

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**PAPICH CONSTRUCTION COMPANY, INC.
398 Sunrise Ter.
Arroyo Grande, CA 93420**

Employer

Inspection No.
1236440

**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

Papich Construction Company, Inc. (Employer or Papich) was a subcontractor on a solar energy construction project, known as the Cal Flats Solar Site (worksite), which was predominantly located in Monterey County. On May 19, 2017, Senior Safety Engineer Gregory Clark (Clark), commenced an inspection of Employer. The actual physical worksite inspection commenced on or about May 25, 2017.

On November 15, 2017, the Division of Occupational Safety and Health (Division) cited Employer with four alleged violations of title 8 health and safety standards.¹ Citation 1, Item 1, alleges a General violation of section 5144, subdivision (e)(1) [failure to provide a medical evaluation to determine an employee's ability to safely use a respirator]. Citation 1, Item 2, alleges a General violation of section 5144, subdivision (k)(5) [failure to engage in retraining on safe respirator use]. Citation 2, Item 1, alleges a Repeat Serious violation of section 1509, subdivision (a) [failure to implement procedures for identifying, evaluating and correcting unsafe work conditions and work practices for the Injury and Illness Prevention Plan (IIPP)]. Citation 3, Item 1, alleges a Serious violation of section 5144, subdivision (a)(1) [failure to use respirators when engineering controls are not feasible to prevent disease].

This matter was heard before Rheeah Yoo Avelar, an Administrative Law Judge (ALJ) for the Board. William Cregar, Staff Counsel, represented the Division. Eugene McMenamin, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer.

ALJ Avelar subsequently became unavailable to write the Decision in this case. Pursuant to section 375.1, subdivision (c), and by mutual consent of the parties, ALJ Dale A. Raymond was

¹ Unless specified otherwise all reference will be to title 8 of the California Code of Regulations.

assigned to issue the Decision. ALJ Raymond subsequently issued a Decision vacating each citation.

The Division filed a timely Petition for Reconsideration of the ALJ's Decision. The Board took the ALJ's decision under reconsideration. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

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

ISSUES

1. Was a violation of section 5144, subdivision (a), established by a preponderance of the evidence by the Division?
2. Was a violation of section 1509, subdivision (a), established by a preponderance of the evidence by the Division?
3. Was a violation of section 5144, subdivision (e)(1), established by a preponderance of the evidence by the Division?
4. Was a violation of section 5144, subdivision (k)(5), established by a preponderance of the evidence by the Division?
5. Did the Division establish a rebuttable presumption that Citations 2 and 3 were properly classified as Serious?
6. Did Employer rebut the presumption that Citations 2 and 3 were properly classified as Serious?
7. Was the Repeat classification for Citation 2 correct?
8. Were the proposed penalties reasonable?

FINDINGS OF FACT

1. A disease known as coccidioidomycosis, commonly known as Valley Fever, can occur when a person inhales the spores of the coccidioides (cocci) fungus. The fungus lives in the soil. The spores of the fungus can become airborne when soil containing them is disturbed. The spores may also be carried by the wind and other weather related phenomena which disturb or displace soils.
2. The spores are, in general, three to five microns in size and can be inhaled when airborne.
3. California rates for Valley Fever were highest in the counties of Kern, Kings, San Luis Obispo, Tulare, Madera and Monterey. (Exhibit E.)

4. In a small percentage of persons exposed to cocci fungal spores, it can cause a disseminated infection, spreading through the lungs, causing damage and destruction to lung tissue. It can also spread to other body tissues including the brain, spinal cord, bones, and skin. It can cause pneumonia, permanent loss of function in the lungs, and death. It takes only between one and ten spores to cause infection.
5. There is a realistic possibility that a person can suffer serious physical harm or death as a result of exposure to the cocci fungal spores.
6. It is difficult to conduct a soil test to determine whether the cocci fungus or its spores are present. While there are research and experimental methods to test for the cocci fungus, there is no widely available commercial test. Further, the tests that do exist are not entirely reliable as the fungus is not homogenous throughout the soil and is difficult to culture even when present.
7. Employer was a subcontractor on a solar energy construction project. The worksite was spread over approximately 3,000 acres.
8. This worksite was a multi-employer worksite predominantly located in Monterey County. Multiple employers were engaged in the development of a solar power plant.
9. McCarthy Building Co, Inc. (McCarthy) was the general contractor for the project and had responsibility for health and safety at the site. First Solar was the owner of the worksite.
10. McCarthy provided Papich employees some training regarding Valley Fever.
11. Papich was aware cocci fungal spores existed in the area of the worksite and that dust mitigation would be an issue.
12. Papich's contractual responsibilities at the worksite included compliance with an overlay Valley Fever Management Plan. (Exhibit 17.) This document noted that the cocci fungus had been reported in Monterey County and relied upon data from the Monterey County Health Department. The document provided requirements and strategies for reducing employee exposure to cocci fungal spores, including fugitive dust control procedures, job hazard analysis requirements, training, and other measures.
13. Papich's primary task at the worksite involved earthwork. Papich performed various tasks, including paving roads, grading, fencing, excavating, trenching, and creating paddocks. Papich also supplied water to the site.
14. Papich used a variety of different industrial equipment at the site including: buggies, Powerscreens, excavators, Ozzie's padder, motor graders, and skid steers. Pictures of several pieces of equipment were introduced into the record. (Exhibits 5, 6, and 14.) Some of the equipment had enclosed cabs, some did not.

15. Papich employed equipment operators, laborers, spotters, and supervisors at the site. The number of employees at the worksite fluctuated.
16. Papich employees worked at the job from November 2016 until, at least, May 2017. However, there were some intermissions in employees' work at the worksite due to weather conditions.
17. Papich had employees at the worksite when the Division conducted its inspection.²
18. Pursuant to its contractual responsibilities, Papich completed job hazard analysis forms addressing Valley Fever, including Exhibit 21.
19. Charles Evans (Evans), Papich's Environmental Safety and Health Officer (also referred to as a "Safety Coordinator"), admitted Papich's earthwork created dust at various points in his testimony and acknowledged it was impossible to eliminate all dust at the worksite.
20. Papich engaged in efforts to suppress dust at the worksite. Papich's dust suppression efforts focused on using water to suppress dust.
21. Papich provided all of its employees, and required they carry, N-95 dust masks (respirators)³ and provided bags to keep them clean.
22. Papich never provided clear direction to employees as to when they were required to, or should use, the N-95 masks. Discretion as to when to use the mask was largely left to the employees.
23. On September 4, 2013, the Division issued Employer a citation asserting a violation of section 1509, subdivision (a), referencing a violation of section 3203, subdivision (a)(6). Papich abated that citation. That citation was affirmed by an ALJ of the Board via an Order issued on April 5, 2016.

