BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1360156**
CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION **P.O. BOX 944246** **SACRAMENTO, CA 94244-2460** **Employer**	**DECISION**

Statement of the Case

California Department of Forestry and Fire Protection[1] (hereinafter "CAL FIRE" or "Employer"), is the State of California agency responsible for fighting wildland fires within the state. Beginning November 14, 2018, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Nick Panos, conducted an accident investigation at Rattlesnake Flats Road, Oroville, California (the site). The site was one of many locations where Employer had personnel working to fight the Camp Fire. One of Employer's crews assigned to work at the site to conduct firefighting operations had to retreat from the advancing fire, resulting in several employees suffering burn injuries to their ears and necks (the incident).

On May 8, 2019, the Division issued two citations to Employer, alleging two violations of the California Code of Regulations, title 8.[2] Citation 1, classified as Repeat Serious Accident-Related, alleges that Employer failed to provide ear and neck thermal protection to employees fighting a wildland fire. Citation 2, classified as Serious Accident-Related, alleges that Employer failed to provide suitable gloves to protect wildland fire fighters' hands and wrists from hazardous conditions.

On November 17, 2023, the Division moved to amend Citation 1 to allege, in the alternative, that Employer failed to conduct a hazard assessment and require employees to use Personal Protective Equipment (PPE) when necessary. The undersigned granted the Division's motion on December 26, 2023.

[1] Employer was cited as "CA Forestry and Fire Protection." Employer does not dispute that it was the entity cited.
[2] Unless otherwise specified, all references are to California Code of Regulations, title 8.

Employer filed a timely appeal of each alleged violation, as well as the classification, proposed penalty, and reasonableness of abatement of each of the alleged violations. Employer also asserted numerous affirmative defenses including the Independent Employee Action Defense (IEAD).[3]

During the hearing, Employer withdrew its appeal of Citation 2. Employer's withdrawal of its appeal of Citation 2 is reflected in the Order and the attached Summary Table.

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 February 27 and 28, 2024. ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video platform. Silas Shawver, Staff Counsel, represented the Division. David Wiseman, Attorney, represented Employer.

This matter was submitted on April 1, 2025.

Issues

1. Did Employer fail to provide ear and neck thermal protection for employees fighting a wildland fire?

2. Did Employer establish any of its pleaded affirmative defenses?

3. Did the Division properly classify Citation 1 as a repeat violation?

4. Is abatement of the violation unreasonable?

Findings of Fact[4]

1. Employer was previously cited for a violation of section 3410 for failing to provide neck and ear protection. The citation resulted from inspection number 1091806 and was affirmed as a final order on September 12, 2017, with respect to a workplace located at 15195 Bottle Rock Road, Cobb, California.

2. The previous violation of section 3410 that was cited under inspection number 1091806 occurred within five years prior to the incident discussed herein, and involved essentially

[3] Unless otherwise discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)
[4] Findings of Fact 1, and 3 through 13 result from stipulations reached by the parties.

similar conditions and hazards with respect to failing to use a protective shroud during a burnover event[5] resulting in employees suffering face and neck burn injuries.

3. Citation 1 was correctly classified as Serious Accident-Related.

4. The Division calculated the penalty for Citation 1 in accordance with its policies and procedures.

5. On November 8, 2018, Employer's crew was on Rattlesnake Road for the purpose of engaging in wildfire suppression activities related to the Camp Fire in Butte County, California. The Camp Fire started that same day and was ultimately one of the deadliest and most destructive fires in California's history.

6. On the date of the incident, Employer issued adequate equipment to its employees for thermal protection of the ears and neck defined in section 3410.1, subdivision (c). Each firefighter was in possession of a protective shroud attached to his or her helmet.

7. On the date of the incident, Employer's employees were preparing to conduct a firing operation on Rattlesnake Road in Butte County. The purpose of a firing operation is to help contain an active wildfire.

