BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
ARANA RESIDENTIAL AND COMMERCIAL PAINTING, INC. **dba ARANA CRAFTSMAN PAINTERS** **819 SAN LEANDRO BLVD.** **SAN LEANDRO, CA 94577** **Employer**	**1568252** **DECISION**

Statement of the Case

Arana Residential and Commercial Painting, Inc. (Employer) operates a painting business. Beginning December 13, 2021, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Jose Nevarez, conducted an accident investigation in response to a report of injury that occurred on December 10, 2021, at Employer's jobsite located at 1 Nace Avenue in Piedmont, California (jobsite).

On April 7, 2022, the Division issued four citations, consisting of 14 alleged violations, to Employer. The citations allege: Employer failed to provide records of inspections and employee safety and health training; Employer failed to provide Cal/OSHA Form 300 logs; Employer failed to provide its Injury and Illness Prevention Program; Employer failed to provide its Code of Safe Practices; Employer failed to provide records of toolbox/tailgate safety meetings; Employer did not ensure a suitable number of persons appropriately trained in first aid were at the jobsite; Employer failed to provide its COVID-19 Prevention Program; Employer failed to provide drinking water at the jobsite; Employer failed to provide its Heat Illness Prevention Plan; Employer failed to provide medical evaluations to employees required to use respirators; Employer failed to ensure that employees were fit tested prior to initial use of respirators; Employer failed to identify, evaluate, and correct the hazard of employees climbing on the outside of scaffolding; Employer failed to determine if any employees may be exposed to lead at or above the action level; and Employer did not develop and implement a written respiratory protection program.

Employer filed timely appeals of the citations contesting the existence of the violations, the classification of the violations, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses, including the issue of whether Employer consented to the Division's inspection.[1]

[1] 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).)

At the beginning of the hearing, the Division moved to modify the penalties for Citation 1, Items 8 through 11, based on a reduction of Extent to Medium, resulting in a modified proposed penalty of $750 for each Item.

This matter was heard by Jennie Culjat, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Sacramento, California. The parties and witnesses appeared remotely via the Zoom video platform on August 22, 23, 24 and 29, 2023. Alka Ramchandani-Raj and Eric L. Compere of Littler Mendelson, P.C. represented Employer. Kathryn Tanner, Staff Counsel, represented the Division. The matter was submitted for Decision on September 18, 2023.

Issues

1. Did Employer consent to the Division's inspection?

2. Did Employer maintain records of scheduled and periodic inspections and employee safety and health training?

3. Did Employer document recordable employee injuries on Cal/OSHA Form 300 logs?

4. Did Employer have a written Injury and Illness Prevention Program?

5. Did Employer have a written Code of Safe Practices?

6. Did Employer conduct toolbox or tailgate safety meetings at least every 10 days?

7. Did Employer fail to ensure that a suitable number of persons appropriately trained to render first aid were at the jobsite?

8. Did Employer have a written COVID-19 Prevention Program?

9. Did Employer fail to provide drinking water to its employees?

10. Did Employer have a written Heat Illness Prevention Plan?

11. Did Employer fail to provide medical evaluations to determine the ability of employees to use a respirator prior to initial use of a respirator?

12. Did Employer fail to ensure that employees were fit tested prior to initial use of a respirator?

13. Did Employer fail to identify, evaluate, and correct a workplace hazard of employees accessing different levels of scaffolding through areas other than the designated ladder?

14. Did Employer fail to determine if any of its employees at the jobsite may be exposed to lead at or above the action level?

15. Did Employer fail to develop and implement a written respiratory protection program?

16. Did the Division establish that Citation 1, Items 1 and 6, and Citation 2 were properly classified?

17. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

18. Are the proposed penalties for Citation 1, Items 1 and 6, and Citation 2 reasonable?

Findings of Fact

1. On December 10, 2021, Employer's employee, Jim Chacon Campos (Campos), was power washing a residential home in preparation for painting, when he slipped and fell off a scaffold, which resulted in an injury. Campos's injury was reported to the Division by the fire department and Employer.

2. Jose Nevarez (Nevarez), Associate Safety Engineer, went to inspect the jobsite twice. No workers were present on either occasion.

3. After his two attempts to contact Employer at the jobsite, Nevarez contacted Employer by telephone and reached Kristin Carmichael (Carmichael), Employer's workers' compensation insurance broker and safety consultant.

4. The Division sent Employer a document request sheet, requesting that Employer submit various documents to the Division for review.

5. Carmichael sent Nevarez several emails on behalf of Employer, with Catherine Baldi (Baldi), Employer's owner, copied on the emails, indicating Employer's intention of submitting requested documents and scheduling employee interviews.

6. Employer did not submit any of the requested documents during the inspection but produced many of the documents at hearing.

7. Employer did not have records of scheduled and periodic inspections.

8. Employer documented recordable employee injuries on Cal/OSHA Form 300 logs.

9. Employer had a written Injury and Illness Prevention Program.

10. Employer had a written Code of Safe Practices related to its operations.

11. Employer conducted toolbox/tailgate safety meetings at least every 10 days.

12. Employer did not have a person trained in first aid at the jobsite at all times.

13. Employer provided drinking water to employees.

14. Employer had a written COVID-19 Prevention Program.

15. Employer allowed an employee to climb up the outside of scaffolding approximately four to six feet in order to reenact Campos's accident.

16. Employer performed lead assessment testing of the paint to determine if employees would be exposed to lead prior to starting work at the jobsite.

17. Employer developed and implemented a written Respiratory Protection Program.

Analysis

1. Did Employer consent to the Division's inspection?

Labor Code section 6307 gives the Division the "power, jurisdiction, and supervision over every employment and place of employment in this state, which is necessary adequately to enforce and administer all laws and lawful standards and orders, or special orders requiring such employment and place of employment to be safe, and requiring the protection of life, safety, and health of every employee in such employment or place of employment." Labor Code section 6314, subdivision (a), provides that Division inspectors, "upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect during regular working hours…." If an employer refuses to give the Division permission to inspect or investigate a place of employment, the Division may obtain an inspection warrant. (Lab. Code § 6314, subd. (b).)

It is well established that the Fourth Amendment protects employers from unreasonable searches and seizures. (*Marshall v. Barlow's, Inc.* (1978) 436 U.S. 307; *Bimbo Bakeries USA*, Cal/OSHA App. 03-5215, Decision After Reconsideration (June 9, 2010).) "Even though the Fourth Amendment protects individuals, and businesses, from unreasonable searches and seizures by government agents, it does so to the extent that those rights are properly asserted." (*Bimbo Bakeries USA, supra*, Cal/OSHA App. 03-5215.) For there to be a search under the Fourth Amendment, a reasonable expectation of privacy must be established. (*Id.*) "This reasonable expectation of privacy…is not presumed under any rule. It is a fact-specific expectation to be determined by a judge upon the presentation of evidence." (*Id*.)

Here, Employer is not arguing that the Division conducted a search of the jobsite. It is undisputed that Nevarez did not enter the jobsite or any other business premises of Employer during the inspection. Rather, Employer argues that the Division's use of a document request was tantamount to an administrative subpoena, and therefore was a constructive search.

In its post-hearing brief, Employer relied on *Cal. Rest. Ass'n v. Henning* (1985) 173 Cal.App.3d 1069, (*Henning*). In *Henning*, the court found Labor Code section 93, which made it a misdemeanor to willfully ignore a subpoena from the Labor Commissioner, unconstitutional. In reaching its finding, the *Henning* court explained:

> The use of subpoenas and subpoenas *duces tecum* as an investigatory tool is an accepted and established part of the administrative process. [Citations]. Nevertheless, their intrusive nature is obvious. In recognition of this reality, subpoenas have been treated as constructive searches within the meaning of the Fourth Amendment ever since that provision was first judicially construed. [Citations]. More than 20 years ago our Supreme Court treated this principle as established beyond dispute. Within the context of a challenge to an administrative subpoena, the court stated: 'Of course, department heads cannot compel the production of evidence in disregard of the . . . constitutional provisions prohibiting unreasonable searches and seizures.' [Citation.]