DECISION

1. Was a violation of section 5144, subdivision (a), established by a preponderance of the evidence by the Division?

For ease of analysis, we first begin with consideration of the Serious citations. Citation 3,

² Although some of these dates fall outside the six month statute of limitations, we concur with the ALJ's Decision to the extent that it found that the citations were not barred by the statute of limitations due to the continuing violation doctrine. (Decision, pp. 3-4; see Lab. Code, § 6617.)

³ Section 5144, subdivision (b), defines a negative pressure respirator as "a respirator in which the air pressure inside the facepiece is negative during inhalation with respect to the ambient air pressure outside the respirator." It defines a "filtering facepiece (dust mask)" as "a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium." From the definitions employed in subdivision (b) it is clear that the term dust mask and respirator are not necessarily contradictory. Here the evidence indicates that Employer provided its employees an N-95 dust mask, which is merely a type of negative pressure particulate respirator. Therefore, the two terms are often used interchangeably herein.

Item 1, alleges a Serious violation of section 5144, subdivision (a)(1), which states:

(a) Permissible Practice

(1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

In citing Employer, the Division alleged:

Prior to and during the course of the investigation, including, but not limited to, May 19, 2017, the employer did not require employees to use appropriate respirators when effective engineering controls were not feasible, or while they were being instituted, to protect against exposure to harmful dust contaminated with coccidioides fungal (Valley Fever) spores during soil disturbance operations and other dust-generating activities while working in windy environments at the Cal Flats Solar site.

The Division has the burden of proving all elements of a violation by a preponderance of evidence. (*National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) As part of its burden, the Division also bears the burden of proving employee exposure to the violative condition addressed by a safety order. (*Ibid.*)

To establish a violation of this section, the Division must prove: (1) the citation concerns a relevant source of atmospheric contamination, i.e. harmful dusts, (2) one or more of Employer's employees were exposed to harmful dusts, (3) Employer failed to use accepted engineering control measures as far as feasible to prevent atmospheric contamination, and⁴ (4) when effective engineering controls are not feasible to prevent atmospheric contamination, or while being instituted, appropriate respirators were not used.

Element 1: Does the citation concern a relevant source of atmospheric contamination?

Section 5144, subdivision (a), applies to those occupational diseases "caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors....",

⁴ When a safety standard includes two or more distinct requirements, a violation of the safety standard occurs if an employer violates any one of the requirements. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).) Therefore, a violation may be found to exist if the Division demonstrates elements 1 and 2, and either element 3 or element 4.

therefore, a necessary preliminary inquiry is whether the cocci spores actually constitute “harmful dust” that can contaminate the air. Employer initially makes several definitional arguments. Employer argues that cocci spores are neither a harmful dust, nor are they a contaminant. We address each argument in turn.

First, Employer argues the cocci spores do not constitute dust. Dust is defined as “Particles of solid matter, other than fumes, in such a state of comminution they may be inhaled.” (§ 5140.) Employer’s closing brief argues cocci spores do not fit the definition of dust, predominantly focusing on the word “comminution.”

Here, when deciding whether cocci spores constitute dust, Employer seeks to analyze the cocci spores as a distinct element, separate from all the other particles and elements that generally formulate soil or dust. However, as a practical matter, there does not appear to be any meaningful way to differentiate a spore from the other components that generally constitute soil or dust—rather, the evidence demonstrates the spores are merely part of an amalgamation that forms dust, and are only 3 to 5 microns in size. As such, this question appears to be largely academic, rather than practical. However, assuming, arguendo it is appropriate to consider the spore as a distinct constituent element, separate from the surrounding elements that form dust, we find it constitutes dust.

Initially, it is not disputed the spores satisfy most of the requirements to constitute “dust.” The spores are particles of solid matter that can become airborne and be inhaled. The dispute is whether the spores are in a state of comminution. In resolving this issue, the Board keeps the purpose behind the Occupational Safety and Health Act of 1973 in mind and interprets regulations liberally to promote worker safety. (Lab. Code, § 6300; *Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303, 313; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107.)

The Board concludes the spores are in state of comminution for two reasons. First, the spores fall within the definition of comminution. The word comminute is variously defined to mean, “to reduce to minute particles: PULVERIZE”⁵ and “To reduce to powder; pulverize.”⁶ The definition of comminute indicates that the particles must be small in size, i.e. a “minute particle” or akin to “powder.” Here, at only three to five microns, the spores are indeed minute and akin to a powder. Second, even assuming they do not meet the definition of comminution, this is not dispositive. The definition of dust in section 5140 refers to particles “in such a state of comminution that they may be inhaled.” Cocci spores, as solid matter, are in a similar state or condition to minute particles or powders that can become airborne and be inhaled. As such, the spores meet the definition of dust.

Next, and as we shall explain further with regard to the subsequent elements, the record is clear that cocci spores can be harmful. The testimony demonstrates inhalation of the spores can cause illness, pneumonia, permanent loss of function in the lungs, and death. As such, cocci spores qualify as a harmful dust.

⁵ Merriam-Webster Dictionary (Online) <www.merriam-webster.com/dictionary/comminute> [accessed November 23, 2020].

⁶ American Heritage Dictionary (Online) <<https://ahdictionary.com/word/search.html?q=comminute>> [accessed November 23, 2020].

Employer also argues that cocci spores are not a contaminant. To support its argument, Employer points to the definition of “contaminant” found in section 1504 which defines it as “a harmful, irritating or nuisance material that is foreign to the environment.” (§ 1504 [Emphasis added].) Employer argues cocci spores are not foreign to the environment. However, Employer’s argument makes a fundamental error. Section 1504 contains definitions for the Construction Safety Orders. The instant citation concerns a violation of the General Industry Safety Orders. As such, Employer is citing inapposite definitions.⁷

Since there is no special definition for the word contaminant in the General Industry Safety Orders, we apply a common or ordinary definition for the word “contaminate,” which may be derived from dictionaries. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal. App. 4th 75, 82-83 [other citations omitted].)The word contaminate is defined to mean, relevant here, “**2**: to make unfit for use by the introduction of unwholesome or undesirable elements.”⁸ We conclude that cocci spores can be a contaminant. As cocci spores make the air unfit or undesirable for breathing, they fit the definition of a contaminant.

Therefore, we conclude that cocci spores are both harmful dust and constitute a relevant source of atmospheric contamination for purposes of this safety order.

Element 2: Were employees exposed to the harmful dusts?

