BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1238985**
GRIMMWAY ENTERPRISES, INC. **P.O. BOX 81498** **BAKERSFIELD, CA 93380** **Employer**	**DECISION**

Statement of the Case

Grimmway Enterprises, Inc. (Employer) processes and packages carrots. Beginning June 13, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido (Pulido), conducted an accident investigation at Employer's worksite, a carrot processing and packaging facility located at 11412 Malaga Road in Arvin, California (the site).

On October 11, 2017, the Division issued two citations to Employer alleging violations of the California Code of Regulations, title 8.[1] Citation 1, Item 1, classified as Serious, alleges that Employer failed to guard a portion of a roll sizer[2] machine (hereinafter, the roll sizer) that created a rotating hazard. Citation 2, classified as Serious Accident-Related, alleges that Employer failed to control hazardous energy while an employee was cleaning and unjamming the roll sizer.

Employer filed a timely appeal contesting the existence of both alleged violations, their classifications, and the proposed penalties. Additionally, Employer raised affirmative defenses to both citations, including, but not limited to, the Independent Employee Action Defense.[3]

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on May 26, 2021, February 10 and 11, 2022, and January 19 and 20, 2023. ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[2] As discussed further *infra*, a roll sizer is a machine used for processing carrots.
[3] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

platform. Clara Hill-Williams, Staff Counsel, represented the Division. Manuel Melgoza, of Donnell, Melgoza and Scates, LLP, represented Employer.

This matter was submitted on August 1, 2024.

Issues

1. Did Employer fail to guard a portion of the roll sizer that created a rotating hazard?

2. Did Employer fail to control hazardous energy while its employee was cleaning and unjamming the roll sizer?

3. Did Employer establish any of its pleaded affirmative defenses as to Citation 2?

Findings of Fact

1. Employer processes carrots at the site for retail sale. One of the machines used at the site is the roll sizer.

2. The roll sizer is approximately 12 feet by 50 feet. The machine shakes carrots onto rollers and ultimately onto a conveyor belt to transport them for further processing. A revolving rod with approximately 6-inch-long bars sticking out of it runs the length of the conveyor and is used to sort and process the carrots (hereinafter, "the spindle").

3. The rotating spindle creates a risk of entanglement.

4. Robert Salazar (Salazar) was employed at the site as a sanitation employee at the time of the accident. Salazar's duties included cleaning the roll sizer by wetting it down with a hose while standing on a raised work platform off to the side of the roll sizer.

5. Salazar was permitted to safely wet down the roll sizer while the machine was running. Employer required him to de-energize the roll sizer and utilize locks assigned to Salazar to lock out the controls of the roll sizer to prevent the release of hazardous energy any time he was going to reach into the machine.

6. Salazar reached into the roll sizer to unjam the spindle after he noticed plastic and carrots stuck in it. Salazar did not de-energize or lock out the roll sizer.

7. It was virtually impossible to reach the spindle from standing position on either of the raised working platforms on the north and south sides of the roll sizer. The distance between the edge of the frame and the spindle, and the design of the frame of the roll sizer, including a gear box, made it impossible to reach the spindle without significant concerted effort.

8. Salazar was standing on the frame of the roll sizer when he reached in to unjam the spindle. The frame of the roll sizer was not a sanctioned work platform.

9. Salazar had received adequate training from Employer prior to the accident regarding Employer's safety policies, including its lock out/tag out procedures with respect to the roll sizer. Salazar understood the training and had been observed working safely on multiple occasions prior to the accident.

10. Employer provided an adequate level of supervision to detect and correct hazardous conditions and practices. Salazar's accident happened when one lead sanitation worker responsible for observing safe practices was leaving and another was coming on shift. Lead workers regularly walked around and observed employees during their shifts to ensure they were following safety rules.

11. Employer disciplines employees for safety infractions, and it disciplined Salazar after the accident.

12. Salazar knew that reaching into the roll sizer to unjam it while it was energized and running violated Employer's safety requirements regarding control of hazardous energy. Salazar committed the violation because he was in a hurry and had forgotten to carry his locks with him.

Analysis

1. Did Employer fail to guard a portion of the roll sizer that created a rotating hazard?

Section 4002, subdivision (a), provides:

(a) All machines, parts of machines, or component parts of machines which create hazardous revolving, reciprocating, running, shearing, punching, pressing, squeezing, drawing, cutting, rolling, mixing or similar action, including pinch points and shear points, not guarded by the frame of the machine(s) or by location, shall be guarded.

