

BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

In the Matter of the Appeal  
of:

**BIG LOTS #4038**  
300 Phillipi Road  
Columbus, OH 43228

Employer

DOCKETS 11-R3D2-1929  
through 1931

**DECISION**

**Background and Jurisdictional Information**

Big Lots (Employer) is a discount retail department store. Beginning May 25, 2011, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Jeffrey Berliner conducted a complaint inspection at a place of employment maintained by Employer at 3705 Rosecrans Street, San Diego, California (the site). On June 6, 2011, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup>:

<u>Cit./Item</u>	<u>Alleged Violation</u>	<u>Type</u>	<u>Penalty</u>
1-1	3203(b)(2) [no training records]	Regulatory	\$375
1-2	3664(a) [forklift operating rules not posted]	Regulatory	\$375
1-3	2340.16(a) [insufficient work space about electric equipment]	General	\$185
1-4	2340.21(a)(2) [unmarked electrical equipment]	General	\$185

<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

1-5	2340.22(b) [electrical disconnects or overcurrent devices not marked to indicate purpose]	General	\$185
1-6	2340.24 [discontinued circuits not maintained or conductors removed]	General	\$185
1-7	2510.4 [no face plate on wall receptacle]	General	\$185
1-8	3203(a)(6)(B) [no written procedures for imminent hazards which cannot be immediately abated]	General	\$185
1-9	3272(b) [aisles and walkways less than 24 inches wide]	General	\$185
1-10	3276(c)(15)(E) [ladder topcap or step below topcap used]	General	\$375
1-11	3382(a) [no eye protection]	General	\$185
1-12	3384(a) [no hand protection]	General	\$185
1-13	3668(a)(1) [failure to ensure each forklift operator was trained and evaluated]	General	\$185
1-14	4353(g) [ineffective locking system for baler]	General	\$185
1-15	6151(c)(1) [fire extinguisher not readily accessible]	General	\$185
1-16	5194(e)(1) [incomplete written hazard communication program re methods to communicate]	General	\$375
1-17	5194(h)(1) [insufficient hazard communication training]	General	\$185
1-18	5194(h)(2)(D/E) [insufficient employee training re hazardous substance detection and protection]	General	\$375

2	2340.17(a) [unguarded energized parts]	Serious	\$3,375
3	5162(a) [no emergency eyewash]	Serious	\$3,375

Employer filed timely appeals contesting the existence of the alleged violations (except for Citation 2), the classification of Citation 3, the abatement requirements for Citation 3, and the reasonableness of all proposed penalties.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on October 2, 3, and 23, 2012. Kathy Derham, District Manager, represented Employer. Todd Hunt, Esquire, represented the Division. The parties presented oral and documentary evidence. The parties requested, and were granted, leave to file simultaneous briefs. Each party was limited to one brief. Employer filed a closing brief. The Division did not file a brief. The ALJ extended the submission date on her own motion to December 14, 2012.

**Law and Motion**

The Division moved, without objection, to amend the last line of the alleged violation description for Citation 1, Item 5, by replacing "B" with "PP" in order to correct a typographical error. Good cause appearing therefor, the motion was granted.

Motions for Sanctions for Violation of Due Process

In its closing brief, Employer moved for sanctions against the Division for due process violations and discovery abuse. The motion was based on three grounds: (1) The scope of the inspection was overbroad because it exceeded the scope of the complaint on which it was based; (2) The Division did not provide Employer a copy of the written complaint upon which the inspection was based, nor reveal that the complaint was written until the hearing; and (3) The Division issued citations without sufficient evidence to support the citations, proven by the fact that the evidence that Division used at hearing was obtained after the inspection.

Scope of Inspection

The written complaint is not in evidence. After reviewing the file, Berliner testified that the Division received the written complaint on April 25, 2011, and that it was mailed on April 21, 2011. In response, on April 27, 2011, the Division mailed Employer a letter in lieu of performing an inspection. (Exhibit C) The letter recited the following possible violations based on the complaint: (1) No eyewash in warehouse/receiving dock area; (2) No hazard

communication training for employees handling chemicals; (3) No Material Safety Data Sheets (MSDS) for chemicals. In its brief, Employer acknowledged that, consistent with Division policy and the Labor Code, the Division did not share the name of the complaining party or the actual written complaint with the employer during the inspection. But, Employer asserted that the scope of the inspection was limited by the nature of the complaint, citing DOSH Policies and Procedures Manual C-1 at C.2, and Labor Code § 6314(a) ("within reasonable limits and in a reasonable manner"). Employer objected to Berliner's inspection of areas outside the dock that were not in any way identified in or implicated by the complaint.

Inspections are governed by the Fourth Amendment. The Court of Appeal has applied criminal law doctrines of search and seizure to proceedings before the Cal/OSHA Appeals Board. (*Salwasser Manufacturing Co. v. Occupational Safety and Health Appeals Board (Salwasser II)*, (5<sup>th</sup> Dist. 1989); 241 Cal.App.3d 625; *Salwasser Manufacturing v. Municipal Court (Salwasser I)* (5<sup>th</sup> Dist. 1979), 94 Cal.App.3d 223).

The Board has held that the Fourth Amendment protects businesses from unreasonable searches by government agents only to the extent that those rights are properly asserted. (*Bimbo Bakeries, USA, (Bimbo)* Cal/OSHA App. 03-5216, Decision After Reconsideration (June 9, 2010), citing *Minnesota v. Carter* (1998) 525 U.S. 83, 88, quoting *Rakas v. Illinois* (1978) 439 U.S. 128, 134.) Employer must assert a reasonable expectation of privacy in the particular area searched to bring a Fourth Amendment challenge. (*Id.*) Employer has the burden of establishing a legitimate expectation of privacy in the place searched. (*Bimbo*, citing *People v. Jenkins*, (2000) 22 Cal.4<sup>th</sup> 900, 972; and *Rudolph and Sletten, Inc.*, Cal/OSHA App. 01-478, Decision After Reconsideration (Mar. 30, 2004).) A reasonable expectation of privacy is not presumed under any rule. (*Bimbo*, at 7) The Board rejected the assertion that proof of a valid inspection is jurisdictional, or to be borne by the Division as part of its case-in-chief, over 30 years ago, and that remains the rule. (*Bimbo*, citing *Metro-Young Construction*, Cal/OSHA App. 80-315, Decision After Reconsideration (Apr. 23, 1981).)

In *Bimbo* (p. 6, 8), the Appeals Board has further held that an employer who fails to timely and specifically assert its Fourth Amendment rights cannot effectively do so for the first time in a post-hearing brief. (*Bimbo*, citing *Salwasser II*.) The Board looked to the Penal Code, which requires adequate notice of a defendant's legal contention so that the prosecutor can obtain all the relevant evidence. The reason for the specificity is to give each party an opportunity to litigate the facts and inferences. (*Bimbo* at p. 8) Board procedures require adequate notice of the issues on appeal. (*Ibid.*) Motions to amend appeal forms must be made no later than 20 days before a hearing date, absent good cause showing why the deadline was not met. (*Ibid*, §371.)

Here, Employer did not assert the affirmative defense of "invalid inspection" in its initial appeal. Because Employer did not learn of the basis for its position that the inspection was invalid i.e., that the complaint was written, until after the hearing began, Employer showed good cause for not asserting the affirmative defense before the hearing date.

Employer learned that the complaint was written on the first day of the hearing, October 2, 2012, during Employer's cross examination of Berliner. However, Employer did not assert its fourth amendment affirmative defense, until its post-hearing closing brief. It did not explain why it did not assert the defense on the date it learned of the relevant facts, or at any time before the end of the last day of hearing, October 23, 2012, nearly three weeks later. The first time the Division had any notice that Employer would be asserting a Fourth Amendment defense was in its post-hearing brief, to which no reply was allowed, as each party was limited to one brief. The Appeals Board in *Bimbo* (p. 9) condemned this practice as "the type of gamesmanship" that the *Williams* court [*People v. Williams* (1999) 20 Cal.4<sup>th</sup> 119, 129-133] "sought to prohibit."

Following the above precedent, it is found that Employer's Fourth Amendment assertion that the scope of inspection was overbroad is untimely and not effectively made. (*Bimbo*) Hence, it is rejected.

Even if timely, Employer's argument fails. Employer has confused inspection pursuant to a search warrant with an inspection pursuant to a complaint. Under Labor Code §§ 6307 and 6309, the Division has the jurisdiction, authority, and obligation to receive and act upon complaints at all times. When an inspection is made pursuant to a complaint, Labor Code § 6309 does not limit the inspection to the matters in the complaint. Labor Code § 6309 authorizes the Division to initiate an inspection on its own motion if it "learns or has reason to believe that an employment or place of employment is not safe or is injurious to the welfare of an employee."

An inspection pursuant to a warrant is limited by the places described in the warrant. No similar limitation exists with respect to inspections pursuant to complaints. Employer did not cite any authority for its position. Employer consented to the inspection. Employer did not dispute that Employer, through Assistant Store Manager Scott Lanners and Store Manager Kenneth Bratz, consented to the inspection, did not withdraw that consent, and accompanied Berliner whenever he was at the site. In the absence of contrary evidence, it is presumed that the inspecting officer acted legally. (*Bimbo*, citing Evidence Code § 664; *Victor Badillo v. Superior Court*, (1956) 46 Cal.2d 269 and *Scribner Construction*, Cal/OSHA App. 93-2161, Decision After Reconsideration (Sep. 1, 1990).) Berliner was lawfully at the site. Once lawfully at the site, the inspecting officer does not have to close his eyes to a hazard in plain view. (*J.W. Bailey Construction Co.*, Cal/OSHA App. 78-1577, Decision After Reconsideration (Sep. 31, 1984).)

Consent is a well-recognized exception to the warrant requirement in Cal/OSHA cases challenging the validity of an inspection. (*Rudolph and Sletten, Inc.*, Cal/OSHA App. 01-479, Decision After Reconsideration (Mar. 30, 2004), citing *Beacom Construction Co.*, Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981).) The Division informed Employer in writing of the scope of the contents of the complaint before the inspection began. (Exhibit C) Employer knew or should have known of the scope of the complaint. Employer's argument is that its consent was not valid because it did not know that the complaint was written.

While Labor Code § 6314(a) requires inspections to be performed "within reasonable limits and in a reasonable manner," this language has never been interpreted by either the Appeals Board or by the courts to mean that an inspection based upon a complaint is limited to the matters set forth in the complaint. Employer did not cite any authority to support its position that it does. To the contrary, Labor Code § 6314(a) specifically states that "all qualified divisional inspectors *shall*, upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect during regular working hours *and* at other reasonable times ... and within reasonable limits and in a reasonable manner." (Emphasis added) The Labor Code § 6314(a) language Employer quotes ("within reasonable limits and in a reasonable manner") refers to inspections conducted outside of regular working hours. It is not a limitation on the scope of the inspection, as Employer contends.

Berliner was at places he was entitled to be when he observed the violations in question. At the time of the inspection, Employer did not limit its consent to only the items in the complaint. None of the places Berliner inspected were secured. Most of the violations Berliner found were in plain view. Even where they were not immediately in plain view, the conditions Berliner observed in plain view gave him reason to believe that unsafe conditions may have existed in the remaining parts of the rooms where he saw the unsafe conditions<sup>2</sup>.

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<sup>2</sup> Employer had the burden of proof to establish that Employer had a reasonable expectation of privacy for any of the places he inspected once he was at the dock area or no rational basis for inspection. Employer did not meet its burden. Berliner had a rational basis to inspect the sales floor because that is where the chemicals referred to in the complaint were located (Exhibits 2, 3, 4, 5, 6, 7, 48, 49). As the sales floor is open to the general public during normal business hours, Employer cannot assert an expectation of privacy in the sales floor. Pursuant to the matters in the complaint, Berliner had reason to inspect the maintenance room (Exhibits 31, 32, 43, 44, 45, 52, 53, 54, 55, A) because that is where employees had to go for chemicals and other equipment that they needed to clean up spills. Exhibit 47 is a photograph of the hallway to the maintenance room. The maintenance room has a doorway opening, but no door on it. The bailer and the surrounding area, including the powered industrial truck (Exhibit 26), were just inside the dock area and were in plain view while Berliner was traveling from the dock to the maintenance room. (Exhibits 26, 27, 29, 30, 39, 40, 42, 51, A) The safety orders require a set of operating rules to be posted for powered industrial trucks. This gave Berliner reason to look for the required poster. The electrical panels were in the open, and visible to

Therefore, Employer did not establish that its Fourth Amendment rights were violated.

#### Failure to Provide Copy of Complaint

On the first day of the hearing, October 2, 2012, Berliner reviewed the Division's file, and found a copy of the written complaint in the file. The parties agree that the Division did not provide Employer a copy of the written complaint. The Division did not dispute that Employer made a written request for all documents in the Division's files, and requested that it be provided with a privilege log if any documents were withheld. (Exhibit D, last paragraph) The Division did not inform Employer that it withheld the complaint. (Exhibit E-no reference to withheld documents) In its brief, Employer alleged that "It is at least plausible, if not likely, that the employer could have more actively limited the scope of the inspection or presented additional evidence about the scope of the hearing had this information not been hidden."

Employer's argument fails. Labor Code § 6309 requires that "The name of any person who submits to the division a complaint regarding the unsafeness of an employment or a place of employment shall be kept confidential by the division, unless that person requests otherwise."<sup>3</sup> Similarly, § 372.1(f) states that nothing requires the disclosure of the identity of a person who submitted a complaint. It follows that if a written complaint would reveal the identity of a complainant, then the complaint must be kept confidential. Employer learned of the existence of the complaint on the first day of hearing, October 2, 2012. Employer did not move for a review of the complaint to determine whether its release would carry the danger of revealing the complainant's identity. (See § 376.2) Therefore, Employer has not rebutted the Division's assertion that keeping the entire written complaint confidential is required to protect the identity of the person who submitted the complaint. (See Evidence Code §§412, 413)<sup>4</sup>

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anyone who was walking from the dock to the maintenance room. (Exhibits 18, 19, 20, 21, 22, 23, 24, 25) On his way from the dock to the maintenance room, he passed by the employee break room (Exhibit A). The employee break room did not have a door (Exhibits 35, 36, 37, 43, A) nor did the furniture storerooms (Exhibits 33, 41, 46, A). The employee break room was a logical place to look to find a posted set of forklift operating rules. A quick glance at the clutter and debris in the furniture storeroom was sufficient cause for Berliner to believe that an unsafe condition might exist in the furniture storeroom.

<sup>3</sup> Exhibit 57 is a copy of Labor Code § 6309

<sup>4</sup> Evidence Code §412 provides, "if weaker and less satisfactory evidence is offered when it was within the power of a party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." Evidence Code § 413 provides, "In determining what inferences to draw from the evidence of facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, is such be the case."

Before the inspection began, Employer knew the substance of the complaint. Employer asserts that "it could have more actively limited the scope of the inspection" if it had known that the complaint was written; but, Employer did not give any details. Employer did not present evidence regarding how it would have limited the scope of the inspection, or what the effect would have been. Therefore, Employer has not established prejudice from lack of knowledge that the complaint was written.

Employer learned of the existence of the written complaint on the first day of hearing. There were three days of hearing. The third day of hearing was October 23, 2012, nearly three weeks later. Employer had sufficient time to consider additional evidence to present about the scope of the inspection and to cure any surprise or prejudice. Employer did not request a continuance for this purpose or assert at hearing that it needed more time to develop or present additional evidence about the scope of the inspection. Therefore, Employer's argument that it could or would have presented additional evidence about the scope of the inspection is unsupported and is rejected.

Accordingly, no violation of due process and no discovery abuse is found.

#### Timing of Evidence Obtained to Support Violations

The Division called four witnesses to testify: (1) Associate Safety Engineer Jeffrey Berliner (Berliner), who conducted the inspection; (2) Dr. Paul Joseph Papanek (Papanek), (3) former employee Aaron White (White) and (4) former employee Roy Wright (Wright).

Berliner testified that he interviewed White during his inspection. He asked White questions on the phone. Berliner re-interviewed White shortly before this hearing began. Berliner prepared a Documentation Worksheet (Form Cal/OSHA 1B) for Citation 3. It contained a summary of evidence on which he based issuance of the violation. Exhibit B records that both White and Wright were interviewed, and contains a summary of the interviews. The summary of their interviews related to leaking chemicals from unloading trucks. The summary referred to various publications about the hazards associated with the chemicals that White and Wright unloaded.

Papanek testified that he was first asked to review material relating to the appeal about one week before the hearing. White testified that the inspector did not interview him while he was an employee, but someone from Cal/OSHA interviewed him by telephone while he was an employee, mostly about the incident where an employee got powder in his eyes. White could not recall who interviewed him. Three weeks before the hearing, he was interviewed about topics relevant to the instant appeal.

In its closing brief, Employer asserted that the medical testimony and former employee testimony was developed during interviews occurring in the few weeks before the hearing. On this basis, Employer presented the question of what basis the Division had to issue 20 citations if they did not have sufficient evidence to go to hearing.

Employer did not prove that the Division issued citations without evidence sufficient to support issuance of citations. The test of whether the Division has sufficient evidence to issue a citation is whether the citation was the result of a serious process, as opposed to arbitrary and capricious action. (*Oasis Springs Corporation*, Cal/OSHA App. P95-019, 020, and P95-2137 to 2143, Decision After Reconsideration (Feb. 18, 1998).) Arbitrary and capricious means lacking any reasonable basis whatsoever. (*Ibid.*) Even a single fact supporting the issuance of a citation is sufficient to defeat a claim that its issuance was arbitrary and capricious. (*Ibid.*)

Employer presented the documentation worksheet for Citation 3 (§ 5162(a)—no emergency eyewash) only. (Exhibit B) The Documentation Worksheet contains excerpts from scientific literature that describes the hazards associated with the relevant chemicals being handled by the employees. It records that both White and Wright handled those chemicals, that bleach and other chemicals splashed them, and that there was no eyewash. This satisfies the reasonableness test. The fact that the Division developed new or additional evidence after the Citations issued is not relevant.

