BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1269048**
U.C.I. CONSTRUCTION, INC. **3900 FRUITVALE AVENUE** **BAKERSFIELD, CA 93308** **Employer**	**DECISION**

Statement of the Case

U.C.I. Construction, Inc. (Employer) is a licensed general engineering contractor providing a wide variety of construction services, including repairing underground oil and gas pipelines. Beginning October 26, 2017, the Division of Occupational Safety and Health (the Division) through Compliance Officer John Rodenburg (Rodenburg), conducted an inspection at Employer's worksite identified as "South of Highway 99 & Interstate 5," in Bakersfield, California (the site) based on an injury report it received from Employer. On March 15, 2018, the Division issued Citation 1, Items 1, 2, and 3; and, Citation 2, Item 1, to Employer for alleged violations of the California Code of Regulations, title 8.[1]

Citation 1, Item 1, classified as Regulatory, alleges that Employer failed to timely report to the Division a serious injury suffered by an employee.

Citation 1, Item 2, classified as General, alleges Employer failed to implement its Injury and Illness Prevention Program (IIPP) to effectively identify, evaluate, and control workplace hazards relating to exposure to Valley Fever.

Citation 1, Item 3, classified as General, alleges Employer failed to implement its IIPP to effectively train employees on hazards relating to Valley Fever.

Citation 2, Item 1, classified as Serious Accident-Related, alleges that Employer failed to ensure employees used appropriate respirators to protect against exposure to Valley Fever.

Employer filed a timely appeal contesting the existence of the alleged violations and the reasonableness of the proposed civil penalties for Citation 1, Items 1, 2, and 3. For Citation 2, Item 1, Employer contested the existence of the alleged violation, the classification, and the reasonableness of the proposed civil penalty. For all appealed citations, Employer pleaded numerous affirmative defenses.[2]

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

[2] Except as otherwise noted in this Decision, Employer failed to present evidence in support of its pleaded affirmative defenses, and said defenses are therefore deemed waived. (See, e.g., *RNR Construction,, Inc*., Inspection No. 1092600, Denial of Petition for Reconsideration (May 26, 2017).

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California on November 12, 2020, via Zoom. William Cregar, Esq., Staff Attorney, represented the Division, and Elizabeth Estrada, Esq., Alexander & Associates, represented Employer.

The Division and Employer submitted post-hearing briefs on December 14, 2021. During the hearing, Employer introduced Exhibit H, its 284-page Safety Manual. The undersigned conditionally admitted Exhibit H, ordering Employer to identify the relevant pages of Exhibit H in its brief. Employer's post-hearing brief does not identify any pages in Exhibit H as relevant. Exhibit H therefore will not be admitted as evidence, and is excluded from the record.

The Division's post-hearing brief attached a declaration from Mary C. Kochie, Nurse Consultant III (Kochie), who testified on behalf of the Division during the hearing. In her declaration, Kochie sought to correct testimony that she provided during the hearing regarding N95 respirators. No objection was received from Employer prior to issuance of this Decision. Furthermore, no factual findings or legal conclusions in this Decision were drawn from Kochie's testimony regarding N95 respirators. In order to ensure a complete record, and because the undersigned finds no prejudice would result from its inclusion, the undersigned orders that the three-paragraph Kochie declaration attached to the Division's closing brief be admitted as testimony in this appeal.

The Division's post-hearing brief also attached a copy of Employer's Exhibit C (Notice of Intent to Classify Citation as Serious) and requested that the exhibit be admitted as evidence in this appeal. No objection was received from Employer prior to issuance of this Decision. Exhibit C was submitted by Employer as a potential exhibit, and although not utilized during the hearing, could have become relevant if Citation 2 were affirmed. In order to ensure a complete record, and because the undersigned finds no prejudice would result from its inclusion, the undersigned orders that Exhibit C be admitted into evidence in this appeal.

The matter was submitted for Decision on January 13, 2021.

Issues

1. Did Employer violate section 342, subdivision (a), by failing to timely report an illness?
2. Did Employer violate section 1509, subdivision (a), by failing to effectively identify, evaluate, and control hazards related to Valley Fever?
3. Did Employer violate section 1509 by failing to provide training regarding hazards related to Valley Fever?
4. Did Employer violate section 5144, subdivision (a)(1), by failing to ensure employees used appropriate respirators to protect against Valley Fever?