Citation 1 alleges:

Prior to and during the course of the investigation, including, but not limited to, on May 26, 2017, a revolving hazard created by a rotating rod on the secondary roll sizer #4, located in the Cut plant sizing area, was not guarded.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Applicability

The parties do not dispute that Employer is subject to the requirements of section 4002, subdivision (a), or that the roll sizer falls within the scope of this safety order. Pulido credibly testified that the roll sizer is comprised of various conveyors and roller systems that together are called roll sizers. (Exhibit 9.) The roll sizer moves and processes carrots.

Violation

a. Did any portion of the roll sizer create a hazardous revolving action?

The operation of the roll sizer is depicted in a video that was submitted as evidence during the hearing. (Exhibit 31.) Injured employee Salazar credibly testified that the roll sizer is approximately 12 feet by 50 feet. The machine shakes carrots onto rollers and ultimately onto a conveyor belt to transport them for further processing. Pulido testified that a revolving rod with approximately 6-inch-long bars sticking out of it runs the length of the conveyor and is used to sort and process the carrots (referred to herein as "the spindle"). (See, e.g., Exhibit 23.) Pulido credibly testified that the spindle creates a risk of entanglement. The spindle and the conveyor are depicted in Exhibits 17 and 18. Employer failed to offer any evidence suggesting that the spindle in the roll sizer did not create a hazardous revolving action.

Based on the totality of the evidence, it is found that the spindle in the roll sizer created a hazardous revolving action.

b. Was the spindle guarded by the frame of the roll sizer or by its location?

Section 3941 defines "guarded" as:

> Shielded, fenced, enclosed or otherwise protected according to these orders, by means of suitable, enclosure guards, covers or casing guards, trough or "U" guards, standard railings or by the nature of the location where permitted in these orders, so as to remove the hazard of accidental contact.

Furthermore, section 3941 defines "guarded by location" as:

> The moving parts are so located by their remoteness from floor, platform, walkway, or other working level or by their location with reference to frame, foundation or structure as to remove the likelihood of accidental contact.

The Appeals Board has interpreted guarding by location to mean that the "'likelihood of accidental contact with moving parts is removed by their remoteness,' and decreasing the likeliness of accidental contact is not enough." (*Arriaga USA, Inc. dba Stoneland USA*, Cal/OSHA App. 1279492, Decision After Reconsideration (Dec. 7, 2021), quoting *EZ-Mix, Inc*., Cal/OSHA App. 08-1898, Decision After Reconsideration (Nov. 26, 2013).)

Furthermore, the Appeals Board has held that:

> In order for moving parts to be guarded by location, section 3941 provides for two scenarios: (1) the moving parts may be so high up from the working level that employees would not be likely to come into contact with them accidentally; or (2) even if not remote from the working level, the moving parts may be located within the structure of the equipment such that there is unlikely to be any accidental contact.

(*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600.)

Two raised working platforms run alongside the roll sizer, one on its north side and the other on its south side. Sanitation employees would stand on one of the working platforms holding a hose to water down the roll sizer as part of the cleaning process. Salazar had been standing on the raised working platform on the north side of the roll sizer and was watering it down prior to the accident. There is no dispute, however, that Salazar was standing on the frame

on the north side of the roll sizer, as opposed to on one of the designated elevated work platforms, when the accident occurred.

Pulido testified that he took measurements of the roll sizer during his inspection. (See Exhibit 5, p. 14.) According to Pulido, the roll sizer measured 6 feet 7 inches wide[4] not including the frame. Pulido testified he inspected the elevated working platform that ran alongside the north side of the roll sizer. Pulido measured three and a half feet of distance between the edge of the frame of the roll sizer and the nearest edge of the working platform. Pulido also testified that he measured the distance between the edge of the frame and spindle as 19 inches. Additionally, Pulido testified that, if standing on the frame of the roll sizer, the spindle was between approximately one foot four inches and two feet below the top of the frame. Nothing in the record, however, suggests that the top of the frame of the roll sizer was a working platform on which employees were authorized to climb or stand.

Pulido also testified to hazard exposure that he observed on the south side of the roll sizer, opposite to the side that Salazar was working on before the accident. According to Pulido, he measured 55 inches from the working level of the platform adjacent to the south side of the roll sizer to the top of the frame surrounding the conveyor and spindle. (Exhibit 21.) From the edge of the frame, Pulido testified that he determined through measurements and physical observations that one would need to reach down an additional 11 inches to reach the spindle. (See, e.g., Exhibits 22 and 23.)