8. Employer's crew began preparing for the firing operation at approximately 2:15 p.m. At that time, the crew was approximately one-quarter mile south from the active wildfire line.

9. At approximately 2:45 p.m., Employer noticed that the wind suddenly changed direction and significantly increased velocity, pushing the wildfire south toward the crew. One of Employer's fire captains on site observed that flame lengths were between 10 and 15 feet high at that point.

10. Shortly after the wind picked up, the wildfire crossed Rattlesnake Road to the west of the crew, blocking that exit. In response, one of the fire captains instructed the crew to begin defensive firing as a means of containing the oncoming flames. However, as the crew was operating the defensive fire, the oncoming flames blocked their egress from the road.

[5] A burnover event is "an event in which a fire moves through a location or overtakes personnel or equipment where there is no opportunity to utilize escape routes and safety zones. Burnover often results in personal injury or equipment damage." (https://ask.usda.gov/s/article/What-is-burnover-in-a-wildfire <accessed March 13, 2025>). This definition is consistent with the testimony and other evidence provided by the parties during the hearing which describe the incident.

Some of the crew was then forced to retreat by crossing over a barbed wire fence which bordered each side of Rattlesnake Flat Road.

11. The fire captain had a protective shroud on his person but had not unfurled it at the time of the burnover event.

12. The fire captain suffered burn injuries to the face and neck.

13. The fire captain spent multiple days in the hospital undergoing treatment for the burns suffered from the incident.

14. It is feasible for Employer to abate the violation by requiring employees to use protective shrouds to prevent burn injuries while fighting wildland fires.

Analysis

1. Did Employer fail to provide ear and neck thermal protection for employees fighting a wildland fire?

Section 3410 (Wildland Fire Fighting Requirements), subdivision (c), provided at the time of the inspection:

> (c) Thermal Protection of the Ears and Neck. Protection against burns on the ear and neck shall be provided by one or more of the following means, or other equivalent methods, when fire fighters engaged in wildland fire fighting are exposed to injurious heat and flame: flared neck shield attached to brim of helmet; hood, shroud or snood; high collar with throat strap. Fabric specified for this purpose shall be constructed and tested in accordance with the provisions of section 3410(d) for body protection. Similar protection shall be provided emergency pick-up labor when exposed to injurious heat and flame.

In the alternative, section 3380, subdivision (f), provides:

> (f) Hazard assessment and equipment selection.
>
> > (1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;

Citation 1 alleges:

Prior to and during the course of this investigation, including but not limited to, on 11/14/18, the employer failed to ensure firefighters engaged in wildland firefighting and exposed to the identified hazard of heat and flames were protected against burns to their ears and neck. As a result, on November 8, 2018 one firefighter received serious burns to the ears and neck and two firefighters received non-serious burns to the ears and neck.

The CA Forestry and Fire Protection dba Cal Fire was previously cited for a violation of a substantially similar regulatory requirement to this Title 8 CCR standards, which was contained in inspection number 1091806 citation number 1, item number 1 and was affirmed as a final order on 09/12/17, with respect to a workplace located at 15195 Bottle Rock Road, Cobb, California.

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, Decision After Reconsideration (Oct. 7, 2016).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Because the violation was alleged in the alternative, the safety orders will be analyzed sequentially.

Section 3410, subdivision (c)

Applicability

Pursuant to section 3410, subdivision (c), employers are required to provide employees with protection against ear and neck burns where those employees are firefighters engaged in wildland fire fighting and exposed to injurious heat and flame. Additionally, employers are required to provide similar protection to emergency pick-up labor where those employees are

exposed to injurious heat and flame. The parties do not dispute that section 3410, subdivision (c), applied to Employer's activities on the date of the incident and they stipulated that one of Employer's crews was engaged in wildfire suppression activities at the site of the incident.

