BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
DRILL TECH DRILLING AND SHORING, INC. **2200 Wymore Way** **Antioch, CA 94509** **Employer**	**1420923** **DECISION AFTER RECONSIDERATION**

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

JURISDICTION

Drill Tech Drilling & Shoring, Inc., (Employer) is a drilling and shoring company in the construction industry. On August 6, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Travis Haskins, commenced an accident investigation of Employer's work site located at 500 Old Davis Road in Davis, California (work site). On December 2, 2019, the Division issued three citations to Employer, alleging violations of California Code of Regulations, title 8.[1]

At the hearing in this matter, the Division withdrew Citation 2. The remaining citations allege that: (1) Employer failed to maintain an effective Injury and Illness Prevention Program; and (2) Employer failed to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation.

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the Board. ALJ Jessup conducted the hearing from Sacramento, California, on February 1 and 2, 2023, and March 1 and 2, 2023, with the parties and witnesses appearing remotely via the Zoom video platform. Robert Ayers, attorney with Holland & Hart, LLP, represented Employer. Lauren Ocadiz, staff counsel, represented the Division. The ALJ's Decision, issued July 21, 2023, affirmed Citations 1 and 3, modifying the associated penalties.

Employer timely filed a Petition for Reconsideration (Petition). The Division filed an Answer. Employer's Petition asserts that (1) the evidence does not justify the findings of fact in the Decision; and (2) the findings of fact do not support the Decision. (Lab. Code, § 6617.)

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

Employer further argues that it established several affirmative defenses regarding Citation 3. First, Employer argues that the task involved here fell within the exception provided by section 3314, subdivision (c)(1), which applies in situations where the task requires machinery to remain energized or capable of movement. Second, Employer asserts the cleaning operation fell within the "minor servicing" exception to section 3314, subdivision (c). Third, Employer argues that it established all elements of the Independent Employee Action Defense (IEAD). All arguments not raised in the Petition are deemed waived. (Lab. Code, § 6618.)

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Employer fail to maintain an effective Injury and Illness Prevention Program?

2. Did Employer fail to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation?

3. Did Employer demonstrate that section 3314, subdivision (c)(1), applied?

4. Did Employer demonstrate that the "minor servicing" exception to section 3314, subdivision (c), applied?

5. Did Employer establish the IEAD?

FINDINGS OF FACT[2]

1. Nick Michalowski (Michalowski) experienced a partial amputation of two fingers on his left hand as a result of an incident on July 17, 2019.

2. Jason Askew (Askew) and Michalowski were employees of Employer on July 17, 2019.

3. On July 17, 2019, Michalowski suffered a serious injury as that term was defined under California Code of Regulations, title 8, section 330, subdivision (h), at the time.

4. On July 17, 2019, Askew was a foreman on site for Employer.

5. At the time of the incident, Askew was operating the drill rig.

6. On the day of the incident, Askew was Michalowski's supervisor.

7. The Bauer drill rig (drill rig) in use by Askew and Michalowski used a stored energy system, a hydraulic system, to move its tools and equipment.

8. The Kelly bar is an extension of the drill rig that is used to secure tools to the drill rig. The Kelly bar on the drill rig weighed approximately 20,000 pounds. The drill rig's auger tool weighed approximately 2,500 pounds. The spin bottom is a tool used to clean out the

[2] Findings of fact numbers 1 to 4 are pursuant to stipulation by the parties.

bottom of holes dug by other drilling tools. The spin bottom tool weighed approximately 4,000 pounds.

9. Prior to the incident, the drill rig had been used to dig a hole with a digging bucket.

10. After the hole was dug by the drill rig, Askew and Michalowski began the process of connecting the drill rig, via the Kelly bar, to the spin bottom. During the process of connecting the drill rig to the spin bottom, both Askew and Michalowski observed that the Kelly, or receiver, box used to connect the spin bottom to the Kelly bar required cleaning before the tool could be secured.

11. After noticing the spin bottom's receiver box required cleaning, both Askew and Michalowski took action to begin cleaning the spin bottom. At the time of the incident, Askew and Michalowski were involved in the task of cleaning the spin bottom's receiver box.

12. When Askew noticed that the spin bottom required cleaning, he used the drill rig to lift the Kelly bar out of the spin bottom. Askew did not notify Michalowski he would be lifting the Kelly bar. At that time, Michalowski was standing directly adjacent to the spin bottom and had his fingers in the holes of the spin bottom box and the Kelly bar. The movement of the Kelly bar amputated two of Michalowski's fingers.

13. The process of attaching the spin bottom to the Kelly bar can involve a variety of adjustments to line up the holes. However, the adjustments do not require an employee to be directly adjacent to the spin bottom while the holes are being aligned.

14. The spin bottom was not cleaned prior to Askew and Michalowski beginning the task of securing it to the Kelly bar.

15. Tools, like the spin bottom, are typically cleaned prior to making attempts to secure a tool to the Kelly bar.

16. Cleaning the box of the spin bottom does not require that the Kelly bar be in place in the spin bottom box and it does not require the drill rig to be energized.

17. The incident occurred when Askew used the drill rig to lift the Kelly bar out of the spin bottom, and it took place in less than five to six seconds.

18. At the time of the incident, Michalowski did not expect the Kelly bar to be moved out of the spin bottom's receiver box.

19. The drill rig was capable of causing injury to employees by way of unexpected start-up or through the release of stored energy.

20. The drill rig is a machine capable of movement. At the time of the incident, the drill rig was not de-energized and did not have its power source disengaged.

21. Askew did not ensure step-by-step communication and, instead, expected communication only if something was wrong.

22. Askew was able to partially see Michalowski at the time of the accident, while Michalowski was directly adjacent to the spin bottom. However, Askew could not see the entirety of Michalowski, most notably his hands, because a portion of his view was obstructed by the equipment.