Employer's Sanitation Supervisor Asuncion Mendoza (Mendoza) testified that he was familiar with the roll sizer involved in the accident. Mendoza credibly testified that the conveyor belt of the roll sizer was located approximately 18 to 24 inches above the working platform, and that on the north side of the machine one would have to reach approximately between 16 and 19 inches horizontally into the machine to reach the bars (described by Mendoza as "spikes") on the spindle, past a metal gear box (Exhibit 26). In addition, David Flores (Flores), Employer's Director of Environmental Health and Safety, credibly testified that he was familiar with the roll sizer. Flores testified that the spindle was guarded by the frame of the machine, and that one would have to reach around and behind the gearbox and the frame to reach the spindle, making it virtually impossible to reach accidentally. Witness testimony and documentary evidence, including multiple photographs, support a finding that the height of the working platforms on the north and south sides of the roll sizers, and the height of the frame on both sides, are substantially similar.

Pulido's testimony about the measurements that he took, when viewed alongside the testimony of Mendoza and Flores and the photographs and measurements that are part of the

[4] Pulido's testimony as to the dimensions and configuration of the roll sizer was at times confusing and hard to follow.

evidentiary record, supports a finding that the hazardous revolving action created by the spindle was guarded by location. On the south side of the roll sizer, one would need to reach their arm over the top of the frame, which Pulido described as being roughly armpit height, and would need to reach down another 11 inches to come into contact with the alleged hazard. On the north side of the roll sizer, Pulido's measurements and the photos in evidence establish that one would need to reach three and a half feet horizontally past the edge of the working platform to reach the frame surrounding the roll sizer. One would then need to reach another 19 inches horizontally inward from the frame to come into contact with the hazard. In both cases, it is unlikely that an employee could accidentally come into contact with the hazard, given the distances involved and the presence of the frame surrounding the roll sizer.

In sum, the preponderance of the evidence introduced during the hearing does not demonstrate that Employer violated section 4002, subdivision (a), because the alleged hazard created by the spindle was guarded by location and by the frame surrounding the roll sizer. Accordingly, Citation 1 and its associated penalty is vacated.

2. Did Employer fail to control hazardous energy while its employee was cleaning and unjamming the roll sizer?

Section 3314, subdivision (c), provides:

> (c) Machinery or equipment capable of movement shall be stopped and the power source de-energized or disengaged, and, if necessary, the moveable parts shall be mechanically blocked or locked out to prevent inadvertent movement, or release of stored energy during cleaning, servicing and adjusting operations. Accident prevention signs or tags or both shall be placed on the controls of the power source of the machinery or equipment.

Citation 2, alleges:

> Prior to and during the course of the inspection, the employer did not ensure that employees engaged in cleaning and unjamming equipment capable of movement stop and de-energize or disengage the equipment from the power source during cleaning work and the place accident prevention signs or tags or both on the controls of the power source of the equipment. As a result, on or about May 26, 2017, an employee suffered a serious injury while cleaning and unjamming a rotating rod on the secondary roll sizer #4, located in the cut plant sizing area. The rotating rod was not stopped, de-energized or disengaged from the power source, nor were accident prevention signs or tags placed on the controls of the power source of the machinery during the cleaning and unjamming operation.

Applicability

The parties do not dispute that the roll sizer qualifies as machinery or equipment capable of movement, and the uncontroverted evidence submitted during the hearing supports such a conclusion. Thus, section 3314, subdivision (c), applies to Employer's operation of the roll sizer.

Violation

The "clear purpose" of section 3314, subdivision (c), "is to keep employees away from the danger zone created by moving machinery." (*Stockton Steel Corporation*, Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002).) Section 3314, subdivision (c), "imposes two primary safety requirements prior to cleaning, adjusting and servicing machinery: (1) machine parts capable of movement must be stopped, and (2) the power source must either be de-energized or disengaged. If the two primary requirements are not effective to prevent inadvertent movement, another requirement applies -- the parts capable of movement must be mechanically blocked or locked in place." (*Rialto Concrete Products, Inc*., Cal/OSHA App. 98-413, Decision After Reconsideration (Nov. 27, 2001), citing *Macco Constructors, Inc*., Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993).)

a. *Was the roll sizer stopped?*

There is no factual dispute that the roll sizer was operating and was not stopped at the time of Salazar's accident. The accident occurred while Salazar was attempting to clean the roll sizer. Salazar credibly testified that he left the roll sizer running during this process. He further testified that the rollers were spinning, although the spindle (what he called the revolving rod and attached bars) was stuck. No witnesses testified that the roll sizer was stopped when the accident occurred, and Salazar's testimony is consistent with the fact that he suffered an injury when his arm was caught by the bars of the revolving rod. Thus, it is found that the roll sizer was not stopped.

b. Was the roll sizer's power source de-energized or disengaged?