Violation

As noted above, in order to establish a violation of section 3410, subdivision (c), the Division must prove by a preponderance of the evidence that (1) firefighters or emergency pickup labor[6] were (2) exposed to injurious heat and flame (3) while engaged in wildland fire fighting and that (4) employer failed to provide protection against ear and neck burns (5) pursuant to the means contemplated by the safety order.

i. Employees were exposed to the hazard of injurious heat and flame

The first element that the Division has the burden of establishing is that Employer's employees were exposed to the regulated hazard. The hazard contemplated by the cited safety order is injurious heat and flame. Employee exposure can be demonstrated in two different ways under Appeals Board precedent: either (1) by showing employees were actually exposed to the zone of danger, or (2) by showing employee access to zone of danger was reasonably predictable in the course of assigned work or personal activities during work. (*Dynamic Construction Services Inc*., Cal/OSHA App. 1005890, Decision After Reconsideration (Dec. 1, 2016.).)

The parties stipulated that employees were preparing to conduct a firing operation on Rattlesnake Road in Butte County. The purpose of a firing operation is to help contain an active wildfire. Employer's crew began preparing for the firing operation at approximately 2:15 p.m.. At that time, the crew was approximately one-quarter mile south from the active wildfire line. At approximately 2:45 PM, Employer noticed that the wind suddenly changed direction and significantly increased velocity, pushing the wildfire south toward the crew. One of Employer's fire captains on site observed that flame lengths were between 10 and 15 feet high at that point. Shortly after the wind picked up, the wildfire crossed Rattlesnake Road to the west of the crew, blocking that exit. In response, one of the fire captains instructed the crew to begin defensive firing as a means of containing the oncoming flames. However, as the crew was operating the defensive fire, the oncoming flames blocked their egress from the road. The crew tried to retreat, and the assigned fire captain suffered burn injuries to his neck and face during the retreat.

Exposure is thus demonstrated here in two ways. First, there was actual exposure created when the fire overran the crew's position while the crew was working on containment. Captain

[6] Section 3402 defines "Emergency Pick-Up Labor" as "[p]ersonnel consisting of National Guard, military forces, forest product workers, farm workers, ranchers, and other persons who may be recruited from time to time to help contain and control wildland fires."

Chad Carothers (Carothers), who was injured in the incident, testified that the wind rapidly changed and flames rapidly advanced on his crew's position, forcing a hasty retreat. While attempting to retreat, Carothers sustained serious burn injuries from contact with the flames.

It was also reasonably predictable that Employer's employees would be exposed to the zone of danger. As noted, Employer's employees were charged with conducting firing operations as part of the effort to contain the Camp Fire. Chief Timothy Davis (Davis) acknowledged in his testimony that the situation was "volatile" and that the fast-moving Camp Fire posed a potential hazard of a dangerous fire incident on Rattlesnake Flats Road. Carothers credibly testified that "any time you're dealing in a wildland environment … the most variable factor is the weather." (Hearing Transcript (TR), Feb. 27, 2024, 37:9-10.) Employer's Information Summary Report of Serious or Near Serious CAL FIRE Injuries, Illnesses, and Accidents ("Green Sheet") prepared in response to the incident, notes that the area was experiencing unusually dry conditions and wind activity primarily from the Northeast. (Exhibit A.) Evidence at hearing established that the crew was working south of the fire when it rapidly advanced toward their position. That the fire reached the location where the crew was working and posed an immediate danger to them was reasonably predictable given the conditions identified in the Green Sheet.

For the foregoing reasons, therefore, exposure is found by a preponderance of the evidence.

ii. Employees were engaged in wildland fire fighting

Section 3402 defines "Wildlands" as "[s]parsely populated geographical areas covered primarily by grass, brush, trees, crops, or combination thereof." There is no factual dispute that Employer's employees were engaged in wildland fire fighting. The parties stipulated that Employer's crew was on Rattlesnake Road for the purpose of engaging in wildfire suppression activities related to the Camp Fire. Carothers described the area where Employer's employees were working as an undeveloped field bisected by Rattlesnake Flats Road. To one side of the road, Carothers observed grass pasture and cattle, as well as scattered oak trees. To the other side, he observed no cattle, and much taller, dry grass. The area of the incident is also captured in photos on page 16 of Exhibit A, as well as Exhibits 14, 15, 18 and 19, and the photographs are consistent with Carothers' testimony. The testimony and photographs depict the area in question as a sparsely populated area comprising a grassy field separated by Rattlesnake Flats Road, covered in grass and sporadic trees. Employer offered no evidence suggesting that the location of the incident did not meet the definition of wildlands under title 8, and the evidence preponderates toward such a finding. Thus, it is found that employees were in a wildland area.