Findings of Fact[3]

1. Employer did not disturb any topsoil at either the first or the second location in Lebec.

[3] The Division and Employer entered numerous stipulations of fact into the record during the hearing. Relevant stipulations of fact are incorporated into the discussion of the citations herein.

2. Employer provided the crew with a water buffalo truck to assist with dust suppression. Employer also provided air-conditioned cabs on all work trucks, and provided N-95 masks for optional use.
3. Any dirt that had been removed from the holes and not yet transported for dumping was covered by a tarp. Throughout the project, there were no windy conditions.
4. Timothy Margis (Margis), an employee at the site, was not hospitalized for over 24 hours for other than observation.
5. Employer conducted daily Job Safety Analyses (JSAs) during the project. The JSAs identified airborne particles as a potential hazard that its employees could become exposed to during the work at the site. Employer evaluated the work that was being performed at the site and determined that its employees were not exposed to the hazard of Valley Fever.
6. Valley Fever is endemic to Kern County where the site is located.
7. The Division did not test for wind during either visit to the site.
8. The Division did not test for the presence of Valley Fever spores at the site during the investigation.

Analysis

1. Did Employer violate section 342, subdivision (a), by failing to timely report an illness?

Section 342, subdivision (a), found under Article 3 (Reporting Work-Connected Injuries), Subchapter 2 (Construction Safety Orders), of Chapter 3.2 (California Occupational Safety and Health Regulations) provided at the time of the inspection:

> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.
>
> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Section 330, subdivision (h), found under Article 1 (Definitions Under California Occupational Safety and Health Act of 1973), Subchapter 1 (Regulations of the Director of Industrial Relations), Chapter 3.2 (California Occupational Safety and Health (CAL/OSHA)) provided at the time of the inspection:

> (h) "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical

> observation or in which an employee suffers a loss of any member of the body or suffers any serious degree of permanent disfigurement, but does not include any injury or illness or death caused by the commission of a Penal Code violation, except the violation of Section 385 of the Penal Code, or an accident on a public street or highway.

In citing Employer, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on October 26, 2017, the employer failed to immediately report to the Division a serious illness of an employee resulting in hospitalization beyond 24 hours.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385 and 2386, Decision After Reconsideration (Oct. 7, 2016.) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

To establish a violation, the Division must demonstrate that Employer failed to report to the Division a serious injury or illness suffered by an employee at work or in connection with work within the required statutory period. The uncontroverted evidence at hearing demonstrates Employer did report the alleged serious illness to the Division on September 19, 2017. The issue in dispute is whether Margis suffered a serious illness triggering Employer's obligation to report.

Only serious illnesses are reportable. In order to meet the statutory definition of a serious illness, the Division must show there was an illness that required inpatient hospitalization for a period in excess of 24 hours for other than medical observation.

a) Serious Illness – 24 hours of hospitalization

When the seriousness of the injury is not initially known, the reporting period begins only after 24 hours of hospitalization. (*Rudolph and Sletten Inc.,* Cal/OSHA App. 99-1291, Order Setting Aside Denial of Petition for Reconsideration; Decision After Reconsideration (Dec. 20, 2002) overruling *Rudolph and Sletten, Inc.,* Cal/OSHA App. 99-1291, Denial of Petition for Reconsideration (Nov. 27, 2002).)

Here, the parties stipulate that Margis sought medical treatment on September 3, 2017, at which point he was hospitalized. Margis was discharged on September 12, 2017 with a diagnosis of Valley Fever. Although the Division had the opportunity, it did not present any evidence regarding what treatment, if any, Margis received while hospitalized. Where a party has the motive and opportunity, as the Division 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 §§412,

413; *Jace Varghese*, Cal/OSHA App. 1213886, Decision After Reconsideration (Jan. 27, 2021), citing *Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016), affirmed in *Nolte Sheet Metal, Inc. v. Occupational Safety and Health Appeals Board*, (2020) 44 Cal.App.5th 437.)