However, an administrative subpoena satisfies the requirements of the Fourth Amendment "if the subpoena (1) relates to an inquiry which the administrative agency is authorized to make; (2) seeks information reasonably relevant to that inquiry; and (3) is not too indefinite." (*Henning, supra*, 173 Cal.App.3d 1069.) In addition, "[t]he Fourth Amendment also requires that there exist a mechanism by which validation, modification, or nullification of the subpoena can be judicially resolved, without penalty, before compliance with the subpoena can be exacted." (*Id*.)

The *Henning* court further explained "'while the demand to inspect may be issued by the agency in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoenaed party may obtain judicial review of the reasonableness of the demand *prior to suffering penalties for refusing to comply*.'" (*Henning, supra,* 173 Cal.App.3d 1069 quoting *See v. City of Seattle* (1967) 387 U.S. 541, italics added by *Henning*.) The court in *Henning* found Labor Code section 93 unconstitutional because it imposed "strict criminal liability in the event a subpoenaed party refuses to surrender his rights against unreasonable searches and seizures without a prior judicial validation of the subpoena as required by the Fourth Amendment."

There is no administrative subpoena at issue in this case.[2] The Division issued a Document Request Sheet to Employer. Employer argued that the Division cannot avoid the constitutional requirements governing subpoenas by instead issuing informal document requests. The Document Request Sheet informed Employer that if copies of the requested documents were not provided by the due date "it will be interpreted as an admission that the documents do not exist and possible Citations and Monetary Penalties could result." (Ex. 12.) Employer asserted that this language left it with the choice of either producing the documents or suffering penalties, which is contra to the constitutional requirement of judicial review of constructive searches.

Employer makes clear that it is not contesting the Division's general use of document requests during inspections. What Employer argues is that the Division was required to issue a subpoena to ensure there was a mechanism for judicial review in this case because Employer did not consent and objected to the validity of the inspection.

Consent has long been recognized as an exception to the warrant requirement. (*Rudolph and Sletten, Inc.*, Cal/OSHA App. 01-478, Decision After Reconsideration (Mar. 30, 2004), citing *Beacom Construction Co.*, Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981).) As such, if Employer consented to the inspection, the question of whether the Division violated the constitutional requirement of judicial review of constructive searches need not be resolved.

"The determination of whether consent was given to the inspection is fact specific and requires examination of the particular circumstances under which the consent was granted. [Citations.]" (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

[2] While the Division did not issue a subpoena in this case, it is authorized to issue subpoenas. Labor Code section 6314, subdivision (c), authorizes the Division to issue subpoenas to "compel the attendance of witnesses and the production of books, papers, records, and physical materials, administer oaths, examine witnesses under oath, take verification or proof of written materials, and take depositions and affidavits for the purpose of carrying out the duties of the division."

a. Overview of events during the inspection.

Late in the morning of Friday, December 10, 2021, the Division's Oakland district office received a report of injury from the Piedmont Fire Department. The report states that a worker slipped and fell off a scaffold, most likely 20 feet, and was transported to a hospital. (Ex. 3.) Based on this report, District Manager, Wendy Hogle-Lui (Hogle-Lui) assigned Nevarez to investigate. That same day, Nevarez went to the jobsite, but no one was there. Nevarez took several photographs of the house and scaffolding from the public street, but he never entered the jobsite. In consultation with Hogle-Lui, Nevarez left and planned to return to the jobsite on Monday.

On the evening of December 10, 2021, Carmichael, on behalf of Employer, reported Campos's injury to the Division. (Ex. K.) The following day, Carmichael again called the Division to update that Campos had been discharged from the hospital and was doing fine. (*Id*.)

On Monday, December 13, 2021, Spencer Wojcik (Wojcik), Associate Safety Engineer, was on duty to take accident reports, complaints, and follow-up on calls that had come in after hours. Wojcik contacted Carmichael to complete Employer's report of injury that had been made over the weekend. According to Carmichael, during this conversation, Wojcik informed her that the matter would not be investigated because there was no serious injury. Wojcik testified at the hearing that he did not recall telling Carmichael that the matter would not be investigated. Wojcik further testified that he does not inform callers whether a matter will or will not be investigated because that determination is made by a district manager.[3]

On December 13, 2021, Nevarez returned to the jobsite as planned. Again, no one was present. Nevarez took more photographs from the public street and did not enter the jobsite. After this second attempt to contact Employer at the jobsite, in consultation with Hogle-Lui, Nevarez decided to contact Employer by telephone.

Nevarez testified that he reached Carmichael when he called Employer. Nevarez further testified that he explained to Carmichael who he was and the purpose of his call. According to Nevarez, Carmichael informed him that she was Employer's workers' compensation coordinator. Nevarez testified that, because he was confused by Carmichael's title, he asked her follow-up questions to determine her relationship to Employer. Nevarez testified that, based on Carmichael's answers, he concluded that Carmichael worked for Employer and then asked for her consent to conduct the inspection. Nevarez testified that Carmichael gave him consent to proceed with the inspection.

[3] Regardless of whether Carmichael took any statements by Wojcik to mean that an investigation would not be commenced, Carmichael was informed later that day that an investigation had been opened when she spoke to Nevarez.

Carmichael denied giving Nevarez consent to conduct the inspection. Carmichael testified that, during the initial conversation with Nevarez, she explained that she had spoken with Wojcik that morning who informed her that the matter would not be investigated because there was no reportable serious injury. Carmichael asserted that from there she argued with Nevarez about why an investigation was opened. Carmichael further asserted that Nevarez did not ask for consent to conduct an inspection and she never gave consent to Nevarez to proceed.

After their conversation, Nevarez sent an email to Carmichael to verify who he was, and shortly thereafter, he sent her another email with the Document Request Sheet attached. (Ex. 12.) In response to Nevarez's email, Baldi requested the written policy that authorized an investigation under the circumstance where a workplace accident did not result in a serious injury. (Ex. BB.) In this email, Baldi explained that Campos was released from the hospital the same day as the accident and was never admitted. (*Id*.) Baldi attached Campos's discharge paperwork to this email.

On December 14, 2021, Nevarez responded to Baldi that the matter had been assigned to him for investigation on the day of the accident. (Ex. BA.) Nevarez explained that he did not mention a written policy to Carmichael during their conversation. (*Id*.) Nevarez informed Baldi that the district manager evaluates reports of injury and determines how to proceed. (*Id*.) Nevarez also informed Baldi that she was free to contact him if she had additional questions. (*Id*.)

Nevarez testified that on December 15, 2021, he received an email from Carmichael informing him that she had been under the weather, and that she and Baldi would be reaching out to his district manager. Nevarez testified that he sent an email in response offering Employer more time to respond to the document request.

On December 16, 2021, Baldi emailed Nevarez and Hogle-Lui requesting the Division's written policies governing the opening of an investigation. (Ex. AV.) Baldi asserted that Wojcik had confirmed there was no serious injury, and she requested the Division to issue a Notice of No Violation After Inspection (1AX) on the basis that Employer was in compliance with injury-reporting requirements. (*Id*.)

On December 17, 2021, Hogle-Lui responded to Baldi's email explaining that the Division's authority to conduct an inspection at every place of employment is found in Labor Code sections 6307 and 6314, and that Labor Code section 6314, subdivision (b), specifically applies. (Ex. AU.) Hogle-Lui further explained that, regardless of whether the accident was reported as required, the Division had authority to investigate.[4] (*Id*.) On that same day,

[4] Labor Code section 6313, subdivision (a), requires the Division to investigate an employment accident that results in a fatality or a serious injury or illness. The initial accident report from the fire department indicated that an employee likely fell 20 feet. (Ex. 3.) While there was no assertion that Campos actually suffered a serious injury, Labor Code section 6313, subdivision (b), provides that the Division "may investigate the cause of any other

Carmichael emailed Nevarez asking to "extend our time" because her daughter was in the hospital. (Ex. AT.)