The parties stipulated that Employer's crew was engaged in fire fighting activities during the incident, and both Carothers and Davis credibly testified that Employer's employees were engaging both defensive and offensive fire fighting activities.

Based on the above-summarized evidence, it is found that Employer's employees were engaged in wildland fire fighting operations at the time of the incident.

iii. Employer provided its employees with PPE meant to afford protection against ear and neck burns

The parties stipulated that Employer issued adequate PPE to its employees for thermal protection of the ears and neck defined in section 3410.1, subdivision (c). Each firefighter was in possession of a protective shroud attached to his or her helmet. This is further supported by the corroborating testimony of Carothers, who testified that he had a protective shroud attached to his helmet. (See Exhibit 33.)

Thus, it is found that Employer provided its employees with PPE meant to afford protection against ear and neck burns.

iv. Employer did not ensure that its employees used PPE meant to afford protection against ear and neck burns

Labor Code section 6401 provides:

> Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.

Labor Code section 6403 provides:

> No employer shall fail or neglect to do any of the following:
>
> (a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.
> (b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.
> (c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

Commonly-cited principles of statutory and regulatory interpretation support an interpretation of the cited safety order that requires that appropriate PPE must actually be used. The Appeals Board has previously addressed principles of statutory and regulatory interpretation as follows:

> It is a well-established rule of statutory construction that '"the words of the statute should be given their ordinary and usual meaning and should be construed in their regulatory context.'" (*People v. Toney* (2004) 32 Cal.4th 228, 232.) If the statute's language is clear, we presume the Legislature meant what it said and the plain meaning of the statute governs. (*Ibid*.) In construing a particular clause of a statute, courts read that clause in harmony with other clauses and in context of the statutory framework as a whole. (*Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.)

(*Papich Construction Company, Inc*., Cal/OSHA App. 1204848, Decision After Reconsideration (Dec. 26, 2018).)

"The same rules of construction and interpretation which apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies." (*The Home Depot*, Cal/OSHA App. 98-2236, Decision After Reconsideration (Dec. 20, 2001), citing *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1517 citing *Cal. Drive-in Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292.)

A plain reading of Labor Code sections 6401 and 6403 necessitates the use of protective equipment that employers are required to provide employees. (See generally *Bendix Forest Products Corp v. Division of Occupational Safety and* Health (1979) 25 Cal.3d 465; see also *UPS Ground Freight Inc. DBA UPS Freight*, Cal/OSHA App. 1111325, Denial of Petition for Reconsideration (Nov. 22, 2017).) The key language of section 3410, subdivision (c), states:

> ***Protection against burns on the ear and neck shall be provided*** by one or more of the following means, or other equivalent methods, when fire fighters engaged in wildland fire fighting are exposed to injurious heat and flame[.]

(Emphasis added.)

The plain language of the safety order thus requires that ***protection*** be provided when fire fighters engaged in the covered activity are exposed to the hazard of injurious heat and flame. The word "protection" is commonly understood to mean "the act of protecting" or "the state of

being protected". (www.merriam-webster.com <accessed 3-7-2025>.) In other words, in the context of the cited safety order it is the ***active*** protection against burns on the ears and neck that is required. That protection only exists if the required PPE is actually used by the affected employees. This reading is consistent with well-established case law holding that regulations are to be interpreted broadly to promote worker safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313.) A contrary reading would not promote worker safety and would indeed undermine worker safety by exposing employees to the very harm addressed by the regulation.