The Division failed to demonstrate that Margis's hospitalization exceeded 24 hours for other than observation. The Division did not establish by a preponderance of the evidence that Margis suffered a serious illness as defined by section 330, subdivision (h). Therefore the Division did not meet its burden of proof.

b) Knowledge of alleged serious illness

An employer's duty to inform the Division that a serious injury or illness occurred is not triggered solely by knowledge that the ill employee has been to a hospital. Rather, the safety order clearly specifies that the duty begins after the employer knows or with diligent inquiry would have known of the serious illness. (*Daily Breeze*, Cal/OSHA App. 99-3429, Decision After Reconsideration (Apr. 12, 2002), citing *Welltech Incorporated*, Cal/OSHA App. 90-784, Decision After Reconsideration (Aug. 22, 1991).)

In *Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003), the Appeals Board offered the following discussion regarding determining whether the employer had constructive knowledge of an employee's serious illness:

> We find that in addressing the constructive knowledge requirement in section 342, subdivision (a), the circumstances must be examined in order to determine whether Employer would have known in the exercise of reasonable diligence the nature of the injury as being serious. Facts which are relevant include, but are not limited to, the type and location of the injury or illness suffered by the employee, Employer's knowledge of the cause of the injury or illness, Employer's observations of the employee following the injury or illness, steps taken to obtain or provide medical treatment, Employer's efforts to determine the nature of the hospitalization (e.g. for observation, tests, treatment, duration, etc.) and the timeline and events following Employer learning of the injury or illness. Thus, the facts in a particular case must be examined to determine if an employer knew or with diligent inquiry would have known of the nature of the serious injury that requires the hospitalization described in section 330(h).

The parties stipulate that Margis informed Employer on September 13, 2017, that he had been hospitalized between September 3, 2017, and September 12, 2017. Division District

Manager Efren Gomez (Gomez) credibly testified that Employer reported Margis's alleged illness to the Division by phone on September 19, 2017 at 12:50 p.m.[4]

As mentioned previously, there is no evidence in the record to substantiate that Margis was hospitalized for more than observation. Without evidence that Margis received any treatment during his hospitalization, any finding that Employer knew or could have discovered through diligent inquiry that Margis had suffered a serious illness is insupportable. The Division had the opportunity to present direct witness testimony and documentary evidence to support that Employer had actual or constructive knowledge sufficient to trigger a duty to report. Given the absence of any evidence that Margis received treatment during his hospitalization, the record does not support a finding that Employer had actual or constructive notice of a serious, reportable illness.

c) Alleged serious illness occurring in a place of employment or in connection with employment

Section 342, subdivision (a), requires an employer to report any serious illness occurring in a place of employment regardless of whether it is work related. (*Honeybaked Hams*, Cal/OSHA App. 13-0941, Denial of Petition For Reconsideration (Jun. 25, 2014).) Section 342, subdivision (a), alternatively requires an employer to report any serious illness occurring in connection with any employment.

The record contains no evidence to suggest Margis suffered a serious illness while at work. In fact, Gomez testified that the Division "was not claiming" that Margis got sick at work. Gomez admitted during cross-examination that no soil or air samples were taken at the site to determine whether Valley Fever spores were present because there is no way to test for its presence, and consequently Gomez testified that he did not know if Valley Fever was present at the site. He also admitted that he was aware that Margis lived in Taft, which is located in the Central Valley, and where Valley Fever is endemic. Kochie[5] testified that she was not familiar with the site or the project and had not reviewed the inspection file, so she was unable to testify whether there were Valley Fever spores present at the site while work was being performed by Margis and his crewmembers.

As discussed previously, Margis sought treatment on August 23, 2017, for persistent cough and fever, and requested a Valley Fever test. The record is silent regarding when Margis started to experience the symptoms, whether a Valley Fever test was administered, and if it was, the reported result. Four days later, on August 27, 2017, Margis went to the hospital complaining

[4] Rodenburg, who conducted the inspection, was not present for and did not testify during the hearing.

[5] Kochie received her nursing degree from Mount St. Mary's College and a master's degree in nursing from California State University, Los Angeles. Prior to working for the Division, Kochie worked as an occupational nurse for several electronic companies and taught nursing.

of a rash, shortness of breath and fever, which resulted in him being sent home with a diagnosis of pneumonia. Margis was later hospitalized on September 3, 2017. Although Margis was ultimately diagnosed with Valley Fever, there is no evidence in the record to demonstrate that Margis contracted Valley Fever while working at the site.

