BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
JACE VARGHESE **P.O. Box 9567** **Alta Loma, CA 91701** **Employer**	**1213886** **DECISION AFTER RECONSIDERATION**

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

JURISDICTION

Jace Vahghese (Appellant or Varghese) is engaged in the business of purchasing, remodeling or renovating, and re-selling houses, commonly referred to as flipping. On March 1, 2017, the Division of Occupational Safety and Health (Division), through Compliance Officer Matthew Zylowski (Zylowski), conducted a complaint investigation at 1830 McKenzie Street, Long Beach, California (the site).

On April 3, 2017, the Division issued Appellant one Citation alleging nine violations of California Code of Regulations, title 8[1]. Citation 1, Item 1 alleged a Regulatory violation of title 8, section 14300.40 subdivision (a) [failure to produce required records within four (4) business hours when requested by an authorized government representative]. Item 2 alleged a General violation of section 1509, subdivision (a) [failure to establish, implement, and maintain an effective Injury and Illness Prevention Program]. Item 3 alleged a General violation of section 1509, subdivision (b) [failure to adopt a written Code of Safe Practices relating to the employer's operations]. Item 4 alleged a General violation of section 1526, subdivision (d) [failure to provide clean toilet facilities and an adequate supply of toilet paper]. Item 5 alleged a General violation of section 1527, subdivision (a) [failure to provide washing facilities with adequate soap and single use towels, in a location readily available after using the toilet]. Item 6 alleged a General violation of section 2405.4, subdivision (b) [failure to use ground-fault circuit interrupters when using a circular saw]. Item 7 alleged a General violation of section 3241, subdivision (c) [failure to provide training in proper and safe use of equipment for employees involved in tree work, maintenance, or removal]. Item 8 alleged a General violation of section 3380, subdivision (f) [failure to assess workplace for hazards necessitating the use of personal protective equipment (PPE)]. Item 9

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

alleged a General violation of section 3395, subdivision (i) [failure to establish, implement, and maintain an effective Heat Illness Prevention Plan].

Appellant timely appealed, arguing that the Division lacked jurisdiction to issue Appellant the Citation, on the grounds that Appellant is not an employer. Appellant further argued that the classification for Citation 1, Item 1 was incorrect, that the safety orders were not violated for Citation 1, Items 2 through 9, and that the abatement requirements for Items 2, 3, and 9 were unreasonable.

The matter was heard by Dale A. Raymond, Administrative Law Judge (ALJ) for the Board, in West Covina, California on April 25 and 26, 2019. James Clark, Staff Counsel, represented the Division. Appellant Jace Vahghese represented himself. On November 8, 2019, the ALJ issued a Decision.

In his Decision, the ALJ concluded that Appellant was an "employer" under the Labor Code and title 8, and that Appellant failed to rebut the presumption that the worker(s) present at the site were employees. The ALJ found that Citation 1, Item 1, was properly classified as regulatory. The ALJ affirmed Citation 1, Items 2, 3, 4, 5, and 9, affirmed all penalties assessed by the Division regarding those Items, and affirmed the abatement requirements with regard to Citation 1, Items 2, 3, and 9. Finally, the ALJ dismissed Citation 1, Items 6, 7, and 8, as not established by sufficient evidence. Penalties were assessed at a total of $4000. While Appellant's petition is not clear on the point, we deem it to challenge only the Items affirmed by the ALJ.

Appellant filed a Petition for Reconsideration of the ALJ's Decision on November 23, 2019, in which he briefly stated the grounds for his petition under the Labor Code, adding that he was leaving the country for a month, and requesting additional time to fully prepare his arguments. Appellant subsequently filed "Amendment #1 of Petition for Reconsideration" on January 13, 2020.

The Division timely filed an answer to Appellant's petition. Appellant timely replied.