Here, the parties stipulated that Carothers had a protective shroud on his person but had not unfurled it at the time of the burnover event. Carothers credibly testified that he had kept the shroud rolled up and tucked in his helmet, so that it was ready to deploy, but did not actually have a chance to deploy it before suffering burn injuries. Thus, Carothers was not using the PPE while exposed to the hazard of injurious heat and flame. This is sufficient evidence to sustain a violation.

For the foregoing reasons, it is determined that Employer violated section 3410, subdivision (c), because its employee did not use provided PPE when he was exposed to the hazard of injurious heat and flame. Therefore, Citation 1 is affirmed.[7]

2. Did Employer establish any of its pleaded affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. (*RNR Construction, Inc*., *supra*, Cal/OSHA App. 1092600.) Here, Employer pleaded several affirmative defenses, including IEAD, greater hazard, and impossibility or infeasibility of compliance.[8] The defenses are discussed below.

IEAD

The IEAD does not apply where the alleged violation was committed by a supervisor. (*Davey Tree Surgery Co. v. Occupational Safety and Health Appeals Board*, (1985) 167 Cal.App.3 1232, 1242-43.) Here, Carothers testified that he was a supervisor with responsibility

[7] Because a violation is found under section 3410, subdivision (c), it is unnecessary to reach the issue of whether a violation was established under the alternatively-pleaded safety order, section 3380, subdivision (f).

[8] Employer also pleaded as an affirmative defense that a more specific safety order, namely section 3410, subdivision (c), applied to the work being performed. Because this Decision does not reach the issue of whether Employer violated section 3380, subdivision (f), this affirmative defense is deemed moot.

for directing his crew's work and was responsible for their safety on the date of the incident. Employer offered no evidence to contradict Carothers' status as a supervisor on the date of the incident. Therefore, the IEAD does not apply.

Greater Hazard

Employer also pleaded and asserts in its post-hearing brief that compliance with the cited safety order would have created a greater hazard for its employees, specifically in that it would have exposed them to the risk of heat illness and would have interfered with their ability to communicate with one another during the incident.

The Appeals Board in *Superior Construction, Inc*., Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000), observed that finding that compliance with a safety order would create a greater hazard for employees is:

> […] beyond the power the Appeals Board to adjudicate. Its function is confined to interpreting and applying the safety orders adopted by the [Occupational Safety and Health] Standards Board. It may not go beyond that function and ignore or revise the requirements of an order. If an Employer believes an order unwise or unworkable, its recourse is with the Standards Board -- the agency which conducted the regulatory hearing, heard from the experts, and fashioned the terms of the order, and the agency vested with power to grant variances from it.

Thus, the Appeals Board does not recognize such a defense. If Employer's argument is that compliance with the safety order necessarily creates a greater hazard for employees, Employer's recourse is to seek a variance from the Standards Board. Nothing in the record, however, suggests that Employer sought a variance from compliance with section 3410, subdivision (c).

Employer's defense could arguably also be interpreted as asserting that the logical time for compliance had not yet occurred. "The logical time defense exists to protect employees from situations where the otherwise suitable application of a safety rule illogically exposes the employee to greater danger." (*Bay Cities Paving & Grading, Inc*., Cal/OSHA App. 12-1665, Denial of Petition for Reconsideration (May 16, 2014).) Thus, if an employer can prove by a preponderance of the evidence that the employee(s) would be exposed to greater danger if the safety order were applied at a particular stage of the work rather than a later time, the safety order will not apply until compliance does not create the added or greater hazard. (*Ibid*.)