On December 20, 2021, Nevarez emailed Baldi asking for status of the documents and about possibly setting employee interviews for December 22. (Ex. AS.) Nevarez again provided the Document Request Sheet by attaching it to the email. (*Id*.) On that same day, Carmichael emailed Nevarez stating that she was waiting on a medical report and that she would contact Hogle-Lui for the 1AX since there was no serious injury. (Ex. AR.) Carmichael also stated that she would send a witness statement. (*Id*.) Nevarez responded that Hogle-Lui had provided Employer the Division's authority for the inspection and that for "any programs and documents that are not provided the Division will assume that those do not exist and may issue citations…." (Ex. AP.) Nevarez also followed up about scheduling employee interviews. (*Id*.) Carmichael responded with the following (Ex. AO):

> We have plenty of documentation requested to submit however due to my family emergency I communicated with you about I was not available to be at the office to gather all documents you requested. I'll be in tomorrow and we are a small business. We take this serious and will provide you everything as soon as possible. I'm sorry my daughters life threatening illness caused delay but I am a single mom and have zero back up.

Shortly after, Carmichael emailed Nevarez a video reenactment of the accident (Ex. BE) and a witness statement by Manuel Arana (Arana),[5] one of the other employees at the jobsite on the day of the accident. (Ex. BF.)

On December 21, 2021, Carmichael emailed Nevarez stating the following (Ex. AN):

> I checked with [Baldi] and the 22nd does not work for everyone as we are closing due to rainy weather and the holidays. Can you provide another couple dates and times for interviews? We are currently working on getting all documents to you ASAP. I'll be sending documents in a separate email for each subject. Things will be coming over as soon as possible. Thank you for your kindness and understanding.

On December 22, 2021, Carmichael emailed Nevarez informing him that she would be out of the office until January 2, 2022. (Ex. AJ.)

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industrial accident or occupational illness which occurs within the state in any employment or place of employment…."

[5] Manuel Arana is the nephew of Baldi's husband.

On January 5, 2022, Carmichael emailed Nevarez a medical report to support that Campos had not suffered a serious injury and renewed Employer's request for a 1AX based on there being no reportable serious injury. (Ex. V.)

On March 7, 2022, Nevarez sent an email to Carmichael explaining that he had left her a voicemail message about scheduling employees for interviews. (Ex. AG.) On that same day, Carmichael responded that "[w]ork is slow right now and the guys are not working this week to be interviewed. Work is slow for the next few weeks. I do not have them on the schedule as of yet." (Ex. AH.) In this email, Carmichael informed Nevarez that she never got a response to her January 5, 2022, email and again requested a 1AX based on there being no reportable serious injury. (*Id*.) On that same day, Nevarez replied that employee interviews could be conducted over the phone, and he requested contact information for the employees that were on the jobsite. (Ex. AF.) Nevarez further explained in this email that Hogle-Lui had already addressed Employer's request for a 1AX. (*Id*.)

On March 11, 2022, Carmichael emailed Hogle-Lui asking to discuss the case. (Ex. W.) Carmichael again outlined that there was no reportable serious injury and that Wojcik said there would be no need for investigation. (*Id*.) Carmichael again requested a 1AX and raised a concern that there was a two-month delay in communication from the Division. (*Id*.)

On March 16, 2022, Nevarez conducted a telephone interview with Campos. On March 17, Nevarez conducted a telephone interview with Arana. Employer did not provide Nevarez with the employee contact information. Nevarez testified that he got Campos's telephone number from the report of injury and Campos gave Nevarez Arana's telephone number.

On March 17, 2022, Nevarez sent a follow-up email to Carmichael and Baldi requesting the following: Employer's respiratory protection program; records of medical evaluations and fit tests; respiratory training records; records of periodic evaluations of the respiratory protection program; and the initial lead assessment records for the project at the jobsite. (Ex. X.) Nevarez asked that the records be sent by close of business that day. (*Id*.) Shortly after, Carmichael sent Nevarez two emails each stating that she was still awaiting a response from Hogle-Lui about Employer's request for a 1AX based on there being no reportable injury. (Ex. Y and Ex. Z.) That same day, Hogle-Lui emailed Employer that she was available to have a discussion that day. (Ex. AC.) Hogle-Lui also noted that she had already provided the Division's authority for the investigation. (*Id*.) Carmichael responded that "[i]t is our policy and intent to fully cooperate with Cal OSHA." (Ex. AB.) Carmichael again requested a 1AX, explaining that it was Employer's belief that, because the accident did not result in a serious injury, the injury was not reportable and did not give rise to an investigation. (*Id*.)

On March 18, 2022, Nevarez emailed both Carmichael and Baldi an Intent to Classify Citations as Serious. (Ex. 14.)

On April 5, 2022, Nevarez emailed both Carmichael and Baldi indicating that he had left them voice messages explaining that the investigation was closing and that he would like to conduct a closing conference. (Ex. 14.)

On April 11, 2022, Nevarez emailed both Carmichael and Baldi to notify them that he had attempted to reach them by telephone to conduct the closing conference but that he had been unable to reach them. (Ex. 14.) The email also indicated that the parties had agreed to proceed with the closing conference on April 11, 2022, when they spoke on April 6, 2022. (*Id*.) That same day, Carmichael responded that she was unavailable due to illness and asked that the closing conference be rescheduled. (*Id*.)

On April 19, 2022, Carmichael emailed Nevarez about status of the closing conference. (Ex. 14.)

On April 20, 2022, Nevarez responded indicating that the closing conference could be conducted by telephone and asked for dates of availability. (Ex. 14) On that same day, Carmichael responded that she and Baldi would reach out once the citations were received. (*Id*.)

On April 22, 2022, Baldi emailed Nevarez that Employer received the citations, and Carmichael would respond with their availability. (Ex. 14)

b. Employer's consent to the inspection.

As set forth above, the totality of the circumstances is considered when determining whether an employer consented to an inspection. (*Nolte Sheet Metal, Inc*., *supra*, Cal/OSHA App. 14-2777.) Here, Nevarez's and Carmichael's recollections of what transpired during their initial conversation are diametrically opposed. Nevarez testified that he asked for consent and Carmichael consented. Carmichael denies that Nevarez asked for consent or that she consented.

Carmichael testified that she is a licensed insurance broker who operates Fritz Insurance Agency, and, in this capacity, she has assisted various employers in about 40 Division inspections, including many where she participated in the opening conference and provided consent on behalf of the employer. Carmichael asserted that she is familiar with the Division's inspection process. Given this familiarity, it does not follow that Carmichael, in her many emails to the Division, never mentioned that Nevarez did not ask for consent and that she did not give consent during their initial phone call. Instead, Carmichael sent emails indicating Employer's intent to submit the requested documents and arrange employee interviews.

If no consent was provided, it is unclear why Carmichael continually manifested cooperation with the inspection. Carmichael testified that her statements about submitting documents were limited to documents supporting Employer's request for a 1AX. However, Carmichael expressly stated in one email that "[w]e have plenty of documentation requested to submit," but she was not in the office "to gather all documents [Nevarez] requested." (Ex. AO.) Additionally, Carmichael stated in another email that she is "currently working on getting all documents to [Nevarez] ASAP. I'll be sending documents in a separate email for each subject." (Ex. AN.) As Carmichael specifically referenced the documents that were requested, her claim that she only meant documents in support of a 1AX is unreasonable. While these emails came after an email from Nevarez asserting that citations may be issued if no documents were submitted, prior to this exchange, Carmichael requested more time to respond after being offered an extension to produce the requested documents. The request for more time to respond implies that Employer intended to submit the requested documents.