We next address whether the employees were exposed to harmful dusts. In addressing whether there is exposure to harmful dust, we are faced with the unique question of what exposure standard to apply. The Board may apply its usual exposure analysis, i.e. actual or reasonably predictable access. (*Dynamic Construction Services, Inc.*, supra, Cal/OSHA App. 14-1471 [other citations omitted].) However, there is another option. Article 107 repeatedly uses the term “harmful exposure.” (§ 5140, 5141.) And although section 5144, subdivision (a), does not itself use the term “harmful exposure,” due to the surrounding regulatory context, the Board has historically held “harmful exposure” is the actual required inquiry. (*Nielsen Freight Lines*, Cal/OSHA App. 79-647, Decision After Reconsideration (Aug. 17, 1984); *Plessy Precision Metals*, OSHAB 74-891, Decision After Reconsideration (May 17, 1976).) We observe arguments may exist for departing from this latter line of authority. However, at this point, we need not resolve this question as it is not dispositive. As we shall explain below, exposure exists under either of the aforementioned exposure standards.

First, exposure may be established under the Board’s typical exposure analysis. Under the Board’s typical analysis, exposure may be established in either of two different ways. (*Dynamic Construction Services, Inc.*, supra, Cal/OSHA App. 14-1471 [other citations omitted].) The Division may establish exposure by showing an employee was actually exposed to the zone of danger created by the violative condition, i.e. that the employees have been or are in the zone of danger. (*Ibid.*) Alternatively, the Division may establish exposure by “showing the area of the hazard was ‘accessible’ to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of

⁷ Further, even if we were to apply employer’s definition, we would still find the cocci spores to be a contaminant because they are foreign to the breathing or respiratory environment.

⁸ Merriam-Webster Dictionary (Online) <www.merriam-webster.com/dictionary/contaminate> [accessed November 23, 2020].

danger.” (*Ibid.*) “The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent.” (*Ibid.*)

The alleged hazard in this instance is employee exposure to inhalation of cocci fungal spores present in the atmosphere due to soil disturbing activities or weather related vectors. Testimony from Dr. Paul Papanek, M.D. (Papanek) and Mary Kochie, R.N. (Kochie), as well as several documents entered into evidence, demonstrate the disease known as Valley Fever, can occur when a person inhales the spores of the cocci fungus. The fungus lives in the soil. The spores of the fungus can become airborne, and subject to inhalation, when soil is disturbed or through weather related vectors such as wind. The spores, at only approximately 3 to 5 microns, are small enough to be inhaled.

Applying the latter of the two exposure standards, the evidence demonstrates that this hazard was accessible to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*Dynamic Construction Services, Inc., supra*, Cal/OSHA App. 14-1471.)

Employer’s worksite was predominantly located in Monterey County. The record, including, without limitation, the testimonies of Papanek, Clark, Evans, and documentary evidence, demonstrate cocci fungus exists and is endemic within Monterey County, where Employer’s worksite was located. Monterey County has one of the highest statewide incidence rates for Valley Fever. (Exhibit E.)

Further, the evidence demonstrates Papich was aware and recognized that cocci fungal spores were a hazard in the area. First, Evans admitted Papich knew that cocci fungal spores existed in the area. He had received information from an environmental impact report that brought attention to the existence of cocci fungal spores in the area. He said, “It was known to be present...” Second, Papich’s recognition of the hazard of cocci fungal spores also stemmed from its contractual responsibilities. Papich’s contractual responsibilities included compliance with an overlay Valley Fever Management Plan. (Exhibit 17.⁹) This document noted that the cocci fungus had been reported in Monterey County, and included charts showing the areas with the highest rates of cocci. (*Id.* at Fig. 1.4.) Third, Papich’s recognition of the hazard of Valley Fever is also demonstrated by, without limitation, job hazard analysis forms. Evans said Papich had been required to prepare job hazard analyses specific to the hazard of Valley Fever, and one such form was introduced into the record. (See Exhibit 21.) Finally, Evans also offered testimony indicating that other employers at the worksite had experienced Valley Fever cases. He said, “We didn’t have any cases and all other cited contractors did.” (Emphasis added.) Evans said, “There are many contractors there. Many of them had cases of valley fever.”¹⁰ (Transcript [11/29/18], pp. 155, 169.)

The record also demonstrates that it is reasonably predictable by operational necessity or otherwise that Papich’s employees have been, are, or will be in the zone of danger. As already

⁹ The testimony in the transcript refers to site owners as First Solar, and refers to the Valley Fever Management Plan as belonging to First Solar. However, multiple documents refer to a company called California Flats Solar LLC.

¹⁰ While not necessarily dispositive to our conclusions, Exhibit 20, although hearsay, also presents information that be relied upon to supplement and explain other evidence demonstrating that exposure to valley fever existed at the worksite. (§ 376.2.) However, the Division’s arguments to have it admitted under Evidence Code sections 801 and 1341 are denied.

stated, the spores of the fungus can become airborne when soil is disturbed. Here, Papich disturbed the soil and created dust. Papich's primary task at the site involved earthwork. Evans said Papich performed various tasks, including paving roads, grading, excavating, trenching, earth filtering, earth compacting, and creating paddocks. Papich used a variety of different equipment at the site including: Powerscreens, excavators, bobcats, Ozzie's padder, motor graders, loaders, and skid steers. (E.g., Exhibits 5, 6 and 14.) Employees also used shovels to move dirt, worked as spotters, and entered into excavations. Evans described the work as: "Very generally, the movement of dirt; disturbing ground; conditioning the ground for purposes such as the driving of metal poles to hold up solar arrays; conditioning roadways; opening up open areas to put equipment on. If it involved moving dirt, breaking ground, that's what we were doing." (Transcript [11/29/18], p. 134.) At various points, Evans admitted Papich's earthwork and other tasks created dust and acknowledged it was impossible to eliminate all dust at the site. Evans said dust mitigation is always an issue during earth disturbing work.

Other witnesses also discussed employee exposure to dust at the worksite based on the type of work being conducted and weather related vectors. Clark, Papanek, and Kochie offered testimony supporting a finding that employees were exposed to dust. Luis Sandoval (Sandoval), laborer, and David Santa Cruz (Santa Cruz), also discussed the presence of dust and employees dust mask usage. (§ 376.2 [admissible to supplement and explain]). There was also evidence indicating construction of solar farms presents a unique and enhanced risk for exposure to cocci spores and transmission of valley fever.

Here, the aforementioned facts sufficiently demonstrate exposure under the Board's reasonably predictable access exposure analysis. (*Dynamic Construction Services, Inc., supra*, Cal/OSHA App. 14-1471.)