23. At the time of the incident, Michalowski attempted to clean the box on the spin bottom by using his fingers to clear debris.

24. Prior to the incident, Michalowski attempted to verbally communicate to Askew that the spin bottom box was dirty and that he believed he could clear the obstruction.

25. Employer's safety policy requires the following: eye contact between equipment operators and employees entering the work area; communication between equipment operators and employees on the ground; and, ensuring operators remove their hands from equipment controls at any time they are aware employees are in harm's way.

26. Employer's safety training instructed its employees to avoid pinch points.

27. Askew did not follow Employer's safety policy when he lifted the Kelly bar from the spin bottom because he did not communicate to Michalowski that he was going to raise Kelly bar from the spin bottom.

28. A failure to Lockout/Tagout equipment can result in fractures, lacerations, amputations, and other injuries up to, and including, death.

29. One employee was exposed to the hazardous condition that gave rise to the citations.

DISCUSSION

1. Did Employer fail to maintain an effective Injury and Illness Prevention Program?

In Citation 1, Employer was cited for an alleged violation of California Code of Regulations, title 8, section 1509, subdivision (a). Section 1509, subdivision (a), provides that "Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders."

Section 3203, subdivision (a), provides:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
>
> […]
>
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
>
> […]

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> […]
>
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
>
> […]

The Alleged Violation Description (AVD) of Citation 1 provides:

> Ref. Employer's Code of Safe Practices (Pg. 56)
>
> 21. Employees must observe and obey every rule, regulation and orders, which are necessary to the safe conduct of work. The foreman shall take such action as it [sic] necessary to obtain compliance.
>
> Ref. Bauer Safety Information – Danger Zone (Pg. 7) The operator must warn persons exposed to danger; in general he can do so by audible signals (sounding the horn). Where the surrounding noise level is high, established hand signals must be used instead of horn signals.
>
> Prior to and during the course of the investigation, including but not limited to July 17, 2019[,] at a jobsite located at: 500 Old Davis Rd. [,] Davis, CA 95616; the employer's IIPP was ineffective in that they did not ensure the operator of the Bauer Drill [sic] rig warned person(s) exposed to danger(s) of the moving part(s); as required by this section.

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP). To establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement" or "maintain" an "effective" program. While an employer may have a comprehensive written IIPP, the Division may still establish a violation by demonstrating the employer failed to effectively implement its IIPP. (*OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016); *Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP / Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) (*NDC/Tri-State*).)

Additionally, a supervisor's violation of a safety rule is attributed to an employer and such a violation supports the conclusion that an employer has failed to enforce its safety program. (*PDM Steel Service Centers, Inc*., Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) The Division has the burden of proving a violation by a preponderance of the evidence. (*Wal-Mart Stores, Inc. Store # 1692*, Cal/OSHA App. 1195264, Decision After Reconsideration

(Nov. 4, 2019).) "'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." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020) [other citations omitted].) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

The Division alleged that Employer failed to effectively implement its IIPP in compliance with the manufacturer's safety instructions for the Bauer drill rig. Specifically, the Division alleged that Askew, who was a supervisor, failed to ensure clear communication with Michalowski, and failed to confirm Michalowski was out of harm's way, before moving the Kelly bar. Employer argues that Michalowski violated safety rules by placing his fingers in the pin hole, and Askew could not have known he needed to alert Michalowski before raising the Kelly bar. (Petition, p. 6.) Employer asserts that Askew's and Michalowski's communication was in compliance with its IIPP as well as with industry practice. (Petition, pp. 4-5.) Employer further argues that, even if this incident did amount to a failure to implement its IIPP, the deficiency was not "'essential' to Drill Tech's overall safety program." (Petition, p. 5.)

Addressing the last question first, Board precedent holds that a single deficiency can constitute an IIPP violation, if that deficiency is essential to the employer's overall safety program. (*OC Communications, Inc*., *supra*, Cal/OSHA App. 14-0120.) Employer's primary business involves drilling and shoring operations, the activity that it was conducting at the time of the accident. Drilling takes place daily, as do operations involving changing, cleaning, and adjusting tools on the drill rig. As such, drilling safety is essential to Employer's overall safety program. Having established this threshold question, we move on to the issue of whether Employer failed to ensure effective communication during drill rig operations.

On the day of the accident, Askew and Michalowski were using the drill rig to drill holes that would contain the structural elements of a bridge. Askew was operating the drill rig. Michalowski, the ground man, was responsible for the manual operations involved in setting up, cleaning, and adjusting tool attachments on the drill rig. After drilling the hole with the digging bucket attachment, Askew and Michalowski removed the digging bucket and began the process of attaching the spin bottom, a tool used to clean debris from the bottom of the hole.

The spin bottom tool is attached to the drill rig by securing a part of the tool, called either Kelly box, or receiver box, to a part of the drill rig called the Kelly bar. (See, e.g., HT Day 1, p. 45; HT Day 4, p. 38; Modified Joint Exhibits 1 and 2.) The bar and the box have corresponding holes that align when the drill rig operator places the bar inside the box. The ground man secures the bar and box together by placing a pin through these aligned holes. On this occasion, Askew lowered the Kelly bar into the spin bottom's receiver box, but saw that the pin holes could not be properly aligned due to debris in the Kelly (or receiver) box. Michalowski also saw that the box was dirty; he testified that he attempted to verbally tell Askew that there was mud in the receiver box and that he would clean it. (HT Day 1, pp. 56, 57-58.) Michalowski then tried to use his fingers to clean the pin holes. Askew did not know that Michalowski had placed his fingers in the pin holes. There was no further communication between Askew and Michalowski before Askew moved the Kelly bar. Askew raised the Kelly bar, partially amputating two of Michalowski's

fingers. At the time he moved the Kelly bar, Askew could see part of Michalowski's body, but could not see his hands. (HT Day 4, p. 51.)