For all of the foregoing reasons, the Division did not carry its burden of proving by a preponderance of the evidence that Employer failed to timely report a serious illness to the Division. Accordingly, the Division failed to establish a violation of section 342, subdivision (a), and Citation 1, Item 1, and its associated penalty shall be vacated.

2. **Did Employer violate section 1509, subdivision (a), by failing to effectively identify, evaluate, and control hazards related to Valley Fever?**

Section 1509, subdivision (a), found under Article 3 (General) of Subchapter 4 (Construction Safety Orders) 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.

Section 3203, subdivision (a), found under Introduction, Group 1 (General Physical Conditions) of Subchapter 7 (General Industry Safety Orders) provides, in relevant part:

> (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;
>
> Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
>
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

In Citation 1, Item 2, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on October 26, 2017, the employer did not ensure implementation of methods and/or procedures to 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 their workplace activities at customer locations.

The parties stipulated that Employer is a contractor that was performing construction activities at the site. Therefore, section 1509, subdivision (a), is applicable to Employer.

Merely having a written IIPP is insufficient to establish implementation. (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).) Although an employer may have a comprehensive IIPP, the Division may still demonstrate a violation by showing that the employer failed to implement one or more elements. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015); *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

To establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement" or "maintain" an "effective" program. A single, isolated failure to "implement" a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991); *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

However, an IIPP is not effectively maintained if there is even one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).) Procedures to ensure compliance with safe and healthy work practices and procedures for correcting unsafe or unhealthy conditions, including imminent hazards, are essential to the overall program. (*GTE California*, *supra*, Cal/OSHA App. 91-107; *David Fischer, dba Fischer Transport, A Sole Proprietorship*, *supra*, Cal/OSHA App. 90-762.) Whether an employer has implemented its IIPP is a question of fact. (*National Distribution Center, LP*, et al., Cal/OSHA App. 12-0391, Decision After Reconsideration, (Oct. 5, 2016), citing, *Ironworks Unlimited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996).)

Gomez testified that the Division issued Citation 1, Item 2, to Employer because Employer had not identified Valley Fever as a hazard, especially in connection with digging under windy conditions and when disturbing soils. The Division, however, offered little evidence

during its case in chief regarding its investigation into the steps that Employer took to identify and evaluate workplace hazards, including potential exposure to Valley Fever spores. Although Employer's IIPP was admitted into evidence, the Division did not refer to it during the hearing.

Gomez testified that Valley Fever spores are endemic in Kern County, and that the spores are found in topsoil extending between one and 12 inches below the surface. Gomez also testified, without proper foundation, that top soil is typically part of a foundation for a road.[6] However, Gomez also admitted during cross examination that he did not know if top soil was disturbed during the work performed at the site. Gomez also did not know whether Margis's crew experienced windy conditions at the site. Finally, as noted previously, Gomez ultimately did not know whether Valley Fever spores were even present at the site while Margis's crew was working.

In her testimony, Kochie admitted that she had not visited the site, was not familiar with what work was being performed, and did not review the Division's inspection file in preparing to testify in this appeal. In fact, although Kochie testified that she knew the inspection took place in Kern County, Kochie stated that she is "not that familiar" with the county.

Jeffrey Holz, Employer's Vice President (Holz), testified during the hearing that Employer used Job Safety Analyses (JSAs) at the site. Although the JSAs show that airborne particles were identified as a potential hazard, Holz testified that Employer did not specifically identify Valley Fever spores as a potential hazard. Holz explained that none of the work done by Employer disturbed native topsoil. Holz testified that the asphalt had already been removed from the roadway by July 31, 2017. Holz further testified that none of the work performed by Margis's crew was going to disturb the native topsoil. He denied being aware of any high winds at the site while the work was being performed. As discussed further below, Holz also testified that Employer utilized a series of engineering controls to control dust and airborne particles at the site.