Next, the evidence also demonstrates the existence of "harmful exposure." "Harmful exposure" is defined as, "[a]n exposure to dusts, fumes, mists, vapors, or gases: ... (b) 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.) For the litany of reasons identified above, the Division established exposure to the relevant harmful dusts (cocci spores). Further, the Division established that this dust, through inhalation, will "result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function." (§ 5140.) Again, the Division's citations concern the cocci spores. The evidence, including the testimony of Papanek and Kochie, demonstrate that the cocci fungus lives in the soil, has the ability to send infectious particles (spores) into the air. The spores may become airborne when soil is disturbed or through weather related vectors such as wind. The inhalation of cocci spores can cause a disease known as Valley Fever, which can result in illness, impairment and loss of lung function, disseminated disease, and even death.

Element 3: Did Employer fail to use accepted engineering controls measures as far as feasible to prevent atmospheric contamination?

We now consider the third element, which is whether Employer used accepted engineering controls as far as feasible to prevent atmospheric contamination. Here, the record demonstrates that Employer utilized engineering controls to address employee exposure to dust and cocci spores. Employer principally relied on water suppression as an engineering control to suppress dust. Evans testified Employer used water trucks and water buffaloes, among other methods, to spread copious

amounts of water on the soil to suppress dust during soil disturbing activities. Evans said “any place that is being excavated will be watered first. Open areas are constantly watered. Once excavation takes place, generally speaking, there is more water applied. That way the earth doesn't dry out.”

Employer also utilized other engineering controls. For example, Employer used washing stations, utilized some vehicles with enclosed cabins, and operated equipment at lower speeds. In addition, the record discussed work practice controls. Employer had job hazard analyses indicating work should be stopped if dust was uncontrollable. (Exhibit 10.)

However, the evidence demonstrates Employer's engineering controls were not implemented as far as feasible. While Employer used many vehicles with enclosed cabins, some of Employer's vehicles, including some of its earth moving equipment, were open-air, which the evidence indicates creates employee exposure to dust. For example, Evans discussed the use of open-air buggies, which were constantly in motion and created dust on the roads. He also discussed skid steers with open cabs. Papanek noted that there is literature demonstrating that exposure to dusty conditions in an open cab is a risk factor compared to exposure to dusty conditions in a closed cab. As such, given the risk of valley fever in this particular area, while we do observe that Employer engaged in many notable efforts, we conclude Employer failed to engage in all feasible engineering controls.

However, even if we were to assume, *arguendo*, that Employer did utilize appropriate engineering controls that addressed the hazard as far as feasible, this does end the inquiry, as there are yet other regulatory requirements that must be considered. As previously mentioned, when a safety standard includes two or more distinct requirements, a violation of the safety standard occurs if an employer violates any one of the requirements. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

Element 4: If Effective Engineering Controls Are Not Feasible, Did Employer Require Respirators?

The safety order additionally requires that when effective engineering controls are not feasible to prevent atmospheric contamination, or while they are being instituted, appropriate respirators shall be used pursuant to this section. Therefore, we must decide whether the engineering controls were effective to prevent atmospheric contamination and, if not, whether Employer required respirators. The term “effective” is defined to mean, “1a: producing a decided, decisive, or desired effect.”¹¹ We consider effectiveness in connection with the objectives of the safety order. The primary objective of this safety order is to prevent employee exposure to relevant atmospheric contamination.

Here, the record demonstrates that the engineering controls utilized by Employer were not always effective in every instance, or dynamic condition, to sufficiently control or prevent employee exposure to harmful dust.

¹¹ Merriam-Webster Dictionary (Online) <www.merriam-webster.com/dictionary/effective> [accessed January 29, 2021].

First, Evans admitted, at several points in his testimony, that Employer's earthwork, including its use of heavy equipment near spotters and employee shoveling, can create airborne dust and acknowledged it was impossible to eliminate all dust at the site. Discussing shoveling, Evans said, "There is dirt and dust to a degree." Clark also discussed the risks attendant to shoveling.

Second, there was testimony regarding windy conditions in the Central Valley that raised dust. For example, credible testimony of Clark and Kochie (and Evans to a lesser degree) indicated that Employer's watering practices would not be entirely effective to control dust in all circumstances, such as on windy days, during certain weather events, or when using certain equipment.

Third, Employer's own conduct, and the statements of its own employees, support a finding that employer's engineering controls would not be effective in all circumstances, requiring occasional resort to respirators. That Employer provided and required employees carry such masks at all times supports a strong inference that Employer believed that its engineering controls would not always be effective, and circumstances would exist necessitating employee usage of the mask. Next, one of the job hazard analysis forms introduced into evidence, discussing the hazard of Valley Fever and fugitive dust, indicated Employer believed usage of masks would be required in some circumstances. It said employees should "use mask whenever necessary to protect yourself from dust."¹² (Exhibit 21.) Further, Scott Bell (Bell), Papich's Project Engineer (Project Manager), indicated employees would use a mask if a dust event were to occur.¹³ Although the term "dust event" was never defined, evidence was introduced regarding potential adverse weather conditions such as high wind, which would support required use of a mask. (See, e.g., Exhibit 2 and 17.) Additionally supporting the finding that effective engineering controls were not always feasible, and as previously mentioned, employee interviews indicated employees were placed in situations where they deemed mask usage necessary. Sandoval indicated that dust mask usage was one of the measures employees used to address Valley Fever and dust exposure. (§ 376.2 [admissible to supplement and explain]). Sandoval noted he used a dust mask when needed and went through three masks a week. Johnathan Santa Cruz, a foreman, also indicated he handed out two to three dust masks per week. (*Ibid.*)

The evidence also demonstrated there were gaps in time between the time that water would dry or be deemed insufficient, and before further water could be applied. Evans noted that there were occasions where conditions became less than ideal or inadequate, which resorted to him calling for further water.¹⁴ This is relevant because the safety order also calls for respirators during the interim periods when engineering controls are being instituted.

The aforementioned evidence, without limitation, demonstrated that effective engineering controls would not always be feasible to prevent atmospheric contamination in every instance,

¹² This JHA (Exhibit 21) also demonstrates that the masks were not just provided to address dust, but to address the risk of Valley Fever.

¹³ Clark interview notes, introduced as Exhibit 4, discussed his interview with Bell, and may be relied upon pursuant to Evidence Code sections 1222, 1271 and/or 1280, and alternatively under section 376.2.

¹⁴ Although Evans, in general indicated that he conducted inspections and that Employer addressed observed watering insufficiencies in a timely manner, his testimony on this point appears somewhat speculative. It is noted that there were time periods where he was only there once every two weeks.

particularly during, for example, certain weather conditions, dust events, and when using certain equipment, requiring use of respirators. In short, while respirators may not have been needed at all times (or even most occasions), the record sufficiently demonstrates that some occasions existed where Employer's safety practices, per the safety order, should have been supplemented by required use of respirators.