Employer's safety policy recognized the dangers the drill rig presented to employees in its operation area. Employer's response to the Division's Notice of Intent to Classify Citation 3 as Serious (1BY) states, "(1) Drill Tech trains all employees to make eye contact with the operator before entering the work area or putting themselves in harm's way"; and, "(2) Drill Tech also trains operators the [*sic*] hand off controls any time they are aware of any employee putting themselves in harm's way." (Ex. 16.) Employer was thus aware that both the operator and affected employee needed to clearly communicate with one another when an affected employee was in an operational area where moving parts were capable of causing injury to the affected employee.

However, Askew testified that Employer's safety policy, as well as industry practice, did not require "constant" communication between the operator and ground man. Askew stated that communication during a tool change was necessary only if something was "going wrong." (See, e.g., HT Day 4, pp. 66, 71, 73.) He testified that he did not notify Michalowski before raising the Kelly bar, because he did not anticipate that Michalowski would place his fingers in the pin hole.

Michalowski was in the operation area of the drill rig, and was exposed to the hazard of injury from the drill rig. Both Askew and Michalowski saw that the spin bottom's receiver box needed cleaning, yet failed to effectively communicate how the cleaning would be done. As the ALJ pointed out, and we agree, these facts expose a deficiency in Employer's safety policies regarding clear communication.

The manufacturer's safety manual for the drill rig, which Employer's IIPP incorporates by reference, provides, "The operator may start to move or operate the machine only when he is sure that there is no person in the danger zone"; and, "Before the operator starts the machine, he must satisfy himself that no person will be endangered thereby." (Ex. 25.) Employer's "Safety Stand Down," issued after the accident,[3] states:

> The operator and any workers on the ground must have clear communication, not just eye contact. Before any persons puts [sic] any part of their body in a position that could become injured the equipment must be deenergized or disengaged from the power source. This is not merely eye contact. This is making sure the proper procedures are followed.

(Ex. 16.)

Askew did not make an effort to confirm that Michalowski was out of the danger zone, and did not inform Michalowski before raising the Kelly bar. Askew could see that Michalowski was in the operation area of the drill rig, but could not see Michalowski's hands. Nonetheless, Askew moved the Kelly bar without confirming or observing that Michalowski was out of the zone of danger. Employer failed to follow its own safety rules to ensure that employees complied with the manufacturer's instructions associated with equipment in use at the work site. (Decision, p.7)

[3] Evidence Code, section 1151, provides: "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event." To the extent Employer offers Exhibit 16 as evidence to absolve it of culpability in this matter, that argument is rejected.

Therefore, Employer did not effectively implement and enforce its safety policy to ensure that an operator confirmed an employee was out of harm's way before engaging the controls for the equipment.

The Division met its burden of proof to establish a violation of section 1509, subdivision (a). Citation 1 is affirmed.

2. Did Employer fail to stop and de-energize or disengage the power source, and if necessary, mechanically block or lock movable parts to prevent inadvertent movement or release of stored energy during a cleaning, servicing, or adjusting operation?

Citation 3 alleged a violation of section 3314, subdivision (c). Section 3314, subdivision (c), provides, in relevant part:

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

The AVD for Citation 3 provides:

> Ref. Employer's Code of Safe Practices (Pg. 62)
>
> 4. Do not service, repair or adjust machinery or equipment while it is moving or operating.
>
> 6. Use lockout procedures whenever the possibility exists that the equipment, machine or vehicle may be started/engaged by someone other than the person working on it.
>
> Prior to and during the course of the investigation, including but not limited to July 17, 2019[,] at a jobsite located at: 500 Old Davis Rd. Davis, CA 95616; the employer did not ensure that the Bauer drill rig was stopped and the power source de-energized, during cleaning/servicing/adjusting operations, as required by this section.

The "clear purpose" of this safety order "is to keep employees away from the danger zone created by moving machinery." (*Stockton Steel Corporation,* Cal/OSHA App. 00-2157, Decision After Reconsideration (Aug. 28, 2002).) The safety order "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. 98413, Decision After Reconsideration

(Nov. 27, 2001), citing *Macco Constructors, Inc*., Cal/OSHA App. 91-674, Decision After Reconsideration (May 27, 1993).)

A. Is Section 3314, subdivision (c), applicable to the facts of the case?

To meet its burden of proof, the Division must establish the applicability of the cited safety order to the facts of the case. (*Dish Network California Service Corporation*, Cal/OSHA App. 12-0455, Decision After Reconsideration (Aug. 28, 2014); *C.A. Rasmussen*, Cal/OSHA App. 95-943, Decision After Reconsideration (Aug. 26, 1997).) Employer asserts that section 3314 is inapplicable to the equipment and activities involved in this incident.

Section 3314, subdivision (a), provides us with guidance as to the applicability of section 3314. It provides, in relevant part:

> (1) This Section applies to the cleaning, repairing, servicing, setting-up and adjusting of machines and equipment in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.
>
> (2) For the purposes of this Section, cleaning, repairing, servicing and adjusting activities shall include unjamming prime movers, machinery and equipment.

Employer asserts that section 3314, subdivision (c), does not apply for the following reasons. First, Employer argues that the process of changing the tool on the drill rig was not an "adjusting," "setting-up," or "cleaning" operation as contemplated by the safety order. (Petition, pp. 13-15.) Employer next argues that the drill rig was energized at the time of the accident, and thus, no "unexpected energization or start up … or release of stored energy" could have occurred and caused Michalowski's injury. (Petition, pp. 10-11, 12.) On a related note, Employer argues, the movement of the drill was "deliberate," in the sense that Askew intended to raise the Kelly bar and thus was not "unexpected" within the meaning of the safety order. (Petition, pp. 11, 13.)