Appellant primarily challenges the ALJ's Decision with regard to the finding that Appellant is an "employer." Appellant also argues broadly that the alleged violations were not established by the Division. Although Appellant does not specifically address the ALJ's findings with regard to each alleged violation, reading the petition in the light most favorable to Appellant, we will address these items here. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618). The petition asserts that the evidence does not justify the findings of fact, and that the findings of fact do not support the decision. (Lab. Code § 6617, subdivisions (c) and (e), respectively.)

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

ISSUES

1. Did the ALJ properly conclude that Appellant is an employer and that the worker(s) present at the site on the day of the inspection were Appellant's employees?

2. If Appellant is an employer, did the ALJ properly decide the classification of Citation 1, Item 1?

3. If Appellant is an employer, did the ALJ properly decide the existence of the Labor Code violations(s) alleged in Citation 1, Item 2?

4. If Appellant is an employer, did the ALJ properly decide the existence of the Labor Code violation(s) alleged in Citation 1, Item 3?

5. If Appellant is an employer, did the ALJ properly decide the existence of the Labor Code violation(s) alleged in Citation 1, Item 4?

6. If Appellant is an employer, did the ALJ properly decide the existence of the Labor Code violation(s) alleged in Citation 1, Item 5?

7. If Appellant is an employer, did the ALJ properly decide the existence of the Labor Code violation(s) alleged in Citation 1, Item 9?

8. If Appellant is an employer, did the ALJ properly decide on reasonableness of the abatement requirements in Citation 1, Items 2, 3, and 9; and the reasonableness of all assessed penalties in Citation 1, Items, 1, 2, 3, 4, 5, and 9?

FINDINGS OF FACT

1. Zylowski conducted a complaint investigation at 1830 McKenzie Street, Long Beach, California (the site) on March 1, 2017.
2. On March 1, 2017, Varghese was in the process of renovating the house on the site.
3. Varghese purchased the site in a probate sale on December 22, 2015, and sold it on or about January 17, 2019.
4. Varghese owned and lived in a house in Rancho Cucamonga. Varghese never lived at the site.
5. Varghese did not have a contractor's license.
6. When Zylowski arrived at the site, Verghese was present, along with another adult male who identified himself only as "Richard."
7. Richard was sweeping the floor with a push broom at the time of the inspection.
8. Varghese paid Richard to work at the site.
9. Varghese's relatives, including his brother, his cousin Jijo Varghese (Jijo), and Richard, helped him with construction at the site.
10. On March 6, 2017, Varghese provided Zylowski a document consisting of a rental property insurance estimate dated January 31, 2017.
11. Varghese did not have an IIPP.
12. Varghese did not have a written CSP.
13. The site did not have a functioning, clean toilet facility supplied with toilet paper.
14. The site did not have a working sink, convenient to the toilet and stocked with soap and paper towels, for washing hands.

15. Varghese did not have a written HIPP.
16. Varghese did not give any reason why he could not create the documents required to abate Citation 1, Items 2, 3, and 9.

DISCUSSION

1. Appellant's Employer Status

The only genuine issue here is whether Appellant is an employer as defined by the Occupational Safety and Health Act of 1973 (Labor Code sections 6300 et seq., or "the Act.") An individual's status as an employer is a jurisdictional question. (*Gonzalo Olascoaga dba Gonzalo Olasgoaga*, Cal/OSHA App. 13-R6D5-20, Decision After Reconsideration (November 24, 2015), citing *Strategic Outsourcing Inc.*, Cal/OSHA App. 10-0905, Denial of Petition for Reconsideration (Sep. 16, 2011).) If Appellant is not an employer, the Division lacked jurisdiction to issue Citation 1, Items 1 through 9.

Labor Code section 6304 provides that "employer" has the same meaning as used in Labor Code section 3300: "Every person including any public service corporation, which has any natural person in service." (Labor Code section 3300, subdivision (c).)

Labor Code section 6304.1, subdivision (a), provides that, "Employee means every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment." (*Sully-Miller Contracting Co.*, Cal/OSHA App. 99-0896, Decision After Reconsideration (Oct. 30, 2001).)