The record also supports a finding that Papich's employees did not use, and were not required to use, respirators (or N-95 dust masks) during the specific times when effective engineering control were not feasible. Section 5144, subdivision (a) states respirators "shall" be used. Employer's policies were non-compliant, they did not require use of masks during any reasonably specific occasion, much less when effective engineering controls were not feasible. Employer policies while vaguely indicating that masks should be used on some occasions (as discussed further below), left virtually unlimited discretion regarding mask usage to employees, rather than specifying the occasions where they must be worn. Consequently, a violation is found.

In conclusion, the Board finds the record preponderates to a finding that the Division established a violation of section 5144, subdivision (a)(1) because the breathing air was contaminated with harmful dusts; employees were exposed to harmful dusts; Employer's engineering control measures did not control employee exposure to Valley Fever as far as feasible; and appropriate respirators were not used when effective engineering controls were not feasible to prevent atmospheric contamination.

2. Was a violation of section 1509, subdivision (a), established by a preponderance of the evidence by the Division?

Citation 2, Item 1, asserts a Serious violation of section 1509, subdivision (a). That section states,

(a) 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.

The citation addresses the requirements of section 3203, subdivisions (a)(4) and (a)(6), which state:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

[...]

(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 the employer is make 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 and 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 hazardous condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

In Citation 2, the Division alleged:

Instance 1

Prior to and during the course of the investigation, including, but not limited to, May 19, 2017, the employer did not adequately identify and evaluate through periodic inspections the known hazards of employees disturbing soil, employees conducting dust generating activities and dust generated by wind, contaminated with coccidioides fungal spores that could result in employee contracting Valley Fever as a result of workplace activities. (Ref: GISO 3203(a)(4).)

Instance 2

Prior to and during the course of the investigation, including, but not limited to, May 19, 2017, the employer did not effectively correct unsafe or unhealthy conditions, work practices or procedures involving employees disturbing soil, employees conducting dust generating activities and dust generated by wind, contaminated with coccidioides fungal spores that could result in employees contracting Valley Fever as a result of workplace activities. (Ref: GISO 3203(a)(6))

Exposure to a hazard:

Preliminarily, we determine whether the Division established employees were exposed to a hazard. Exposure to a hazard is an element of the Division's burden of proof. (*Dynamic Construction Services, Inc.*, supra, Cal/OSHA App. 14-1471 [other citations omitted].) For the reasons discussed at length in the preceding section, the record amply demonstrates exposure under the Board's reasonably predictable access standard. Again, we conclude it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be exposed to a zone of danger of cocci spores.

Elements of the cited safety order:

Citation 2 alleges two different instances of IIPP violations. First, Instance 1, alleges Employer failed to identify and evaluate workplace hazards related to conducting soil disturbing activities where the soil may contain the cocci fungal spores through periodic inspections. (§ 3203, subd. (a)(4).) It next alleges, within Instance 2, Employer did not effectively correct unsafe or unhealthy conditions, work practices or procedures involving employees disturbing soil contaminated with cocci fungal spores. (§ 3203, subd. (a)(6).) The Division need only demonstrate one of the instances charged by the citation is violative of the safety order. (*National Distribution, supra*, Cal/OSHA App. 12-0391.)

Much, if not most, of the evidence at hearing focused on Instance 2, an alleged violation of section 3203, subdivision (a)(6), for failure to correct a hazard; therefore, we first address that instance.

Within Instance 2, the Division asserts Employer failed to implement an IIPP that included appropriate methods and procedures for correcting unhealthy conditions, work practices, and work procedures pertaining to employee exposure to cocci fungal spores. Section 3203, subdivision (a)(6), requires employers have written procedures for correcting unsafe or unhealthy conditions and it requires the employer to actually implement those procedures by taking appropriate action to correct hazards. (*National Distribution, supra*, Cal/OSHA App. 12-0391 [other citations omitted].) Implementation of an IIPP is a question of fact. (*Ibid.*) Proof of implementation requires evidence of actual responses to known or reported hazards. (*Ibid.*) Further, the corrective action taken by the employer must be sufficient in magnitude and scope to address the particular hazard. (*Ibid.*)

Monterey County, as already noted, has one of the highest statewide incidence rates for Valley Fever. (See, e.g., Exhibit E.) Papanek said the county has a fair amount of cocci fungus, noting the Central Valley is very high. He said the soil conditions are right for cocci in Monterey County. As discussed above, the record also demonstrates Employer was aware of the hazard of cocci fungal spores at the worksite. Employer, therefore, had a duty to take appropriate action to correct the hazard. (*National Distribution, supra*, Cal/OSHA App. 12-0391.)

Employer did undertake efforts to address and correct the relevant hazard. As discussed Employer's corrective efforts predominantly focused on dust suppression through application of water. Evans said water trucks would be constantly moving to wet down roads and other areas.

However, the evidence demonstrates additional corrective actions should have been taken. Most notably, and as discussed in some detail in the preceding section, the evidence indicates Employer should have required use of respirators during occasions where effective engineering controls were not feasible to prevent atmospheric contamination.

Further, and separately supporting a violation of this subsection, Employer's practice of providing and requiring employees carry safety equipment, but then largely delegating specific decision making as to its use to the employees, constitutes a failure to correct an unsafe or unhealthy condition. In sum, if the circumstances warrant requiring employees to have and carry

N-95 masks at all times, they also require Employer to provide specific instructions as to when employees should use them, particularly where the evidence indicates the existence of circumstances at this site that would necessitate use of the masks for adequate employee protection.¹⁵ Therefore, the Board finds a violation of section 3203, subdivision (a)(6).

Next, returning to Instance 1, Employer's lack of meaningful analysis as to the specific circumstances when masks should be required to be used, and its significant delegation of decision-making to employees regarding mask usage, constitutes a failure to effectively implement procedures to identify and evaluate work place hazards, constituting a violation of section 3203, subdivision (a)(4). Evans specifically acknowledged that he never reached the conclusion that respirators were not necessary to augment dust suppression; nonetheless, he acknowledges that Employer never required use of them under any reasonably specific circumstances. (Transcript [11/29/18], pp. 177-178.) This, among other facts discussed herein, demonstrates a lack of meaningful or effective evaluation. Thus, the citation is affirmed.

3. Was a violation of section 5144, subdivision (e)(1) established by a preponderance of the evidence by the Division?

Citation 1, Item 1, asserts a General violation of section 5144, subdivision (e)(1), which states,

(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.