To be sure, there were conflicting messages from Employer. Baldi requested from the Division its authority for the investigation. While this statement could be taken to imply that Employer was not consenting, Baldi clarified that "I just need to understand what policy you're referencing, and I need that policy in writing…." (Ex. BB.) Additionally, Baldi was included on Carmichael's emails indicating that documents were forthcoming and employee interviews could be arranged. However, Baldi never clarified that Employer had no intention of doing either of these things because it never consented to the inspection.[6]

Employer focused much of its attention on requesting that the Division conclude its inspection by issuing a 1AX. However, requesting that an inspection result in a finding of no violation does not necessarily give rise to a foregone conclusion that an employer is not consenting to an inspection. Inspections by their nature can be contentious. More than disagreement as to whether there was a violation is needed to establish non-consent to a search. Even here where the disagreement was regarding whether there was a reportable serious injury giving rise to an inspection, this does not equate to non-consent considering the emails from Employer demonstrating that it intended to participate in the inspection.

Based on the foregoing, it is reasonable to conclude that Carmichael consented to the inspection during the initial conversation with Nevarez, as she continually manifested Employer's intent of providing documents and arranging employee interviews in subsequent emails. Accordingly, the preponderance of the evidence is that Carmichael consented to the Division's inspection.

[6] Baldi testified that, based on Hogle-Lui's email referencing Labor Code section 6314, subdivision (b), which provides that when permission to inspect a place of employment is refused, the Division is authorized to seek a warrant, Baldi believed that the Division needed a warrant to proceed. However, even if this is what Baldi believed, there were insufficient objective statements or actions to establish that Baldi was not consenting to the inspection and was waiting for the Division to present her with a warrant.

c. Carmichael had apparent authority to consent.

An inspector may rely on consent to search given by someone who, in the inspector's reasoned judgment, has apparent authority to consent. (*Nolte Sheet Metal, Inc., supra*, Cal/OSHA App. 14-2777.)

Baldi testified that she asked Carmichael to assist her with responding to the accident. Baldi conceded that she authorized Carmichael to act on behalf of Employer, but she asserted that Carmichael's authority was limited to reporting the injury and requesting a 1AX. However, there is nothing to establish that Nevarez was made aware of Carmichael's limited authority.

Carmichael was the initial point of contact who discussed the matter with Nevarez. While Baldi followed up that same day with an email, she did not direct Nevarez that he should communicate with her going forward. Rather, Carmichael continued to communicate directly with Nevarez via email with Baldi copied on the emails. In her emails, Carmichael requested additional time to respond, provided a video and a witness statement, and attempted to arrange employee interviews on behalf of Employer. Furthermore, Carmichael indicated that she was part of Employer's business with statements such as "we are a small business" and "we are closing due to rainy weather and the holidays." (Ex. AO and Ex. AN, respectively.) At no point did Baldi or Carmichael inform Nevarez of Carmichael's limited authority. Based on Carmichael's statements and actions, of which Baldi was aware, it was reasonable for Nevarez to believe that Carmichael had authority to consent to the inspection.

Accordingly, Carmichael had apparent authority to consent, and did consent, to the inspection on behalf of Employer. Therefore, the Division's inspection was lawful. As Employer consented to the inspection, and specifically indicated that it would submit the requested documents, it was not improper for the Division to use the Document Request Sheet rather than issuing a subpoena.

2. Did Employer maintain records of scheduled and periodic inspections and employee safety and health training?

California Code of Regulations, title 8, section 3203,[7] requires employers to have a written Injury and Illness Prevention Program (IIPP) that meets the minimum requirements set forth in the regulation and that the IIPP must be established, implemented, and maintained effectively. Section 3203, subdivisions (b)(1) and (2), in relevant part, require the following:

> (b) Records of the steps taken to implement and maintain the Program shall include:

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

(1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year; and

Exception: Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected.

(2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.
[…]

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide records of inspections to identify unsafe conditions and work practices and of employee safety and health training to the Division upon request.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "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. (*Nolte Sheet Metal, Inc., supra*, Cal/OSHA App. 14-2777.)

The Division issued Citation 1, Item 1, because it requested Employer's records of scheduled and periodic inspections and employee safety and health training during the inspection, but Employer did not provide these records during the inspection. Based on Employer's failure to submit the records, Nevarez inferred that the records did not exist.

While Employer did not submit any of the requested documents to the Division during the inspection, Employer produced many of the documents at hearing. No negative inference will be taken from Employer's failure to submit documents during the inspection. Other than to point out that some of the documents are undated, the Division did not otherwise call into question the authenticity of the documents. However, Employer did not produce any records of periodic

inspections during the hearing. Accordingly, a violation of section 3203, subdivision (b)(1), is established.

"The Division need only show one missing component, of the many required by the safety order, in order to establish a violation. [Citations.]" (*Hill Crane Service, Inc.*, Cal/OSHA App. 1135350, Decision After Reconsideration (Sep. 24, 2021).) Accordingly, it is unnecessary to determine whether Employer maintained records of employee safety and health training.

Employer failed to keep records of scheduled and periodic inspections as required by section 3203, subdivision (b)(1). Therefore, Citation 1, Item 1, is affirmed.

3. Did Employer document recordable employee injuries on Cal/OSHA Form 300 logs?

Section 14300.31, subdivision (a), requires the following:

> (a) Basic requirement. You must record on the Cal/OSHA Form 300 the recordable injuries and illnesses of all employees on your payroll, whether they are labor, executive, hourly, salary, part-time, seasonal, or migrant workers. You also must record the recordable injuries and illnesses that occur to employees who are not on your payroll if you supervise these employees on a day-to-day basis. If your establishment is organized as a sole proprietorship or partnership, the owner or partners are not considered employees for recordkeeping purposes.

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide records of the Cal/OSHA Forms [*sic*] 300 with recordable injuries and illnesses of all employees on their payroll to the Division upon request.

At the hearing, Employer submitted its Cal/OSHA Form 300 logs (300 logs) for the period of 2017 to 2021. (Ex. CM.) Baldi confirmed that 300 logs were regularly maintained by Employer. A review of the 300 logs reveals that Employer recorded employee injuries, including Campos's injury for the year 2021.

It is noted that section 14300.40, subdivisions (a) and (b), requires employers to provide a Division representative with copies of 300 logs within four business hours of a request. While the Alleged Violation Description asserts that Employer failed to provide 300 logs, the Division did not cite employer for a violation of section 14300.40. Employer was cited for failing to

document recordable employee injuries on the 300 logs pursuant to section 14300.31. The Division could have moved to amend the citation to reflect section 14300.40 as the cited regulation but did not do so. The ALJ declines to amend the citation sua sponte. (See *MTM Builders, Inc.*, Cal/OSHA App. 1101230, Denial of Petition For Reconsideration (June 12, 2020).) Furthermore, it was not the failure to produce the documents that was the basis of the citation.

The Division's theory was that because Employer failed to provide the documents during the inspection, it was out of compliance with the regulation. However, the evidence adduced at hearing does not support the Division's conclusion. As such, there is insufficient evidence to establish that Employer violated the cited regulation. Therefore, Employer's appeal of Citation 1, Item 2, is granted.

4. Did Employer have a written Injury and Illness Prevention Program?

As noted above, section 3203 requires employers to have a written IIPP that meets the minimum requirements set forth in the regulation and that the IIPP must be established, implemented, and maintained effectively.

In Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide a copy of their Injury and Illness Prevention Program to the Division upon request.

At the hearing, Employer produced an English and a Spanish version of its IIPP. (Ex. CO and Ex. DB.) While there is no date reflected on either version of the IIPP, Baldi testified that Employer has had an IIPP for as long as she can remember and the IIPP was in effect at the time of the accident.

The Division issued Citation 1, Item 3, based on its conclusion that Employer did not have an IIPP because it was not produced during the inspection. However, Employer's IIPP was admitted into evidence without objection and the Division did not identify any missing elements in Employer's IIPP. Accordingly, the Division failed to establish that Employer did not have a written IIPP that met the requirements of section 3203. Accordingly, Employer's appeal of Citation 1, Item 3, is granted.

5. Did Employer have a written Code of Safe Practices?

Section 1509, subdivision (b), provides that "[e]very employer shall adopt a written Code of Safe Practices which relates to the employer's operations. The Code shall contain language

equivalent to the relevant parts of Plate A-3 of the Appendix."