First, Employer's position is that the safety order does not apply because Askew and Michalowski were engaged in one task, and one task only, at the time of the accident, and that task was changing the tool on the drill rig. Employer repeatedly asserts that the employees' singular task of "changing a tool" on the drill rig did not, and could not, involve "adjusting," "setting up," or "cleaning," the spin box. Employer therefore asserts that the ALJ erred in finding that the tool change operation involved two separate, and legally distinct, steps.

1. Were Employees performing "cleaning, […] setting-up and adjusting" operations?

The threshold question for application of section 3314 is whether employees were involved in cleaning, repairing, servicing, setting-up, or adjusting a machine. Employer argues that the only operation here was "changing a tool on the drill." (Petition, p. 11.) Employer asserts that no aspects of this task fall under the categories of setting up, adjusting, or cleaning the machinery. We disagree.

a. Were Employees "setting up" or "adjusting" a machine?

First, we find that the tool changing operation required employees to set up and adjust the drill rig. "Setting up" a machine has been referred to as "the process of preparing the machine or equipment for operation, and not something done routinely while the machine or equipment is in operation which is a necessary part of that operation." (*Newman Flange & Fitting Company*, Cal/OSHA Ap. 07-2581, Decision After Reconsideration (October 5, 2011). (*Newman Flange*).)

It is clear that this tool change was necessary to the "process of preparing the machine or equipment for operation." (*Newman Flange*, *supra*, Cal/OSHA App. 07-2581.) The hole had been dug, and the next step of the work required cleaning debris from the bottom of that hole. A new tool, the spin bottom, was required to perform that operation. The tool change was thus a necessary part of the operation of the machine, to prepare it for the task of using the spin bottom to clean debris from the hole. Askew and Michalowski were in the process of preparing the drill rig for the new task of using the spin bottom6, and were therefore setting up a machine to prepare it for operation.

"Adjustment" of a machine "implies changing or regulating the machinery to assure its optimal performance." (*Macco Constructors*, *supra*, Cal/OSHA App. 91-674; *Golden State Boring & Pipe Jacking, Inc.*, Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020).) Askew testified that multiple adjustments may be necessary to properly align the holes used to secure a tool to the drill rig. (HT Day 4, p. 74.) The tool-changing process therefore involves adjusting the drill rig and/or the tool to allow for the optimal operation of the drill rig and the tool. (Decision, p. 12.) Employer argues, "Changing a tool does not 'adjust' the drill." (Petition, p. 13.) However, the ALJ correctly rejected this argument, reasoning that the operation of attaching a tool to the drill rig "involves adjusting the tool to allow for its operation." (Decision, p. 12.) Askew and Michalowski were therefore involved in an operation of setting up and/or adjusting a machine.

b. Were Employees involved in a cleaning operation?

Employer refers to the entire operation as simply "changing the tool" (Petition, p. 11.) But, as the ALJ correctly found, changing the tool involved more than one task on this occasion. In this case, Michalowski and Askew noticed the new tool could not be installed without first being cleaned. Askew testified that cleaning a tool, such as the spin bottom, was generally done prior to starting to attach it to the drill rig. (HT Day 4, pp. 55-56, 57, 58.) However, on this occasion, the cleaning task had not been done after its previous use, and thus fell to Askew and Michalowski. (*Id*.) This suggests that cleaning the spin box was not a step usually contemplated in the basic process of changing a tool.

Exhibit 18, the Employee Accident Investigation Report prepared by Employer, states, as part of the description of the events, "Nick [Michalowski] had his fingers in pin hole to clean out dirt when operator of drill pulled up on Kelly bar." As the cause of the accident, it states, "Something besides fingers could be used to clean out hole. Tool needed cleaning before accident occurred." (*Id*.) As a training improvement to prevent future accidents, it states, "All ground personnel to be trained on procedures for installing pins or cleaning out pin holes." (*Id*.) This document was prepared and signed by Brad Middleton (Middleton), Employer's Safety Manager.

Similarly, Exhibit 20, Employer's Form 5020 (Employer's Report of Occupational Injury or Illness), states that the injury occurred when "Nick tried to clean pin hole, operator pulled Kelly bar up cutting off Nick's fingers." This document was also prepared and signed by Middleton.

There was testimony from both Michalowski and Askew that they were attempting a cleaning operation when the accident occurred. Michalowski testified that he put his fingers into the pin hole in an effort to clear out mud that was obstructing the hole and preventing him from properly placing the pin to attach the spin box. (HT Day 1, pp. 56-58.) Askew testified that the pin would not fit properly into the pin holes due to debris, requiring the box to be cleaned before it could be installed. (HT Day 4, pp. 50, 51, 52, 53, 54, 55, 57, 64, 65, 74.)

When Askew and Michalowski noticed that the box needed cleaning, they halted the setting up and adjusting operation and began a cleaning operation. The broader operation of changing the tool therefore involved cleaning the spin box, and this was a distinct and separate task from setting up and adjusting the spin box.

The ALJ therefore found, and we agree, that the employees had begun a cleaning operation. Both Askew and Michalowski testified that they observed the receiver box, used to connect the spin bottom to the Kelly bar, was dirty and required cleaning. Both employees engaged in actions that indicated they intended to clean the box, and took steps towards that end. Michalowski attempted to use his fingers to clean debris from the pin holes of the box. Askew, seeing that the box was dirty, lifted the Kelly bar from the box. In its Petition, Employer concedes that lifting the Kelly bar from the box is necessary to clean the box. (Petition, pp. 15-16.)