The Division's alleged violation states,

Prior to and during the course of the investigation, including, but not limited to, May 19, 2017, the employer did not determine through medical evaluation the employee's ability to wear a respirator before allowing employees to wear a respirator to protect against exposure

¹⁵ That Employer provided the masks as part of the general contractors plan does not absolve it of responsibility for advising employees as to when to use them, nor does it allow Employer to place the onus of decision making as to mask usage on employees. An employer's duty to establish, implement, and maintain an effective IIPP is non-delegable. (*National Distribution, supra*, Cal/OSHA App. 12-0391; *Staffchex, supra*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014).) The Legislature has squarely placed the duty to ensure a safe and healthy workplace on the employer, not the employee. (Lab. Code, §§ 6400, 6401, 6402, 6403, 6404.)

to harmful airborne dust contaminated with coccidioides fungal (Valley Fever) spores.

To establish a violation, in addition to the issue of exposure, the Division must demonstrate, relevant here, two elements: (1) an employee was fit tested or Employer required the use of a respirator in the workplace, and (2) the employer failed to provide a medical evaluation to determine the employee's ability to use a respirator.

Here, the Division, as already discussed, established exposure under all relevant standards. Next, it is undisputed that Employer failed to provide a medical evaluation to gauge the employee's ability to use respirators. The primary dispute centers on the second element.

The second element requires that the Division demonstrate an employee was either fit tested, or Employer required usage of a respirator in the workplace. There are no allegations as to fit testing. Rather, Employer argues that it did not require use of masks in the workplace, leaving discretion as to whether to use a mask to employees. The ALJ accepted this assertion. She credited the testimony of Evans to that effect. However, we reach a different conclusion.

Employer never provided clear direction to employees on when masks should be utilized. For example, and as discussed above, Employer never specifically required mask usage when its engineering controls were not feasible to prevent atmospheric contamination. However, that Employer never provided employees clear direction on when masks were required to be used, does not mean they were not required. We infer that mask usage was required by Employer, albeit vaguely. An inference is a deduction about the existence of a fact that may be logically and reasonably be drawn from some other fact or group of facts found to exist. (Evid. Code, § 600, *Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal. App. 4th 21, 50.) First, that Employer provided and required employees carry N-95 masks at all times supports a finding that masks were required. Second, the inference that employee mask usage was actually required is supported by one of the job hazard analysis forms introduced into evidence, discussing the hazard of Valley Fever and fugitive dust, which said employees should "use mask whenever necessary to protect yourself from dust."¹⁶ (Exhibit 21.) Third, the inference that mask usage was actually required and expected in some instances, notwithstanding Employer's statements to the contrary, is supported by Clark's interviews, including his interview with Scott Bell (Bell), Papich's Project Engineer. Bell admitted circumstances could exist warranting mask usage. He said employees would use a mask if a dust event occurred. Further, Sandoval and Santa Cruz's testimony indicated that employees believed respirators were needed in some instances. (§ 376.2 [hearsay may be used to supplement and explain].) The aforementioned facts compel the conclusion that masks were required, but the problem has been, and remains, that Employer never provided clear direction on when they were required to be used. As such, masks were simply not required in a manner compliant with any of the safety orders heretofore addressed.

In her Decision, the ALJ applied an exception enumerated in section 5144, subdivision (c), when analyzing section 5144, subdivision (e)(1) and found Employer met its requirements, i.e., use of masks was voluntary and dust masks were filtering facepieces. She then vacated the citation.

¹⁶ This JHA (Exhibit 21) also demonstrates that the masks were not just provided to address dust, but to address the risk of Valley Fever. Indeed, it is difficult to reconcile Exhibit 7 with this document, calling Exhibit 7 into question.

However, even assuming, arguendo, we were to agree that the exception could be advanced here (a questionable premise), Employer failed to meet the requirements of the exception, as the exception applies “where respirator use is not required.” (§ 5144, subd. (c).) Here, for the reasons discussed above, we conclude respirator use was required.

Again, all elements having been established, and no exception excusing Employer’s conduct, the violation asserted in Citation 1, Item 1, is affirmed.

4. Was a violation of section 5144, subdivision (k)(5), established by a preponderance of the evidence by the Division?

Citation 1, Item 2, asserts a General violation of section 5144, subdivision (k)(5), which states:

(k) Training and information. This subsection requires the employer to provide effective training to employees who are required to use respirators. The training must be comprehensive, understandable, and recur annually, and more often if necessary. This subsection also requires the employer to provide the basic information on respirators in Appendix D to employees who wear respirators when not required by this section to do so.

[...]

(5) Retraining shall be administered annually, and when the following situations occur:

(A) Changes in the workplace or the type of respirator render previous training obsolete;

(B) Inadequacies in the employee’s knowledge or use of the respirator indicate that the employee has not retained the requisite understanding or skill; or

(C) Any other situation arises which retraining appears necessary to ensure safe respirator use.

The citation alleges that:

Prior to and during the course of the investigation, including, but not limited to, May 19, 2017, the employer did not ensure retraining of employees regarding proper respirator selection to effectively correct the unsafe work practice of employees utilizing bandanas or face masks in lieu of respiratory protection resulting in exposure of employees to dust contaminated with coccidioides fungal spores that could result in employees contracting Valley Fever.

There are many requirements set forth in section 5144, subdivision (k), and therefore many ways to prove a violation. However, the instant citation focuses on the retraining requirement set forth in subsection (k)(5). To prove a violation of the cited subdivision, in addition to the issue of exposure, the Division must demonstrate the following relevant elements: (1) that respirator usage was required, and (2) retraining is required because inadequacies were demonstrated in employee’s

knowledge regarding respirator usage.

Here, for reasons already stated, the Division established exposure under all relevant standards and also demonstrates that respirators were required in some instances, albeit vaguely. However, an issue remains concerning the second element, which is whether the Division established that retraining was required due to inadequacies in Employer's knowledge.

Clark issued this citation because his employee interviews revealed some employees were allegedly using bandanas to protect against dust, which he said required retraining. However, the sole statements regarding usage of bandanas were derived from Clark's employee interview notes, not personal observation from any witness that testified. These statements from the notes regarding bandana usage qualify as hearsay. They are statements made by someone other than the person testifying, which are offered for the truth of the matter asserted. (Evid. Code, § 1200.) As such, when deciding whether the Board can rely on the hearsay statements, it is necessary to determine (1) whether the statements supplement or explain other evidence or (2) whether the hearsay statements would be otherwise admissible over a hearsay objection in civil proceeding. (§ 376.2.)