Presumably, Berliner prepared Documentation Worksheets for all of the violations before he issued the citations. At hearing, he supported many of the violations with his own testimony and photographs. He testified that management personnel, Store Manager Lanners, told him that employees went to the areas where Berliner took photographs. These statements were Employer admissions<sup>5</sup> that established employee exposure to the violative conditions. Berliner interviewed Lanners before he issued the citations, and, therefore, had evidence of violations and employee exposure before the citations were issued. This was sufficient to base issuance of the citations. The fact that the Division decided to use different witnesses at hearing (White and Wright instead of Lanners) is irrelevant.

Accordingly, Employer's motion for sanctions is denied.

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<sup>5</sup> An admission is defined by Evidence Code § 1221. Evidence Code § 1221 provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof has, by words or other conduct, manifested its adoption or its belief in its truth.

## All Dockets

### Summary of Evidence

Evidence presented on any alleged violation was considered for all alleged violations to avoid duplication of effort and to save time. Evidence presented for one violation is not repeated in the Summary of Evidence for subsequent violations, but is incorporated by reference.

Jeffrey Berliner (Berliner) testified that the Division had employed him as Associate Safety Engineer for the last six and one-half years, and that before that, the Division employed him as an Industrial Hygienist for six years<sup>6</sup>. His duties were to go to places of employment and conduct investigations of complaints and accidents. He has performed about 560 inspections in the last 12 years. About 90% of his investigations have been accidents. About seven to 10 of those inspections involved eyewashes.

When the Division received a written complaint regarding the site, its initial response to the complaint was to write a letter to Employer asking it to respond to the complaint. (Exhibit C) Employer responded in writing to the Division (Exhibit 56), but the District Manager was not satisfied. The District Manger then assigned Berliner to conduct a complaint inspection at the site.

Berliner opened his inspection on May 25, 2011. He spoke to Associate Manager Scott Lanners (Lanners), who gave him permission to inspect, and then conducted a walk-through inspection of the site. That day, May 25, 2011, he took photographs at the site. (Exhibits 2 through 7, 19 through 49, 51 through 55)<sup>7</sup> He interviewed Store Manager Kenneth Bratz (Bratz) on June 9, 2011, June 13, 2011, and at the closing conference<sup>8</sup>. Berliner gave Lanners a document request (Exhibit 58), and received some of the requested documents<sup>9</sup>. Among the documents he received were a copy of Employer's Illness and Injury Prevention Program (IIPP)(Exhibit 38).

Employer is a retail discount department store. The store has a sales floor in the front where products are offered for sale. The store has a warehouse area in the back (Exhibit A). A loading dock was in the back, outside the warehouse area (Exhibit A). The warehouse had an unloading area just behind the loading dock, a baler in the unloading area, a stockroom next to the unloading area, a maintenance room, a furniture store room, an

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<sup>6</sup> Berliner retired from State service on October 30, 2012.

<sup>7</sup> Exhibit A is a map of the site. On Exhibit A, Berliner circled and labeled the approximate locations where he took the photographs. The numbers he wrote on Exhibit A refer to Exhibit numbers.

<sup>8</sup> The closing conference was held on or before July 6, 2011.

<sup>9</sup> What documents were received and their contents are discussed more fully below under the summary of facts for specific Items.

associate break room, and restrooms. (Exhibit A) The baler bundled cardboard from shipping boxes into bales and put straps around the bales. On cross-examination, Berliner estimated the distance from the loading dock to the maintenance room to be about 120 feet, although he did not measure it.

Bratz testified that he was the Store Manager at the site. The store had three Assistant Managers and two Associate Managers. Bratz transferred to the store in question in February 2011 as a store manager. Previously, he was a store manager at different Big Lots store. His duties as store manager were to oversee all employees and to execute Employer's standards.

Bratz testified that Exhibit A was a diagram of the current layout of the entire store as of the day of the hearing. In January 2012, Employer did a remodel that changed the sales floor, but did not change the warehouse section of the store. The warehouse section included the loading dock, unloading area stock rooms, the maintenance room, the employee break room, and restrooms. Bratz did not measure the distance, but he estimated that the distance between the maintenance room and the loading dock was about 150 feet. He estimated the width of the maintenance room was 15 to 20 feet.

Bratz further testified that the products Employer sells include household chemicals and bleach. All products that the store sells are brought to the store on trucks. Trucks come one to two times a week at about 9:00 p.m. Each truck is usually unloaded by about 11:30 p.m. Employees unload boxes from the trucks and put them on pallets. The pallets are taken to the stockroom. Employer received entire pallets which contained only bleach. These pallets arrived every two to three weeks. Bratz testified that he had the store clean up the clutter<sup>10</sup> shortly after the inspection, and that the store does not look the way it appeared in the photographs now.

### **Docket 11-R3D2-1929**

### **Citation 1, Item 1, § 3203(b)(2), Regulatory**

### **Summary of Evidence**

The Division cited Employer for failing to have complete training records.

### **Testimony of Aaron White**

The Division called Aaron White (White) to testify. He testified that he worked for Employer for about five years as a part-time<sup>11</sup> associate, but no longer works there. He left Employer about one and one-half years before the

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<sup>10</sup> like that depicted in Exhibits 31, 32, 41, and 46

<sup>11</sup> During the Christmas season, he worked three to four nights a week. During the rest of the year, he worked two to three nights a week.

day of the hearing, but he worked for Employer on the first day of Berliner's inspection. His main duties were as a truck unloader. He was lead on a crew, but he was not a supervisor. He assigned duties and ran the crew at night. Between two and five other employees typically worked with him on the night crew. He trained new employees on unloading trucks, building pallets, and operating the baler. With some exceptions, he worked the graveyard shift, from 9 p.m. to 5 a.m. Occasionally, he worked as a cashier.

White further testified that every night he worked, there was a meeting between the Associate Manager and his crew. There were usually four men in a crew. Two worked inside the truck, and two worked outside the truck. During that meeting, the goals and expectations were discussed. He and his crew received some type of safety training about once a week.

White also testified that he received formal baler safety training. He watched a video, was physically taught how to operate the baler, and signed a document.

White testified that Employer terminated him because White was responsible for an employee getting injured. White took full responsibility for causing the injury.

### **Testimony of Jeffrey Berliner**

Berliner testified that the document request he gave Lanners (Exhibit 58) included a request for training records, and specifically requested training documents for the baler. The safety orders required that training records show the date of training, the training provider, the topic, and the persons present for the training.

Berliner also asked Bratz on June 9, 2011, and June 13, 2011, about baler training. Bratz told him that there had not been any baler safety training.

Berliner did not receive any records for safety training given employees. Based upon the above, Berliner issued Citation 1, Item 1 for a regulatory violation of § 3203(b)(2).

On cross-examination, Berliner testified that he interviewed White during his inspection, before he issued any citations. Before he issued any citations, he completed a summary of the evidence on which he relied (Form Cal/OSHA 1B.) He had information in his notes which he may not have included on the Form 1B. Exhibit B is Form 1B for Citation 3.

Berliner testified to calculation of the proposed penalty, using the proposed penalty worksheet (Form Cal/OSHA 10, Exhibit 59). He started with a base of \$500 because all regulatory violations start with a \$500 base for

severity. No adjustments for extent or likelihood are permitted for a regulatory violation. He then applied adjustment factors of 15% for good faith, zero for size, and 10% for good history for a total of 25%. The adjustment for size was zero because Employer had over 100 employees. The adjustment for having a good history was 10%, the maximum, because Employer did not have a record of any Cal/OSHA violations at that facility. This made the adjusted penalty \$375. Abatement credits are not allowed for regulatory violations. The result was a \$375 proposed penalty.

### **Testimony of Kenneth Bratz**

Bratz testified White was an associate who worked as a cashier and unloaded trucks, and that Employer terminated him.

### **Findings and Reasons for Decision**

**The Division established that Employer did not maintain health and safety training records.**

**The violation was properly classified as regulatory.**

**The proposed \$375 penalty is reasonable.**

The Division cited Employer for a violation of § 3203(b)(2), which reads as follows:

#### § 3203 Injury and Illness Prevention Program

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

...

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

[Exceptions omitted]

The Division has the burden to prove a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980) at pp. 2-3; *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The Division must make some showing that every element of the violation

occurred. (*Lockheed California Company*, Cal/OSHA App. 80-889, Decision After Reconsideration (July 30, 1982).) The phrase “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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G.V. Perry & Associates* (1996) 43 Cal.App. 4<sup>th</sup> 472, 483, review denied.)

With the exception of regulatory violations, the Division has the burden of proving that employees of the cited employer were exposed to the hazard addressed by the safety order. (*Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981) [neither general contractors’ nor other employees shown to be exposed—no exposure under either California or federal standard]; *General Motors Corp.*, Cal/OSHA App. 77-573, Decision After Reconsideration (Aug. 9, 1978); *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).)

White testified that he received weekly safety training, and that he trained others regarding operation of the baler. This testimony was not disputed and is credited. Berliner credibly testified that he requested Employer’s training records, (Exhibit 58) but did not receive any. Where the Division presents evidence, which, if believed, would support a finding if unchallenged, the burden of producing evidence shifts to the employer to present convincing evidence to avoid an adverse finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).) Employer did not provide any evidence to contradict the Division’s assertions, and so the Division’s statements made under penalty of perjury are credited as true. (See *Alika Ikaika Enterprises Inc. dba Attention to Details*, Cal/OSHA App. 10-1191, Decision After Reconsideration (May 11, 2012), citing *Club Fresh, LLC.*, Cal/OSHA App. 06-9242, Decision After Reconsideration (Sep. 14, 2007).)

Hence, there being no evidence to rebut Berliner’s sworn testimony, it is found credible and accepted as true. Because this is a regulatory violation, no proof of employee exposure is required. Therefore, the Division established a violation of § 3203(b) by a preponderance of the evidence.

Berliner classified the violation as regulatory. Employer did not appeal the violation’s classification; however, appeal of the reasonableness of the penalty automatically raises the issue of the violation’s classification. Even when only the penalties are on appeal, the Division is on notice that the existence of the violations remains relevant for determining the appropriateness of the penalties. (*System 99, A Corporation*, Cal/OSHA App. 78-1259, Decision After Reconsideration (Aug. 30, 1992). The reason is that classification directly affects the penalty amount. (§ 361.3(a)(5).)

A regulatory violation is defined by § 334(a) as follows:

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

Because this violation related to keeping for training records, the violation was properly characterized as regulatory.

Regulatory violations begin with a base penalty of \$500 (§ 336(a)(1)), with exceptions not applicable here. Penalty adjustment factors for size, good faith, and history may be applied to Regulatory violations, but no abatement credit is allowable. (§ 336(a)(1))

The penalty adjustment for size depends on the number of employees. Since Employer has over 100 employees, no adjustment for size is allowable. (§§ 335(b), 336(d)(1)) The Division did not allow any penalty adjustment for size for any violation. (Exhibit 59)

Employer did not have a history of violations with the Division. Accordingly, a penalty adjustment of 10% for good history is allowable. (§§ 335(d), 336(d)(2)) The Division allowed a penalty adjustment of 10% for history for all violations. (Exhibit 59)

The Division rated "Good Faith" as medium, or 15% for all violations. (§s 335(c), 336(d)(2)) "Good Faith" is defined in § 335(c) as follows:

The Good Faith of the Employer—is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of CAL/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act,<sup>12</sup> Good Faith is rated as:

GOOD—Effective safety program.

FAIR—Average safety program.

POOR—No effective safety program.

Employer asserted that "the Division presented absolutely no evidence supporting its decision not to provide the employer with the full 'good faith'

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<sup>12</sup> California Occupational Safety and Health Act of 1973.

credit.” Employer argues that there was no evidence that Employer failed to cooperate with the Division, and that Berliner<sup>13</sup> was given immediate access to the dock area and the employees on more than one occasion. Employer further added that it provided the documents requested during the inspection.

“Good Faith” depends on a number of factors. Cooperation by the employer is only one factor. Employer provided documents that were requested to the extent that they had them. Employer ignores the fact that it did not provide all the requested documents. If Employer had the required training records, it would not be in violation of § 3203(b). Bratz testified that he cleaned up the cluttered areas shortly after the inspection, but actions taken after the inspection do not affect the rating. “Good Faith” is rated on the first day of the inspection.

Berliner did not testify regarding the reasons he rated “Good Faith” as medium. However, the sheer number of violative conditions (20) and the large amount of clutter and debris throughout the site shows that the extent and quality of Employer’s safety program is problematic. Employer has an Illness and Injury Prevention Program (IIPP) (Exhibit 38) but Employer did not present evidence of specific displays of accomplishments or its efforts to comply with the Act. Under these circumstances, the Division was well within its discretion to rate employer’s safety program as “average,” and this rating will not be disturbed.

A rating of “average” gives a 15% penalty adjustment credit. The Division’s rating is found consistent with the regulations, and will be applied to all violations.

Accordingly, a penalty of \$375 is found reasonable and is assessed.

### **Citation 1, Item 2, § 3664(a), Regulatory**

#### **Summary of Evidence**

The Division cited Employer for failure to post operating rules for powered industrial trucks.

Employer did not offer any evidence regarding this violation.

#### **Testimony of White**

White testified that Exhibit 26 was a photograph of a battery-operated forklift that Employer called “Big Joe.” It lifted pallets up with its forks and moved them. He operated it about once a week. He walked beside it when he moved it. There were no rules posted for operating forklifts.

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<sup>13</sup> In its brief, Employer mistakenly names Michael Richards as the inspector.

## **Testimony of Berliner**

Berliner testified that Employers are required to post operating rules for powered industrial trucks. On the day of the inspection, he saw a powered industrial truck, and took a photograph (Exhibit 26). He did not see any rules posted. White told him that no rules were posted. Based on the above, Berliner issued Citation 1, Item 2 for a regulatory violation of § 3664(a).

Berliner testified that he calculated the penalty for Citation 1, Item 2 the same way he calculated the penalty for Citation 1, Item 1. The resulting penalty was \$375.

### **Findings and Reasons for Decision**

**Employer's employees used a forklift, but Employer did not post operating rules for forklifts.**

**The Division established a regulatory violation of § 3664(a).**

**The proposed \$375 penalty is reasonable.**

The Division cited Employer for a violation of § 3664(a), which provides as follows:

Every employer using industrial trucks or industrial tow tractors shall post and enforce a set of operating rules including the appropriate rules listed in Section 3650(t).

Industrial trucks are defined in § 3649 as "A mobile power-driven truck used for hauling, pushing, lifting, or tiering materials where normal work is normally confined within the boundaries of a place of employment." White did not sit on the truck, but that is not necessary for a finding that it was a powered industrial truck. The truck was used for moving pallets, and it was power-driven. Therefore, it was a powered industrial truck. The Appeals Board has held that forklifts are industrial trucks. (*Western Pacific Roofing Corporation*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996).)

White's sworn testimony that he operated the forklift was not disputed and is credited. Employer did not introduce any evidence to establish that operating rules for the forklift were posted. Accordingly, the Division established a violation of § 3664(a) by a preponderance of the evidence.

A regulatory violation is defined above. Because this violation relates to a posting requirement, it was properly classified as regulatory.

The proposed penalty for Citation 1, Item 2, was calculated the same way as the proposed penalty for Citation 1, Item 1. (Exhibit 59) Penalty adjustment factors of 25% for good faith and history were properly applied to the base penalty of \$500. No other adjustments are proper.

Accordingly, a penalty of \$375 is found reasonable and is assessed.

### **§ 2340.16(a), Citation 1, Item 3, General**

#### **Summary of Evidence**

The Division cited Employer for insufficient space about electrical equipment.

Employer did not offer any evidence regarding this violation.

#### **Testimony of Berliner**

Berliner testified that he observed three electrical panel boxes on the right side as he walked out of the retail portion of the store into the stock room area<sup>14</sup>. Access to the panels was blocked. Berliner took photographs of the electrical panels and the objects surrounding them. (Exhibits 19, 20, 21, 22) The panels had cardboard boxes in front and to the side. A dolly was also in front of the panels. Brackets were also on the side and some merchandise that looked like a child seat was immediately beneath the panels.

Exhibit 19 is a side view (next to panel B) that shows the brackets, boxes and other objects that block the panels. It also shows a child seat underneath the panels and boxes blocking it from the front. Exhibit 20 is a photograph that shows boxes and a ladder that block access from the front. The space in front the boxes was completely closed off. Boxes or the ladder would have to be moved to get access to either panel. The approximate distance from the front of the panels to the boxes blocking them was 1 to 2 feet. Exhibit 21 shows the boxes that block the panels from the other side (next to panel PP). Exhibit 22 depicts a front view of two electrical panel boxes marked PP and B that are right next to each other.

The panels operated light switches for the retail store. White told Berliner that employees were required to access the panels to turn the lights on. White also told him that one of the switches in the panels operated the baler, and that White accessed the switch from time to time.

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<sup>14</sup> It is labeled "electrical panels" on Exhibit A and the number 19 is enclosed in a circle.

Berliner could not get through the material between him and the panels to access the panels. Berliner testified that three feet clearance deep and wide is required. Ready access to electrical panels is required in the event that electricity needs to be turned off quickly; for example, if there is faulty wiring somewhere.

Based upon the above, Berliner issued Citation 1, Item 3 for a general violation of § 2340.16(a).