Where there is an actual question as to the status of an entity as an employer, the Board reviews the record for indices of control over the manner and means of work. (*Treasure Island Media, Inc.*, Cal/OSHA App. 10-1095, Decision After Reconsideration (Aug. 13, 2015).) While not dispositive, "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*S.G. Borello & Sons, Inc. v. Dep't of Industrial Relations* (1989) 48 Cal.3d 341, 350-351 (*Borello*).)[2]

Also relevant in this matter, Business and Professions Code section 7026 defines "contractor" as:

> [A]ny person who undertakes to or offers to undertake to, or purports to have the capacity to undertake to, or submits a bid to, or does himself or herself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof,

[2] We note that the *Borello* test was later superseded, in some contexts, by the Supreme Court in *Dynamex Operations West Inc. v. Superior Court* (2018) 4 Cal.5th 903 [referring to wage orders], by AB 5, and again by AB 2257, which modified multiple statutes in the Labor Code. (See, e.g. Lab. Code, § 2775 et seq.) Neither party has requested or briefed whether this matter should be decided under this latter line of authority and therefore we proceed under the *Borello* analysis. Were we to apply the ABC test here, however, the outcome would remain unchanged.

> including the erection of scaffolding or other structures or works in connection therewith, or the cleaning of grounds or structures in connection therewith, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or the installation, repair, maintenance, or calibration of monitoring equipment for underground storage tanks, and whether or not the performance of work herein described involves the addition to, or fabrication into, any structure, project, development or improvement herein described of any material or article of merchandise.

Business and Professions Code section 7026.1, subdivision (a) (2) (A) additionally states that the definition of contractor includes:

> Any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company, who or which undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any building or home improvement project, or part thereof.

Labor Code section 2750.5 provides:

> There is a rebuttable presumption … that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.

This rule applies in proceedings before the Board. (See *Tree People*, Cal/OSHA App. 91-315, Denial of Petition for Reconsideration at p.2 (Dec. 31, 1991).) Varghese testified that he was remodeling and renovating the house on the site in order to sell the property. Zylowski testified that, at the time of the inspection, the bathroom was being renovated. (Decision at 5.) The ALJ therefore concluded that the work being done was that of a contractor, as defined in Business and Professions Code sections 7026 and 7026.1. As such, a valid contractor's license was required. Appellant did not have a contractor's license. The ALJ accordingly found that the presumption under Labor Code section 2750.5 would attach, meaning that any person performing work for Varghese is presumed to be his employee. (Decision at 5.)

Appellant then had the burden to rebut this presumption by demonstrating that the workers performing services for him at the site were something other than employees. This requires Appellant to provide evidence establishing the factors set forth in *Borello* (*supra*, 48 Cal. 3d 341 at 351), incorporated by the Board in *Treasure Island Media, Inc.* (*supra*, Cal/OSHA App. 10-1095) as follows:

> (a) The right to discharge at will.
>
> (b) Whether the one performing services is engaged in a distinct occupation or business.

(c) The kind of occupation, with reference to whether the work is usually done under the direction of the principal**,** or by a specialist without supervision.

(d) The skill required in the particular occupation.

(e) Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.

(f) The length of time for which the services are to be performed.

(g) The method of payment, whether by the time or by the job.

(h) Whether the work is part of the regular business of the principal.

(i) Whether the parties believe they are creating the relationship of employer-employee.

a. Appellant's Arguments Were Properly Rejected by the ALJ

In his petition and his reply to the Division's answer, Appellant has offered a creative array of *ad hominem* attacks on the Division and the ALJ, but no substantive evidence to rebut the presumption established by the Division, and affirmed by the ALJ, that he had control over the time, place, and manner of the work performed. His arguments - that the only people present on the day of the inspection were members of his family; that no paid work was being done on the site on the day of the inspection; and that he was not technically "flipping" the site - were all properly rejected by the ALJ as irrelevant to the question of Appellant's status as an employer. The ALJ found that a preponderance of the evidence indicated Appellant paid the workers at the site and had control over what work was done and when and where the work was performed. We agree. We review Appellant's arguments here, in the context of the relevant facts of the case.