Here, while the referenced employee interviews may serve to supplement and explain many other issues, such as whether masks were required by employer, the utility of these interviews with regard to bandana usage is limited as to this specific citation. There is no other evidence of actual bandana usage to address dust outside of these notes. Clark did not actually observe any employee using a bandana, and the notes do not meaningfully supplement and explain other relevant testimony regarding the specific issue of bandana usage. Nor do we ascertain any exception that would make these statements otherwise admissible in civil proceedings. Therefore, these statements cannot be used for a finding of fact and the Division has not established all elements of a violation. Citation 1, Item 2, is vacated.

5. Did the Division establish a rebuttable presumption that Citations 2 and 3 were properly classified as Serious?

The Division classified Citations 2 and 3 as Serious. Labor Code section 6432 sets forth the evaluative framework for determining whether a citation has been properly classified as Serious. Labor Code section 6432, subdivision (a), provides, "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." As used therein, the term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13- 0231, Decision After Reconsideration (April 24, 2015).) Serious physical harm is defined in Labor Code section 6432, subdivision (e), which states,

"Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

- (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.

To meet its initial burden, the Division offered the testimony of Papanek, who was deemed an expert witness. Here, the actual hazard was exposure to cocci fungal spores and Valley Fever. Papanek said in a small percentage of people exposed to the spores, it can result in an infection that spreads through the lungs, causing damage and destruction to lung tissue. It can also spread into other body tissues including the brain, the spinal cord, bones, and skin. His testimony demonstrated there is a realistic possibility that a person can suffer serious physical harm or death as a result of exposure to the cocci fungal spores. It can cause pneumonia, permanent loss of function in the lungs, and even death. Papanek's testimony sufficiently demonstrated a realistic possibility of serious physical harm for both Citations 2 and 3.

6. Did Employer rebut the presumption that Citations 2 and 3 were properly classified as Serious?

Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:

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

Employer failed to rebut the presumption that the violations set forth in Citations 2 and 3 were Serious as it cannot be said that 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. As already discussed at length, Employer had a policy of providing its employees with, and requiring that they carry, N-95 masks. There was also evidence demonstrating that Employer believed mask usage would be needed and required in some vague instances. (E.g. Exhibit 21.) However, there was a significant flaw with regard to Employer's stated mask policies. Employer's policy left far too much discretion as to whether and when to use the masks to employees. (Exhibit 7.) Employer never gave its employees any specific direction regarding when mask usage was needed or required. Employer's practice of providing safety equipment, but then largely delegating decision making as to its use to an employee constitutes an impermissible delegation of a safety decision, and demonstrates that Employer did not take all steps a reasonable and responsible employer would take. Again, it is not enough to simply provide personal protective equipment. Employer should have provided specific instruction on when, and under what circumstances, employees should use them. Instruction that was absent here. The Serious classifications are therefore affirmed.¹⁷

7. Was the Repeat classification for Citation 2 correct?

Citation 2, Item 1, was issued on November 15, 2017 as a Repeat violation. At the time the citation was issued, section 334, subdivision (d), contained the following definition for a Repeat violation:

Repeat Violation - is a violation where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon a later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest of: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law. For violations other than those classified as repeat regulatory, the subsequent violation must involve essentially similar conditions or hazards.

Based on the foregoing definition, to establish the Repeat classification of a violation, the Division must establish the following elements:

- (1) a violation of substantially similar regulatory requirement;
- (2) within the state;
- (3) within a period of five years immediately following the latest of: the date of the final order affirming the existence of the previous violation cited in the underlying citation; or the date on which the underlying citation became final by operation of law; and
- (4) employer abated or indicated abatement of that earlier violation.

Here, the record demonstrates that Citation 2 was properly characterized as Repeat, as all elements are satisfied. Exhibit 11 demonstrates that on September 4, 2013, the Division issued Employer a citation asserting a substantially similar violation and similar conditions or hazards as

¹⁷ To the extent Employer argues that an untimely issuance of the 1BY results in an absence of jurisdiction, we concur with the ALJ that no jurisdictional defect is established.

set forth in Citation 2. This earlier citation asserted a violation of section 1509, subdivision (a), referencing (among several other instances) a violation of section 3203, subdivision (a)(6). The citation contained the following alleged violation description:

The employer did not effectively correct unsafe or unhealthy conditions, work practices or procedures involving employees disturbing soil contaminated with coccidioides fungal spores during their work activities which could result in employees contracting Valley Fever from breathing coccidioides fungal spores present in the soil which could become airborne as a result of the employees work activities. (Ref. T8CCR Section 3203(a)(6).)

Papich abated the citation. (Exhibit 11.) The citation was affirmed by an ALJ of the Board via an Order issued on April 5, 2016. (*Ibid.*) All elements having been established, the Repeat classification is affirmed.

8. Were the proposed penalties reasonable?

Employer's appeal asserted the proposed penalties for Citations 2 and 3 were unreasonable. 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. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) However, the Division must provide proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004); *RII Plastering, Inc.*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346.)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*MI Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) In the immediate matter, the Division introduced its proposed penalty worksheet and Clark offered testimony pertaining to the applicable penalty criteria.

Citation 2:

Citation 2 was classified as Repeat Serious and had a proposed penalty of \$45,000. Employer's appeal contested the penalty amount.

Section 335, subdivision (a)(1)(B), provides that the severity of a Serious violation is high. Section 336, subdivision (c)(1), provides that the initial base penalty of a Serious violation is \$18,000. Therefore, \$18,000 is the correct base penalty for Citation 2.

Extent:

Citation 2 pertained to the hazard of becoming ill with Valley Fever. Section 336, subdivision (c)(1), provides that Extent for a Serious violation is rated under section 335, subdivision (a)(2), which provides:

i. When the safety order violated pertains to employee illness or disease, Extent shall be based upon the number of employees exposed:

LOW-- 1 to 5 employees.

MEDIUM-- 6 to 25 employees.

HIGH-- 26 or more employees.

Section 336, subdivision (c), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MEDIUM," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Clark testified that Extent was high because it involved employees working outdoors for Papich on equipment. However, when discussing the penalty amount as to this specific citation, Clark did not identify the specific number of exposed employees. Notwithstanding this deficiency, other testimony indicated that the crew size during the time of his inspection was between 6 and 25 employees. Therefore, a medium Extent classification is found resulting in no further adjustment to the penalty.

Likelihood:

Section 336, subdivision (c), provides that Likelihood for a Serious violation is rated under section 335, subdivision (a)(3), which states,

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

Section 336, subdivision (c), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MODERATE," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Here, Clark testified he rated Likelihood as moderate based on his assessment of the situation. However, Clark's testimony regarding Likelihood, as to this citation, bore little relationship to the criteria set forth in section 335, subdivision (a)(3). Therefore, Likelihood is reduced to low. The Board applies maximum credits when the Division fails to justify its proposed

penalty. (See, e.g., *Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries*, *supra*, Cal/OSHA App. 01-2346.) The gravity-based penalty for Citation 2 is calculated at \$13,500.