Berliner testified to calculation of the proposed penalty. (Exhibit 59). He started with a base of \$1,000 for low severity. He rated extent and likelihood as low, which made the gravity-based penalty \$500. He then applied adjustment factors of 15% for good faith, zero for size, and 10% for good history for a total of 25%, as previously discussed. That made the adjusted penalty \$375. Application of the mandatory 50% abatement credit<sup>15</sup> and rounding down to the nearest five dollars resulted in a penalty of \$185.

### **Testimony of White**

White testified that he recognized Exhibits 19 through 22 and 24 and 25. The panel on the right (panel PP) had electrical switches for the store. While Employer's crews were unloading and processing the boxes from the truck at night, the lights turned off automatically every night. He or another member of his crew had to switch the lights back on, or they could not continue to perform their work.

One of the switches inside Panel PP and photographed in Exhibit 25 was for the baler, but he did not remember which switch it was. The baler switch was not marked. The manager told him which switch it was. Sometimes the baler would not work, so he used the switch to reboot the baler, and then it worked. He needed to do this about once a month. Some of the buttons in the panels operated the main lights.

After all the boxes were taken off the truck, it took the Employer's crew until about 4:30 a.m. to get everything taken to the right pallet and priced. It was typical for them to have boxes right in front of the electrical panels in question due to overstock storage limitations. White had seen boxes fall into the panels.

### **Findings and Reasons for Decision**

**Employer's employees were subject to the hazard of an electrical panel that did not have sufficient clearance around it to permit ready and safe operation.**

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<sup>15</sup> One-half of \$375 is \$187.50.

**The violation was properly classified as general.**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 2340.16(a), which provides as follows:

Sufficient access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment.

White credibly testified that he accessed the electrical panel PP to turn on the lights at night, and also to turn on the switch for the baler when necessary to reboot it. Berliner's testimony that the clearance in front of and to the sides of the panels was almost non-existent was corroborated by his photographs. (Exhibits 19 through 22, 25) In order to access the panels, it was necessary to move boxes and other objects. Employer's argument in its brief that employees could easily move the boxes is not persuasive. A large number of big boxes were right next to each other and on top of each other. They were so tightly packed that there did not appear to be anywhere to move one box without moving a lot of other boxes. The photographs do not show any areas where boxes or other merchandise could be moved.

Therefore, the Division established a violation of § 2340.16(a) by a preponderance of the evidence.

The Division classified the violation as general. In order to establish a general violation, the Division need only show that the safety order was violated and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998).) Since space about electrical equipment affects its safe operation, the violation was properly classified as general.

The Division gave the lowest possible rating for severity, extent and likelihood. Berliner did not testify regarding the reason for giving the lowest ratings; but, where the Division does not present evidence, Employer is given the maximum reduction possible. (*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).) This yielded a gravity-based penalty of \$500.

The Division gave a 25% penalty adjustment (good faith—15%, size—0%, history—10%) for the reasons explained above in connection with Citation 1, Item 1. Thus, the adjusted penalty became \$375. Application of the

mandatory 50% abatement credit gave a proposed penalty of \$185 when rounded down to the nearest \$5.00 (§ 336(j).)

Therefore, the penalty was calculated in accordance with the Division's regulations. A penalty of \$185 is found reasonable and is assessed.

**§ 2340.21(a), Citation 1, Item 4, General**

**Summary of Evidence**

The Division cited Employer for failing to ensure that electrical equipment was marked with the voltage, current, wattage, or other rating.

Employer did not offer any evidence regarding this violation.

Berliner took a photograph of an electrical box that was on a cement wall next to the baler. (Exhibit 23). There were no markings for voltage, current, wattage, or other rating. Underneath the box was a screwdriver. On top of the box was a white plastic bottle cap. Next to the box was an aluminum beverage can. "General Electric" was written on a plate attached to the box. Above it were three switches.

Berliner did not know if the electrical switches were in use, but he believed they were in use because of the personal items surrounding the box. A dial on the box was lit up. He could not tell if it measured voltage or amps.

Berliner identified the box in question as related to Employer's baler because a conduit went from the box to the other side where the baler was located. Associate Manager Lanners told Berliner that the electrical box was for the baler. The plate on the baler read 460 volts. (Exhibit 28)

Based upon the above, Berliner issued Citation 1, Item 4 for a general violation of § 2340.21(a)(2).

Berliner testified that he calculated the penalty for Citation 1, Item 4 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

**Findings and Reasons for Decision**

**Employer had electrical equipment in use that did not have markings for voltage, current, wattage, or other ratings. The Division established a general violation of § 2340.21(a)(2) by a preponderance of the evidence.**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 2340.21(a)(2), which provides as follows:

(a) Identification of Manufacturer and Ratings.

Electric equipment shall not be used unless the following markings have been placed on the equipment:

- (1)...
- (2) Other markings giving voltage, current, wattage, or other ratings.

The parties agreed that the electrical box in question (Exhibit 23) had a meter or dial that was lit and which had a red pointer. Employer argued that the dial showed voltage. The evidence does not support this assertion. Berliner was at the site and personally examined the meter. Although the meter was working, Berliner credibly testified that he could not tell if the meter was measuring voltage or amps. He could not find any legible markings that gave this information. Employer had the motive and opportunity to rebut Berliner's testimony and prove that the meter had markings that indicated that it was measuring voltage. Employer did not. Therefore, the inference to be drawn is that the meter did not have the required markings to show that it was measuring voltage. (See Evidence Code § 413<sup>16</sup>) Berliner's direct evidence is sufficient to prove that the box was not marked. (Evidence Code § 411<sup>17</sup>)

Employee exposure is established by the plastic bottle cap on top of the box, the aluminum beverage can next to the box, and the screwdriver below the box, all of which are visible in Exhibit 23. This is circumstantial evidence, but circumstantial evidence may be as persuasive and convincing as direct evidence and may properly be found to outweigh conflicting direct evidence. (*R 85 L Brosamer, Inc.*, Cal/OSHA App., Decision After Reconsideration (Oct. 5, 2011), citing *ARB, Inc.*, Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997).) There is no reason to believe that anyone besides an employee would be in the warehouse areas of the store.

Employer also points out that the equipment shown in Exhibits 27 and 28 (the baler) has labels or stickers showing voltage. While true, Citation 1, Item 4 was issued for lack of markings on the electrical box depicted in Exhibit 23. The citation was not issued for lack of markings on the baler.

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<sup>16</sup> Evidence Code § 413 provides, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

<sup>17</sup> Evidence Code § 411 provides, "Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact."

Therefore, the Division established a violation of Citation 1, Item 4 by a preponderance of the evidence. As it relates to safety, it was properly classified as general. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998).)

The Division's proposed penalty of \$185 was calculated in accordance with the regulations. The Division gave Employer the maximum adjustments and credits allowable, except for a 15% rating for good faith and a 0% rating for size, which were previously found proper. A penalty of \$185 is found reasonable and is assessed.

**Citation 1, Item 5, § 2340.22(b), General**

**Summary of Evidence**

The Division cited Employer for failure to mark electrical service, feeder and branch circuits at their disconnecting means or to mark their overcurrent device.

Employer did not offer any evidence regarding this violation.

**Testimony of White**

White's testimony in connection with Citation 1, Item 3 is incorporated by reference. White also testified that the panel had all the fuses for the store.

**Testimony of Berliner**

Berliner referred to panel PP, which he photographed in Exhibits 24 and 25. Exhibit 24 is a photograph of the inside of the door. There is a label on the door that identified the wattage and current of each switch. Exhibit 25 is a photograph of the electrical switches in the boxes. There was no legend indicating what the switches controlled, except for the Christmas Table and Christmas lights. There were 36 switches, all of which were numbered.

Berliner was aware that White operated one of the switches in Panel PP for the baler and the lights. He did not know about anyone else that operated the switches.

Based upon the above, Berliner issued Citation 1, Item 5 for a general violation of § 2340.22(a).

Berliner testified that he calculated the penalty for Citation 1, Item 5 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

### **Findings and Reasons for Decision**

Electrical service, feeders, and branch circuits were not legibly marked at their disconnecting means to indicate their purpose.

The Division established a violation of § 2340.22(b) by a preponderance of the evidence.

The proposed \$185 penalty is reasonable.

The Division cited Employer for a violation of § 2340.22(b), which provides as follows:

Services, Feeders, and Branch Circuits. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.

Berliner credibly testified that the switches in electrical panel PP were not marked, except for the Christmas switches. His photographs corroborated his testimony. (Exhibits 19, 25) White credibly testified that he accessed panel PP to turn on the lights for the store and to occasionally flip the switch for the baler. White testified that the switch was not marked, and the manager had to tell him which one was for the baler. All the switches looked alike. They were not arranged so that their purpose was evident.

Accordingly, the Division established a violation of § 2340.22(b). Since it related to employee safety, it was properly classified as general.

The proposed penalty was calculated in the same way as the penalty for Citation 1, Item 3, and is found to be consistent with the regulations.

A penalty of \$185 is found reasonable and is assessed.

### **Citation 1, Item 6, § 2340.24, General**

#### **Summary of Evidence**

The Division cited Employer for failing to remove the conductors from a discontinued circuit or maintain it as if still in use.

#### **Testimony of Berliner**

Berliner testified that he observed a discontinued electrical conductor. (Exhibit 33). The raceway had been cut off, which is clearly shown in the photograph. He could see that the wires at the end of the conduit were still there. It was located in the furniture stock room. (Exhibit A<sup>18</sup>) Employees pulled merchandise from the area.

Berliner asked Lanners, and Lanners told him that the circuit had been abandoned. Lanners told him that employees went into the furniture stock room.

Based upon the above, Berliner issued Citation 1, Item 6 for a general violation of § 2340.24.

Berliner testified that he calculated the penalty for Citation 1, Item 6 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

### **Testimony of Bratz**

Bratz testified that Exhibit 33 was a photograph of the furniture stock room. There were some products being stacked. They were going to be returned to the manufacturer as defective. Some of the products were being stored for future sale in the store. Employees went into the furniture stock room every day.

### **Findings and Reasons for Decision**

**Employer had an abandoned electrical circuit that was no longer in use, but did not remove the conductor from the raceway in an area where employees frequented.**

**The Division established a general violation of § 2340.24 by a preponderance of the evidence.**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of §2340.24, which provides as follows:

When a circuit is abandoned or discontinued, its conductors shall be removed from the raceways, or be maintained as if in use.

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<sup>18</sup> Berliner wrote the number "33" and circled it on Exhibit A to show where he observed the discontinued electrical conductor.

Berliner credibly testified that Employer had an abandoned electrical circuit and he took a photograph. (Exhibit 33). Assistant Store Manager Lanners told him<sup>19</sup> that the area was the furniture stockroom, and that employees went into the area. The amount of boxes and other materials in the furniture stock room corroborated Lanner's statement that employees accessed the area. Bratz credibly testified that employees went into the furniture stock room daily. The Division established employee exposure.

Therefore, the Division established a violation of § 2340.24 by a preponderance of the evidence. As it had an effect on employee safety, it was properly classified as general.

The penalty was calculated in the same way as the penalty for Citation 1, Item 3. This calculation is found to be consistent with the regulations. A penalty of \$185 is found reasonable and is assessed.

### **Citation 1, Item 7, § 2510.4, General**

#### **Summary of Evidence**

The Division cited Employer for failure to have a face plate over live parts in a wall receptacle.

Employer did not offer any evidence regarding this violation.

Berliner testified that when he went into the employee break room, he observed a light switch that did not have a cover (Exhibits 34, 35<sup>20</sup>) and two electrical sockets that did not have a face plate. (Exhibits 36, 37<sup>21</sup>). Berliner testified that the light switch had live electrical parts which an employee could make contact with when switching the light on or off. He further testified that a cover was necessary for the electrical sockets so that employees did not make contact with the live parts when he or she plugged an electrical device in.

There were employees in the break room<sup>22</sup> when Berliner was in the break room conducting interviews. Berliner checked the switches and they were live.

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<sup>19</sup> Since Lanners was a member of management, his statements are attributed to Employer and are not hearsay. (*Webcor Construction, Inc. dba Webcor Builders*, Cal/OSHA App. 06-2095, Decision After Reconsideration (Mar, 27, 2012), citing Evidence Code 1222; *Bill Nelson General Engineering Construction, Inc.*, Cal/OSHA App. 09-3769, Denial of Petition for Reconsideration (Oct. 7, 2011).) Lanner's statements are authorized admissions under Evidence Code § 1222. Evidence Code § 1222 provides that evidence offered against a party is not made inadmissible by the hearsay rule if the statement was made by a person authorized by the party to make statements concerning the subject matter of the statement.

<sup>20</sup> Exhibit 34 is a close up of the switch photographed in Exhibit 35.

<sup>21</sup> Exhibit 36 is a close up of the plugs photographed in Exhibit 37.

<sup>22</sup> Some of the employees were preparing meals.

Based upon the above, Berliner issued Citation 1, Item 7, for a general violation of § 2510.4.

Berliner testified that he calculated the penalty for Citation 1, Item 7 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

### **Findings and Reasons for Decision**

**The Employer's employees were exposed to the hazard of a light switch and an electrical receptacle that had live electrical parts exposed to contact.**

**The Division established a general violation of § 2510.4 by a preponderance of the evidence.**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 2510.4, which provides as follows:

Fixtures, lampholders, lamps, rosettes, and receptacles shall have no live parts normally exposed to contact.

In its brief, Employer admitted that the light switch and the electrical sockets did not have face plates. Employer argued that there was no violation because the Division presented no evidence of any employee exposure to the hazard. Employer conceded that employees used the break room, but argued that Berliner did not testify that the missing face plates actually created exposure to any live parts. Employer alleged that Berliner hypothesized that if the wiring in the wall and behind the fixtures was also faulty, only then could an employee be exposed.

The record does not support Employer's assertion. Berliner testified that there were live electrical parts behind the light switch and the electrical sockets that employees could touch if they used the switch or the sockets. Employer did not offer any testimony to the contrary despite the motive and opportunity. Berliner's testimony is sufficient to establish the violation. Therefore, employee exposure to the hazard of contact with live electrical current is found.

Accordingly, the Division established a general violation of § 2510.4 by a preponderance of the evidence.

The penalty was calculated the same way as the penalty for Citation 1, Item 3. This calculation is found to be consistent with the regulations. A penalty of \$185 is found reasonable and is assessed.

**Citation 1, Item 8, § 3203(a)(6)(B), General**

**Summary of Evidence**

The Division cited Employer for failing to have procedures in its Illness and Injury Prevention Program (IIPP) when an imminent hazard cannot be immediately abated.

Berliner requested and received Employer's IIPP. (Exhibit 38) When he reviewed it, he found an Emergency Action Plan (EAP), but did not find any procedures regarding imminent hazards. There was nothing about who would respond to an imminent hazard or what response, if any, there would be. There was nothing about correcting imminent hazards or designating personnel who would stay behind to correct an imminent hazard.

Based upon the above, Berliner issued Citation 1, Item 8 for a general violation of § 3203(a)(6)(B).

Berliner testified that he calculated the penalty for Citation 1, Item 8 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

On cross-examination, Berliner testified that the type of imminent hazards Employer could expect included, but were not limited to, fires, earthquakes, floods, and violence. Although there may not be any reason for any employee to stay in the store in the event of an imminent hazard, the IIPP must state such and employees must be trained in the procedures to be followed. Those procedures would include how to evacuate, who does the evacuation, and where to meet once outside the store. Employer's IIPP does have an EAP, but the IIPP omits these provisions.

**Testimony of Bratz**

Bratz testified that Employer had procedures in place in the event of an emergency<sup>23</sup>. Employer supplied a flip chart that managers could use. There were several flip charts in different areas in the store for employees to use. Nothing needed to be preserved by employees. There was no need to rescue anyone or to save any merchandise.

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<sup>23</sup> Bratz described some of these procedures. In the event of a fire in the store, there was a code word to be used on the PA system. If the fire were small, they would use a fire extinguisher to put it out. They would ensure that all the customers got out safely. The procedures were the same in the event of an earthquake.

### Findings and Reasons for Decision

Employer's IIPP did not have provisions regarding employees who remain behind to correct an existing imminent hazard. The Division established a violation of § 3203(a)(6)(B) by a preponderance of the evidence.

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 3203(a)(6)(B), which provides as follows:

(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:

...

(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) ...

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

Employer recognized that its IIPP (Exhibit 38) did not explain safeguards for employees who must remain exposed to an imminent hazard in order to correct the condition. However, Employer maintained that it was in full compliance with § 3203(a)(6)(B) because there is no eventuality that could occur at the store that would require employees to stay behind. For example, in case of fire, employees are expected to vacate the premises. Employer further argued that adding the provisions in question would make its IIPP less effective because it would contain information that is clearly irrelevant to its operations and facilities.

Employer's argument is misplaced. Employer recognized that there were situations where employees and customers were required to evacuate the site due to an imminent hazard. If employees are never to stay behind when exposed to an imminent hazard to correct a condition, then the IIPP must have provisions that explicitly spell out that requirement. Otherwise, employees

may not be aware that they are not to try to stay behind to fight a fire, preserve merchandise, or to try to help someone trapped<sup>24</sup>. Employer's IIPP (Exhibit 38) is not clear on this point. A reading of Employers EAP (in Exhibit 38) shows managers, at their discretion, are permitted to assign employees to stay behind for a period of time to deal with an imminent hazard until certain tasks are accomplished, such as securing all funds and ensuring that no one else is still in the building. These employees fall into the category of employees who remain behind to correct an existing condition due to an imminent hazard. Employer has no specific provisions for them, as required by the safety order.

Therefore, the Division established a violation of § 3203(a)(6)(B). Since it relates to employee safety and health, it is properly classified as general.