Employer argues that the employees were not engaged in a cleaning operation, because the receiver box could not be cleaned with the Kelly bar in the box, and Michalowski therefore could not have been engaged in cleaning the box. (Petition, p. 15.) However, the key term here, as the ALJ noted, is that Michalowski *attempted* to use his fingers to clean the box, whether this action was successful or not. (Decision, p. 13.) Also, as noted, Askew raised the Kelly bar when he noticed the receiver box was dirty. He testified that he did because the box could not be cleaned otherwise. (HT Day 4, p. 64.) Even if Michalowski could not have cleaned the box by simply clearing mud from the pin holes with his fingers, Askew's action in raising the Kelly bar, as described by both his testimony and Employer's description, is consistent with initiating a cleaning operation.

2. Were the employees using machines and equipment in which the unexpected energization or start up, or release of stored energy, could cause injury to employees?

After determining that the two employees were involved in cleaning, repairing, servicing, setting-up, or adjusting a machine, the next step in determining the application of the safety order is evaluating whether the employees were using machines and equipment in which the unexpected energization or start up, or release of stored energy, could cause injury to employees.

a. Was the drill rig capable of unexpected energization, start-up, or release of stored energy?

In this case, it is undisputed that the drill rig was on and energized during the tool changing process, and capable of start-up and release of stored energy. It is also undisputed that Employer's

practice was not to de-energize the drill rig during the tool change process. However, as the ALJ pointed out, the language of section 3314, subdivision (a), "does not require an *actual* unexpected energization or start-up in order for section 3314 to apply. Instead, it is sufficient that the drill rig *could* cause injury to employees from an unexpected start-up or release of stored energy." (Decision, p. 15.)

Employer refers to *Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2217, Decision After Reconsideration (Apr. 18, 2017) (*Thyssenkrupp*) to support its argument that "where equipment is 'deliberately placed in motion,' energization or startup is not 'unexpected' and thus section 3314 is inapplicable." (Petition, p. 11.) In *Thyssenkrupp*, the Board held that section 3314, subdivision (c), did not apply to an operation where an employer intentionally energized a machine as part of the maintenance or repair process, because there was no "unexpected energization." (*Id.*) According to Employer, because the drill rig here was intentionally energized, section 3314 cannot apply.

However, the Board has rejected this line of argument. (See *Sierra Forest Products*, Cal/OSHA App. 1291481, Decision After Reconsideration (Feb. 6, 2024).) Under the plain language of section 3314, subdivision (c), "machinery or equipment capable of movement shall be stopped *and the power source de-energized or disengaged* during cleaning, servicing and adjusting operations." (§ 3314 (c) [emphasis added].) The safety order explicitly requires employers to shut down equipment or machinery, stop any moving parts, and de-energize or disengage the power source during cleaning and adjusting operations. (§ 3314, subds. (c), (d).)

The Board has further pointed out that, "under Employer's narrow reading, employers can eschew those safety measures […] by deliberately leaving the machinery or equipment on, with parts still moving and the power source energized or engaged." (*Sierra Forest Products*, *supra*, Cal/OSHA App. 1291481.) The Board declines to endorse Employer's overly narrow construction of the safety order. (*See Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 311-314 [safety orders "are to be given a liberal interpretation for the purpose of achieving a safe working environment"]; *Dept. of Industrial Relations v. Occupational Safety and Health Appeals Bd.* (2018) 26 Cal. App. 5th 93, 106.)

Here, the drill rig was capable of movement, and did move. The ALJ reasoned, "The plain meaning of the term start-up refers to situations where the machinery starts to perform an action. Therefore, this scenario of machinery in action necessarily contemplates machinery in motion." (Decision, p. 14.) Thus, start-up of the machine occurred when Askew raised the Kelly bar.

Moreover, the drill rig's hydraulic system employed a system of stored energy. (Ex. 16.) The hydraulic system was capable of moving equipment including the augur, spin bottom, and Kelly bar. These pieces of equipment weighed between 2,500 and 20,000 pounds apiece. The ALJ reasoned that if the hydraulic system had sufficient energy to move heavy tools and equipment, it also had sufficient energy to amputate Michalowski's fingers. (Decision, pp. 14-15.) We agree.

b. Was the movement of the drill rig capable of causing injury?

The movement of the drill rig was capable of causing injury, in that it did injure Michalowski. In addition, this movement was unexpected by Michalowski. Askew did not notify Michalowski before raising the Kelly bar; if he had anticipated the movement of the Kelly bar,

Michalowski would certainly have removed his fingers from the box. By the same token, Askew did not intend or expect to harm Michalowski by raising the Kelly bar; his action was therefore inadvertent in terms of its consequences. (HT Day 4, pp. 82-83.)

Therefore, the drill rig was capable of causing injury to employees by way of unexpected energization or start-up, or through the release of stored energy.

The ALJ accordingly determined, and we agree, that section 3314 applied to the drill rig in question. (Decision, p. 15.)

B. Was a violation of section 3314, subdivision (c), established?

In order to establish a violation of section 3314, subdivision (c), the Division must establish that (1) during a cleaning or adjusting operation (2) on a machine capable of movement, an employer (3) failed to stop the machinery or de-energize or disengage the power source of the machinery, or (4) failed to mechanically block or lock the equipment or machinery, where necessary, (5) to prevent the inadvertent movement or release of stored energy.

Here, as discussed, the record establishes that (1) Askew and Michalowski were involved in cleaning or adjusting the drill rig; (2) the drill rig was capable of movement; (3) the drill rig was not stopped or de-energized; and (4) the drill rig was not mechanically blocked or locked (5) to prevent its inadvertent movement or the release of stored energy.