In Citation 1, Item 4, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide a copy of their Code of Safe Practices to the Division upon request.

In order to establish a violation of section 1509, subdivision (b), the Division must prove, by a preponderance of the evidence, that Employer did not have a Code of Safe Practices (CSP) related to its operations at the time of the inspection.

At the hearing, Employer submitted an English and a Spanish version of its CSP. (Ex. CR, Ex. CZ, and Ex. DA.) Baldi testified that Employer has had a CSP in effect for as long as it has had an IIPP. Employer's CSP is contained in its IIPP and consists of 21 pages. The CSP was admitted without objection.

The Division issued this citation because Employer failed to produce its CSP during the inspection, resulting in the conclusion that Employer did not have a CSP. However, the evidence adduced at hearing established that Employer had a CSP. The Division did not offer sufficient evidence to refute Baldi's testimony that the CSP was in existence at the time of inspection. Accordingly, Employer's appeal of Citation 1, Item 4, is granted.

6. Did Employer conduct toolbox or tailgate safety meetings at least every 10 days?

Section 1509, subdivision (e), requires that "[s]upervisory employees shall conduct 'toolbox' or 'tailgate' safety meetings, or equivalent, with their crews at least every 10 working days to emphasize safety."

In Citation 1, Item 5, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, , [*sic*] the employer failed to provide records of 'toolbox' or 'tailgate' safety meetings or equivalent with their employees to emphasize safety to the Division upon request.

Citation 1, Item 5, was issued based on the theory that, because Employer did not provide records of toolbox or tailgate safety meetings, Employer did not conduct the required safety meetings.

Baldi testified that Employer held tailgate safety meetings on various safety topics every 10 days. Baldi explained that the tailgate safety meetings were typically conducted by her production manager, but she also conducted these meetings on occasion. Employer submitted tailgate safety meeting training documents for various periods in 2020 and 2021 into evidence. (Ex. CG, Ex. CH, Ex. CI, Ex. CJ, Ex. CK, Ex. CV and Ex. J.) Baldi testified that she received the tailgate safety meeting training documents from the Painting & Decorating Contractors of California association. The documents show that the meetings were held via Zoom and list the employees who were in attendance, evidencing that tailgate meetings occurred.

The Division presented no other evidence to refute Baldi's testimony or call into question the documents provided by Employer. Based on the foregoing, there is insufficient evidence to establish a violation of the cited regulation. Therefore, Employer's appeal of Citation 1, Item 5, is granted.

7. Did Employer fail to ensure that a suitable number of persons appropriately trained to render first aid were at the jobsite?

Section 1512, subdivision (b), provides the following:

> Appropriately Trained Person. Each employer shall ensure the availability of a suitable number of appropriately trained persons to render first aid. Where more than one employer is involved in a single construction project on a given construction site, the employers may form a pool of appropriately trained persons. However, such pool shall be large enough to service the combined work forces of such employers.

In Citation 1, Item 6, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer did not ensure the availability of a suitable number of appropriately trained persons to render first aid at the jobsite exposing employees to safety hazards.

The Appeals Board has explained that the purpose of section 1512, subdivision (b), is to guarantee that all construction projects have qualified persons available onsite to provide immediate medical care for injury or illness before the arrival at the site of health care professionals. (*Triad Geotechnical Consultants, Inc.*, Cal/OSHA App. 95-2231, Decision After Reconsideration (Nov. 10, 1999).)

Nevarez testified that both of the workers he interviewed, Campos and Arana, told him that they were not trained in first aid. During the inspection, Employer did not provide the Division with documentation to show that its employees were certified in first aid. Based on Employer's lack of response and the worker interviews, the Division issued Citation 1, Item 6.

Baldi testified that Juan Rivas (Rivas), Employer's production manager, was certified in first aid. Baldi explained that she hired a company, On-Site, to do the first aid training and Rivas was certified through this training. Baldi conceded that Rivas was not present when Campos fell off the scaffolding because he had left the jobsite. Baldi asserted that Rivas was gone for only a couple of minutes when the employees telephoned Rivas and told him to come back to the jobsite because of the accident.

While Rivas may have been away for only a short period, during this period there was no appropriately trained person to render first aid at the jobsite. As the purpose of section 1512, subdivision (b), is to ensure immediate medical care, there is no allowance for even short absences of the appropriately trained person. As this case demonstrates, an accident, and the potential need for first aid, may occur in the short period that the appropriately trained person is not present.

Based on the foregoing, the Division established a violation of section 1512, subdivision (b). Therefore, Citation 1, Item 6, is affirmed.

8. Did Employer have a written COVID-19 Prevention Program?

At the time of the injury, section 3205, subdivision (c), provided the following:

> (c) Written COVID-19 Prevention Program. Employers shall establish, implement, and maintain an effective, written COVID-19 Prevention Program, which may be integrated into the employer's Injury and Illness Prevention Program required by section 3203, or be maintained in a separate document. […]

In Citation 1, Item 7, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide a copy of their COVID-19 Prevention Program to the Division upon request.

The Division issued this citation based on Employer's failure to produce documents during the inspection and the inference that the documents did not exist. At the hearing, Employer submitted its COVID-19 Prevention Program (CPP). (Ex. CQ and Ex. DC.) The cover

page of the CPP reflects that it was updated in May of 2021 and Baldi testified that the CPP was in effect in December of 2021.

The Division identified no deficiencies in Employer's CPP that would give rise to a violation. The only issue raised by the Division was that the CPP was not produced during inspection. The Division did not present other evidence in support of its conclusion that, because Employer did not provide the CPP during inspection, it did not exist. As such, the Division failed to meet its burden of proof and Employer's appeal of Citation 1, Item 7, is granted.

9. Did Employer fail to provide drinking water to its employees?

The Division cited Employer for a violation of section 3395, subdivision (c), which provides:

> Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable, including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged.

In Citation 1, Item 8, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer did not provide drinking water to employees working at the jobsite exposing them to health and safety hazards.

Nevarez issued this citation based on his interviews of Campos and Arana, who told him that Employer did not provide drinking water.

At the hearing, Baldi testified that Employer provides water to employees in various ways, including supplying water daily at the jobsite. Baldi further testified that the production manager carried several cases of water in his vehicle, which could be delivered to the workers when needed, and that there was also water available at Employer's office.

Employer made hearsay objections to Nevarez's testimony about what Campos and Arana told him during their interviews. Under section 376.2, when there is an objection to hearsay evidence, that evidence cannot be relied upon to support a finding of fact, unless the hearsay falls within a recognized exception, and its use is limited to supplementing or explaining other evidence. The Division only relied on the hearsay statements of Campos and Arana in support of this citation and did not point to other non-hearsay evidence to corroborate the hearsay statements. Accordingly, the Division failed to meet its burden of proof, and Employer's appeal of Citation 1, Item 8, is granted.

10. Did Employer have a written Heat Illness Prevention Plan?

Section 3395, subdivision (i), provides:

> (i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
>
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

In Citation 1, Item 9, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide a copy of their Heat Illness Prevention Plan to the Division upon request.

At the hearing, Employer produced a copy of its Heat Illness Prevention Plan (HIPP). (Ex. CP.) Baldi testified that Employer has had an HIPP in effect for as long as it has had its IIPP.

The HIPP was admitted without objection. The Division did not identify any shortcomings in Employer's HIPP. The Division issued Citation 1, Item 9, based on Employer's failure to produce the HIPP during the inspection. However, the Division did not offer any

evidence to rebut Baldi's testimony or otherwise present evidence to support its contention that, because the HIPP was not submitted during the inspection, it did not exist. Accordingly, Employer's appeal of Citation 1, Item 9, is granted.

11. Did Employer fail to provide medical evaluations to determine the ability of employees to use a respirator prior to initial use of a respirator?