The proposed penalty was calculated the same way as the penalty for Citation 1, Item 3. This calculation is found to be consistent with the regulations. A penalty of \$185 is found reasonable and is assessed.

### **Citation 1, Item 9, § 3272(b), General**

#### **Summary of Evidence**

The Division cited Employer for having aisles and walkways that were less than 24 inches wide.

Berliner testified that he found multiple areas of limited clearance for walking during his inspection, and took photographs. (Exhibits 39 through 48).

One location was at the entrance to the maintenance room. A hallway leads to the maintenance room from the stock room. (Exhibit A). A photograph of that hallway (Exhibit 47) depicts the doorway to the maintenance room. The doorway is obstructed by a mop handle that sticks out across the opening on the bottom left side. Exhibit 43 is a photograph showing the doorway from the inside, with the mop handle across the opening. Exhibit 45 is a close up of the mop handle and a measuring tape. The tape shows that the doorway opening is approximately 34 inches<sup>25</sup> when unobstructed. The width of the opening not obstructed by the mop is 19". (Exhibit 45) Exhibits 44 and 48 depict the rest of the handle and other end of the mop, where the mop is hanging into a large sink.

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<sup>24</sup> Persons may be trapped for a number of reasons: fire, fallen objects, debris, a gunman, and so forth.

<sup>25</sup> The tape measure is extended past the 32" mark, and the tape holder is about 2" long.

A second location was next to the baler. (Exhibits 39, 40, 41<sup>26</sup>) A storage area was behind the baler. The forklift, "Big Joe" was stored there, among other items, like dollies. To reach this area, employees had to walk by the baler where Berliner took the photographs. A blue crow bar was on the floor between the baler and shelving stored on its end<sup>27</sup>. Berliner measured the distance between the baler and the shelving as 22" (Exhibit 39). He measured the distance between the baler and the crowbar as 14" (Exhibit 39).

Berliner took photographs inside the furniture storage room. (Exhibits 41, 46) Exhibit 46 shows shelving on the right hand side of the room, and Exhibit 46 shows shelving on the left hand side of the room. Berliner testified that employees must have access to the stacks of merchandise, either to add merchandise or retrieve it. Berliner referred to Exhibit 41, which was the hallway leading to the maintenance room. It was an example of a required aisle. The clearance was less than 24". Exhibit 46, the furniture stock room<sup>28</sup>, also shows blocked shelves. Both photographs show boxes and other merchandise stored next to the shelves in such a manner that the shelves were blocked. It was not possible to get to the shelves.

Based on the above, Berliner issued Citation 1, Item 9 for a general violation of § 3272(b).

Berliner testified that he calculated the penalty for Citation 1, Item 9 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

### **Testimony of Bratz**

Bratz testified that Exhibit 31 was a photograph taken in the maintenance room. Employees had access to the maintenance room every day. Employees use equipment kept there, including the ladder.

Bratz testified that Exhibits 41 and 46 were photographs of the furniture stock room. Exhibit 41 depicted defective merchandise waiting to be returned to the vendor. Boxes were stacked in the employee work area. Employees put boxes and materials on the racks photographed in Exhibits 41 and 46. On the left side of Exhibit 41, merchandise has been put on a rack. Similarly, Exhibit 46 depicts a different part of the furniture stock room. Employees work in that area. Defective merchandise is waiting to be returned. The left hand side of Exhibit 46 depicts rolled up carpet on the top shelf. Employees had the job of placing the carpet on the shelf.

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<sup>26</sup> The metal green object in Exhibits 39, 40 and 41 is the same baler photographed in Exhibits 27 and 28.

<sup>27</sup> The shelving formed a barrier like a wall.

<sup>28</sup> Exhibit 46 was taken in the same room as Exhibit 33. Berliner marked a "33" with a circle around it on Exhibit A where he took the photograph for Exhibit 33.

### Findings and Reasons for Decision

Employer's employees were exposed to the hazard of aisles that were less than 24 inches wide. The Division established a violation of § 3272(b) by a preponderance of the evidence.

The proposed penalty of \$185 is reasonable.

The Division cited Employer for a violation of § 3272(b), which provides as follows:

Where aisles or walkways are required, machinery equipment, parts, and stock shall be so arranged and spaced as to provide clear walkways or aisles of not less than 24 inches in width and 6 feet 8 inches clear headroom to a safe means of egress from the building.

Employer did not dispute that the openings depicted in Exhibits 39 through 47 show boxes and products that would block an aisle. However, Employer argued that the Division did not present any evidence that the aisles were "required;" and, therefore, Employer did not violate § 3272(b). In its brief, Employer conceded that employees may have had need to access the areas depicted in the photographs, and the only way to do that was to remove the boxes blocking the aisle. Employer maintained that employees just moved whatever they needed to move to get whatever it was they needed to get. Employer further argued that unless and until the aisles are cleared to allow employee access, the aisles could not be required to allow an employee to exit the area; i.e., the aisles (as shown in the Exhibits) were not aisles.

Employer did not cite authority for its position, and the Appeals Board precedent does not accept Employer's interpretation. The term "required aisles" is not defined in the safety orders. However, the Appeals Board has interpreted its meaning as used in § 3272(b) in *Proctor and Gamble Manufacturing Company*, (Proctor and Gamble) Cal/OSHA App. 78-1550, Decision After Reconsideration (Aug. 31, 1984) and *Starcrest Products of California, Inc.*, (Starcrest) Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004).

In *Proctor and Gamble*, the Board held that § 3272(b) pertains to all walkways and aisles, citing *Kaiser Steel Corporation, Steel Manufacturing Division*, Cal/OSHA App. 75-0619, Decision After Reconsideration (June 21, 1982). The Board held that every walkway and aisle is a required walkway and aisle for the purposes of § 3272(b). In *Proctor and Gamble*, the Board rejected the employer's contention that because the mezzanine near which a walkway passed was not a work station and used only for a limited purpose, § 3272(b) did not apply to the walkway.

In *Starcrest*, Employer maintained a warehouse that had rows of stacked boxes. The rows were a maximum of six feet long. The spaces between the rows were approximately 16 inches. Employees retrieved boxes from the rows. Employer denied that employees accessed the rows between the boxes, except to see a label, at most. In *Starcrest*, Employer introduced the testimony of an expert on workplace safety and English grammar, having taught grammar at the college level. The expert gave his expert opinion on the meaning of "aisle or walkway" and the concepts of "required" and "egress." He opined that the 16-inch spaces between the stacked boxes were organizational delineators only. He opined that they were not required aisles or walkways because they were not required for egress from the building and because they were not used for passage.

In *Starcrest*, the Board rejected Employer's arguments, citing *Kaiser Steel Corporation, Steel Manufacturing Division*, Cal/OSHA App. 75-0619, Decision After Reconsideration (June 21, 1982). The Board held that the language of § 3272(b) requires employers to provide clear passageways from areas where employees work to an area where employees can safely exit. The Board held that the amount of usage is not determinative as to whether the space is a hallway, walkway or passageway. It stated that "The public policy underlying the regulation sets forth a minimum standard for persons to use if the aisle or walkway is used." (*Id.* at 3) The Board noted that looking for a box in the middle of the row would require an employee to enter the space between the boxes. No physical barrier prevented employees from using the spaces as aisles. Employer did not present any evidence that employees were told not to use the spaces as aisles. Therefore, the Board held that the spaces were aisles.

Following the above precedent, the spaces Berliner photographed are found to be required aisles. The instant case is similar to *Starcrest*. Here, employees accessed the boxes shown in Exhibits 39 through 47. To do so, they had to step into the spaces in between the boxes, and may have had to create a larger space. Exhibits 39, 40, and 42 show a crowbar partially blocking an opening by the baler where employees walked through to reach the space behind the baler. (Exhibit A). Exhibit 42 has a tape measure that shows that the unblocked opening is less than 24 inches. Exhibits 43, 44, 45 and 47 show a mop handle partially blocking the entrance to the maintenance room. Exhibit 45 shows that the unblocked portion of the entrance is less than 24 inches. Exhibits 41 and 47 show boxes stacked very near to shelves. These spaces in front of the shelves were less than 24 inches.

Therefore, the Division established a violation of § 3272(b) by a preponderance of the evidence. Because the violation is related to safety, it was properly classified as general.

The proposed penalty was calculated in the same way as Citation 1, Item 3. The calculation is found to be consistent with the regulations. A penalty of \$185 is found reasonable and is assessed.

**Citation 1, Item 10, § 3276(c)(15)(E), General**

**Summary of Evidence**

The Division cited Employer for employees who stood on ladder topcaps or the step below the topcap.

Employer did not offer any evidence regarding this violation.

Berliner testified that on June 13, 2011, when he went to the site, he observed a female standing on the topcap of a ladder placing a plastic tub on top of a shelf. Lanners was next to Berliner when Berliner made the observation.<sup>29</sup> The employee was about 3 to 4 feet off the ground.

Based on the above, Berliner issued Citation 1, Item 10 for a general violation of § 3276(c)(15)(E).

Berliner testified that he calculated the penalty for Citation 1, Item 10 the same way he calculated the penalty for Citation 1, Item 3, except that he rated severity as high. The hazard associated with the violation is falling from the top cap. He rated severity as high because it was likely that in the event of an injury caused by the violation, an employee would be in the hospital for over 24 hours for more than observation. With a high severity, the resulting penalty was \$375.

**Findings and Reasons for Decision**

**The Employer's employee stood on the top cap of a ladder. The Division established a general violation of § 3276 (c)(15)(E).**

**The proposed \$375 penalty is reasonable.**

The Division cited Employer for a violation of § 3276(c)(15)(E), which provides as follows:

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<sup>29</sup>Lanners then talked to the employee. Lanners told Berliner that there were longer ladders available for employees to use. Employer had an 8 to 10 foot ladder, as depicted in Exhibits 31 and 47. Berliner believed that the ladder in the maintenance room (Exhibit 31) was probably a 12-foot ladder. There were at least eight rungs.

Employees shall not sit, kneel, step or stand on the pail shelf, topcap or the set below the topcap of a step ladder.

Berliner and Lanners saw an employee stepping on the top cap of a ladder during the course of Berliner's inspection. The employee was inside the store and in the course of performing her duties.

Therefore, the Division established a violation of § 3276(c)(15)(E) by a preponderance of the evidence. Because the violation related to employee safety, the Division properly classified it as general.

Berliner rated "severity" as high because the most likely injury in the event of an accident caused by the violation (falling from a ladder) was hospitalization for over 24 hours. This testimony was based on Berliner's experience and training to which he testified. His testimony on this point was not disputed or refuted, and it is credited. (See *Alika Ikaika Enterprises Inc. dba Attention to Details*, Cal/OSHA App. 10-1191, Decision After Reconsideration (May 11, 2012), citing *Club Fresh, LLC.*, Cal/OSHA 06-9292, Decision After Reconsideration (Sep. 14, 2007).)

In § 335(a)(1)(A)(ii), "severity" for a general violation, when not pertaining to an employee illness or disease, is based upon the type and amount of medical treatment likely to be required. Severity is rated as "low" when first-aid only is required, "medium" when medical attention but not more than 24-hour hospitalization is required; and "high" when more than 24-hour hospitalization is required. Therefore, the high rating for severity was proper.

Berliner rated extent and likelihood as low, then applied the 25% penalty adjustments (15% good faith, 10% history), followed by the 50% abatement credit. This is the same calculation as for Citation 1, Item 3, and is found appropriate, as discussed.

Accordingly, a penalty of \$375 is found reasonable and is assessed.

**Citation 1, Item 13, § 3668(a)(1), General**

**Summary of Evidence**

The Division cited Employer for failure to ensure that forklift operators were properly trained.

Employer did not offer any evidence regarding this violation.

### **Testimony of White**

White testified that he operated the forklift "Big Joe" (Exhibit 26) by walking next to it while he operated the controls. He did not push it. It was battery powered. It was used for moving pallets. He operated it about once a week. The manager was aware that the operated Big Joe. He testified that Employer did not give him specific training on safe operation of Big Joe. White handled pallet jacks previously. He did not have any hands-on training in the operation of Big Joe. He thought that the associated hazard was unstable pallets.

On cross-examination, White testified that his supervisor, Daniels, asked him if he could operate Big Joe, and White responded affirmatively.

### **Testimony of Berliner**

Berliner testified that he requested documentation of forklift or powered industrial truck training (Exhibit 58), but he did not receive anything that indicated there was industrial truck training. The safety orders require both classroom and hands-on training. Berliner described various accidents that can occur and the possible resulting injuries when operators are not trained.

Based on the above, Berliner issued Citation 1, Item 13 for a general violation of § 3668(a)(1).

Berliner testified that he calculated the penalty for Citation 1, Item 13 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

### **Findings and Reasons for Decision**

**Employer did not ensure that powered industrial truck operators were competent to operate powered industrial trucks safely.**

**The Division established a general violation of § 3668(a)(1).**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 3668(a)(1), which provides as follows:

The employer shall ensure that each powered industrial operator is competent to operate a powered industrial truck safely, as demonstrated by the

successful completion of the training and evaluation specified in this section.

White credibly testified that he operated "Big Joe," a battery-powered industrial truck. The truck was used for moving pallets, and it was power-driven. As previously discussed<sup>30</sup>, "Big Joe" was a powered industrial truck.

White testified that Employer did not train or evaluate him on his knowledge and ability regarding powered industrial trucks or forklifts. The record is void of any evidence that Employer did any training or evaluation, or ensured that White was properly trained.

Therefore, the Division established a violation of § 3668(a)(1) by a preponderance of the evidence. Because the violation relates to employee safety, the violation was properly classified as general.

Berliner calculated the penalty the same way he did for Citation 1, Item 3. This calculation is found to be consistent with the regulations.

The proposed penalty of \$185 is found reasonable and is assessed.

### **Citation 1, Item 14, § 4353(g)**

#### **Summary of Evidence**

The Division cited Employer for having an ineffective locking system for its baler.

Employer did not offer any evidence regarding this violation.

#### **Testimony of White**

The baler was kept in the warehouse<sup>31</sup>, about 14 feet from the loading dock. It took cardboard, pressed it down, and made a bale. There was a bin where Employer's truck unloading crew threw in cardboard from the boxes that came from the boxes carried by the trucks. They would put a screen down over the cardboard, push the button for the baler, and the baler would push the cardboard down. When the bin was full, they would make a bale by putting aluminum or steel cable around the bale. (Exhibit 30) Then they lifted the bale out onto a pallet, and put it on an empty truck.

White testified that he operated the baler himself. Normally, they made one or two bales each night that he worked. Everyone except one person in the

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<sup>30</sup> The discussion is above in connection with Citation 1, Item 2.

<sup>31</sup> Its location is shown on Exhibit A.

crew operated the baler. Other employees were allowed to use the baler as long as they were over 18. Training was required to use the baler.

The baler required a key in order to operate it. The key turned the power on and off. Exhibits 27 and 28 show the key in the switch. The key was always there, in place the entire time he worked there. The only time that the key was not in place was immediately after the Cal/OSHA inspection.

### **Testimony of Berliner**

Berliner testified that when he inspected the baler, the key was in the switch that operated the baler. (Exhibits 27, 28, 51). He testified that this defeats the purpose of preventing unauthorized persons from using the baler. White told him that he operated the baler, and that the key was in the baler the whole time.

Based upon the above, Berliner issued Citation 1, Item 14 for a general violation of § 4353(g).

Berliner testified that he calculated the penalty for Citation 1, Item 14 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

### **Findings and Reasons for Decision**

**Employer's employees were subject to the hazard of a baler that did not have an effective locking system. Unauthorized persons had free access to the baler. The Division established a violation of § 4353(g).**

**The violation was properly classified as general.**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 4353(g), which provides as follows:

Compaction equipment shall be provided with a locking system to prevent unauthorized operation.

White testified that Employer's baler compacted cardboard and made bales. Employer did not dispute that the baler was compaction equipment. The baler had a locking mechanism, but the key was in the lock when Berliner performed his inspection. (Exhibits 27, 28, 51) White credibly testified that the key stayed in the lock. White also testified that employees under 18 were not authorized to operate the baler. Employer did not dispute White's testimony on any of these points, and it is credited.

With the key in the lock, anyone could operate the baler, whether the person was authorized or trained or not. Therefore, the Division established a violation of § 4353(g) by a preponderance of the evidence.

Unauthorized persons could use the baler. This relates to employee safety, since use by someone not trained could lead to an injury. Therefore, the Division properly classified the violation as general.

Berliner calculated the penalty the same way he calculated it for Citation 1, Item 3. This calculation is found to be consistent with the regulations. The proposed penalty of \$185 is found reasonable and is assessed.

**Citation 1, Item 15, § 6151(c)(1), General**

**Summary of Evidence**

The Division cited Employer for a fire extinguisher that was not readily accessible.

Employer did not offer any evidence regarding this violation.

Berliner testified that while he was performing his inspection, he saw several portable fire extinguishers. One of the extinguishers was in the retail section of the store, sitting on the tile floor. (Exhibit 49) It sat between some shelves and boxes of bleach sitting on a pallet. The shelves were stocked with plastic bottles of liquid cleansers (Windex and Sun Burst). Berliner testified that the fire extinguisher would be hard to find. The fire extinguisher was blocked by some of the products and by the pallet with boxes of bleach bottles.

Based on the above, Berliner issued Citation 1, Item 15 for a general violation of § 6151(c)(1). There were other fire extinguishers in the store, including one in the maintenance room (Exhibit 44) and the employee break room. (Exhibit 37). Berliner did not cite Employer for either of these fire extinguishers or for any other fire extinguisher. Berliner did not know how many fire extinguishers were in the store.

