*.)

Even where an employer can demonstrate financial hardship to warrant penalty reduction, other factors must be considered in determining the amount of reduced penalty. Such factors include the gravity and duration of the financial hardship, the size of the proposed penalty, and the commitment to employee health and safety as demonstrated by the employer. Finally, as enunciated by the Board in *Dye & Wash*, any penalty reduction must take into account the deterrent purposes of the California Occupational Safety and Health Act of 1973 (the Act).¹⁹ The central purpose of the Act is to induce employers to provide employees with a safe and healthful work environment through the use of education, compliance inspections, civil penalties, and for those appropriate cases, criminal prosecution. (*Dye & Wash, supra.*)

Employer has not demonstrated that its financial obligations are so dire that payment of the penalties would impact its ability to continue to operate its business. A threat of bankruptcy does not rise to the level of inability to pay based on an employer's debt ratio to income or an actual discontinuance of business operations. And here, where a willful serious violation has been sustained, it cannot be said that Employer has shown the requisite concern for employee safety. As a consequence, Employer's request for penalty reduction based on financial hardship must be denied.

Decision

It is hereby ordered that the citations and all items contained therein are established, modified, vacated or withdrawn as indicated above and set forth in the attached Summary Table. A total civil penalty of \$72,100 is assessed against Employer.

BARBARA J. FERGUSON
Administrative Law Judge

Dated: March 11, 2003
BJF:ml

¹⁹ Labor Code § 6300.