Appellant's petition asserts that the evidence does not support the ALJ's findings of fact, and that the findings of fact do not support the Decision. Appellant himself now offers somewhat conflicting versions of the facts, but none of his various accounts materially affect the ALJ's conclusions.

The ALJ's findings of fact state that Appellant purchased the site at a probate sale on December 22, 2015, and thereafter added his cousin Ann John as a co-owner. (Decision at 1.) Appellant now disputes this finding, stating that, "Ann John and I bought the home together in 2014." (Amendment #1 Petition for Reconsideration (Petition), p. 3.) Appellant provides no evidence to support this statement. It is nonetheless undisputed that Appellant owned the site as of the date of the inspection.

It is also undisputed that on the day of the inspection, March 1, 2017, Appellant was renovating the house on the site, which he sold in 2019. (Decision at 5.) The ALJ's findings of fact state that, on the day of the inspection, Zylowski saw and spoke to Appellant at the site, and also saw and spoke to another man, who identified himself only as "Richard." (*Id*. at 2.) Zylowki testified that he saw Richard working at the site on the day of the inspection, and that Richard told him "Varghese paid him for his work that he performed on the site." (*Id*. at 5.) Zylowski further

testified that Appellant told him he was renovating the house to sell it, which he did for a living, and that he was currently also renovating several other properties for the same purpose. (*Id*.) A witness for the Division, Frank Diaz (Diaz), a general contractor who occasionally stayed at a house next door to the site, also testified that he had spoken with other workers at the site, including one worker named Jose, who confirmed that they worked for Appellant as employees at this and other job sites, renovating houses for Appellant to sell. (*Id*.)

At the hearing, Appellant testified that "his cousin Jijo, his cousin's brother Richard, as well as Appellant's brother, worked for Varghese at the site." (Decision at 5.) Appellant now disputes the ALJ's factual finding with regard to Richard's presence at the site. Appellant's testimony, his petition, and his reply to the Division, offer conflicting accounts as to who was present at the site on the day of the inspection. In the course of the hearing, Appellant did not dispute that Richard was present at the site during the inspection. In his petition, Appellant states that only he and his brother, not Richard, were at the site during the inspection, and that no other workers were present that day. (Petition at 1.) In his reply to the Division's answer, Appellant recalls that, along with Appellant's brother, "Jijo … was with me on the day of inspection." (Jace Varghese's Reply to Division's Answer to "Amendment #1 Petition for Reconsideration" of Employer Jace Varghese (Reply), p. 2.) Appellant further states, contrary to his previous testimony, "I do not know who the Richard … is." (*Id*. at 1, 3.) Appellant also denies knowing the worker named Jose, mentioned in Diaz's testimony. (*Id*. at 1, 3.)

Although his account of exactly who was at the site during the inspection varies, Appellant essentially argues that he is not an employer because the only people present were family members (his brother, his cousin Jijo, and his cousin's brother Richard). In his petition, Appellant asserts, "I am a regular home owner and have no employees; my family and me do [the] majority of what is needed" to renovate the houses that Appellant then sells. (Petition at 2.) As the ALJ pointed out, this is immaterial to whether Appellant is an employer. The definitions of "employer" and "employee" do not contain exceptions for family members. (Decision at 6.) In addition, Appellant's previous statements that he never lived at the site, and was only renovating it to sell, render this argument disingenuous at best. Appellant's conflicting and shifting versions of who was present at the site on March 1, 2017, do, however, call Appellant's credibility into question.