Berliner testified that he calculated the penalty for Citation 1, Item 15 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185.

**Findings and Reasons for Decision**

**Employer's fire extinguisher was not mounted and identified. The Division established a general violation of § 6151(c)(1).**

**The proposed \$185 penalty is found reasonable and is assessed.**

The Division cited Employer for a violation of § 6151(c)(1), which provides as follows:

The employer shall provide portable fire extinguishers and shall mount, locate and identify them so that they are readily accessible to employees without subjecting the employees to possible injury.

In its brief, Employer acknowledged that one portable fire extinguisher (depicted in Exhibit 49) was sitting on the floor between shelves containing liquid cleansers and a pallet of boxes of bleach. Employer asserted that the Division presented no evidence that Employer failed to “mount, locate, and identify” a sufficient number of fire extinguishers to comply with § 6151(c)(1), nor did the Division present any evidence that fire extinguisher shown in Exhibit 49 exposed any employee to possible injury.

There was no dispute that the fire extinguisher in Exhibit 49 was not mounted or identified. Employer reads in an exception to the effect that a “sufficient number of fire extinguishers” would serve to comply with § 6151(c)(1) and excuse the non-compliance of other fire extinguishers.. Employer did not cite any authority for its argument, and the burden is on Employer to prove this exception. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar 2, 2001); *Barnard Engineering*, Cal/OSHA App. 81-0241, Decision After Reconsideration (May 28, 1982).)

The safety order itself refers to each and every fire extinguisher. The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of rules and regulations of administrative agencies. (*California Drive-In Restaurant Association v. Clark* (1943) 22 C.2d 285) Absent ambiguity, the ordinary meaning of the words is used. (*California State Restaurant Association v. Whitlow* (1976) 58 C.A.3d 340).

Adoption of Employer’s interpretation would lead to uncertainty and less protection for employees, as some fire extinguishers would not be readily accessible and could subject employees to a risk of injury. There is no standard to determine what number of mounted and identified fire extinguishers would be sufficient, and Employer has not suggested one. Extinguishers might be missed in a fire, or an employee could trip on an extinguisher sitting on the floor. Employer’s interpretation is contrary to the California Supreme Court’s directive to the Appeals Board to liberally interpret legislation to promote healthful and safe working environments. (*Carmona v. Division of Industrial Safety* (1975) 13 C.3d 303). The Appeals Board has

extended this doctrine to apply to safety orders. (*Golden West Homes, Riverside Division*, Cal/OSHA App. 78-1095, Decision After Reconsideration (Nov. 19, 1984).)

It has long been held that where a statute is susceptible of two constructions, one leading to mischief and absurdity, and the other leading to sound sense and wise policy, the latter construction is adopted. (*Teichert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002), citing *Lockheed Missiles & Space Co.*, Cal/OSHA App. 79-492, Decision After Reconsideration (Apr. 14, 1982).) Accordingly, Employer's interpretation is rejected.

Therefore, it is found that the Division established a violation of § 6151(c)(1) by a preponderance of the evidence. The \$185 proposed penalty, calculated in the same way as the penalty for Citation 1, Item 3, is found reasonable and is assessed.

### **Summary of Evidence**

#### **Citation 2, § 2340.17(a), Serious**

The Division cited Employer for having unguarded energized parts.

#### **Testimony of Berliner**

Berliner testified that anything over 50 volts must be guarded to prevent electric shock. He found two instances where electrical current of more than 50 volts was not guarded.

The first instance was an electrical panel box with live wires that were not guarded. The electrical panel box was about 8 to 9 feet tall. (Exhibit 31). On the right side of the box, there were exposed horizontal wires. (Exhibit 31). He tested the wires with a pen that lights up when it is near electricity. The wires tested as live, or energized. (Exhibit 52). One switch opening on the box was not guarded. (Exhibit 34) The switches on the panel box tested as live when Berliner tested them with the light pen. (Exhibit 55). The panel box was rated at 120/240 volts and 800 amps, as shown by the attached plate. (Exhibit 53). Two beverage bottles were on top of the electrical panel box. (Exhibit 31)

The electrical panel box was in the maintenance room, as labeled in Exhibit A<sup>32</sup>. The electrical panel box was in the same room as the sink. (Exhibit 48) Exhibit 31 photographs a ladder in the maintenance room. The

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<sup>32</sup> Berliner wrote a 31 and circled it in the location where he took the photograph admitted as Exhibit 31. It is in the upper left hand corner of Exhibit A. Bratz testified that Exhibit 31 was taken in the maintenance room.

sink was just in front of the ladder. The ladder had a mop laying on it. A dolly and buckets were also in the room and shown in the photographs. Berliner asked Lanners about who used the room. He said that the employees used the room to store the ladder, mop, and bucket. White also told Berliner that he and other employees used the room. The room is where the mop, mop bucket, and Spill Magic were stored. Berliner testified that if the wiring in the wall behind the panel was faulty, then an employee would be exposed to electrical shock. The panel could become energized. All of the exposed wires were insulated, but they were not inside cabinets or another enclosure.

The second instance was exposure of the wires that ran the baler. The baler had a gray conduit running to it containing green and black electrical wires that ran the baler. (Exhibits 27, 28, 51). The conduit had been pulled away from the wall, exposing the wires. (Exhibits 29, 30) The baler was rated at 460 volts. (Exhibits 27, 28, 30, 51) Using the light pen tester, he found that the wires tested as live. (Exhibit 29) All the exposed wires were insulated. A walkway was in front of the location where the exposed wires went into the concrete wall.

Berliner asked Lanners to run the baler to show how it worked. White told Berliner that he picked up the metal straps that were stored on the conduit. (Exhibit 30) Lanners was aware that employees took the straps from that location to make bales. Exhibit 51 shows the baler's gray conduit on the right. It is the same conduit photographed in Exhibits 29 and 30.

Berliner testified that he has investigated five electrical accidents during his employment with Cal/OSHA. In every case, a serious injury resulted from contact with live electrical current. The voltage ranged from 120 to 400 volts. The amps ranged from 6 to 800. One accident involved a fatality. In the other four cases the injuries consisted of significant second and third degree burns, permanent memory loss, and damage to lungs. Berliner testified that 100 to 200 milliamps is enough to cause serious injury. Two amps are enough to stop a heart. Twenty amps are enough to cause tissue burns. More than 20 amps causes organ failure and substantial tissue burning. If electrical parts energized at a level of a few amps are touched, there is over a 50% chance of serious injury.

Berliner testified that he has done inspections on balers. Employer's baler did not indicate the number of amps. Berliner estimated the amps at between 15 and 200.

Based on these two instances, he issued Citation 2 for a serious violation of § 2340.17(a).

Berliner testified regarding his calculation of the penalty for Citation 2. Serious violations begin with a base of \$18,000. He rated extent and likelihood as low, which brought the gravity-based penalty down to \$9,000. He applied

penalty adjustments of 15% for medium good faith, zero for size, and 10% for a good history, making the adjusted penalty \$6,750. Application of the 50% abatement credit resulted in a proposed penalty of \$3,375.

### **Testimony of White**

White testified that he was familiar with the room with the electrical panel box. (Exhibits 31, 32<sup>33</sup>) The room had a sink in it. (Exhibit 48) There was a storage spot by the sink. (Exhibit 32) He and other employees went in the room when they needed to mop or sweep. They swept every night. They mopped once or twice a week. The storage shown in the photographs was typical for that room. (Exhibit 32) No one ever cleared the room out. Spill Magic was kept in that room. White recalled seeing the exposed wires on the electrical panel box. As far as he knew, the wires were always uncovered. Everyone had access to the room. There was no door in the doorway opening.

White testified that the baler had a sticker on its side that said it was energized at 460 volts. (Exhibits 27, 28) At the rear of the baler was a gray conduit with electrical wires inside that supplied power for the baler. There was no other power source. The conduit ran through a hole in the concrete wall behind it. (Exhibits 29, 30) The metal straps that they used to bundle the bales was lying on top of the conduit. (Exhibit 30) He and the other employees picked up a strap from that stack every time they bundled a bale. The straps photographed in Exhibit 30 were aluminum. Sometimes they were stainless steel. White accessed the area behind the baler to obtain straps to bundle the bales. They made one or two cardboard bales every night.

### **Testimony of Bratz**

Bratz testified that Exhibits 31 and 32 were photographs taken in the maintenance room. Employees had access to the maintenance room every day. Employees use equipment kept there, including the mop and ladder. Exhibit 31 shows a door way. There is yellow tape in the middle of the electrical panel, but he does not know what it covers. Exhibit 32 depicts a shop vacuum and a cart. It also shows a broom handle that had fallen horizontally. There were carpentry walk-off mats stored in the maintenance room also. He believed that employees accessed the maintenance room about once a week.

Bratz testified that Exhibits 29 and 30 depicted a conduit running through a concrete wall. It was the conduit for the baler. Exhibit 30 also depicted the wires employees used to tie off the bales. Bratz testified that the employees used the wires about twice a week to make cardboard bales.

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<sup>33</sup> The electrical panel box is photographed in the upper left hand corner of Exhibit 32.

### Findings and Reasons for Decision

Employer did not appeal the existence of a violation of § 2340.17(a). It is established by law.

The Division did not prove, by a preponderance of the evidence, that in the event of an accident caused by the violation, there was a realistic probability of serious injury or death. The violation is reclassified to general.

The proposed penalty of \$3,375 is not reasonable.

The Division cited Employer for a violation of § 2340.17(a), which provides as follows:

Except as elsewhere required or permitted by these orders, energized parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by use of approved cabinets or other forms of approved enclosures or by any of the following means:

- (1) By location in a room, vault, or similar enclosure that is accessible only to qualified persons.
- (2) By suitable permanent, substantial partitions or screens so arranged that only qualified persons will have access to the space within reach of the energized parts. Any openings in such partitions or screens shall be so sized and located that persons are not likely to come into accidental contact with the energized parts or to bring conducting objects into contact with them.
- (3) By location on a suitable balcony, gallery, or platform so elevated and otherwise located as to prevent access by unauthorized persons; or
- (4) By elevation of 8.0 feet (2.44 m) or more above the floor or other working surface.

Employer did not appeal the existence of the safety order violation. It is therefore established by law. An issue not raised on appeal is deemed waived. (See § 361.3 and *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) Existence is then presumed. (*Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000).)

The Division classified the violation as serious. To establish a violation as serious, Labor Code § 6432(a) provides that there is "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."

"Serious physical harm" is not defined in the Labor Code or Title 8 of the California Code of Regulations. However, it has been held to have the same meaning as "Serious Injury or Illness" as defined in Labor Code § 6302(h). (*Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985).) "Serious injury or illness" is defined in Labor Code § 6302(h) as follows:

"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.

The evidence to support a serious violation must, at a minimum, show the types of injuries that would more likely than not result from the condition which forms the basis of the violation. (*Capital Building Maintenance Services, Inc.*, Cal/OSHA App. 97-680, Decision After Reconsideration (Aug. 20, 2001), relying on *Friendly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).) Otherwise, the Appeals Board is left only to speculate regarding the likelihood of a serious injury from a particular hazard. (See e.g., *Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 23, 2002).)

Berliner credibly testified that contact with live electrical wires energized at above 200 milliamps was sufficient to cause serious physical harm. His opinion was based upon his education, training, and experience investigating electrical accidents. Berliner testified that the electrical panels and the baler were energized at 50 volts or more. Employer did not dispute this testimony although it had the motive and opportunity; and, therefore, Berliner's testimony is credited.

Employer correctly pointed out that all the electrical wires to the baler and the electrical panels were fully insulated, although they were not inside an enclosure. (Exhibits 29, 30, 31, 52) No live electrical wires were exposed. Berliner did not testify as to how an employee could be injured by coming into contact with insulated wires, and there is no basis for such a finding. The electrical panel in the maintenance room had a switch that was not covered.

(Exhibit 54). The opening was large enough to put a finger or hand into it. However, Berliner did not testify that an employee would come into contact with live electrical parts if the employee put a finger or hand in the opening. Berliner credibly testified that if a wire were exposed, that the metal could become energized and give an electrical shock that was more likely than not to cause a serious injury to any employee who touched the panel. However, he did not testify that this scenario was a realistic possibility in this particular case.

Therefore, the Division did not meet its burden to prove that in the event of contact with the insulated wires, there was a realistic possibility that death or serious physical harm could result. As a result, the violation must be reclassified to general.

As a general violation, the proposed penalty of \$3,375 is not reasonable. Recalculating the penalty as a general violation results in a penalty of \$325. Severity is rated low for \$1,000 because Berliner did not describe the possible injuries that could result from touching insulated wires. Extent is rated high because there were numerous wires not enclosed within a cabinet or other enclosure. This raises the penalty to \$1,250. Likelihood is rated low because the number of employees exposed was low—the night crew—and because there was no evidence of the extent to which the violation has in the past resulted in injury. This lowers the penalty to \$1,000. Application of the penalty adjustment factors of 15% for good faith and 10% for history yield an adjusted penalty of \$750. Finally, the mandatory 50% abatement credit results in a penalty of \$325.

Accordingly, a penalty of \$325 is found reasonable and is assessed.

**Dockets 11-R3D2-1929 and 1930**

**Citation 1, Item 11, § 3382(a), General**  
**Citation 1, Item 12, § 3384(a), General**  
**Citation 1, Item 16, § 5194(e)(1), General**  
**Citation 1, Item 17, § 5194(h)(1), General**  
**Citation 1, Item 18, § 5194(h)(2)(D)/(E), General**

**Docket 11-R3D2-1931**

**Citation 3, § 5162(a), Serious**

**Summary of Evidence**

The Division cited Employer for failure to provide eye protection (Citation 1, Item 11); failure to provide hand protection (Citation 1, Item 12); failure to have a complete written hazardous substance communication program (Citation 1, Item 17); failure to train regarding hazardous substances in the

work place (Citation 1, Item 17); failure to train regarding detection of the presence or release of hazardous substances and procedures relating to hazardous substances (Citation 1, Item 18); and failure to have an emergency eyewash (Citation 3).

### **Testimony of Berliner**

Berliner testified that the inspection was the result of a complaint about lack of an eyewash for chemicals that leaked from containers that were transported by trailer trucks. The complaint was that employees opened cardboard boxes in order to price the products, but sometimes containers leaked and soaked the boxes.

Berliner went to the retail portion of the store and took photographs of chemicals products that Employer sold. (Exhibits 2, 3) They included "The Works," a toilet bowl cleaner (Exhibit 4), White Cloud Premium Bleach (Exhibit 5), Clorox Pro Results Outdoor Bleach (Exhibit 6), Liquid PlumR (Exhibit 7), Old Dutch Institutional Cleansing Powder with Bleach (Exhibit 8), and American Value Bleach. All were liquids except the Old Dutch Cleanser, which was a powder.

Berliner requested the Material Safety Data Sheets (MSDS) for these products. He received Exhibits 10 (The Works Toilet Bowl Cleaner), 11 (American Value Bleach)<sup>34</sup>, 12 (Clorox Outdoor Bleach Cleaner) and 13 (Liquid PlumR) from Employer. After the document request, Berliner went to the internet and downloaded MSDSs on June 8, 2011 for A-1 Ultra Disinfecting Bleach (Exhibit 15) and for White Cloud Disinfecting Bleach (Exhibit 16). He also obtained the MSDS for Old Dutch Institutional Cleansing Powder (Exhibit 14) on his own.

Berliner explained that liquids have a pH value from 0 to 14. A pH value measures how acidic or alkaline a liquid is. A value of 7 is neutral<sup>35</sup>. A value lower than 7 indicates an acid. A value higher than 7 indicates a base or alkaline. Exposure to a liquid with a value of less than 2 or greater than 11 is always hazardous and will cause eye irritation and injury, and possible blindness. Berliner testified that disinfectants are classified as pesticides. Berliner described the scientific tests that determined the harmful effects of acidic or alkaline substances. Berliner testified that the degree of damage was determined from studies done on rabbits' eyes in the early 20<sup>th</sup> century. He went into detail regarding the testing and the results.

Berliner testified regarding the written warnings given for each chemical<sup>36</sup> and their meanings. White Cloud Premium Bleach had a pH of 11.5

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<sup>34</sup> Exhibit 11 was not a true MSDS, but it contained relevant information about the product.

<sup>35</sup> Water has a value of 7.

<sup>36</sup> Berliner created a summary of the MSDS information for each substance. (Exhibit 9)

To 12.5. It may cause severe eye irritation and may cause severe permanent eye damage. (Exhibit 16) The Works Toilet Bowl Cleaner had a pH of less than 1.0. It was corrosive and causes severe eye burns. (Exhibit 10) Clorox Outdoor Bleach had a pH of about 12.5. It was corrosive to eyes and injures eyes. (Exhibit 12) Liquid PlumR had a pH of 13.2. It was corrosive to eyes and injures eyes. (Exhibit 13) Old Dutch Cleanser had a pH of 11.09. Direct contact causes severe irritation and possible eye injury. (Exhibit 14).

White and Roy Wright told Berliner that they took the products out of the boxes and put prices on them. They did not take the products to the shelves. He testified that White told him that there were instances when containers of bleach leaked while they were in cardboard boxes, soaked through the cardboard, contaminated other containers, and exposed the employees to the bleach. The same thing happened with The Works Toilet Bowl Cleaner. White also told Berliner of an incident where Wright got powder from Old Dutch Cleanser in his eyes.

Berliner testified that both White and Wright told him that employees did not wear safety glasses or safety gloves. They both told him that Employer did not provide chemical protection gloves. Garden-type gloves and dishwashing-type gloves were available in the store, but they were inadequate. Employer informed him and his District Manager that there was no emergency eyewash. (Exhibit 56). By eyewash, Berliner meant an eyewash that met the requirements of sections 5, 7, or 9 of ANSI<sup>37</sup> Z358.1-1981, Emergency Eyewash and Shower Equipment.