There is no factual dispute that the roll sizer's power source was neither de-energized nor disengaged at the time of Salazar's accident. Salazar admitted to Pulido and testified credibly during the hearing that he left the roll sizer running while attempting to unjam it, and his testimony is deemed credible and is consistent with other witness testimony including that of Sanitation Foreperson Carmen Castro (Castro) who credibly testified that she pressed the emergency stop button to de-energize the machine after hearing Salazar's screams. Thus, it is found that the roll sizer's power source was neither de-energized nor disengaged.

Here, it is determined based on a preponderance of the evidence that the roll sizer was not stopped, and its power source was neither de-energized nor disengaged, prior to Salazar attempting to clean and unjam the spindle. Thus, this Decision does not reach the issue of whether the roll sizer was capable of inadvertent movement, as it is not necessary to the determination of whether a violation occurred. Additionally, Employer did not present evidence in support of the minor servicing exception to section 3314, subdivision (c), and nothing in the record suggests that Salazar's activity at the time of the accident falls within this exception. In conclusion, the preponderance of the evidence supports a conclusion that Employer violated section 3314, subdivision (c).

3. Did Employer establish any of its pleaded affirmative defenses as to Citation 2?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600.) Here, Employer presented evidence in support of its Independent Employee Action Defense (IEAD) during the hearing.

To successfully assert the IEAD, an employer must establish the following elements:

(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 against employees who violate the safety program; and
(5) The employee caused a safety infraction which he or she knew was contra to the employer's safety requirements.

(*Fedex Freight, Inc*., Cal/OSHA App. 12-0144, Decision After Reconsideration (Dec. 14, 2016); *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

The IEAD is an affirmative defense, thus Employer bears the burden of proof and must establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

As explained by the Appeals Board in *General Dynamics NASSCO*, Cal/OSHA App. 1300984, Decision After Reconsideration (Jan. 23, 2023):

The defense is premised upon the employer's compliance with non-delegable statutory and regulatory duties. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002).) The IEAD "recognizes that where the employer has done its best to comply with OSHA, the purposes of the act would not be furthered by punishing it for the violation" (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeal Bd*. (1985) 167 Cal.App.3d 1232, 1242; *Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 08-1920, Decision After Reconsideration (Mar. 5, 2013).)

a. Was Salazar experienced at the job that he was performing?

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

Salazar testified that he had one year of experience working as a sanitation employee for Employer at the time of the accident. In the two months prior to his accident, Salazar estimated that he had worked on the roll sizer approximately 40 to 50 times. As discussed more fully below, Salazar received comprehensive instruction and on-the-job training on cleaning the roll sizer, including Employer's lock out/tag out procedures and requirements. (See, e.g., Exhibits I, M and N.) During his testimony, Salazar demonstrated proficient knowledge on the steps for safely cleaning and unjamming the roll sizer, and his testimony was consistent with foreperson Castro's testimony. Thus, it is found based on a totality of the evidence that Salazar was experienced at cleaning and unjamming the roll sizer while following Employer's lock out/tag out procedures. Employer, therefore, established the first element of the IEAD.

b. Did Employer have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments?

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

Salazar credibly testified that he received one week of training for the roll sizer, and that his training included instructions regarding de-energizing the roll sizer and locking out the controls of the machine prior to engaging in cleaning operations that required him to reach into the machine. In addition, Salazar and Castro credibly testified that sanitation employees received

initial video-based training on safety (Exhibit BQ), specifically including lock out/tag out, and that Salazar had been trained on Employer's procedures to de-energize and lock out or tag out the roll sizer prior to removing any product (here, carrots) from the machine. This testimony is corroborated by Employer's Lock Out/Tag Out Program (Exhibit I) and by training records offered into evidence during the hearing (in particular, Exhibits M and N), which together demonstrate that Salazar was successfully trained in how to safely perform his job assignments related to the roll sizer. The Division had the opportunity to present evidence that Employer's safety program was deficient but presented no such evidence other than the evidence of the accident itself.

Based on the foregoing evidence, it is found that Employer had a well-devised safety program that included training employees such as Salazar in matters of safety respective to his particular job assignments. Thus, Employer established the second element of the IEAD.

c. Did Employer effectively enforce its safety program?