Here, Employer did not meet its burden. Dr. Thomas Ferguson (Ferguson), a retired physician serving as a medical consultant to Employer, testified to the "tremendous heat load"

that can be created by fire fighters performing activities while wearing PPE. Ferguson credibly testified that wearing PPE interferes with the body's ability to regulate its temperature, interferes with such effective sweating, and that head and neck PPE can block hot air from escaping up and out of the fire fighter's clothing at the neckline, which Dr. Ferguson compared to a chimney, resulting in heat illness. Ferguson credibly testified that severe cases of heat illness could result in serious illness such as rhabdomyolysis and could ultimately cause a fatality. Dr. Ferguson's testimony was unrebutted and is credited. Employer also presented credible witness testimony that wearing the protective shroud could interfere with communication between crew members in an emergency.

Although Ferguson's testimony was deemed credible, his testimony was speculative in regard to the hazard of heat illness posed by using the protective shroud during the incident. Employer presented evidence that the PPE provided to its employees for protection from the hazard of injurious heat and flame could also expose employees to the hazard of heat illness resulting in serious illness or fatality. It must be noted, however, that this evidence is speculative, as no evidence was presented during the hearing suggesting that employees involved in the subject incident were at a substantial risk of heat illness as a result of using their assigned PPE. Accordingly, although Ferguson's testimony was credible, it is outweighed because the evidence of burn hazards is specific to this incident. Accordingly, the evidence is afforded very little weight. The record, however, does establish that employees were subjected to the real risk of injury or death from the advancing flames, and this evidence is given substantial weight.

Section 3410, subdivision (c), mandates the use of PPE to protect against injury or death from injurious heat and flames. For the protection to exist, the PPE must actually be used when the employee is exposed to the hazard of injurious heat or flame. The evidence presented during the hearing established that, among other activities, employees on Carothers' crew were using torches to set defensive fires and were working in an area under dynamic conditions that Employer knew could quickly result in employees being exposed directly to advancing flames of the Camp Fire. Even assuming the risk of heat illness from wearing PPE existed at the time of the incident, Employer offered no explanation for how heat illness was a greater danger than being burned by advancing flames, and offered no evidence as to when in this case it would have been the logical time for employees to deploy and use their provided shrouds to protect themselves from serious burn injuries. While it is acknowledged that heat illness can be fatal, the undersigned takes official notice pursuant to section 376.3, subdivisions (a) and (b)(4), of the fact that fire is dangerous and can and does kill people every year. Based on the record as summarized above, Employer did not meet its burden of proof to establish the logical time defense. Accordingly, the defense fails.

Impossibility/Infeasibility

Employer raised as a defense that compliance with the safety order was impossible, premised on the argument that having the required protective shroud deployed as required would have hindered visual and oral communication, thereby endangering Employer's crew. The Appeals Board does not recognize such a defense; rather, employers that believe that compliance is impossible or infeasible "may seek a variance or petition the Standards Board for an amendment to the regulation, but the Appeals Board does not have authority to change the plain language." (*Armour Steel Co., Inc.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).) Thus, the defense fails.

3. Did the Division properly classify Citation 1 as a repeat violation?[9]

Section 334, subdivision (d), defines "repeat violation" as follows:

> (d) 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.

The Appeals Board has previously held that "[v]iolations need not be precisely the same in order to establish a repeat classification." (*Rios Farming Company, LLC*, Cal/OSHA App. 1336276, Decision After Reconsideration (Feb. 6, 2023), citing *Zapata Constructors, Inc*., Cal/OSHA App. 80-284, Decision After Reconsideration (May 31, 1984).)

Here, the parties stipulated that Employer was previously cited for a violation of section 3410 for failing to provide neck and ear protection. The citation resulted from inspection number 1091806 and was affirmed as a final order on September 12, 2017 (Exhibit 38), with respect to a workplace located at 15195 Bottle Rock Road, Cobb, California. The undersigned takes official notice of the Appeals Board's record of the appeal regarding inspection number 1091806, which includes a copy of email correspondence dated April 18, 2016, indicating that Employer had satisfactorily abated the section 3410 violation.

[9] The parties stipulated that Citation 1 was properly classified as Serious Accident-Related.