Appellant further argues that no work was being done at the site on the day of the inspection. (Decision at 6; Petition at 1; Reply at 2.) Zylowski, however, testified that he saw Richard working at the site. (Decision at 2, 5, 6.) The ALJ concluded that Appellant's testimony on this point was not credible. (Decision at 6.) Where conflicting evidence requires credibility findings or involves the weighing of evidence, it is well settled that an ALJ's findings are to be accorded great weight and rejected only on the basis of contrary evidence of considerable substantiality. (*Tomlinson Construction, Inc*., Cal/OSHA App. (Feb 18, 1998), citing *Ignacio L. Zazueta, Jr.,* Cal/OSHA App. 76-621, Decision After Reconsideration (July 24, 1978).) Based on the inconsistencies in Appellant's recollections of the facts, the ALJ correctly found that Zylowski's testimony must be considered more credible and persuasive. Appellant also claims that he never paid his workers. (Petition at 1-2; Reply at 2.) Again, however, the ALJ correctly found Zylowski's testimony, that Richard told Zylowski that Varghese paid him for his work, more credible and persuasive on this point. (Decision at 5.)

Finally, Appellant states that he never used the word "flip" when speaking to Zylowski. (Petition at 3; Reply at 3.) Appellant appears to be making the argument that he is not an employer because he was not technically "flipping" the house, stating, "flipping is for quick transactions; I had [the site] for almost five years." (Petition at 3.) Appellant never denies, however, that he purchases, renovates, and re-sells houses for a living. (Decision at 6; Reply at 4.) The length of time between the purchase and sale of the house is not relevant to whether Appellant employed the workers who renovated these properties. Varghese testified that he never lived in the house on the site, and, during the inspection, he told Zylowski that he was remodeling the house with the express intention of selling it. (Decision at 5, 6.) The ALJ concluded that Appellant "paid natural persons for work performed at the site and directed those individuals as to what work was to be done and when it was to be done," that this activity amounted to a business venture, and that the workers were engaged in work as part of that business. (*Ibid*.)

b. Appellant Failed to Rebut the Presumption of His Employer Status

Appellant has had the opportunity to rebut the presumption that his workers were employees and not, for example, independent contractors. To do so, an appellant must provide evidence to establish the factors set forth in *Borello*. (48 Cal.3d 341, *supra* at 3.) (*Treasure Island Media, Inc.*, Cal/OSHA App. 10-1095, *supra*.)

At the hearing, Appellant failed to produce any evidence, witnesses, or testimony that the workers could not be discharged at will, were engaged in a distinct occupation or business, had a specialized skill set, provided their own tools, the length of time they were working for Appellant, their method of payment, or their agreement with Appellant regarding the serviced they performed on his behalf. (Decision at 6; *Treasure Island Media, Inc.*, Cal/OSHA App. 10-1095.)

Where a party has the motive and opportunity, as Appellant did, to present evidence, but does not do so, it is presumed that the evidence, if produced, would not be in the party's favor. (Evid. Code sections 412, 413; *Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016), affirmed in *Nolte Sheet Metal Inc. v. Occupational Safety and Health Appeals Bd*. (2020) 44 Cal.App.5th 437.)

In its answer to the petition, for example, the Division rightly points out that Appellant could easily have rebutted the presumption of an employer-employee relationship by bringing Richard, or other workers, such as the individual named as Jose in Diaz's testimony, to testify that they were licensed general contractors or unpaid volunteers. (Division's Answer to "Amendment #1 Petition for Reconsideration" of Employer Jace Varghese (Division's Answer), p. 3-4.) Instead of calling these workers as witnesses, Appellant changes his story to deny even knowing Richard or Jose (Reply at 1, 3), although he undercuts this assertion by accusing Diaz of previously having challenged Jijo and Jose to a fistfight. (*Id.* at 2.) The Division concludes in its answer that, "Varghese did not wish to call Richard or Jose because they would have supported the ALJ's finding that he was their employer … The inference is therefore inexorable: he was the employer of the workers at the house and no evidence would show otherwise." (Division's Answer at 3-4.) The ALJ's reasoning is consistent with Evidence Code section 412, which provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce

stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (See also Evidence Code section 413; *R&L Broshammer, Inc*. Cal/OSHA App. 03-R1D5-4832 (Oct. 5, 2011).