Employer had a manager's office with a fax machine. To get a Material Safety Data Sheet (MSDS) for a product, the employees had to call another company, Chem-Tel, who would then fax the MSDS to them. (Exhibit 56) White told him that the second and third shifts did not have access to the manager's office to get the MSDSs if needed because the manager's office was locked.

Berliner testified that the employees were exposed to chemicals from detergent, soaps, bleach, and toilet cleaners that could potentially splash in their eyes. Consequently, eye protection was warranted and an eyewash was needed if a substance got in an employee's eyes. Berliner testified that dishwashing gloves are basically rubber gloves. Rubber gloves are not appropriate for protection from strong acids and bases. The gloves must be rated for the type of chemical that the glove will come in contact with.

Based on the above, Berliner issued Citation 1, Item 11 for a general violation of § 3382(a), Citation 1, Item 12 for a general violation of § 3384(a), and Citation 3 for a serious violation of § 5162(a).

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Employer made a hearsay objection to Exhibit 9.

<sup>37</sup> ANSI stands for "American National Safety Institute."

Berliner requested Employer's hazard communication program. (Exhibit 58). Berliner received its hazard communication program (Exhibit 38, pages 46-48). In reviewing Exhibit 38, Berliner found that Employer had the required provisions for a hazard communication program, with the exception of the provisions relating to spill cleanups. (Exhibit 38, p.50) The program did not describe how Employer would train employees who unloaded items in spill and cleanup procedures, including personal protective equipment, decontamination procedures, safety precautions, monitoring equipment, detection of the visual appearance or odor of hazardous substances, and other training elements in the event of a spill or leak of hazardous substances when their containers became damaged in trailer trucks during transportation. White and Wright both told Berliner that they had not been trained in spill cleanup procedures. White said that Employer kept Spill Magic, a substance like cat litter that absorbs liquid, in the maintenance room. Berliner viewed a DVD supplied by Employer. The DVD discussed how to use and dispose of Spill Magic, but it the demonstration was made without any safety equipment.

Berliner testified that there are hazards associated with spill clean-ups. A substance like Spill Magic will have warnings on it and its MSDS would also describe its hazards. Respiratory, eye, and skin reactivity must be considered. The substance may be flammable or corrosive. A substance like Spill Magic cannot be used responsibly until air monitoring is done. A chemical may vaporize when used. Sweeping may cause a chemical to become airborne. Noses are not good indicators for air monitoring. A nose may not detect injurious levels of a chemical until it is too late.

Based on the above, Berliner issued Citation 1, Item 16 for a general violation of § 5194(e)(1).

Berliner testified that supervisors and managers were required to have the same training under the hazard communication standard as employees. Berliner asked for a list of all employees who worked at the site and the training records for all employees. He received Exhibit 50. There was no hazardous substance training for three employees: Sipologue F DeSoto, Arlene Q. Lujan, and Kenneth Bratz. All three of these employees were managers. Based upon the above, Berliner issued Citation 1, Item 17 for a general violation of § 5194(h)(1).

Berliner testified that Employer was required to train its employees on procedures to clean up spills of hazardous substances like bleach, toilet cleaner, and the Old Dutch Cleanser. White, Wright, and Lanners told him that employees used Spill Magic to clean spills. Both White and Wright told him that Employer did not train them on the subject, and there was no record of training. Based on the above, Berliner issued Citation 1, Item 18, for a general violation of § 5194(h)(2)(D)/(E).

Berliner testified that he calculated the penalty for Citation 1, Items 11, 12, 17 and 18 the same way he calculated the penalty for Citation 1, Item 3. This resulted in a penalty of \$185 for each.

He calculated the penalty for Citation 1, Items 16 and 18 the same way he calculated the penalty for Citation 1, Item 3, except that he rated severity as high. Severity was high because hospitalization for more than 24 hours or temporary disability for a day was likely in the event of an accident caused by the violation. A high severity resulted in a penalty of \$375.

Berliner also testified that he calculated the penalty for Citation 3 the same way he calculated the penalty for Citation 2, resulting in a proposed penalty of \$3,375.

### **Testimony of White**

White testified that all products sold in the store, except furniture, were shipped to the store by truck. The night crew unloaded the boxes from the truck. They put boxes on rollers, and then put the boxes on the pallet designated<sup>38</sup> for the product in the box. They did not open the boxes when the boxes were on the truck or on the rollers. They opened the boxes by hand when they were on the pallets. Then they put price stickers<sup>39</sup> on the products that did not have prices on them already. A different crew unloaded the products and stacked them on the shelves.

Typically, unloading a truck took one and one-half to two hours. White worked three or four days a week during the holiday season, which was October through January. The rest of the year, he worked two or three days a week. He typically worked 28 to 30 hours a week. In addition to unloading trucks, he also worked as a cashier on the sales floor. Normally, they unloaded only one truck per night, but they typically unloaded two trucks per night during the holiday season.

White testified that the trucks were normally packed from the floor to the ceiling. White testified that every truck load contained two to 10 cases of bleach. Old Dutch Cleanser came one to two times a week. The Works Toilet Bowl Cleaner came one to two times a week. White had unloaded every product in the store, including The Works Toilet Bowl Cleaner and White Cloud Premium Bleach. He had experience with handling boxes for those products where the containers had broken or leaked<sup>40</sup>. Every chemical had leaked at least once.

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<sup>38</sup> Employer had a numbering system for the pallets. Generally about 30 pallets were built.

<sup>39</sup> The stickers they put on were orange.

<sup>40</sup> When full containers break in the truck, they normally take the good containers out and leave the broken container in the box.

White testified that containers could break from being transported in the truck, or from human error, as from a dropped container. Full containers could break on the truck during transport and could be located anywhere in the truck. The bottom of boxes could corrode or weaken from being wet, which caused a container to drop out of the box when he lifted a box. Bleach fell out of boxes the most often. When that happened, the top and seal could pop off, and bleach would splash out.

On direct examination, White first testified that normally some container was broken on a truck every night. Later on direct examination, White testified that he found leaky containers on the truck one or two times a week. On cross examination, White testified that bleach fell out of a box about once a week, which was about 50 times a year. When that happened, the top could pop off, but the top did not pop off every time. White estimated that the top popped off bleach bottles from 10 to 20 times each year.

White has gotten chemicals on his hands and pants, but he has not gotten them in his eyes. The bleach that he got on his hands was both from being splashed with bleach and from handling boxes with leaky containers. White was at work one night when Wright got powder in his eyes. White did not see it happen.

White testified that Employer did not provide safety eyewear or gloves. They were allowed to get gloves from off the shelf from the store. Employer had gardening and dishwashing gloves. He did not use those gloves because they did not protect against chemicals. When there was a leak or a spill, he could let his supervisors<sup>41</sup> know, but they could not do anything except clean up<sup>42</sup>. They cleaned up using a mop and "Spill Magic." Spill Magic was absorbent and soaked up liquid like cat litter. They swept Spill Magic up, and threw it out. There was no eyewash anywhere. There was a big sink with a regular faucet with handles in the maintenance room. Employer did not give them any training on cleaning up spills or on using Spill Magic.

White was familiar with MSDSs. If he needed one, he had to go to his manager's office, which was open from 9 a.m. to 5 p.m., but locked the rest of the time. He did not know where MSDSs were located in the office. White was not allowed to have keys to the manager's office. There was no MSDS binder available. White testified that he had not heard of Chem-Tel.

### **Testimony of Roy Wright**

Wright testified that he worked three or four months for Employer, from May to July 2011. He worked as a truck unloader, except for a couple of shifts during the day when he performed customer service. His duties as a truck

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<sup>41</sup> Lanners or Associate Manager Greg Daniels

<sup>42</sup> Whoever was in charge of unloading the truck also did the clean up.

unloader consisted of taking boxes from trucks, putting them on rollers, opening the boxes, pricing the products, and putting the products on pallets<sup>43</sup>. Boxes were not opened until after a truck was fully unloaded. He worked the graveyard shift, from 9 p.m. to 5 a.m., two days a week, except for a couple day shifts when he did customer service.

He went inside the truck trailers to unload boxes. He did not wear protective gloves or eyewear. Some of the boxes were fine, some were damaged, and some were leaking. Every night, there were boxes that contained leaking, damaged or broken containers. Some boxes were visibly wet or covered with powder. He did not know if a box was damaged or leaking until he picked up the box because the inside of the truck was dark. Boxes fell all the time. Some products broke during pricing. He was told to put aside damaged boxes. If there were a spill, he was told to use Spill Magic to clean it up. Spill Magic is a powder that soaks up liquids<sup>44</sup>. He was instructed to set aside any damaged or leaking boxes.

Products containing chemicals that he unloaded included bleach, liquid detergent, aerosol cans, Ajax, Old Dutch Cleanser, carpet cleaner, toilet bowl cleaner, and liquid soap. He testified that he unloaded boxes containing the products depicted in Exhibits 2, 3, 4 (The Works Toilet Bowl Cleaner), 5 (White Cloud Premium Bleach), and 8 (Old Dutch Cleanser). He repriced or priced most products that he unloaded.

Wright described one occasion when he got powder in his eyes<sup>45</sup>. He was wearing a T-shirt and blue jeans, which was typical clothing for him. A large industrial fan<sup>46</sup> was in the unloading area to keep the area cool. Wright picked up a box off a roller and was carrying it to a pallet. The box held containers of Old Dutch Cleanser<sup>47</sup>. When he took the box in front of the fan, a fine, white powder blew all over him and into his eyes. He did not know where the powder came from. He did not see powder on the outside of the box.

With powder in his eyes, Wright had to get to the bathroom. It took him 30 to 45 seconds to get there. When he was there, he had to wash his hands first because they were black from handling the boxes. Then he splashed water into his eyes from a sink faucet. No one helped him rinse his eyes. The powder caused his eyes to burn intensely. His eyes would not stop watering. After 30 minutes, he thought that he had rinsed all the powder out, but his eyes continued to tear. As a result, his supervisor's wife took Wright to an urgent care clinic. He was at urgent care for about 15 minutes. They rinsed

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<sup>43</sup> Boxes were placed on pallets according to Employer's numbering system. A separate stocking crew put the products on the shelves. Pallets were moved with pallet jacks.

<sup>44</sup> Testified that he received training on cleaning up spills the last month he worked there, after the Cal/OSHA inspection.

<sup>45</sup> Wright did not recall the month that the incident occurred.

<sup>46</sup> Wright estimated the fan diameter was 3 feet.

<sup>47</sup> His supervisor, Greg Daniels, told him it was Old Dutch Cleanser.

his eyes with a saline solution. They said no serious damage had been done. The doctor never said he had chemical burns in his eyes or long term damage. The doctor did not give him any medication. He never went back for further treatment.

Wright did not know that Material Safety Data Sheets (MSDS) were available at the site, and never saw one. He testified that it was possible that they were available in the manager's office. Daniels was the only manager on duty. Daniels had a key to the office.

On cross-examination, Wright described another night where bleach had leaked into the truck. A box that contained bottles of bleach was wet. The smell was very strong. The whole truck smelled of bleach. Wright testified that boxes fell all the time. He has had bleach and detergent spill on him from boxes with broken containers.

Wright also testified that he worked with White. White was there 99% of the time that he was there.

#### **Testimony of Paul J. Papanek, Jr., M.D., M.P.H.**

The Division called Paul J. Papanek, Jr., M.D., M.P.H. (Papanek) to testify. He has been a public health medical officer for the Cal/OSHA Medical Unit from June 1, 2012 to the present. He has practiced and taught in the field of occupational medicine for about 30 years. He testified in detail regarding his education, training, publications, and employment. He testified regarding his 15 years of experience with treating occupational eye injuries. He has published articles dealing with eye injuries. He submitted his five-page curriculum vitae (Exhibit 17)<sup>48</sup>. Prior to the hearing, he reviewed material related to this case.

Papanek has seen patients who suffered occupational eye injuries resulting from contact with chemicals. Papanek described the damage caused to the eye from contact with alkalines (pH greater than 11) or acids (pH less than 2). Alkalines cause protein to coagulate. Alkalines go through the layers of the cornea quickly, burning and destroying it. (Exhibit 18) Acids have the same effect, although they do not cause proteins to coagulate. The cornea can become cloudy, sometimes, not clearing. Inflammation and redness are other

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<sup>48</sup> Papanek is a medical doctor who performed an internship and residency in Family Medicine. He also earned Masters of Public Health from UCLA School of Public Health. He has taught as an assistant clinical professor at UCLA Department of Medicine since 1980 and has been the Assistant Director for the Occupational Medicine Residency at UCLA since 2003. He practiced in the field of occupational medicine for Kaiser Permanente in various capacities. He was in private practice for 18 months. He was the Chief of the Toxics Epidemiology Program for the Los Angeles County Department of Health Services. This program monitors consequences of exposure to toxins.

possible injuries. (Exhibit 18) The photograph in Exhibit 18 is an eye a couple a days after a severe alkaline burn. It shows inflammation and a cloudy cornea. Often, a cornea will clear, but an eye can be left with permanent opacity, as depicted in the photograph.

Papanek testified regarding the effect of different quantities of chemicals on an eye. One gram will take off a layer of the cornea if it is not washed out within 10 to 15 seconds. In one to three minutes, there will be permanent eye damage. In three to five minutes, there is a 20% to 30% chance of permanent residual scarring on the cornea. Copious amounts of water for 15 to 20 minutes are necessary to wash alkalines and acids out to prevent permanent eye damage.

Papanek reviewed the MSDSs for The Works Toilet Bowl Cleaner (Exhibit 10), Old Dutch Cleanser (Exhibit 14), and White Cloud Premium Bleach (Exhibit 16). He testified regarding the specific hazards of each if they got in an eye. All of the substances required rinsing an eye for a minimum of 15 minutes to prevent severe eye irritation, burns, and eye damage. The toilet bowl cleaner was an acid. All others were alkalines.

Papanek testified about the effect of the time it took to get to an eyewash when a chemical agent has come in contact with a human eye. Time is of the essence. Research studies were done and published in the 1920s and 1930s. For a strong alkaline, there were about 10 seconds to get it washed out of an eye before irreversible opacity occurred. Alkalines go through corneas rapidly and breach them.

Papanek testified that Old Dutch Cleanser is an alkaline that would cause the burning effect he described. Particulates are harder to rinse out than liquids because particles get caught under the eyelids. Particulates also present a scratching hazard, and can keep releasing chemicals<sup>49</sup>. One gram in the eye would take off a layer of the cornea after 10 to 15 seconds. In one to three minutes, permanent eye damage would occur. After three to five minutes, there was a 20% to 30% chance of residual scarring on the cornea. In order to prevent eye damage, copious amounts of water should be poured on the eye for 15 to 20 minutes.

Papanek testified that the vapors from White Cloud Premium Bleach were extremely irritating, and could cause eye damage, depending on their concentration.

Papanek testified that a person could not get a sufficient stream of water on an eye from a conventional sink and faucet. The clearance between the faucet and sink is insufficient. Water could be splashed into an eye, but that

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<sup>49</sup> Papanek described a study involving cement dust.

was a bad idea if the employee's hand were contaminated. One must use a hand to keep the eyelid open.

Papanek further testified that an employee could get a corrosive substance in an eye by touching an eye with a hand that was contaminated. The employee might not feel the effect for 15 to 20 minutes.

On cross-examination, Papanek testified that the quantity of the chemical was relevant. An eye ordinarily has ½ gram of tears in it. If the amount of the liquid or powder is small, tears will dilute it. About ½ gram or 1 gram of an alkaline or acidic chemical is required before there will be permanent damage. Papanek described ½ gram as about 1/10 of a teaspoon.

### **Testimony of Bratz**

Bratz testified that he has seen employees handle leaky products, like Old Dutch Cleanser and bleach. It happens from time to time. The load inside the truck shifts, which may cause damage to the products. Employees clean up leaky containers. The clean-up method depends on what is in the containers. If it is a liquid, they use Spill Magic. They may call Chem-Tel if they do not know how to clean something up. Bratz has never been made aware of an employee getting a leaky chemical on themselves. Trucks deliver a pallet of bleach every two to three weeks.

Bratz testified that he was aware of an incident in April 2011 where an employee got powder from a dry cleanser in his eyes. The manager on duty at the time told the employee to wash his eyes out. There was no eyewash available. Employer keeps safety gloves and goggles next to the baler, but they were not there prior to the Division's inspection. Bratz was not present when the accident occurred. His testimony is based on what others have told him.

### **Citation 1, Item 11, § 3382(a), General**

#### **Findings and Reasons for Decision**

The Employer's employees worked in locations where there was a risk of eye injuries. Employer did not provide any eye protection. The Division established a violation of § 3382(a) by a preponderance of the evidence.

The violation was properly classified as general.

The proposed \$185 penalty is reasonable.

The Division cited Employer for a violation of § 3382(a), which provides as follows:

Employees working in locations where there is a risk of receiving eye injuries such as punctures, abrasions, contusions, or burns as a result of contact with flying particles, hazardous substances, projections or injurious light rays which are inherent in the work or environment, shall be safeguarded by means of face or eye protection. Suitable screens or shields isolating the hazardous exposure may be considered adequate safeguarding for nearby employees.

The employer shall provide and ensure that employees use protection suitable for the exposure.

White and Wright both testified that Employer did not provide any eye protection. Employer did not dispute this testimony, and it is credited.

White, Wright, and Bratz all testified that containers containing chemicals could leak on the truck, and that employees were exposed to substances that leaked. There was a difference in testimony regarding the number of leaky containers that employees encountered. Bratz gave the lowest estimate; however, even he agreed that products leaked on the truck, and that one of these products was bleach.