The Division met its burden of proof to establish a violation of section 3314, subdivision (c). The burden of proof then shifts to Employer to demonstrate that some exception or affirmative defense absolves it of liability.

3. Did Employer demonstrate that section 3314, subdivision (c)(1), applies?

The Board has long recognized that there is an inherent danger in working around energized machinery, and the danger is present however the activity around the energized machine is characterized. (*Dade Behring, Inc*., Cal/OSHA App. 05-2203, Decision After Reconsideration (Dec. 30, 2008), citing *Stockton Steel Corporation*, *supra*, Cal/OSHA 00-2157.) However, there are delineated exceptions to the safety requirements of section 3314, subdivision (c), which Employer asserts are applicable here. First, Employer asserts that the exception provided in section 3314, subdivision (c)(1), precludes the application of section 3314, subdivision (c), to this matter.

Section 3314, subdivision (c)(1), under "Cleaning, Servicing and Adjusting Operations," provides:

> (1) If the machinery or equipment must be capable of movement during this period in order to perform the specific task, the employer shall minimize the hazard by providing and requiring the use of extension tools (e.g., extended swabs, brushes, scrapers) or other methods or means to protect employees from injury due to such movement. Employees shall be made familiar with the safe use and maintenance of such tools, methods or means, by thorough training.

This provision "recognizes that there are occasions or types of machines which must be in operation for cleaning, adjusting, and so on." (*Stanislaus Food Products Company*, Cal/OSHA App. 13-572, Decision After Reconsideration (Apr. 23, 2015).) An exception to a safety order is in the nature of an affirmative defense; as such, Employer bore the burden of proof of establishing its compliance with the provision. (*MK Auto, Inc*., Cal/OSHA App. 12-2893, Denial of Petition for Reconsideration (July 23, 2014).) Evidence of compliance with the provision "requires proof of three elements: (1) the equipment must be moving; (2) alternative means or methods to minimize the hazards are furnished; and (3) employees are trained in such alternatives." (*Stanislaus Food Products Company*, Cal/OSHA App. 13-572, *supra*.)

Employer argues that this exception applies because (1) the drill rig must be energized and capable of movement to change a tool, (2) Employer provided a method and means to protect employees from injury, and (3) employees were trained on these methods.

As discussed, the ALJ found that the employees here were involved in two distinct operations within the provisions of section 3314, subdivision (c)(1). First, the task of adjusting the spin bottom; second, the task of cleaning the spin bottom's receiver box.

The operation of adjusting the spin bottom required that the drill rig be capable of movement, because that task requires the Kelly bar to be moved. The question regarding the adjusting operation is thus whether Employer sufficiently guarded against the associated hazards by "providing … other methods or means to protect employees from injury due to such movement." (§3314, subd. (c)(1).)

Employer asserts that it provided adequate alternative safety measures, which included training employees to avoid pinch points and other hazards associated with moving equipment, requiring employees to avoid placing body parts in pinch points, ensuring that employees knew how to use industry-standard hand signals, and ensuring communication between operators and ground men. (Petition, pp. 17, 19.) Employer argues that these measures were sufficient, because section 3314, subdivision (c)(1), requires only that an employer provide methods or means to "minimize" the likelihood of injury, not to "guarantee" the safety of workers. (Petition, pp. 18, 20.)

The ALJ correctly rejected this argument. (Decision, p. 17.) The record demonstrates that Employer failed to ensure employees followed its alternative safety measures. First, Employer failed to ensure that employees avoided pinch points or the hazards of moving equipment. Second, Employer failed to ensure communication between the drill rig operator and the ground man.

Middleton testified that employees were trained on the importance of both avoiding pinch points and maintaining communication, and that these were "the most common two hazards that we talk about in safety meetings." (HT Day 3, pp. 33.) Middleton further testified that the drill rig operator and ground man should be in communication when there is an issue with inserting the pin into the receiver box. (HT Day 3, p. 61.)

There is no dispute that Michalowski placed his fingers in the pinch point. This indicates that Employer failed to effectively ensure employees avoided such hazards. In addition, Askew, a

supervisor, moved the Kelly bar without confirming that Michalowski was entirely out of harm's way, even though he could see that Michalowski was standing in the zone of danger near the moving equipment. Askew could see Michalowski's body, but not his hands, yet failed to communicate with Michalowski before moving the Kelly bar. Moreover, he did not believe any communication was necessary. Finally, rather than using hand signals to warn Askew not to raise the Kelly bar, Michalowski attempted to verbally inform Askew that he was going to attempt to clean the pin holes. Employer failed to ensure adequate and effective communication.

With regard to cleaning the spin bottom, if this operation did not require the drill rig to be energized, then the exception provided by subdivision (c)(1) is inapplicable. Employer presents two arguments in support of its assertion that the exception applies. As noted, Employer disputes that the employees here were engaged in a cleaning operation; Employer argues that the only operation was changing a tool, an operation which requires the drill rig to be capable of movement. (Petition, p. 17.) Employer alternatively argues that, even if the employees were involved in a cleaning operation, Askew's act of moving the Kelly bar demonstrates that the cleaning operation itself required the drill to be capable of movement. (Petition, p. 19.)

In either case, Employer's argument fails. Even if the employees were engaged only in changing the tool, or, in the alternate, even if the cleaning operation did require the drill rig to be energized, these arguments pertain only to the first element of the exception; that "the machinery or equipment must be capable of movement during this period in order to perform the specific task." (§ 3314, subd. (c)(1).) Assuming the exception does apply, it fails for the same reasons as applied to the setting up and adjusting operation: Employer failed to provide adequate alternative means or measures to minimize the hazards associated with working in proximity to the energized drill rig.