In his petition and reply, Appellant cites two previous Board decisions in support of his argument that he is not an employer: *Gonzalo Olascoaga dba Gonzalo Olascoaga*, Cal/OSHA App. 13-R6D5-20, *supra*, and *Strategic Outsourcing Inc.*, Cal/OSHA App. 10-0905, *supra.* Neither of these decisions offers support to Appellant's arguments, as both are factually and legally distinguishable. In *Olascoaga*, the Board concluded that the ALJ had incorrectly found an employer-employee relationship between Olascoaga and an individual who was present on the property at the time of inspection, because the putative employer was able to produce credible evidence that this individual was, in fact, a lessee rather than an employee. (Cal/OSHA App. 13-R6D5-20 at 6-7.) Appellant here offers no evidence that the worker(s) present on the site were there for any other purpose than to work on renovating a house owned by Appellant.

In *Strategic Outsourcing*, Cal/OSHA App. 10-0905 at 5, the Board denied Employer's petition for reconsideration on the basis that, in a dual employer situation, the primary employer's contract with the facility where the work was done reserved a significant right of control over the employees. The Board noted:

> California case law holds that the right to control others, as reserved by Employer … is pertinent to determining whether the person having such control is an employer under the Act. (*Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 693.) The employer need not exercise those rights; having them is sufficient. (*Id*.)

In his petition, Appellant offers no new evidence to rebut the presumption that the workers were not his employees, beyond repeating the arguments already dismissed by the ALJ. The Board sees no reason to reject the ALJ's findings on this issue.

The Board finds that the ALJ correctly concluded that Appellant is an employer. We now consider the merits of the alleged violations.

The Division has the burden of proof to establish each element of the alleged violations by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jan. 16, 1983); *Cambro Manufacturing Company*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) "Preponderance of the evidence" means that the thing to be proved is more likely true than not -- the quantum of proof needed to meet the party's burden. (*Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985); see Evid. Code § 115.)

2. Citation 1, Item 1

Section 14300.40 subdivision (a), provides as follows:

(a) Basic requirement. When an authorized government representative asks for the records you keep under the provisions of this article, you must provide within four (4) business hours, access to the original recordkeeping documents requested as well as, if requested, one set of copies free of charge.

The Division's violative description states:

Prior to and during the course of the inspection, the employer failed to provide within four (4) business hours access to the original recordkeeping documents when requested by the Division.

Appellant did not appeal the existence of Citation 1, Item 1. Therefore, it is established by law. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, *supra* at 8; *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (April 26, 2000).) Appellant appealed only the classification of Citation 1, Item 1, as regulatory.

Section 334, subdivision (a), defines a regulatory violation as follows:

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 334, subdivision (b), defines a general violation as:

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.

Regarding the classification of Citation 1, Item 1, Appellant did not provide any evidence or argument that the citation should be classified as anything other than regulatory. The ALJ found the that failure to produce required records pertains to recordkeeping requirements as defined in section 334, subdivision (a), and was properly classified as regulatory.

Both the classification and the violation of Citation 1, Item 1, and the assessed penalty of $250, are upheld.

3. Citation 1, Item 2

Section 1509, subdivision (a), provides:

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

Section 3203, subdivision (a), requires that employers establish, implement, and maintain a written IIPP.

The Division's violative description states:

> Prior to and during the course of the inspection, the employer failed to establish, implement, and maintain at the worksite an effective Injury and Illness Prevention Program for its employees in accordance with this section.

In a document request dated March 1, 2017, the Division requested a written IIPP from Appellant by March 6, 2017. As of April 2, 2017, Appellant had not provided one. The ALJ therefore found that the Division established that Appellant did not have a written IIPP in violation of section 1509, subdivision (a), and the violation, abatement, and penalty of $750 were affirmed.

Appellant has provided no evidence that he does, in fact, have an IIPP. His only argument is that he does not need an IIPP because he is not an employer.