Section 5144, subdivision (e)(1), requires the following:

> (e) Medical evaluation. Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this subsection specifies the minimum requirements for medical evaluation that employers must implement to determine the employee's ability to use a respirator.
>
> (1) General. The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

In Citation 1, Item 10, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer did not provide a medical evaluation to employees required to use respirators to determine the employee's ability to use a respirator exposing them to health and safety hazards.

Nevarez testified that both Campos and Arana informed him that they used respirators at work, but they had not received a medical evaluation. Based on these statements and Employer's failure to produce records of medical evaluations, the Division issued Citation 1, Item 10.

As discussed above, Employer made hearsay objections to Nevarez's testimony about what Campos and Arana told him during their interviews. However, Baldi conceded that, although Employer typically provides medical evaluations prior to respirator use, Employer did not provide a medical evaluation for Campos or Arana because it was not possible due to COVID-19. Baldi further testified that Employer's production manager supplies respirators to employees, but that he would not have provided a respirator to any employee who had not received a medical evaluation.

Baldi testified that she never observed Campos or Arana using respirators and that she could not recall if they worked on a specific job that would have required the use of a respirator. Baldi conceded that Campos had a respirator but asserted that he had the credentials from his previous employer to wear the respirator.

Since Employer supplied Campos with a respirator, it was required to provide a medical evaluation before the employees used the respirator. (See *Tulip Corporation, dba Automotive Battery Products, Co.*, Cal/OSHA App. 81-773, Decision After Reconsideration (June 25, 1982).) However, "[i]n order to establish a violation, the Division must demonstrate employee exposure to the hazard that the safety order attempts to correct by showing 'actual exposure' to the zone of danger, or by demonstrating exposure under the reasonably predictable access standard." (*Shimmick Construction Company Inc*, Cal/OSHA App. 1059365, Decision After Reconsideration (July 5, 2019), citing *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003); *Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)

Section 5144, subdivision (e)(1), sets forth that "a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee." Based on this language, the wearing of the mask itself is the potential hazard. While Campos had a respirator, there is insufficient evidence that he was required to wear the respirator or that he did so voluntarily during the relevant period. The hearsay statements of Campos and Arana that they used a respirator are not sufficient to sustain that finding. Furthermore, as discussed below, the paint on the house at the jobsite tested negative for lead, indicating that there was no requirement for respirators based on lead at the jobsite. The Division did not point to any other evidence that the employees at the jobsite, or on any other occasion during the relevant period, were required to wear or were voluntarily wearing respirators.

Based on the foregoing, there is insufficient evidence to establish that Employer violated section 5144, subdivision (e)(1). Therefore, Employer's appeal of Citation 1, Item 10, is granted.

12. Did Employer fail to ensure that employees were fit tested prior to initial use of a respirator?

Section 5144, subdivision (f)(2), requires the following:

> (f) Fit testing. This subsection requires that, before an employee may be required to use any respirator with a negative or positive pressure tight-fitting facepiece, the employee must be fit tested with the same make, model, style, and size of respirator that will be used. This subsection specifies the kinds of

fit tests allowed, the procedures for conducting them, and how the results of the fit tests must be used.

[…]

(2) The employer shall ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter.

In Citation 1, Item 11, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, on December 12, the employer did not ensure that employees required to use respirator [*sic*] were fit tested prior to initial use of the respirator exposing them to health and safety hazards.

The circumstances surrounding the issuance of Citation 1, Item 11, are similar to those regarding Citation 1, Item 10. Campos and Arana informed Nevarez that they did not receive a fit test prior to being required to use respirators. Based on these statements and Employer's failure to produce records of fit tests, the Division issued this citation.

Employer made hearsay objections to Nevarez's testimony about what Campos and Arana told him during their interviews. However, Baldi conceded that Employer did not fit test Campos or Arana. However, the Division did not establish employee exposure to the hazard. Other than the hearsay statements, the Division produced no other evidence that the employees at the jobsite, or on any other occasion during the relevant period, were required to wear or were voluntarily wearing respirators. As such, there is insufficient evidence to establish that employees were exposed to the hazard that an ill-fitting mask may pose at any time during the relevant period. Therefore, Employer's appeal of Citation 1, Item 11, is granted.

13. Did Employer fail to identify, evaluate, and correct a workplace hazard of employees accessing different levels of scaffolding through areas other than the designated ladder?

Section 3203, subdivisions (a)(4) and (a)(6), provide, in relevant part, that an IIPP must:

(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:

(A) When the Program is first established;

[…]

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

[…]

(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:

(A) When observed or discovered; and,
(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

In Citation 2, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer failed to identify, evaluate, and correct unsafe work practices. Employees were allowed to climb to different levels of a scaffold through areas other than the designated ladder attached to the scaffold for access. An employee fell approximately 15 feet when he was climbing the side of a scaffold.

a. Failure to identify and evaluate workplace hazards.

"Section 3203(a)(4) requires that employers include procedures for identifying and evaluating work place hazards in their Injury and Illness Prevention Programs." (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision After Reconsideration (Oct. 11, 2013).) "To prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish that the employer failed to effectively implement its duty to inspect, identify, and evaluate the hazard. [Citation.]" (*DPR Construction, Inc., et al dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).)

The Division asserts that Employer failed to implement its IIPP because it did not identify and evaluate the hazard of employees climbing on the side of a scaffold to get from one level to another rather than using the designated ladder. On the day of the accident, Campos fell off a scaffold when he was climbing on the outside of the scaffold to get to another level.[8]

It was undisputed that Rivas, the supervisor of Campos and Arana, was not present at the jobsite when Campos slipped and fell off the scaffolding. As the supervisor was not at the jobsite when the accident happened, Employer did not have the opportunity to identify the hazard at that point. Nevarez conceded that he did not ask Campos if climbing on the outside of scaffolding was his regular practice of getting from one level to another. As such, there is insufficient evidence that Campos regularly engaged in this practice. The Division presented no other evidence that Employer's employees were regularly climbing on the outside of scaffolding and that Employer failed to identify and evaluate this hazard. Accordingly, the Division failed to establish a violation of section 3203, subdivision (a)(4).

b. Failure to correct workplace hazards.

"Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards. [Citations.]" (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) "Proof of implementation requires evidence of actual responses to known or reported hazards. [Citation.]" (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).)

While Rivas was not at the jobsite at the time of the accident, he was called back to the jobsite after the accident happened. Arana and Rivas created a reenactment video of the accident.[9] (Ex. 19.) In the video, Arana climbed up the outside of the scaffolding in an attempt to intentionally recreate a similar situation to the one that resulted in Campos's accident. Rivas, as a supervisor, not only failed to correct the hazard by prohibiting Arana from climbing the scaffold in a similar manner to Campos, but he participated in the creation of the reenactment video. When a supervisor is involved in the violation of a safety order, the Appeals Board regularly finds that the supervisor's knowledge of the violation is imputed to the employer. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

[8] While Employer alleged in its post-hearing brief that the Division's evidence of what happened during the accident was based only on uncorroborated hearsay evidence, except for the height from which Campos fell, the circumstances surrounding the accident are largely undisputed.

[9] Employer objected to the video as an accurate representation of Campos's accident. However, it is the action in the video itself that is the basis for the violation. Baldi confirmed that it was Arana climbing the scaffold in the video and that it was Rivas's voice in the video.

Accordingly, the Division established a violation of section 3203, subdivision (a)(6), and Citation 2 is affirmed.

14. Did Employer fail to determine if any of its employees at the jobsite may be exposed to lead at or above the action level?

Section 1532.1, subdivision (d)(1)(A), requires:

(d) Exposure assessment.

(1) General.

(A) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level.

In Citation 3, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer did not initially determine if any employee may be exposed to lead at or above the action level at the place of employment exposing employees to health hazards.

Nevarez testified that Campos informed him that there was a possibility that the paint on the house at the jobsite contained lead. Based on this statement, and Employer's failure to produce documentation showing that the paint on the house had been tested for lead, the Division issued Citation 3. The Division issued this citation based only on possible lead exposure at the jobsite.