The weight of the evidence favors a determination that Employer effectively implemented its IIPP with respect to identifying and evaluating workplace hazards. The Division did not introduce any evidence as to what specific steps Employer failed to implement with respect to its IIPP, even though the Division had the opportunity to do so. Further, the Division did not offer credible evidence that Valley Fever spores were a hazard at the site to which Employer's employees were exposed. On the other hand, Employer offered credible evidence that it implemented its IIPP by conducting daily JSAs which identified airborne particles as a hazard at the site. Employer did not identify Valley Fever spores specifically because the work did not involve disturbance of native topsoil where the parties agree the spores would be found, and because Employer utilized engineering controls to control dust and airborne particles at the site.

Ultimately, the Division did not carry its burden of proving a violation of section 1509, subdivision (a), by a preponderance of the evidence, because the Division did not provide

[6] Gomez testified to his educational and professional background during the hearing. Although Gomez testified to extensive experience in occupational safety and health, he did not testify to possessing any special education or experience in the design or construction of streets or highways.

sufficient evidence that Employer did not identify and evaluate hazards at the site. Accordingly, Citation 1, Item 2, and its associated penalty, shall be vacated.

3. Did Employer violate section 1509 by failing to provide training regarding hazards related to Valley Fever?

Section 1509, found under Article 3 (General) of Subchapter 4 (Construction Safety Orders) begins:

> (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.
> […]

Section 3203, subdivision (a), found under Introduction, Group 1 (General Physical Conditions) of Subchapter 7 (General Industry Safety Orders) provides in relevant part:

> (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:
> […]
>
> (7) Provide training and instruction:
> (A) When the program is first established;
> Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
> (B) To all new employees;
> (C) To all employees given new job assignments for which training has not previously been received;
> (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
> (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on October 26, 2017, the employer did not ensure training on Valley Fever was provided to employees disturbing soil and 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 their workplace activities at customer locations.

The Appeals Board has held the purpose of section 3203, subdivision (a)(7), is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through training and instruction. (See *Sierra Production Service, Inc*., Cal/OSHA App. 84-1227, Decision After Reconsideration (Aug. 13, 1987).) There must be evidence from which one can infer that the worker learned the rules and related safety requirements governing his particular job assignment. *(Pacific Coast Roofing Corp*., Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).) The Appeals Board has found that training as to the hazards presented by places of employment is a critical element and the touchstone of an effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002).) A training deficiency by itself supports a violation of section 3203, subdivision (a). (*Mountain Cascade, Inc*., Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)

Gomez testified that the Division issued Citation 1, Item 3, because the Division determined that Employer's employees faced a new hazard that they would not recognize without training. Specifically, employees needed to be trained how to protect themselves from Valley Fever spores, and what to do if it became windy or a "dust devil" (described by Gomez as being "like a twister or tornado") were to form at the site during the work.

Gomez testified that the site was located in the mountains approximately 3,500 feet above sea level. The Division offered no evidence as to the likelihood that Employer's employees would encounter windy conditions at the site. The Division also offered no evidence as to the likelihood of "dust devils" occurring at any time in the vicinity of where Margis's crew was working. The Division had the opportunity to present weather data or other evidence to corroborate Gomez's speculative testimony, but it did not. Given the lack of evidence, the undersigned infers that windy conditions and "dust devils" were not hazards to which Employer's employees were exposed at the site. (See Cal. Evid. Code, §412.) Furthermore, as discussed above, although Gomez testified that Valley Fever spores were endemic in Kern County, the Division offered no evidence that they were present at the site or, even if so, that the work Employer's employees performed at the site was likely to expose them to the risk of contracting Valley Fever.

The weight of the evidence supports a determination that Employer did not fail to train its employees when they were exposed to a new hazard in their workplace. The Division did not present credible evidence to support a finding that Employer's employees were exposed to environmental conditions that created the risk that they would contract Valley Fever as part of their employment at the site. Because the Division did not establish that employees were exposed

to such a new hazard, the Division did not establish that Employer had a duty to provide training relevant to the hazard.

As a result, the Division did not carry its burden of proving by a preponderance of the evidence that Employer violated section 1509, subdivision (a), by failing to implement training on new hazards in the workplace. Accordingly, Citation 1, Item 3, and its associated penalty, shall be vacated.

4. Did Employer violate section 5144, subdivision (a)(1), by failing to ensure employees used appropriate respirators to protect against Valley Fever?