Under the third IEAD element, the employer has the burden to show that it enforces the safety policies and procedures promulgated in its IIPP and training programs and promotes a safe working environment. (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).) In relevant part, this element requires the employer to demonstrate that it provided an adequate level of supervision to detect and correct hazardous conditions and practices. (*Fed Ex Ground, Inc*., Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020); *City of Los Angeles Water and Power*, Cal/OSHA App. 86-349, Decision After Reconsideration (Apr. 4, 1988).) An employer's failure to exercise a level of supervision necessary to ensure safety has been consistently recognized as negating the IEAD. (*Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd*. (1985) 167 Cal.App.3d 1232, 1243; *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.) While it may be true that one-to-one supervision is neither practical nor required, supervision must be adequate. (*Signal Energy, LLC*, Cal/OSHA App. 1155042, Decision After Reconsideration (Aug. 19, 2022).)

Salazar testified that he received his assignments from Castro. Although Salazar testified that he typically worked alone, Castro credibly testified that she would walk around and observe employees during their shifts to ensure that they were following safety rules. Castro had been the sanitation foreperson for approximately 10 years at the time of the hearing, and her testimony is credited. Castro had arrived on duty shortly before the accident and was going through the door when she heard a loud noise coming from Salazar. Salazar credibly testified he had been in a hurry when the accident occurred, implying that his actions leading up to the accident happened in a very short amount of time. A reasonable inference can be drawn from the testimony and documentary evidence that Salazar's actions immediately prior to the accident would not have been readily observed despite Employer employing reasonable supervision. Indeed, Castro

immediately shut down the plant by engaging the emergency stop button and located Salazar with his arm caught in the roll sizer. Castro's testimony is substantially consistent with Mendoza's testimony concerning the accident and is credited.

Here, it is found that Employer provided an adequate level of supervision to detect and correct hazardous conditions and practices. The hearing record supports an inference that Salazar quickly entered an area that was not a regular work area when he climbed on the frame of the roll sizer, which may have placed him out of view of the employees charged with supervising him. Nothing in the record, however, suggests that the violation occurred due to a lack of appropriate supervision. Salazar had successfully (and presumably safely) worked on the roll sizer approximately 40 to 50 times prior to the accident and had been observed working on previous occasions by employees responsible for supervising his work. Thus, Employer established the third element of the IEAD.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

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

Employer introduced evidence that it disciplines employees for safety violations. Employer introduced its Injury and Illness Prevention Program (IIPP) into evidence. (Exhibits E, F and G.) The IIPP states that Employer uses progressive discipline to sanction employees who violate its safety rules and documents the discipline. (Exhibit F, p. 9.) Furthermore, Employer introduced disciplinary records demonstrating that it implements its discipline policy against employees for committing safety infractions including violations of Employer's Lock Out/Tag Out procedures. (Exhibts BN, BO.) Salazar was disciplined as a result of the accident.

It is therefore found, based on the foregoing evidence, that Employer had a policy of sanctions against employees who violate its safety program. Thus, Employer established the fourth element of the IEAD.

e. Did Salazar cause a safety infraction which he knew was contra to Employer's safety requirements?

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

Here, ample evidence establishes that Salazar knew that he was violating Employer's safety requirements when he reached into the roll sizer to unjam the spindle while the machine was energized and running. As noted previously, Salazar was appropriately trained and understood Employer's procedures for safely working on the roll sizer, including de-energizing and locking out the machine prior to reaching inside to unjam it. Salazar credibly testified that he knew he should have locked out the machine prior to reaching inside, but he had forgotten to take his locks with him and was in a hurry. Nothing in the record suggests that Salazar's accident was caused by inadvertence as opposed to conscious disregard of Employer's safety rules. Thus, Employer established the fifth element of the IEAD.

For the foregoing reasons, it is determined that Employer established the IEAD by a preponderance of the evidence introduced during the hearing, and in light of all reasonable inferences that may be drawn therefrom. Accordingly, the IEAD excuses Employer from liability for this violation, and Citation 2 and its associated penalty shall be vacated.

Conclusions

The evidence supports a conclusion that Employer appropriately guarded the rotating hazard created by the spindle inside the roll sizer, which was guarded by the frame of the machine and by its location within the machine. Thus, Employer did not violate section 4002, subdivision (a).

The evidence supports a conclusion that Employer violated section 3314, subdivision (c), by failing to control hazardous energy while an employee was cleaning and unjamming the roll sizer. Employer established all five elements of the IEAD, however, thereby excusing the violation.

Orders

Citation 1 and Citation 2 and their associated penalties are vacated consistent with this Decision.

Dated: 08/13/2024

/s/ Howard I. Chernin
Howard I Chernin
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**