As discussed above, however, the record supports the ALJ's conclusion that the employees were engaged in a cleaning operation. The record further supports the ALJ's finding that a cleaning operation did not require the drill rig to be energized. (Decision, p. 16.) Employer's Petition, as well as extensive hearing testimony, states that cleaning the spin bottom cannot occur with the Kelly bar in place. (Petition, p. 19.) The spin bottom tool itself is not energized when not connected to the drill rig. (HT Day 4, p. 59.) Accordingly, cleaning the spin bottom's receiver box does not require that the machinery be capable of movement in order to perform that task. (Decision, p. 16) Because the cleaning task does not require that the machinery be capable of movement, the fact that the employees were engaged in a cleaning operation is sufficient to find that section 3314, subdivision (c)(1) does not apply. We agree with the ALJ that this operation does not provide an exception to the application of section 3314, subdivision (c).

We conclude that Employer failed to establish the applicability of section 3314, subdivision (c)(1), to the operation of changing the drill rig's tool.

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

Employer next asserts the "minor servicing" exception to the requirements of section 3314, subdivision (c), which provides:

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

As noted above, the Board has held, "An exception to the requirements of a safety order is in the nature of an affirmative defense, which the employer has the burden of raising and proving at hearing." (*Fed Ex Ground, Inc*., Cal/OSHA App. 1199473, Decision After Reconsideration (Apr. 20, 2020), citing *Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.) In addition, "Exceptions are to be strictly construed in order to justify a freedom from the general rule." (*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.)

Employer argues that contrary to the ALJ's findings, only one task was involved, that of changing the tool on the drill rig, and this task fell within the minor servicing exception. Employer further argues that the Division failed to allege a cleaning operation in Citation 3, and the thus the Decision erred in its "creation of a new, separate task," which unfairly "deprives Drill Tech any opportunity to defend itself against this new allegation." (Petition, p. 22.)

Before addressing the minor servicing exception itself, we address Employer's argument that cleaning the drill rig was not mentioned in the Division's citation. Labor Code section 6317 provides the authority of the Division to issue citations to employers, and states in pertinent part, "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated." This requirement "is grounded in due process of law principles which requires that the Division provide sufficient notice to employers of what legal requirements were breached and allow them to prepare a defense." (*DSS Engineering Contractors*, Cal/OSHA App. 99-1023, Decision After Reconsideration (June 3, 2002).) In *Gaehwiler Construction, Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985), the Board stated:

> It is well settled that administrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws.

Section 3314, subdivision (c), the subject of Citation 3, specifically refers to "cleaning, servicing and adjusting operations." The AVD for Citation 3 states:

> Prior to and during the course of the investigation, including but not limited to July 17, 2019[,] at a jobsite located at: 500 Old Davis Rd. Davis, CA 95616; the employer did not ensure that the Bauer drill rig was stopped and the power source de-energized, during cleaning/servicing/adjusting operations, as required by this section.

This description in the AVD was sufficient to put Employer on notice that the citation applied to cleaning as well as adjusting operations. Moreover, as previously discussed at length, there is a substantial amount of evidence in the record to establish Employer's knowledge that Michalowski and Askew were cleaning the spin bottom's receiver box as part of changing the tool.

Turning to the exception itself, Employer does not address the action of cleaning the spin bottom's receiver box. Employer argues that changing the tool was "routine, repetitive, and integral to the use of the equipment," and "took place during normal production operations." (Petition, p. 20.)

However, the record does not indicate that changing the tool, whether adjusting the Kelly bar to align the pin holes or cleaning debris from the spin bottom's receiver box, took place during normal production operations, as required by the exception. Section 3314, subdivision (b), defines "normal production operations" as "The utilization of a machine or equipment to perform its intended production function."

The drill rig was not in normal production operation at the time of the accident, as defined by the regulation. To the contrary, the record indicates that Askew and Michalowski had to cease normal production operations to do these tasks. (Decision, pp. 18-19.) One task – digging the hole – had ceased, and another – cleaning the bottom of the hole – was about to commence. Employer's Petition does not claim that cleaning out debris left in the spin bottom's receiver box was a routine and repetitive part of tool changing normal operations, thus waiving the argument. (Lab. Code, § 6618.)

Next, as discussed above, Employer failed to demonstrate that it provided employees with "alternative measures which provide effective protection." (§ 3314, subd. (c)(1).) Employer argues that its alternative measures consisted primarily of communication between employees, and training employees to avoid pinch points. As the Board has cautioned:

> [I]nstructions to employees to not put their hands in harm's way […] are certainly laudable safety measures for working around any moving machinery or equipment. […] However, without specific evidence showing how such measures constitute effective protection for performing an assigned task covered under §3314(c), an employer cannot be deemed to have effective alternative measures upon summary representations.

(*Dade Behring, Inc*., *supra*, Cal/OSHA App. 05-2203.)

The ALJ here correctly pointed out that Employer has asserted the existence of the alternative measures of communicating and avoiding pinch points, without specific evidence demonstrating that these measures were effective. (Decision, p. 18.)

Instead, Employer asserts that these measures were effective because they are consistent with industry practice. This argument fails. It is established that industry standards or practices do not supersede regulatory requirements. (*C.C. Meyers*, Cal/OSHA App. 95-4063, Decision After Reconsideration (Jun. 7, 2000).) As such, the Board has stated that industry practice is not a defense against a violation of a safety order. (*General Dynamics NASSCO*, Cal/OSHA App.

1300984, Decision After Reconsideration (Jan. 23, 2023), citing *Webcor Construction, LP*, Cal/OSHA App. 07-5150, Denial of Petition for Reconsideration (Jun. 24, 2009).)The Board has explained that "[i]f an Employer feels a safety order is unreasonable it should apply to the Standards Board for a variance or to have the safety order repealed or amended. [Citations.]" (*City of Sacramento Fire Dept.*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989); *McElroy Metal Mill Inc.*, Cal/OSHA App. 1405439, Denial of Petition for Reconsideration (May 28, 2021).) Employer here is free to do so. However, in the meanwhile, this defense does not establish the minor servicing exception. Employer is therefore not excused from liability on this basis.