Section 5144, subdivisions (a), found under Article 107 (Dusts, Fumes, Mists, Vapors and Gases), Group 16 (Control of Hazardous Substances) of Subchapter 7 (General Industry Safety Orders), as relevant to this discussion, provides:

> (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 Citation 2, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to, on October 26, 2017, the employer did not ensure effective engineering controls prior to disturbing soil, conducting dust-generating activities and generation of dust by wind source, whereas the soil was contaminated with coccidioides fungal spores at the All American Pipeline Project site and the employer did not ensure appropriate respirators were used by employees to protect employees from exposure to harmful dust containing Valley Fever fungal spores.

In order to demonstrate a violation, the Division must prove that (1) employees were exposed to the alleged hazard of dust containing Valley Fever spores, (2) engineering controls were not effective, and (3) Employer did not require employees to use appropriate respirators.

First, as previously discussed, the Division did not establish that employees were exposed to the actual hazard of Valley Fever spores. Critically, although Gomez and Kochie testified that such spores are endemic to Kern County, neither could testify with any level of certainty that the spores were present at the site and that the work being performed would expose Employer's employees to the hazard of dust containing the Valley Fever spores.

Second, even assuming that employees were exposed to Valley Fever spores, the evidence does not support the Division's determination that Employer failed to prevent harmful exposure through its engineering controls. Gomez testified that the Division issued Citation 2 because Employer did not ensure that its employees wore respirators when disturbing soil. Neither Gomez nor Kochie testified credibly, however, that respirators were needed because Employer did not utilize effective engineering controls. Gomez testified that "in these windy conditions someone could get Valley Fever," but as discussed, the Division offered no evidence showing that Employer's employees were exposed to windy conditions at the site. Gomez admitted during cross-examination that he was aware that Employer utilized water-based suppression during the project, and stated that air-conditioned work vehicles and tarps are additional engineering controls that can be used to control against dust containing Valley Fever spores.

Kochie testified conclusively that an employer is not exempt from utilizing Personal Protective Equipment (PPE) just because it utilizes engineering controls, and provided anecdotal evidence and speculation concerning situations in which employees could be exposed to Valley Fever. Kochie speculated that Valley Fever spores can be blown into an excavation but offered no evidence that this was a risk at the site. She also testified that employees could breathe in dust containing Valley Fever spores from their clothes and vehicles, but offered no evidence of such exposure at the site. Although Kochie claimed that 10 to 12 employees contracted Valley Fever in a previous inspection involving a pipeline, she provided no further information or context to determine whether that prior investigation and its findings bore any relationship to the instant appeal. Although given the opportunity, the Division did not present evidence through either Gomez or Kochie that Employer's engineering controls were not effective at preventing atmospheric contamination with dirt spores containing Valley Fever spores.

Holz, in contrast, credibly testified that Employer uses water-based suppression to mitigate the exposure to dust at the site. He testified that Employer utilized a hydrovac to remove the soil below the asphalt roadway to within two feet of the pipeline. Holz explained that a hydrovac is a truck that performs hydro excavation by injecting water into the excavation area, which liquefies the dirt, turning it into mud. Simultaneously, the hydrovac vacuums the mud into the truck, and the mud is then transported offsite. Holz also testified that Employer constantly utilized a water buffalo (which he described as a 500-gallon tank on a trailer, connected to a pump and a fire hose) to spray the site down with water and control dust at the site. Finally, Holz

testified that Employer utilized vehicles equipped with air-conditioned cabs at the site, and testified that the vehicles only drove along paved roadways, and he denied that equipment operators ever rolled down their windows. The Division did not offer any credible evidence to support a finding that Employer's use of a hydrovac and water buffalo was ineffective to control against exposure to dust containing Valley Fever spores. Nor did the Division offer any evidence that the use of air-conditioned vehicles that traveled exclusively on paved roadways was not an effective engineering control to prevent against exposure to Valley Fever spores in dust.

Finally, although Gomez and Kochie testified that Employer was required to provide N95 respirators, Gomez admitted that the Division does not recommend a particular respirator for preventing exposure to Valley Fever spores, and further admitted that he had not seen any studies relating to the effectiveness of N95 respirators for protecting against exposure to the spores that cause Valley Fever. During the hearing, Kochie testified that N95 respirators work by filtering all particles smaller than 95 microns in size. Following the hearing, Kochie corrected her testimony and stated that N95 respirators remove at least 95% of particles from the air that are 0.3 microns or smaller in size. Kochie testified that there are more effective respirators than N95 and which are commercially available. The Division did not prove what type of respirators were appropriate to filter out Valley Fever spores, or that any respirator could filter out Valley Fever spores because the Division did not present evidence as to the size of the spores.