We next consider whether Employer is entitled to any further reduction to the penalty amount. As discussed above, Citation 2 was properly classified as Repeat; therefore, Employer is solely entitled to a further adjustment for Size, not Good Faith, History or abatement. (§ 336, subs. (d)(12), (e)(3)(B).)

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), require no adjustment to the gravity-based penalty if the business has over 100 employees. Clark stated that he learned Employer had over 100 employees. The record supports this determination, resulting in no adjustment.

Here, since Employer is not entitled to any further reduction (including no reduction based on Size), the adjusted penalty is \$13,500, which is then multiplied by two due to the Repeat classification, resulting in a penalty of \$27,000. (§ 336, subd. (g)(1).) This penalty is found reasonable and is affirmed.

Citation 3:

Citation 3 was classified as Serious and had a proposed penalty of \$22,500. Employer's appeal contested the penalty amount.

Citation 3 again pertained to the hazard of becoming ill with Valley Fever. Clark's testimony regarding Extent and Likelihood for these citations was similar, if not identical, to his testimony regarding Citation 2. Therefore, for the reasons discussed above, Extent is classified as Medium and Likelihood is classified to Low, resulting in the gravity-based penalty for Citation 3 of \$13,500.

Further Adjustment Factors.

The penalty adjustments for Good Faith, Size, and History are the same for both Serious and General violations. (§ 335, subs. (b), (c), and (d); § 336, subd. (d).) Clark testified that he did not apply any further adjustment factors for Citation 3. However, the record demonstrates adjustment factors had been applied for the General violations. The Board cannot discern any reason why Employer cannot receive similar adjustments for Citation 3 as the Division provided for Citation 1. The Division failed to point to any reason demonstrating that Good Faith or History should be calculated differently as between Citation 1 and Citation 3.

Size

As discussed above, Employer is not entitled to any reduction based on Size, since the record indicates it had over 100 employees.

History:

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide for penalty modifications based upon the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:

GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.

FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.

POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

Section 336, subdivision (d)(3), provides that for a rating of "GOOD," 10 percent of the gravity based penalty shall be subtracted; for a rating of "FAIR," 5 percent of the gravity-based penalty shall be subtracted; and for a rating of "POOR," no adjustment shall be made.

With regard to Citation 1, Clark testified that Employer received a good history adjustment because it did not have any Serious violations in the three-year time frame. Based on Clark's testimony regarding Citation 1, History for Citation 3 is also rated as good resulting in a 10 percent reduction.

Good Faith:

Section 335, subdivision (c), provides:

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.

Section 336, subdivision (d)(2), allows an adjustment of 30 percent for "GOOD" rating and 15 percent for a "FAIR" rating. An no adjustment for a "POOR" rating.

With regard to other citations, Clark testified that Employer received a fair rating because he concluded that Employer had an average safety program, and because Bell and Evans were

cooperative with the Division. On balance, the record supports the fair adjustment provided by Clark resulting in a further 15 percent reduction.

The penalty adjustments for Good Faith and History are applied, resulting in a combined 25 percent reduction and a resulting penalty of \$10,125. Per Clark, Employer was entitled to no abatement credit.

CONCLUSION


The Division established Employer violated section 5144, subdivision (e)(1). Citation 1, Item 1, and its penalty of \$700, is affirmed.


The Division established that Employer failed to implement its IIPP in violation of section 1503, subdivision (a). Citation 2, Item 1, is affirmed. The violation was properly classified as Repeat Serious and the modified penalty of \$27,000 is found reasonable.

The Division established that Employer violated section 5144, subdivision (a). Citation 3, Item 1, is affirmed. The violation was properly classified as Serious and the modified penalty of \$10,125 is found reasonable.

The Division failed to establish a violation for Citation 1, Item 2. Employer's appeal of that citation is granted and the citation vacated.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD


Ed Lowry, Chairman


Judith S. Freyman, Board Member


Marvin Kropke, Board Member

FILED ON: **03/26/2021**



SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Inspection Number: **1236440**

In the Matter of the Appeal of: **PAPICH CONSTRUCTION COMPANY, INC.**

Site address: **19855 EAST HIGHWAY 41, SHANDON, CALIFORNIA**

Citation Issuance Date: **11/15/2017**

Citation	Item	Section	Class. Type*	Citation/Item Resolution	Affirm or Vacate	Final Class. Type*	DOSH Proposed Penalty in Citation	FINAL PENALTY ASSESSED
1	1	5144 (e)(1)	G	DAR Issued. Citation Affirmed.	A	G	\$700.00	\$700.00
1	2	5144 (k)(5)	G	DAR Issued. Citation Vacated.	V		\$700.00	\$0.00
2	1	1509 (a)	RS	DAR Issued. Citation Affirmed.	A	RS	\$45,000.00	\$27,000.00
3	1	5144 (a)(1)	S	DAR Issued. Citation Affirmed.	A	S	\$22,500.00	\$10,125.00
Sub-Total							\$68,900.00	\$37,825.00
Total Amount Due**								\$37,825.00

*See Abbreviation Key

**You may owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call 415-703-4310 or email accountingcalosha@dir.ca.gov if you have any questions.

Inspection Number:

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: **PAPICH CONSTRUCTION COMPANY, INC.**

Site address: **19855 EAST HIGHWAY 41, SHANDON, CALIFORNIA**

Citation Issuance Date: **19855 EAST HIGHWAY 41, SHANDON, CALIFORNIA**

PENALTY PAYMENT INFORMATION

Please make your cashier's check, money order, or company check payable to: **Department of Industrial Relations**
 Write the **Inspection Number** on your payment.

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

Credit card payments can also be made on-line at www.dir.ca.gov/dosh/calosha_paymentoption.html

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

*Classification Type (Class.) Abbreviation Key:

Abbreviation	Classification Type	Abbreviation	Classification Type	Abbreviation	Classification Type
FTA	Failure to Abate	RR	Repeat Regulatory	WR	Willful Regulatory
G	General	RS	Repeat Serious	WRG	Willful Repeat General
IM	Information Memorandum	S	Serious	WRR	Willful Repeat Regulatory
NL	Notice in Lieu of Citation	SA	Special Action	WRS	Willful Repeat Serious
R	Regulatory	SO	Special Order	WS	Willful Serious
RG	Repeat General	WG	Willful General		