Both Berliner and Papanek testified that bleach was a strong alkaline, and that it could cause severe irritation, corrosion, and permanent damage if it got into an eye and was not rinsed out soon enough. Employer argued that there was no danger of eye injuries because Employer had not had any eye injuries from chemicals, and because the powder that got in Wrights' eyes did not cause permanent damage.

Papanek credibly testified that an employee could get a sufficient quantity of a chemical in his eyes from touching it with a hand that was contaminated with the chemical. Papanek's sworn testimony was credible, and Employer did not offer any evidence in rebuttal. Therefore, it is credited.

Additionally, the very fact that powder got into Wright's eyes is convincing circumstantial evidence that employees worked in a location where there was a risk of receiving eye injuries. Circumstantial evidence may be as persuasive and convincing as direct evidence and may properly be found to outweigh conflicting direct evidence. (*R 85 L Brosamer, Inc.*, Cal/OSHA App., Decision After Reconsideration (Oct. 5, 2011), citing *ARB, Inc.*, Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997).) Lack of a history of eye injuries is irrelevant. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001) [no eye injuries in 30 years], citing *Gal Concrete Construction Co.*, Cal/OSHA App. 89-317, Decision After

Reconsideration (Sep. 27, 1990.) The purpose of the California Occupational Safety and Health Act is to prevent accidents, not wait for them to happen. (*Id.*)

Employer argued that White's testimony should be heavily discounted because he testified that he dropped a gallon of bleach every night that he worked. Employer's argument is not persuasive. First, White was testifying that the bleach bottles dropped because the bottom of the box it was in was too weak to hold it. The bleach bottles leaked from the top popping off when the bottle was dropped from 10 to 20 times a year. White testified that every night he unloaded a truck, he encountered a leaking container of some type. White worked from two to four times a week, depending on the season. That means a container leaked two to four times a week. Later in his direct testimony, he testified that a container leaked one to two times a week.

While White's testimony is inconsistent, it is not so inconsistent that it indicates deception or that his testimony is unreliable. White was making an estimate each time. The number of times a container leaked was not critical for him to know in order to perform his job duties. He did not keep written records, and there is no evidence that anyone kept written records. The lower estimate of one two per week is reasonable and probably a more accurate estimate. When something goes wrong often, it may seem like it happens more frequently than it really does.

Therefore, the Division established a violation of § 3382(a) by a preponderance of the evidence. Because the violation relates to safety and health (eye injuries), the Division properly classified it as general.

Berliner calculated the penalty the same way that he did for Citation 1, Item 3. This calculation is found to be consistent with the regulations. The proposed penalty of \$185 is found reasonable and is assessed.

### **Citation 1, Item 12, § 3384(a), General**

#### **Findings and Reasons for Decision**

**The Division did not establish a violation of § 3384(a).**

**Citation 1, Item 12 is dismissed and the penalty is set aside.**

The Division cited Employer for a violation of § 3384(a), which provides as follows:

Hand protection shall be required for employees whose work involves unusual and excessive exposure of hands to cuts, burns, harmful physical or chemical

agents or radioactive materials which are encountered and capable of causing injury or impairments.

White and Wright credibly testified that they did not wear gloves, and that chemical gloves were not available to them. Employer did not dispute this testimony, but argued that their exposure to chemicals was not “unusual and excessive” as required by the safety order, citing *San Francisco Newspaper Agency San Francisco Printing Co., Inc.*, Cal/OSHA App. 93-319, Decision (Jan. 13, 1994).) This citation is to a decision by an Administrative Law Judge. Decisions by Administrative Law Judges carry no precedential value on appeal. (*Western Plastering, Inc.*, Cal/OSHA App. 79-032, Decision After Reconsideration (Dec. 28, 1983); *Pacific Ready Mix*, Cal/OSHA App. 79-1550, Decision After Reconsideration (April 23, 1982).) Regardless, this decision has been superseded by *United Airlines dba: United Air Lines SFO SYC*, (*United Air Lines*) Cal/OSHA App. 00-2844, Decision After Reconsideration (Apr. 30, 2009), which was issued after remand by the Superior Court.<sup>50</sup>

The Superior Court stated that the “trier of fact is ‘to determine whether the exposure of the affected employees is “too great in amount or degree to be reasonable” under the circumstances.’” (*United Air Lines*, p. 12) The words “unusual and excessive” are used in the conjunctive. (*Id.*) Both elements must exist in order for the safety order to apply. (*Id.* at 12, fn. 16, 18) The Board interpreted the word “unusual” to mean “uncommon.” (*Id.* at 18) It also noted that the phrase “too great in amount” came from the definition used by the ALJ, which the Board previously adopted. (*Id.* at 12, fn. 16) The Board stated that “The intent of § 3384(a) is ‘not to determine whether the exposure of the affected employees is “excessive” as compared to other employees “performing the same type of work.”’” (*Id.* at 12)

The Board found that employees were exposed to the hazard of hand cuts, and went on to determine if the exposure was unusual and excessive. The Board recited the principle that there must be reliable proof that employees are endangered, citing *Rudolph and Sletten Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981). (*Id.* at 14) In finding that the exposure was not unusual or excessive, the Board noted that there were no reported hand cuts due to defective baggage in the year that Employer supplied records to the Division, (*Id.*, fn. 22), despite the large volume of baggage.

Here, the Division has shown that employees are subject to the hazard of chemical splashes on their hands. White and Wright’s testimony in this

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<sup>50</sup> The Board issued its first Decision After Reconsideration on February 15, 2007. A petition for writ of mandate was filed in Superior Court. On October 31, 2008, the Court issued a decision which held that the Board applied an incorrect legal standard, remanded the matter to the Board, and instructed the Board to apply the correct legal standard. The Board then set aside its decision in *United Airlines dba: United Air Lines SFO SYC*, (*United Air Lines*) Cal/OSHA App. 00-2844, Decision After Reconsideration (Feb. 15, 2007).

respect was not disputed, although Employer disputed the frequency of the chemical splashes. The record was void of any evidence that any employee ever suffered a hand injury due to a splash from a product unloaded from a truck, despite the large volume of chemicals unloaded. The evidence presented fell short of establishing that the exposure was "too great in amount or degree to be reasonable under the circumstances."

Therefore, the Division did not meet its burden of proof to establish a violation of § 3384(a). Citation 1, Item 12 is dismissed, and the penalty is vacated.

**Citation 1, Item 16, § 5194(e)(1)**

**Findings and Reasons for Decision**

Employer's written hazard communication program was deficient in that it did not describe how it would meet the label and warning requirements, MSDS requirements, employee information and training requirements, and other requirements. The Division established a violation of § 5194(e)(1) by a preponderance of the evidence.

The violation was properly classified as general.

The proposed \$375 penalty is not reasonable.

The Division cited Employer for a violation of § 5194(e)(1), which provides as follows:

Employers shall develop, implement, and maintain at the workplace a written hazard communication program for their employees which at least describes how the criteria specified in sections 5194(f),(g), and (h) for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

- (A) A list of the hazardous substances known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas);
- (B) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the

hazards associated with substances contained in unlabeled pipes in their work areas.

Employer maintained that all of the chemicals being off-loaded at the site were standard and common household cleaning products, and alleged that the Division presented no evidence of the presence of industrial cleaners or solvents or chemicals of any kind. Because of this, Employer argued that there is no safety order violation.

Employer argues that standard and common household products are an exception to the safety order. When an exception exists to a safety order, it is treated as an affirmative defense, requiring the employer to show it has satisfied the terms of the exception. (*Tutor-Saliba-Perini*, Cal/OSHA App. 97-2799, Decision After Reconsideration (Mar 2, 2001); *Barnard Engineering*, Cal/OSHA App. 81-0241, Decision After Reconsideration (May 28, 1982).)

Employer has not met its burden. Employer did not cite any authority for its position. The safety order by its terms does not specify that only industrial chemicals are on the list of hazardous substances. There is no exception in the safety order for standard and common household cleaning products. Berliner's and Papanek's testimony about the hazards to eyes of the products<sup>51</sup> that Employer's employees unloaded and transported was not refuted, was credible, and is credited.

Exhibit 38 falls short of the written hazard communication program required by § 5194(e)(1). Employer did not have a program which set forth how it would meet the requirements for labels and other forms of warning, material safety data sheets, and employee information and training. It did not set forth a list of hazardous substances known to be at the workplace. It did not set forth the methods Employer would use to use to inform employees of the hazards of non-routine tasks and the hazards associated with substances contained in unlabeled pipes in their work areas.

Accordingly, the Division established a violation of § 5194(e)(1). Because hazard communication relates to employee health and safety, the violation was properly classified as general.

Berliner calculated the proposed penalty the same way that he calculated the penalty for Citation 1, Item 3, except that he rated "extent" as high. He rated extent as high because hospitalization for more than 24 hours or temporary disability for a day was likely in the event of an accident caused by the violation. However, Berliner did not explain how lack of a description of the methods Employer would use to provide the required labels, warnings, MSDSs, information, and training could cause a serious injury assuming that

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<sup>51</sup> These products included liquid bleach, toilet bowl cleaner, drain cleaner, and cleansing powder.

employees received all the required warnings, information, and training, but Employer simply failed to include its methods for doing so in its written program. The Division did not cite Employer for not having the required warnings, labels, or MSDSs, for example. Therefore, the rating for severity must be reduced to "low."

Recalculation of the penalty with a "low" rating for severity results in \$185. A penalty of \$185 is found reasonable and is assessed.

**Citation 1, Item 17, § 5194(h)(1), General**

**Findings and Reasons for Decision**

**Employer did not provide its employees with effective information and training on hazardous substances. The Division established a violation of § 5194(h)(1) by a preponderance of the evidence.**

**The violation was properly classified as general.**

**The proposed \$185 penalty is reasonable.**

The Division cited Employer for a violation of § 5194(h)(1), which provides as follows:

Employers shall provide employees with effective information and training on hazardous substances in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area. Information and training may relate to general classes of hazardous substances to the extent appropriate and related to reasonably foreseeable exposures of the job.

Berliner credibly testified that Employer gave him a list of employees who had training in hazardous substances, and found that three of six managers did not have the training. The managers who had the training were Gregory Daniels, James Scott Lanners, and Katherine Paulsen. The managers who did not have the training were Sipologa De Soto, Arlene Q. Lujan, and Kenneth Bratz. His testimony is credited. (Exhibit 50). Employer did not dispute Berliner's testimony in this regard. Instead, Employer argued in its brief that the violation fails because the Division failed to present any evidence that the managers in question directly supervised or managed any relevant employees.

White and Wright identified their supervisors as "Greg" and "Scott<sup>52</sup>." Both Gregory Daniels and Scott Lanners received the required training.

Employer's argument fails. The hazardous substances were found throughout the store, in the warehouse, in the stock room, and on the sales floor. Bratz did not have the required training. He was the Store Manager and accessed the entire store. As Store Manager, the entire store was his work area and he was exposed to the spills and Spill Magic. Presumably, the two other assistant managers had access to the entire store and were in charge when Bratz was absent. At a minimum, the sales floor, where the chemicals were sold, could be accessed by anyone. The safety order does not require that supervisors directly supervise employees who have hazardous chemicals in their work area.

Employer is reading a superfluous requirement into the safety order. The Appeals Board has no authority to amend, revise, or expand a requirement adopted by the Occupational Safety and Health Standards Board. Absent defective or imperfect language in a standard, the Appeals Board must enforce the standard as drafted and merely determine whether it was violated. (*Southern California Edison Company*, Cal/OSHA App. 75-415, Decision After Reconsideration (May 5, 1976).) In interpreting a statute [or regulation], the judge may simply ascertain and declare what is expressed, not insert what may have been omitted. (*Lockheed Missiles*, Cal/OSHA App. 74-629, Decision After Reconsideration (Apr. 10, 1975).)

Therefore, the Division established a violation of § 5194(h)(1). It was properly classified as general as it has a relationship to occupational safety and health of employees.

The proposed penalty of \$185 is found reasonable. The Division gave the maximum reductions allowable, except for good faith and size, as previously discussed. A penalty of \$185 is found reasonable and is assessed.

**Citation 1, Item 18, § 5194(h)(2)(D/E), General**

**Findings and Reasons for Decision**

**Employer did not train its employees regarding the methods and observations that may be used to detect hazardous substances in the work area or regarding the hazards of the substances in the work area and the measures they could take to protect themselves. The Division established a violation of § 5194(h)(2)(D) and 5194(h)(2)(E).**

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<sup>52</sup> In its brief, Employer states that the employees referred to their supervisors as "Greg" and "James." Lanner's first name is "James", but the witnesses all referred to him as "Scott".

**The violation was properly classified as general.**

**The proposed \$375 penalty is reasonable.**

The Division cited Employer for a violation of § 5194(h)(2)(D/E), which provides as follows:

(h) Employee Information and Training.

(1) ...

(2) Information and training shall consist of at least the following topics:

...

(D) Employees shall be trained in the methods and observations that may be used to detect the presence or release of a hazardous substance in the work area (such as monitoring conducted by the employer, continuous monitoring devices, visual appearance or odor of hazardous substances when being released, etc.).

(E) Employees shall be trained in the physical and health hazards of the substances in the work area, and the measures they can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous substances, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

Berliner requested Employer's training records and White testified that Employer provided weekly safety training for employees. Nonetheless, the record was void of any evidence that Employer ever trained employees regarding the methods and observations they could use to detect the presence or release of a hazardous substance in the work area. White and Wright testified that chemical products leaked. In some cases, they could identify the product by smell, as with bleach, but in other instances, employees did not know what the product was. For instance, Wright did not know of his own knowledge what kind of powder got in his eyes. He relied on what his supervisor said at the time.

The record was also void of evidence that Employer trained employees in the physical and health hazards of the substances in the work area, and the measures they could take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous substances, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

Employer had the motive and opportunity to show that the required training was provided, and it did not. Therefore, it is found that the training did not occur. Employer argued that there was no violation because the chemicals involved were common household cleaning products, not industrial products. Employer's argument has been discussed above. It is rejected for the same reasons discussed above.

Therefore, the Divisions established a violation of §§ 5194(h)(2)(D) and 5194(h)(2)(E) by a preponderance of the evidence. The violation was properly classified as general since it relates to employee safety and health.

Berliner calculated the proposed penalty the same way that he calculated the penalty for Citation 1, Item 3, except that he rated "extent" as high. He testified that he rated extent as high because hospitalization for more than 24 hours or temporary disability for a day was likely in the event of an accident caused by the violation. The hazard associated with the violation is that an untrained employee would not be aware of the presence of a hazardous substance, (§ 5194(h)(2)(D)); and, if aware, would not know how to avoid injury (§ 5194(h)(2)(E)).

Berliner and Papanek testified at length regarding the hazards to an employee's eyes associated with contact with the specific products employees unloaded (e.g. bleach, toilet bowl cleanser, drain cleaner, cleansing powder). The products were highly alkaline or highly acidic, which could cause permanent tissue damage. Papanek credibly testified that alkalines could act rapidly and cause permanent damage within seconds. This evidence is sufficient to support Berliner's testimony that hospitalization for more than 24 hours or temporary disability for a day was likely in the event of an accident caused by the violation because an employee would not be aware of the hazardous substance soon enough or would not know what to do to avoid injury.

Accordingly, a rating of "high" for severity is found appropriate. The penalty was otherwise calculated consistently with the regulations. Hence, a penalty of \$375 is found reasonable and is assessed.

### **Citation 3, § 5162(a), Serious**

#### **Findings and Reasons for Decision**

During routine operations or foreseeable emergencies, the eyes of Employer's employees may come into contact with a substance which could cause corrosion, severe irritation, or permanent tissue damage. Employer did not have an eyewash that met ANSI requirements. The Division established a violation of § 5162(a).

**In the event of an accident caused by the violation, serious injury was a realistic possibility. The violation was properly classified as serious.**

**The proposed \$3,375 penalty is reasonable.**

The Division cited Employer for a violation of § 5162(a), which provides as follows:

Plumbed or self-contained eyewash or eye/facewash equipment which meets the requirements of sections 5, 7, or 9 of ANSI Z358.1-1981, Emergency Eyewash and Shower Equipment, incorporated herein by this reference, shall be provided at all work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption. Water hoses, sink faucets, or showers are not acceptable eyewash facilities. Personal eyewash units or drench hoses which meet the requirements of section 6 or 8 of ANSI Z359.1-1981, hereby incorporated by reference, may support plumbed or self-contained units but shall not be used in lieu of them.

Employer maintained that all of the chemicals being off-loaded at the site were standard and common household cleaning products, and that the Division presented no evidence of the presence of industrial cleaners or solvents or chemicals of any kind. Because of this, Employer argued that there was no safety order violation. This argument was discussed above, and is rejected.

The parties agreed that the chemicals were contained in sealed containers that employees do not open. The Division contends that employees are exposed to the chemicals due to leaking containers damaged in the back of the delivery trucks during transit to the store, as testified to by White and Wright.

Employer argued that White's testimony was inherently unreliable and exaggerated, because Employer had fired him. Employer asserted that White testified that he dropped a gallon of bleach every time he worked, and that this testimony means White's testimony should be heavily discounted. As discussed above in Citation 1, Item 11, this testimony does not warrant a conclusion of unreliability.

White testified that every truck contained a pallet of bleach, which Employer argues was exaggerated to the point of unreliability. Bratz testified that trucks delivered a pallet of bleach every two to three weeks. While these estimates differ, they do not indicate dishonesty by either White or Bratz, and the estimates are in the same ball park. Pallets of bleach were delivered often. The exact number of times bleach was delivered is not critical to Employer's operations. Both White and Bratz gave estimates. Both had biases. Since White had been fired, he would tend to have a bias against Employer. Since Bratz was still employed by Employer, he would tend to have a bias in favor of Employer.