In summary, the weight of the evidence does not demonstrate that Employer exposed its employees at the site to the hazard of dust containing Valley Fever spores. The Division also failed to demonstrate that Employer's engineering controls were ineffective in controlling and eliminating the risk of such an exposure. Finally, although the Division provided some testimony regarding available respiratory protection, the Division did not demonstrate that any commercially available respirator was capable of filtering Valley Fever spores out of the air. Based on the above, the Division did not carry its burden of proof by demonstrating by a preponderance of the evidence that Employer violated section 5144, subdivision (a)(1).[7]

Accordingly, Citation 2 and its associated penalty shall be vacated.

Conclusions

The evidence does not support a finding that Employer violated section 342, subdivision (a).

The evidence does not support a finding that Employer violated section 1509, subdivision (a), by violating section 3203, subdivision (a)(4).

The evidence does not support a finding that Employer violated section 1509, subdivision (a), by violating section 3203, subdivision (a)(7).

[7] This conclusion obviates the need to consider the issue raised on appeal regarding the Serious classification and penalty for Citation 2, Item 1.

The evidence does not support a finding that Employer violated section 5144, subdivision (a).

Order

Citation 1, Items 1 through 3, and Citation 2, Item 1, are dismissed, and their associated penalties are vacated as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 02/12/2021

Howard I Chernin
Administrative Law Judge

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

APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

Inspection No.: **1269048**
Employer: **U.C.I. CONSTRUCTION, INC.**
Date of hearing(s): November 12, 2020

DIVISION'S EXHIBITS

Exhibit Number	Exhibit Description	Status
1	Order After Prehearing Conference	Admitted Into Evidence
2	Citation package, 1BY, and proof of service	Admitted Into Evidence
3	Employer's appeal forms	Admitted Into Evidence
4	C-10 Proposed Penalty Worksheet	Admitted Into Evidence
11	Valley Fever Basics	Admitted Into Evidence

EMPLOYER'S EXHIBITS

Exhibit Letter	Exhibit Description	Status
E	UCI IIPP	Admitted Into Evidence
F	Respiratory Program (Rev 072516)	Admitted Into Evidence
H	UCI Safey Manual	Not Admitted into Evidence
Q	Job Safety Analysis Worksheets	Admitted Into Evidence
Z	OSHA Interview-Garcia	Admitted Into Evidence
AA	OSHA Interview-Margis	Admitted Into Evidence
BB	OSHA Interview-Brennan	Admitted Into Evidence
DD	DIR Publication (Respiratory)	Admitted Into Evidence

Witnesses testifying at hearing:

Jeffrey Holz	Vice President
Mary Kochie	Cal/OSHA Nurse Consultant III
Efren Gomez	District Manager

APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: **1269048**
Employer: **U.C.I. CONSTRUCTION, INC.**

I, Howard Chernin, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

Howard I. Chernin

Howard I Chernin

02/12/2021

Date

SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: **U.C.I. CONSTRUCTION, INC.**	Inspection No. **1269048**

Citation Issuance Date: **03/15/2018**

CITATION	ITEM	SECTION	TYPE	CITATION/ITEM RESOLUTION	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	**FINAL PENALTY ASSESSED**
1	1	342 (a)	R	ALJ vacated citation as set forth in Decision		V	$5,000.00	**$0.00**
1	2	1509 (a)	G	ALJ vacated citation as set forth in Decision		V	$750.00	**$0.00**
1	3	1509	G	ALJ vacated citation as set forth in Decision		V	$750.00	**$0.00**
2	1	5144 (a) (1)	S	ALJ vacated citation as set forth in Decision		V	$18,000.00	**$0.00**
				Sub-Total			$24,500.00	**$0.00**

Total Amount Due* **$0.00**

**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. <u>If sending via US Mail:</u>
   CAL-OSHA Penalties
   PO Box 516547
   Los Angeles, CA 90051-0595

   <u>If sending via Overnight Delivery:</u>
   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	