5. Did Employer establish the IEAD?

Employer argues that it established the IEAD with regard to the violation of section 3314, subdivision (c), as alleged in Citation 3. The IEAD is an affirmative defense that requires the employer to prove each of the following five elements, by a preponderance of the evidence:

(1) The employee was experienced in the job being performed; (2) The employer has a well-devised safety program; (3) The employer effectively enforces the safety program; (4) The employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) The employee caused the safety violation which he knew was contrary to employer's safety rules. (*Synergy Tree Trimming, Inc*., Cal/OSHA App. 317253953, Decision After Reconsideration (May 15, 2017).)

When, as here, multiple employees are involved in a violation, the employer must prove all elements of the IEAD as to all employees. (*FedEx Freight Inc*., Cal/OSHA App. 1099855, Decision After Reconsideration (Sep. 24, 2018).) The ALJ determined that Employer failed to establish the third and fifth elements, defeating the IEAD. Because Employer raised only these elements in its Petition, it is necessary only to discuss the third and fifth elements here. (Lab. Code, § 6618.)

a. Element three: Did Employer effectively enforce its safety program?

It is well-established that the IEAD does not apply when a supervisor or foreperson commits the violation. (*City of Sacramento, Dept. of Public Works*, Cal/OSHA App. 93-1947, Decision After Reconsideration (Feb. 5, 1998); *Brunton Enterprises, Inc*., Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013), citing *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd*. (1985) 167 Cal.App.3d 1232, 1239.) The supervisor exception is not a true "exception," but rather a threshold issue for whether the employer has met the third element required under the IEAD. (*Davey Tree*, *supra*, 167 Cal.App.3d at pp. 1242-43.) In addition, a supervisor's violation of a safety rule is attributed to an employer, and such a violation supports the conclusion that an employer has failed to enforce its safety program. (*PDM Steel Service Centers, Inc*., *supra*, Cal/OSHA App. 13-2446.)

Askew testified that his safety responsibilities as the drill rig operator required him to observe "any hazard and any hand movement or gesture or anything. Because at any second something can happen," and that if he did observe any hazard, the correct response would be to "stop and address it." (HT Day 4, pp. 78-80.) This is consistent with his former testimony that communication was required or expected only if a safety hazard was observed.

In this instance, Michalowski was in close proximity to a moving tool. Askew knew that Michalowski was trying to install the connecting pin, but did not perceive the hazard involved, although Michalowski's hands were out of view. Askew not only failed to respond to this hazard, he failed even to recognize it. This was a violation of Employer's safety program. The Bauer safety manual, which Employer's IIPP incorporates by reference, states, "Before the operator starts the machine, he must satisfy himself that no person will be endangered thereby." (Ex. 25.)

The ALJ therefore appropriately rejected the IEAD's third element, based on Askew's foreman status. Supervisors play an important role in enforcing safety programs. Because of Askew's status as a foreman and supervisor, and his role in violating Employer's safety rules, it cannot be said that Employer effectively enforced its safety policies.

b. Element five: Did the employee cause a safety violation which they knew was contrary to Employer's safety rules?

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

Employer argues that Michalowski was solely to blame for the accident, because he deliberately placed his fingers in the pinch point and knew when he did so that this was a violation of Employer's safety rules. (Petition, p. 24.) Michalowski testified that, although he had been trained to avoid pinch points, and knew that the pin hole in question was a pinch point, he did not recall his thoughts at the moment he placed his fingers in the pin hole. (HT Day 1, pp. 91, 100-101.) The ALJ concluded that Employer failed to demonstrate that Michalowski knowingly violated safety rules. As the burden is on Employer to establish all elements of the IEAD, we agree.

Even if Michalowski did knowingly violate safety rules, however, this element would still fail. Askew, a supervisor, violated Employer's safety program, and this failure is attributed to Employer. (*City of Sacramento, Dept. of Public Works*, *supra*, Cal/OSHA App. 93-1947; *PDM Steel Service Centers, Inc*., *supra*, Cal/OSHA App. 13-2446.)

Middleton testified that employees were trained on the importance of both avoiding pinch points and maintaining communication, and that these were "the most common two hazards that we talk about in safety meetings." (HT Day 3, pp. 33.) Middleton further testified that the drill rig operator and ground man should maintain communication when there is an issue with inserting the pin into the receiver box. (HT Day 3, p. 61.) Jose Padilla, Employer's general superintendent, testified that there should be "constant communication" between the drill operator and the ground man, including when a tool's receiver box required cleaning. (HT Day 3, pp. 134-135.) Exhibit 16, Employer's response to the Division's 1BY, states that Employer trained vehicle operators to keep hands off controls any time they are aware of an employee "putting themselves in harm's way." The manufacturer's safety manual for the drill rig provides, "The operator may start to move or operate the machine only when he is sure that there is no person in the danger zone"; and, "Before the operator starts the machine, he must satisfy himself that no person will be endangered thereby." (Ex. 25.)

As previously discussed, Askew violated these safety rules. He failed to recognize the hazard and compounded that failure by failing to communicate with Michalowski before raising the Kelly bar, despite being aware that Michalowski was in the operational area of the drill rig and not being able to see Michalowski's hands. The fifth element therefore fails.

We conclude that Employer failed to establish the IEAD with regard to Citation 3. Citation 3 is therefore affirmed.

DECISION

For the reasons stated, the Decision of the ALJ is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 08/07/2025