The ALJ correctly found that Appellant is an employer. Citation 1, Item 2, and the assessed penalty and abatement, are therefore upheld.

4. Citation 1, Item 3

Section 1509, subdivision (b), provides:

> Every 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.

The Division's violative description states:

> Prior to and during the course of the inspection, the employer failed to adopt a written Code of Safe Practices which relates to the operations of the company in accordance with this section.

In a document request dated March 1, 2017, the Division requested a written CSP from Appellant by March 6, 2017. As of April 2, 2017, Appellant had not provided one. The ALJ therefore found that the Division established that Appellant did not have a written CSP in violation of section 1509, subdivision (b), and the violation, abatement, and penalty of $750 were affirmed.

Appellant has provided no evidence that he does, in fact, have a CSP. His only argument is that he does not need a CSP because he is not an employer.

The ALJ correctly found that Appellant is an employer. Citation 1, Item 3, and the assessed penalty and abatement, are therefore upheld.

5. Citation 1, Item 4

Section 1526, subdivision (d), provides:

> Toilet facilities shall be kept clean, maintained in good working order, designed and maintained in a manner which will assure privacy and provided with an adequate supply of toilet paper.

The Division's violative description states:

> Prior to and during the course of the inspection, including, but not limited to, on March 1, 2017, the employer failed to provide clean toilet facilities and an adequate supply of toilet paper.

Zylowski provided both testimony and photographic evidence of a dirty toilet bowl with no water hook-up and no toilet paper readily available. (Decision at 9.) At the hearing, Appellant did not dispute that the water to the house was not connected, but stated that the toilet could be flushed by dumping a five-gallon bucket of water into the bowl, and the bathroom did have toilet paper. (*Id*.)

The ALJ found Zylowski's testimony, and photographs taken during the inspection, credible and persuasive evidence that Appellant did not provide a clean, working, properly stocked toilet facility at the site. (Decision at 9.) The ALJ found that the Division established the existence of the violation. The violation and penalty of $750 were affirmed.

Appellant's petition offers no new evidence or argument to dispute the ALJ's findings beyond repeating his claims at the hearing. (Petition at 2.)

Citation 1, Item 4, and the assessed penalty, are upheld.

6. Citation 1, Item 5

Section 1527, subdivision (a), provides:

> Washing Facilities. (1) General. Washing facilities shall be provided as follows: A minimum of one washing station shall be provided for each twenty employees or fraction thereof. Washing stations provided to comply with this requirement shall at all times:
>
> (A) Be maintained in a clean and sanitary condition;
>
> (B) Have an adequate supply of water for effective washing;
>
> (C) Have a readily available supply of soap or other suitable cleansing agent;
>
> (D) Have a readily available supply of single-use towels or a warm-air blower;

(E) Be located and arranged so that any time a toilet is used, the user can readily wash; and

(F) When provided in association with a nonwater carriage toilet facility in accordance with Section 1526(c),

1. Provide a sign or equivalent method of notice indicating that the water is intended for washing; and

2. Be located outside of the toilet facility and not attached to it. Exception to subsection (a)(1)(F)(2.): Where there are less than 5 employees, and only one toilet facility is provided, the required washing facility may be located inside of the toilet facility. Exception to subsection (a)(1): Mobile crews having readily available transportation to a nearby toilet and washing facility.

Section 1504 defines "readily available" as "in a location with no obstacles to prevent immediate acquisition for use." The Board has held that "readily available" means that hand-washing facilities must be close enough to the toilet for employees to wash their hands before returning to work. (*Davey Tree Surgery*, Cal/OSHA App. 00-032, Decision After Reconsideration.) Hand-washing includes the use of soap or other cleansing agent. (*Id.*) The Board has previously found that soap was not "readily available" where one of five hand washing facilities at a work site was not supplied with soap. (*Avalon Bay Communities, Inc.*, Cal/OSHA App. 15-0751, Denial of Petition for Reconsideration (July 22, 2016).