District Manager John Wendland (Wendland) testified about the factual basis of the previous citation, specifically that "firefighters were up on a ridge, the fire came over, and while they were in the retreat, they got injuries to the back of their neck and ears …." Wendland further testified that the violation occurred in connection with a burnover event.

The undersigned takes further official notice of the Alleged Violation Description for Citation 1 issued under inspection 1091806, which reads as follows:

> Prior to and during the course of the inspection (investigation), the employer failed to require that the fire fighters from the Boggs Mountain Helitack Base use the provided shrouds to protect their ears and necks during wildland fire fighting activities in the Valley Fire at 15195 Bottle Rock Rd, Cobb, CA. As a result, on or about 9/12/15, four fire fighters, including a Fire Captain, did not use their shrouds and suffered serious ear and neck burns when trapped in the fire and then worked their way out.

It is found that the circumstances of the previous violation involve essentially similar conditions or hazards to those involved in the present citation. Both involved burnover events where employees who were engaged in wildland fire fighting activities suffered serious ear and neck burns when advancing flames cut off their escape route (trapped them). In each inspection, employees failed to use their protective shrouds. The facts alleged in both inspections are similar enough to warrant a repeat classification under *Rios Farming Company, LLC, supra*, Cal/OSHA App. 1336276. Employer had the opportunity to present evidence to contradict the repeat classification, but failed to do so at hearing.

For the foregoing reasons, the Division properly classified Citation 1 as a repeat violation.

4. Is abatement of the violation unreasonable?

The Division does not mandate specific means of abatement; rather, the employer is free to choose the least burdensome means of abatement. (*Starcrest Products of California, Inc*., Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004), citing *The Daily Californian/Caligraphics,* Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) To establish that abatement requirements are unreasonable an employer must show that abatement is unfeasible, impractical, or unreasonably expensive. (See *The Daily Californian/Caligraphics, supra,* Cal OSHA/App. 90-929.)

Here, Employer presented evidence and argued that compliance with section 3410, subdivision (c), was unfeasible or impractical. Employer presented testimony from Carothers that wearing the shroud could interfere with effective visual and oral communication, thereby endangering the crew if the captain in charge of their safety could not effectively communicate with them during an emergency. Ferguson credibly testified that PPE such as a protective shroud increases the heat load on an employee's body and could potentially increase the risk of serious heat illness. Although the evidence presented by Employer does suggest that in some situations, wearing PPE can increase the risk of injury or death to employees, this hypothetical risk does not outweigh the risk to employees of serious injury or death from contact with flames that the cited safety order is meant to guard against. Employer made no showing that employees could effectively do their job in the situation at bar without using the mandated PPE. In fact, the evidence shows the opposite: at least one employee suffered serious burn injuries as a result of not deploying the protective face shroud, which resulted in him being seriously injured and hospitalized for treatment, and unable to continue effectively fighting the Camp Fire. Substituting one potential harm for another does not further California public policy generally, or the Occupational Safety and Health Act specifically. The appropriate remedy for Employer would have been to seek a variance from the Standards Board for situations where it felt that the risk of injury from injurious heat and flames is substantially outweighed by other risks such as interference with communication or increased risk of heat illness. (*Armour Steel Co., Inc*., *supra*, Cal/OSHA App. 08-2649.)

Conclusion

The evidence supports a conclusion that Employer violated section 3410, subdivision (c), by failing to provide ear and neck thermal protection for employees fighting a wildland fire.

Employer did not prove by a preponderance of the evidence any of its pleaded affirmative defenses.

The Division correctly classified Citation 1 as Repeat Serious Accident-Related.

Employer did not demonstrate that abatement would be unreasonable.

The Division proposed reasonable penalties for Citation 1.

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Order

Citation 1 and Citation 2 and their associated penalties are affirmed, and their penalties are assessed as set forth in the attached Summary Table.

/s/ Howard I. Chernin
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Howard I. Chernin
Administrative Law Judge

Dated: 04/16/2025

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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.