Employer had access to its own records to establish its point about frequency of bleach delivery, but it offered weaker and less satisfactory evidence. Absence of such evidence allows an inference that bleach was delivered more often than Bratz testified. At a minimum, his testimony is viewed with distrust. (Evidence Code § 412<sup>53</sup>)

Assuming, for the sake of argument, that Bratz was correct—pallets of bleach were delivered every two or three weeks—the evidence is sufficient to establish that Employer received pallets of bleach, that containers of bleach leaked from time to time, and that employees got bleach on their skin and clothes.

Employer argues that § 5162 does not apply to exposure to household chemicals in sealed containers, citing federal letters of interpretation and *Public Storage, Inc.*, (Public Storage) Cal/OSHA App. 96-111 to 113, Decision After Reconsideration (Oct. 14, 1997), citing *The Boys Market, Inc.*, Cal/OSHA App. 83-352 to 354, Decision After Reconsideration (Nov. 25, 1986).

Employer cites federal precedent to support its position that the safety orders do not apply to household chemicals in sealed containers. Federal precedents, including federal letters of interpretation, are not binding. California may impose more stringent safety standards. The Board has long held that the Appeals Board is not constrained to follow federal precedent or policies, and this position has been upheld by California courts. (*Frank M. Booth, Inc.*, Cal/OSHA App. 06-4703, Denial of Petition for Reconsideration (Jan. 27, 2009), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), citing *United Air Lines, Inc. v. Occupational Safety and Health Appeals Board* (1982) 32 Cal.3d 762 and *Skyline Homes, Inc. v. Occupational Safety and Health Appeals Board* (1981) 120 Cal.App.3d 663; *Kaiser Steel Corporation*, Cal/OSHA App. 78-1161, Decision After Reconsideration (Mar. 5, 1981).)

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<sup>53</sup> Evidence Code §412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

A reading of the cases Employer cites leads to a conclusion opposite of the one Employer urges. In *Public Storage*, Employer argued that it could not be required to provide an eyewash for common household products. The Board rejected Employer's argument. In *Public Storage*, the Board cited *The Boys Market, supra*, for the holding that Employers had a non-delegable duty to instruct employees in the use of household chemicals where their use was part of their job duties. One of the household chemicals used was Liquid Plumber.

In *Public Storage*, the Board found that employees used a household chemical (a wax stripper), but held that the employer was not required to provide an emergency eyewash. The Board held that to support a violation, the Division must prove (1) employee exposure to the hazard, (2) routine exposure or foreseeable emergency, and (3) the probability of corrosion or severe irritation or damage to the eye. Whether or not the wax stripper was a household product was irrelevant. The effect of the product was relevant.

Applying § 5162(a) to common household products promotes employee safety and health and is consistent with *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303 (*Carmona*). In *Carmona*, the California Supreme Court held that the state's work place safety and health law should be given a "liberal interpretation for the purpose of achieving a safe working environment." (*Id.* at 313.) The Appeals Board has applied that instruction to mean that the law requires any safety order interpretation "to be done in a light most favorable to employee safety." (*Baldwin Contraction Company, Inc.*, Cal/OSHA App. 97-2648, Decision After Reconsideration (Dec. 17, 2001).) The Board adopts an approach that safety orders must be interpreted in a manner that affords maximum protection to workers. (*Beutler Heating and Air Conditioning*, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001).) In *Anning Johnson Company*, Cal/OSHA App. 06-1975, Decision After Reconsideration (Jan 13, 2012), the Board, citing *Carmona*, and relying on the principle of viewing safety orders in the way that is most protective of worker safety, rejected an employer's view of the meaning of a safety order, because to adopt that interpretation would "render the safety order applicable to a smaller number of dangerous work activities, and would thus render the safety order less protective of worker safety."

The Board based its holding in *Public Storage* on a finding that the evidence did not establish frequent use or exposure, and the lab report did not support the Division's contention that the stripper constitutes a hazard. Employees used the wax stripper once or twice a year. The stripper was never used directly from the bottle, but was diluted with water. In that case, Employer called a witness to testify who chaired the Standards Board committee that wrote § 5162(a). He testified that the standard would not apply for occasional operations such as once or twice a year. It was intended for routine operations and foreseeably hazardous situations. The witness further

testified that the danger of splashing while diluting the wax stripper would not be hazardous. The witness did not testify that § 5162(a) was not intended to apply to common household products.

The facts in this case are distinguishable from those in *Public Storage*. Here, the evidence establishes frequent contact with bleach and other chemicals. Both White and Wright testified that something leaked every time they unloaded a truck. Even if bleach were shipped only once every two or three weeks, the potential contact with bleach was enough to be frequent. Unlike *Public Storage*, the chemicals were not diluted. Employer did not dispute the evidence supporting the corrosive or irritating effects of the chemicals.

Employer argued in its brief that the chemicals did not pose any hazard to employee's eyes, pointing out that no employee had ever been splashed in the eyes with a chemical. Employer further argued that Wright did not suffer "an actual chemical related eye injury" because Wright did not suffer permanent eye damage. Employer interprets Papanek's testimony to mean that if the Old Dutch cleanser had gotten into Wright's eyes, Wright's eyes would have been severely injured within minutes. This misinterprets Papanek's testimony. Papanek testified that the particulate nature of the powder made it more difficult to remove from the eye than a liquid, and Wright did not suffer severe injury within minutes, but lack of immediate severe injury does not prove that the powder was not hazardous. The powder was sufficiently irritating that Wright went to the emergency room and he required eye flushing.

The degree of irritation and the amount of damage inflicted depends on the quantity of powder blown into Wright's eyes. According to Papanek, tears dilute powder or a chemical in the eyes, and a threshold amount is required before any permanent damage is done. The exact quantity of powder blown into Wright's eyes is unknown. The logical conclusion to draw is that less than the threshold amount got into Wright's eyes. Therefore, he did not suffer permanent eye damage; but, Wright would have suffered permanent eye damage if more powder had gotten in his eyes.

It is not reasonable to conclude, as Employer argues, that something other than a chemical caused Wright's eye injury. There is no evidence supporting another possibility, and they cannot be the basis of a finding. The Board stated that "Possibilities do not exist without evidence to substantiate such possibilities" in *A. Teichert & Son Inc. dba Teichert Aggregates*; Cal/OSHA App. 10-3029, Decision After Reconsideration (Nov. 15, 2012), footnote 7, citing *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012).

In its closing brief, Employer alleged that the Division was relying on a "worst case scenario" in their "substantial probability" analysis, which was

improper<sup>54</sup>. Employer's argument is misplaced. Papanek testified to one scenario—the results when a quantity of the chemicals in question get in an employee's eyes. The only variable was the amount of the chemical. Further, the Board has held that Division may assume the worst case scenario in evaluating whether the violation is serious. (*A. Teichert & Son, Inc. dba Teichert Construction*, Cal/OSHA App. 05-2650, Decision After Reconsideration (Aug. 16, 2012) citing *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2977, Decision After Reconsideration (Apr. 24, 2003).)

Employer alleged that compliance with § 5162(a) would be “clearly excessive and beyond the intent of the regulation to protect employees using chemicals” because multiple eyewash stations would be required to meet the 10-second rule<sup>55</sup>. Employer based this allegation on the fact that the chemicals in question are located inside the trucks, in the truck dock, in the warehouse area, and on the sales floor. As Wright testified, he was not able to travel from the dock to the restroom within 10 seconds. Employer believes it would be required to have eyewash stations throughout its store.

Employer's defense is without merit. An employer's belief that compliance is impossible or unwise will not succeed as the basis for granting an appeal of a citation. (*Hampshire Construction Co.*, Cal/OSHA App. 79-949, Decision After Reconsideration (Aug. 26, 1980); *C. W. Forcum Construction*, Cal/OSHA App. 83-183, Decision After Reconsideration (Dec. 31, 1986).) If Employer believes a safety order is unreasonable or that its own practice provides greater protection for its employees, Employer's remedy is to petition the Standards Board for a permanent variance pursuant to Labor Code § 143(a) or to have the safety order repealed or amended. (*City of Sacramento Fire Department*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989).)

White and Wright credibly testified that bleach splashed on them while they performed their regular work duties. Both of them got bleach or other chemicals on their hands. While there was no incident where a liquid got into an employee's eyes, there was the incident where the cleansing powder got into Wright's eyes. It is foreseeable that a chemical might get into an employee's eyes, either from splashing from a leaky container or from the employee inadvertently bringing his hand to an eye when his hand had a harmful chemical on it, as Papanek testified. Foreseeable contact is all that the safety order requires. Lack of an accident is irrelevant to the issue of foreseeability.

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<sup>54</sup> Employer cited *Rountree Plumbing, Heating, Inc.*, Cal/OSHA App. 06-731, Decision (Nov. 1, 2007) (“Opinion of ‘substantial probability’ was [improperly] premised only upon the worst of several possible scenarios.”) This citation is to a decision issued by an ALJ. ALJ decisions are not citable as precedent when a citation is appealed. *Western Plastering, Inc.*, Cal/OSHA App. 79-032, Decision After Reconsideration (Dec. 28, 1983); *Pacific Ready Mix*, Cal/OSHA App. 79-1550, Decision After Reconsideration (April 23, 1982).

<sup>55</sup> Eyewash stations must be in accessible locations that require no more than 10 seconds for the injured person to reach.

(*W.F. Scott & Co. Inc.*, Cal/OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999) [Employer had a 39-year history of no reportable injuries, eyewash and shower required.]])

Therefore, it is found that Employer is required to provide an eyewash. The Division established a violation of § 5162(a) by a preponderance of the evidence.

The Division classified the violation as serious. To establish a violation as serious, Labor Code § 6432(a) provides that there is "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."

"Serious physical harm" was defined above in the "Findings and Reasons for Decision" discussion for Citation 2. As discussed above, the evidence to support a serious violation must, at a minimum, show the types of injuries that would more likely than not result from the condition which forms the basis of the violation. (See *Friendly Chemical Disposal, Inc.*, Cal/OSHA App. 91-431, Decision After Reconsideration (May 7, 1992).)

Here, the Division's evidence established that the probable injuries resulting from lack of a readily available eyewash if a severely alkaline or acidic chemical got in an eye, were severe eye irritation, permanent eye damage and potential blindness. These effects were established through Berliner's and Papanek's testimony.

Berliner testified regarding the possible harmful effects of the high or low pH products that employees handled. He based his testimony on the warnings contained on the Material Safety Data Sheets for these products. (Exhibits 10 (toilet bowl cleaner), 11 (American Value bleach), 12 (outdoor bleach), 13 (drain cleaner), 14 (cleansing powder), 15 (A-1 bleach), 16 (white cloud bleach)) All of these substances were corrosive, highly irritating to eyes, and could cause permanent tissue damage, including blindness, if they were not rinsed out of eyes within 10 seconds. Berliner's training, education, and experience regarding pH and the harmful effects of substances with high or low pH values established a valid evidentiary foundation for his opinion. (*California Family Fitness*, Cal/OSHA App. 03-0096, Decision After Reconsideration (Mar. 20, 2009); (*R. Wright & Associates, Inc. dba Wright Construction & Abatement*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).) Berliner testified about studies that were conducted, and the meaning of different words of warning.

Papanek further elaborated on the potential harmful effects of these same substances. His CV (Exhibit 17) and testimony established a valid evidentiary foundation for his opinions, based both on his training and experience with occupational eye injuries. Papanek went into detail regarding

studies performed on rabbits and testified regarding a photograph depicting damage done to a human eye. (Exhibit 18) Papanek went into detail regarding the harmful effects of the highly acidic or alkaline products in question. All the chemicals were corrosive, highly irritating, and could cause permanent tissue damage. He testified to the rapid speed with which very high or low pH chemicals penetrates eye tissue, the fact that particulates are more difficult to remove, and that particulates keep releasing the harmful chemicals as long as they are caught in eye. Papanek further testified about the quantity of the harmful substance that must be present before permanent eye damage will occur. It is ½ gram, or about 1/10 of a teaspoon. Although this quantity is small, it is not zero because eyes are covered with tears at all times. Tears dilute any chemical that comes into contact with eyes. It is when the chemical is not sufficiently diluted that serious injury can occur.

Employer did not offer expert testimony or other evidence to refute Berliner's and Papanek's testimony. Their testimony is found credible and is credited. The Division established that potential injuries caused by the violation are serious.

The Division's evidence also established that serious injuries are a realistic possibility. "Realistic possibility" is not defined in the safety orders<sup>56</sup>. However, the Appeals Board has interpreted the phrase, and it did so in the context of unsafe working conditions from splashing of hazardous chemicals into eyes. The Board interpreted "realistic possibility" to mean a prediction "clearly within the bounds of human reason, not pure speculation." (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), quoting *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) In *Janco, supra*, the Board found that there was a realistic possibility of eye injury from the hazard in question, (splash in the eyes), although such an injury was unlikely and the possibility was remote. (*Id.*)

Effective January 1, 2011, the Legislature changed the standard for finding a serious classification from a "substantial probability" of serious physical harm to a "realistic possibility" of serious physical harm. The Courts presume that the Legislature is aware of existing and related laws when enacting a statute and intended to maintain a consistent body of rules. (*Stone Street Capital, LLC v. California State Lottery Com'n* (2008) 165 Cal.App. 4<sup>th</sup> 109, 118). Presumably, the Legislature was aware of the Board's interpretation

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<sup>56</sup> Generally, where words are not defined in the safety orders, the common and ordinary meaning of words is used. (*D. Robert Schwartz dba Alameda Metal Recycling and Alameda Street Metals*, Cal/OSHA App. 96-3553, Decision After Reconsideration (Mar. 15, 2001); citing *Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (Apr. 18, 1991).)

of "realistic possibility," and by adopting that language, approved the Board's definition. (See *Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, 1017, 9 Cal.Rptr.2d 358, 831 P.2d 798.)

This case is similar to *Janco*. The possibility of an employee getting hazardous chemicals in an eye is remote, and serious injury is unlikely. However, such a prediction is clearly within the bounds of human reason and not pure speculation. It is significant that the quantity required to cause permanent eye damage is very small ( $\frac{1}{2}$  gram or  $\frac{1}{10}$  teaspoon). Following the above precedent, it is found that serious injury is a realistic possibility in the event of an injury caused by the violation—lack of an eyewash that can be reached within 10 seconds.

Therefore, the violation was properly classified as serious.

A review of the proposed penalty shows that it was calculated in accordance with the regulations. All serious violations begin with an \$18,000 base for severity. Extent and likelihood were rated low, which brought the penalty down to \$9,000. The Division applied the penalty adjustment factors for good faith, size, and history of 25%, reducing the penalty to \$6,750. Application of the mandatory 50% abatement credit yielded a penalty of \$3,375.

Accordingly, the proposed penalty of \$3,375 is found reasonable and is assessed.

#### Decision

It is hereby ordered that the citations are established, modified, or withdrawn as indicated above and as set forth in the attached Summary Table.

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



DALE A. RAYMOND

Administrative Law Judge

DAR:mc

Dated: January 7, 2013

## SUMMARY TABLE DECISION

page 1 of 2

In the Matter of the Appeal of:

**BIG LOTS #4038**

**Dockets 11-R3D2-1929 through 1931**

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 315340471

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
11-R3D2-1929	1	1	3203(b)(2)	Reg	ALJ affirmed violation	X		\$375	\$375	<b>\$375</b>
		2	3664(a)	Reg	ALJ affirmed violation	X		375	375	<b>375</b>
		3	2340.16(a)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		4	2340.21(a)(2)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		5	2340.22(b)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		6	2340.24	G	ALJ affirmed violation	X		185	185	<b>185</b>
		7	2510.4	G	ALJ affirmed violation	X		185	185	<b>185</b>
		8	3203(a)(6)(B)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		9	3272(b)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		10	3276(c)(15)(E)	G	ALJ affirmed violation	X		375	375	<b>375</b>
		11	3382(a)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		12	3384(a)	G	ALJ vacated violation		X	185	185	<b>0</b>
		13	3668(a)(1)	G	ALJ affirmed violation	X		185	185	<b>185</b>
<b>Sub-Total</b>								\$2,975	\$2,975	<b>\$2,790</b>

# SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**BIG LOTS #4038**  
**Dockets 11-R3D2-1929 through 1931**

Abbreviation Key: Reg=Regulatory  
 G=General            W=Willful  
 S=Serious            R=Repeat  
 Er=Employer        DOSH=Division

IMIS No. 315340471

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
<b>Subtotal from page 1</b>								\$2,975	\$2,975	<b>\$2,790</b>
11-R3D2-1929	1	14	4353(g)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		15	6151(c)(1)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		16	5194(e)(1)	G	ALJ reduced penalty	X		375	375	<b>185</b>
		17	5194(h)(1)	G	ALJ affirmed violation	X		185	185	<b>185</b>
		18	5194(h)(2)(D/E)	G	ALJ affirmed violation	X		375	375	<b>375</b>
11-R3D2-1930	2	1	2340.17(a)	S	ALJ reclassified to <b>GENERAL</b>	X		3,375	<b>3,375</b>	<b>325</b>
11-R3D2-1931	3	1	5162(a)	S	ALJ affirmed violation	X		3,375	3,375	<b>3,375</b>
<b>Sub-Total</b>								<b>\$11,030</b>	<b>\$11,030</b>	<b>\$7,605</b>

**Total Amount Due\***

**\$7,605**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)  
 Department of Industrial Relations  
 P.O. Box 420603  
 San Francisco, CA 94142

\*You will 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.

ALJ: DR/mc  
 POS: 01/07/13