The Division's violative description states:

Prior to and during the course of the inspection, including, but not limited to, on March 1, 2017, the employer failed to provide a washing station that had an adequate supply of water for effective washing, no soap or cleansing agent, as well as no single use towels.

Appellant does not deny that there was no water supply in the bathroom. He testified that the garden hose was used for hand washing. (Decision at 11.) He also testified that there were soap and paper towels by the hose. (*Id*.) Even if this testimony, which the ALJ found "questionable," (*Id*.) is accepted, the violation is still established because the hose was not "readily available" to the toilet. The ALJ affirmed the violation and penalty of $750.

In his petition, Appellant, does not offer any new evidence beyond re-stating his previous assertions, already rejected by the ALJ, that water for washing and soap were available at the site. (Petition at 2.)

Citation 1, Item 5, and the assessed penalty, are upheld.

7. Citation 1, Item 9

Section 3395, subdivision (i), provides:

> 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).

The Division's violative description states:

> Prior to and during the course of the inspection, including, but not limited to, on March 1, 2017, the employer failed to establish, implement, and maintain an effective heat illness prevention plan in accordance with this section.

In a document request dated March 1, 2017, the Division requested a written HIPP from Appellant by March 6, 2017. As of April 2, 2017, Appellant had not provided one. The ALJ therefore found that the Division established that Appellant did not have a written HIPP in violation of section 3395, subdivision (i), and the violation, abatement, and penalty of $750 were affirmed.

Appellant has presented no evidence that he does in fact have a HIPP. He argues only that he is not required to have a HIPP because he is not an employer.

The ALJ correctly found that Appellant is an employer. Citation 1, Item 9, and the assessed penalty and abatement, are therefore upheld.

DECISION

For the above reasons, Citation 1, Items 1, 2, 3, 4, 5, and 9, and all assessed penalties and abatement requirements, are upheld.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chairman

Judith S. Freyman, Board Member

Marvin Kropke, Board Member

FILED ON: 01/27/2021

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
JACE VARGHESE	**1213886**

Citation Issuance Date: **12/21/2018**

CITATION	ITEM	SECTION	TYPE	CITATION/ITEM RESOLUTION	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	**FINAL PENALTY ASSESSED**
1	1	14300.40(a)	R	ALJ Decision affirmed.	A		$250.00	**$250.00**
1	2	1509 (a)	G	ALJ Decision affirmed.	A		$750.00	**$750.00**
1	3	1509 (b)	G	ALJ Decision affirmed.	A		$750.00	**$750.00**
1	4	1526 (d)	G	ALJ Decision affirmed.	A		$750.00	**$750.00**
1	5	1527 (a) (1)	G	ALJ Decision affirmed.	A		$750.00	**$750.00**
1	6	2405.4 (b)	G	Not at issue.		V	$750.00	**$0.00**
1	7	3241 (c)	G	Not at issue.		V	$750.00	**$0.00**
1	8	3380 (f)	G	Not at issue.		V	$750.00	**$0.00**
1	9	3395 (i)	G	ALJ Decision affirmed.	A		$750.00	**$750.00**
				Sub-Total			$6,250.00	**$4,000.00**

Total Amount Due* **$4,000.00**

**You may owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.*

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to: **Department of Industrial Relations**

2. Write the **Inspection No.** on your payment

3. If sending via US Mail:
   CAL-OSHA Penalties
   PO Box 516547
   Los Angeles, CA 90051-0595

   If sending via Overnight Delivery:
   US Bank Wholesale Lockbox
   c/o 516547 CAL-OSHA Penalties
   16420 Valley View Ave.
   La Mirada, CA 90638-5821

Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

-**DO NOT** send payments to the California Occupational Safety and Health Appeals Board-

Abbreviation Key:

G=General	R=Regulatory	Er=Employer	
S=Serious	W=Willful	Ee=Employee	A/R=Accident Related
RG=Repeat General	RR=Repeat Regulatory	RS=Repeat Serious	