Since 2016, Employer has been a Lead-Safe Certified Firm by the United States Environmental Protection Agency. (Ex. CS.) Baldi testified that she and another employee typically perform estimates for Employer and, as part of the estimate, they conducted lead testing. Baldi explained that the lead testing was performed as part of the estimation because the presence of lead impacted the quote for the job due to the need for additional materials if lead was present.

Baldi testified that she performed the lead assessment test of the paint at the jobsite and the results were negative. Employer submitted the lead assessment test results document that was completed by Baldi. (Ex. CN.) This document reflects that the testing of paint on six different areas of the house was performed on November 29, 2021, and all test results were negative.

The preponderance of the evidence is that Employer performed lead testing of the paint on the house to determine whether an employee may be exposed to lead. Accordingly, Employer's appeal of Citation 3 is granted.

15. Did Employer fail to develop and implement a written respiratory protection program?

Section 5144, subdivision (c)(1), provides in relevant part:

> (c) Respiratory protection program. This subsection requires the employer to develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use. The program must be administered by a suitably trained program administrator. In addition, certain program elements may be required for voluntary use to prevent potential hazards associated with the use of the respirator. The Small Entity Compliance Guide contains criteria for the selection of a program administrator and a sample program that meets the requirements of this subsection.
>
> […]
>
> (1) In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions, as applicable: […]

In Citation 4, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer did not develop and implement a written respiratory protection program with required worksite-specific procedures and elements for required respirator use by employees exposing them to safety and health hazards.

The Division issued Citation 4 based on the premise that Employer did not have a Respiratory Protection Program (RPP) because Employer did not produce the RPP during the inspection. Baldi testified that Employer has had an RPP for as long as it has had an IIPP. Employer submitted its RPP at hearing. (Ex. CL.)

The RPP was admitted without objection. The Division solely relied on its inference that the RPP did not exist because it was not produced during inspection. The Division offered no other evidence to refute Baldi's testimony and identified no deficiencies in Employer's RPP.

Furthermore, even if the Division had shown that Employer did not have an RPP, the Division failed to establish employee exposure. Section 5139 sets forth the purpose of Article 107, in which section 5144 is included, and it states that the purpose is to provide "minimum standards for the prevention of harmful exposure of employees to dusts, fumes, mists, vapors, and gases." A "harmful exposure" is defined as "[a]n exposure to dusts, fumes, mists, vapors, or gases" that are "in excess of any permissible limit set by section 5155" or "of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function." (§ 5140.) The Division produced no other evidence that the employees at the jobsite or any other employees were at risk of any harmful exposure during the relevant period.

Accordingly, the Division failed to meet its burden of proof and Employer's appeal of Citation 4 is granted.

16. Did the Division establish that Citation 1, Items 1 and 6, and Citation 2 were properly classified?

a. Citation 1, Item 1

In Citation 1, Item 1, the Division classified Employer's violation of section 3203, subdivision (b)(1), as a Regulatory violation.

Section 334, subdivision (a), provides:

> Regulatory Violation - is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

Section 3203, subdivision (b)(1), requires an employer to keep records of scheduled and periodic inspections. As this is a recordkeeping requirement, it falls within the definition of a Regulatory violation. Therefore, the Regulatory classification of Citation 1, Item 1, is established.

b. Citation 1, Item 6

In Citation 1, Item 6, the Division classified Employer's violation of section 1512, subdivision (b), as General.

Section 334, subdivision (b), provides: "General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." Nevarez classified this citation as General because the violation is related to employee safety and health, but the violation would likely not result in death or serious injury. Thus, the General classification of Citation 1, Item 6, is established.

c. Citation 2

In Citation 2 the Division classified Employer's violation of section 3203, subdivision (a)(6), as Serious.

Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries

> even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code § 6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Here, Nevarez testified that he was current on his Division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citation as Serious.

Nevarez testified that there is a risk of death or serious physical harm that can result from the hazard of employees climbing on the outside of scaffolds. Nevarez also testified that, in his experience investigating fall accidents, he investigated a case where a fatality resulted from a fall off a four-foot ladder. Baldi testified that in the video Arana is about four to six feet off the ground. As a fall from even four feet can result in a fatality, there is a realistic possibility that not correcting the identified hazard of climbing on the outside of scaffolding can result in serious physical harm or death. Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

17. Did Employer rebut the presumption that the violation in Citation 2 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Baldi asserted that she did not ask that the reenactment video be made and that she reprimanded those involved in making the video. However, Rivas, who was the direct supervisor of Campos and Arana, was present when Arana climbed on the outside of the scaffolding. The knowledge of a supervisor is imputed to an employer, who cannot argue pursuant to Labor Code section 6432, subdivision (c), that it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.) Accordingly, Employer, through Rivas, had knowledge that it failed to correct the hazard of an employee climbing on the outside of scaffolding. Therefore, Employer did not rebut the presumption that Citation 2 was properly classified as Serious.

18. Are the proposed penalties for Citation 1, Items 1 and 6, and Citation 2 reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.) The Division introduced its proposed penalty worksheet and presented testimony regarding the penalty calculations. Employer challenged the reasonableness of the Division's penalty calculations.

a. Citation 1, Item 1

Citation 1, Item 1, is a Regulatory violation for Employer's failure to have records of scheduled and periodic inspections. Section 336, subdivision (a)(1), provides that a minimum statutory penalty of $500 represents the Gravity-based penalty for Regulatory violations. This amount is subject to modifications for Size, Good Faith, and History. (§ 336, subd. (a)(1).) An abatement credit may not be applied. (*Id*.)

Size

Section 335, subdivision (b), defines the "Size of the Business of the Employer" as "the number of individuals employed at the time of the inspection/investigation." Application of the Size adjustment factor is based on section 336, subdivision (d)(1), which provides, in pertinent part, the following adjustment amounts based on the size of the business: "10 or fewer employees - 40% of the Gravity-based Penalty shall be subtracted" and for "11-25 employees - 30% of the Gravity-based Penalty shall be subtracted."

Nevarez determined that Employer employed 15 employees based on his conversation with Carmichael and gave Employer a 30 percent adjustment based on Size. While Employer made a hearsay objection to the testimony about what Carmichael told Nevarez, a review of the tailgate safety meeting documents from the relevant period shows that there were more than 10 employees in attendance. (Ex. CJ and J.) As such, there is evidence in the record to support the 30 percent adjustment based on Size and no further reduction is warranted.

Good Faith

Section 335, subdivision (c), provides:

> The Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD—Effective safety program; FAIR—Average safety program; POOR—No effective safety program.

The Division rated Employer's Good Faith as Poor based on the inference that Employer did not have a safety program because it was not provided during the inspection. However, Employer submitted its IIPP, and various other documents related to its safety program. While Employer was cited for a failure to implement its IIPP when it did not correct the hazard of an

employee climbing on the outside of scaffolding, the Division put forth no evidence of why this single violation should result in an overall average safety program.

The Appeals Board has held that when the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) Section 336, subdivision (d)(2), allows for a reduction of 30 percent to the Gravity-based Penalty for a Good rating for Good Faith, which is the maximum credit. Therefore, Employer shall receive the maximum credit of 30 percent for Good Faith.

History

Section 336, subdivision (d)(3), provides a ten percent reduction to the Gravity-based Penalty for employers with a Good rating for History, which is the maximum credit allowed. The Division provided Employer the maximum credit for History and there is nothing calling into question the Division's assessment. Therefore, the adjustment factor remains at ten percent for History.

Based on the above, the total adjustment factors result in a 70 percent reduction. Accordingly, the final penalty for Citation 1, Item 1, is $150.

b. Citation 1, Item 6

Section 336, subdivision (b), provides that a base penalty will be set initially based on the Severity of the violation and thereafter adjusted based on the Extent and Likelihood. Section 335, subdivision (a), provides in part:

> (a) The Gravity of the Violation--the Division establishes the degree of gravity of General and Serious violations from its findings and evidence obtained during the inspection/investigation, from its files and records, and other records of governmental agencies pertaining to occupational injury, illness or disease. The degree of gravity of General and Serious violations is determined by assessing and evaluating the following criteria:
>
> (1) Severity.
>
> (A) General Violation.
> […]

ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:

LOW-- Requiring first-aid only.

MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.

HIGH-- Requiring more than 24-hour hospitalization.

[…]

(2) Extent.

[…]

ii. When the safety order violated does not pertain to employee illness or disease, Extent shall be based upon the degree to which a safety order is violated. It is related to the ratio of the number of violations of a certain order to the number of possibilities for a violation on the premises or site. It is an indication of how widespread the violation is. Depending on the foregoing, Extent is rated as:

LOW-- When an isolated violation of the standard occurs, or less than 15% of the units are in violation.

MEDIUM-- When occasional violation of the standard occurs or 15-50% of the units are in violation.

HIGH-- When numerous violations of the standard occur, or more than 50% of the units are in violation.

(3) Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

Citation 1, Item 6, is a General violation for Employer's failure to have an appropriately trained person at the jobsite to render first aid. Nevarez testified that the Severity of the violation was rated as High based on the hazard and the amount of time off that a worker may need off as a result of a violation. However, this testimony is insufficient to establish the type and amount of medical treatment that would likely be required as a result of a violation. Without sufficient evidence from the Division, Severity is determined to be Low, resulting in a Base Penalty of $1,000. (§ 336, subd. (b).)

There was no testimony regarding how Nevarez determined Extent. This violation was based on one instance where the person trained in first aid had left the jobsite and then returned. There is no indication that this violation occurred at any other time during the relevant period. Accordingly, the violation is assigned an Extent of Low, which results in a 25 percent reduction in the Base Penalty. (§ 336, subd. (b).)

Nevarez testified that Likelihood was rated as High because it was possible that a person could sustain a serious injury in the event of a violation. However, there was no evidence presented about the "extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records." (§ 335, subd. (a)(3).) Furthermore, there were only two employees at the jobsite when there was no person trained in first aid available. Accordingly, Likelihood is rated as Low, which results in a 25 percent reduction in the Base Penalty. (§ 336, subd. (b).)

Therefore, the violation is determined to be Low Severity with a Low Extent and Likelihood. The Base Penalty of $1,000 is reduced by 50 percent, for a Gravity-Based Penalty of $500.

Section 335 provides for further adjustment to the Gravity-Based penalty for Good Faith, Size, and History. As established above, the total adjustment factors result in a 70 percent reduction for an Adjusted Penalty of $150.

Section 336, subdivision (e), provides that the Adjusted Penalty is subject to an abatement credit of an additional 50 percent. The Division applied the 50 percent abatement credit in its calculation based on the presumption for General citations that an employer will correct the violation by the abatement date. (§ 336, subd. (e)(1).) Accordingly, the final penalty for Citation 1, Item 6, is $75.

c. Citation 2

An initial penalty of $18,000 is assessed for all Serious violations. (§ 336, subd. (c).) As such, the Division correctly assessed an initial penalty of $18,000. The penalty may be further adjusted based on Extent and Likelihood, resulting in the Gravity-Based penalty.

Citation 2 is a Serious violation based on Employer's failure to correct the hazard of an employee climbing on the outside of scaffolding. Nevarez testified that the Division was aware of only two instances of the violation and rated Extent as Medium. However, as established above, there was only a single instance of this violation that occurred during the video reenactment. Accordingly, the violation is assigned an Extent of Low, which results in a 25 percent reduction in the Base Penalty. (§ 336, subd. (b).)

Nevarez testified that Likelihood was rated as High because it was likely that a person could sustain a serious injury from the fall hazard that is created by climbing on the outside of scaffolding. However, there was only one employee exposed to the hazard. Again, there was insufficient evidence presented about the "extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records." (§ 335, subd. (a)(3).) Accordingly, Likelihood is rated as Low, which results in a 25 percent reduction in the Base Penalty. (§ 336, subd. (b).)

The violation is determined to have Low Extent and Likelihood. Therefore, the Base Penalty of $18,000 is reduced by 50 percent, for a Gravity-Based Penalty of $9,000.

Section 335 provides for further adjustment to the Gravity-Based penalty for Good Faith, Size, and History. The Division only applied the 30 percent adjustment factor for Size, because at the time it issued the citations, the Division determined that Employer did not have an IIPP. For Serious citations, the only adjustment factor that can be applied is Size, when the Employer does not have an operative injury prevention program. (§ 336, subd. (d)(8).) However, Employer had an IIPP in effect at the time of inspection. Accordingly, the adjustment factors for Size, Good Faith, and History shall be applied. As established above, the total adjustment factors result in a 70 percent reduction, for an Adjusted Penalty of $2,700.

Section 336, subdivision (e), provides that the Adjusted Penalty is subject to an abatement credit of an additional 50 percent. The Division applied the 50 percent abatement credit in its calculation because the project at the jobsite was complete and it was presumed that the hazard was abated. Accordingly, the final penalty for Citation 2 is $1,350.

Conclusion

For Citation 1, Item 1, the Division established that Employer violated section 3203, subdivision (b)(1), by failing to have records of scheduled and periodic inspections. The violation was properly classified as Regulatory. The penalty, as adjusted above, is found reasonable.

For Citation 1, Item 2, the Division failed to establish that Employer violated section 14300.31, subdivision (a). Employer documented recordable injuries and illnesses of employees on Cal/OSHA Form 300 logs.

For Citation 1, Item 3, the Division failed to establish that Employer violated section 1509, subdivision (a). Employer had a written Injury and Illness Prevention Program.

For Citation 1, Item 4, the Division failed to establish that Employer violated section 1509, subdivision (b). Employer adopted a written Code of Safe Practices related to its operations.

For Citation 1, Item 5, the Division failed to establish that Employer violated section 1509, subdivision (e). Employer conducted toolbox/tailgate safety meetings at least every 10 days.

For Citation 1, Item 6, the Division established that Employer violated section 1512, subdivision (b), by failing to have a person trained in first aid at the jobsite. The violation was properly classified as General. The penalty, as adjusted above, is found reasonable.

For Citation 1, Item 7, the Division failed to establish that Employer violated section 3205, subdivision (c). Employer had a written COVID-19 Prevention Program.

For Citation 1, Item 8, the Division failed to establish that Employer violated section 3395, subdivision (c). Employer provided drinking water to employees at the jobsite.

For Citation 1, Item 9, the Division failed to establish that Employer violated section 3395, subdivision (i). Employer had a written Heat Illness Prevention Plan.

For Citation 1, Item 10, the Division failed to establish that Employer violated section 5144, subdivision (e)(1). Employee exposure to the hazard was not established.

For Citation 1, Item 11, the Division failed to establish that Employer violated section 5144, subdivision (f)(2). Employee exposure to the hazard was not established.

For Citation 2, Item 1, the Division established that Employer violated section 3203, subdivision (a)(6). Employer failed to correct a hazard by allowing an employee to climb on the outside of scaffolding. The violation was properly classified as Serious. The penalty, as adjusted above, is found reasonable.

For Citation 3, Item 1, the Division failed to establish that Employer violated section 1532.1, subdivision (d)(1)(A). Employer performed lead assessment testing to determine if employees would be exposed to lead before work began at the jobsite.

For Citation 4, Item 1, the Division failed to establish that Employer violated section 5144, subdivision (c)(1). Employer developed and implemented a written respiratory protection program.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is modified to $150.

It is hereby ordered that Citation 1, Item 2, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 3, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 4, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 5, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 6, is affirmed and the penalty is modified to $75.

It is hereby ordered that Citation 1, Item 7, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 8, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 9, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 10, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 1, Item 11, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 2, Item 1, is affirmed and the penalty is modified to $1,350.

It is hereby ordered that Citation 3, Item 1, is dismissed and the penalty is vacated.

It is hereby ordered that Citation 4, Item 1, is dismissed and the penalty is vacated.

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

Dated: 09/29/2023

_____
Jennie Culjat
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.**