

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

In the Matter of the Appeal of:

NOLTE SHEET METAL, INC.
1560 N. Marks
Fresno, CA. 93722

Employer.

Docket. 14-R6D7-2777
through 2783

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken Nolte Sheet Metal, Inc.'s (Employer) petition for reconsideration under submission, renders the following decision after reconsideration.

JURISDICTION

Commencing on June 11, 2014, the Division of Occupational Safety and Health, through Safety Engineer Ramon Davila (Davila), conducted a programmed inspection of Employer's sheet metal workshop located at 1560 N. Marks, Fresno, California.

After inspecting Employer's workshop, the Division issued multiple citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, title 8¹, and proposing civil penalties. Employer appealed the citations and administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. The ALJ issued a Decision on January 29, 2015. Within her Decision, the ALJ affirmed a total of 10 general and 4 serious violations.²

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

² Relevant here, the ALJ's Decision affirmed the following citations: Citation 3 stating a serious violation of section 4070, subdivision (a) [failure to guard moving parts of belt and pulley drives]; Citation 4 stating a serious violation of section 4214, subdivision (a) [failure to guard hazard created by a press brake point of operation]; Citation 5 stating a serious violation of section 4227, subdivision (a) [failure to properly guard metal shears to prevent operator's hands from entering the zone traveled by the knives]; Citation 6 stating a serious violation of section 4310, subdivision (a)(2) [failure to properly guard band saw wheels]; and, Citation 7 stating a general violation of section 4650, subdivision (e) [alleging that employer failed to secure compressed gas cylinders].

Employer filed a Petition for Reconsideration raising several issues. First, Employer contends the Division engaged in an illegal search and inspection, requiring the exclusion of derivative evidence. Second, Employer states spoliation of evidence occurred, mandating dismissal of the citations. Third, Employer challenges the serious classification for multiple citations. Finally, Employer challenges the existence of certain violations. The Board took the Petition under submission.

ISSUES

1. Did Employer consent to the Division's inspection?
2. Did spoliation of evidence occur and, if so, what is the proper remedy?
3. Did the ALJ properly affirm the classification of the violations asserted in Citations 3, 5, and 6 as serious?
4. Did Employer fail to properly guard a press brake point of operation in contravention to the requirements of section 4214, subdivision (a) [failure to guard hazard created by a press brake point of operation] and, if so, was the violation properly classified as serious?
5. Did Employer fail to properly secure compressed gas cylinders in contravention to the requirements of section 4650, subdivision (e) [failure to secure compressed gas cylinders]?

FINDINGS OF FACT

1. Employer consented to the Division's inspection. John Nolte, foreman, had authority to, and did, provide consent to the inspection.
2. The original inspection file was stolen from the car of Division District Manager, Jan Hami. The Division recreated the bulk of the file, but was unable to reconstitute several items from the original file.
3. No prejudice was demonstrated based on the loss of portions of the original file. Employer was not deprived of the ability to make its defense, particularly since all participants were available to testify and be cross-examined and since most of the file was recreated.
4. There is a realistic possibility that death or serious physical harm could result from the actual hazards created by the violations asserted in Citations 3, 5, and 6.

5. Employer failed to properly guard the press brake point of operation referred to in Citation 4.
6. There is a realistic possibility that death or serious physical harm could result from the actual hazard created by failure to adequately guard a press brake.
7. The Division established that Employer failed to properly secure the compressed gas cylinders referred to in Citation 7.

DECISION AFTER RECONSIDERATION

The Board has independently reviewed and considered the entire record in this matter, including reviewing the testimony of all witnesses. In making this decision, the Board has taken no new evidence.

1. Did Employer consent to the Division's inspection?

The determination of whether consent was given to the inspection is fact specific and requires examination of the particular circumstances under which the consent was granted. (*People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651; *Enters v. Marshall* (1978) 578 F.2d 1021, 1024 [in determining whether the employer consented to an OSHA inspection, the court looks to the totality of the circumstances].) A review of the particular circumstances in this matter leads to the conclusion that John Nolte had authority to, and did, consent to the Division's inspection of the premises. Davila said he conducted an opening conference in conformance with the Division's policies and procedures. Davila said he asked for the person in charge when he entered Employer's worksite. Davila testified that John Nolte identified himself as the person in charge and also identified himself as a foreman. Davila let John Nolte know that he was there to do a compliance inspection and asked if it was alright for him to get started, whereupon John Nolte consented. John Nolte admits he was asked if they could look around, and that he responded affirmatively by stating "I guess." These facts demonstrate that consent to the inspection was freely given by the person in charge at the time.³ The fact that Davila did not inform John Nolte of the right to refuse the inspection does not render the inspection invalid in this case. (See, *United States v. Drayton*, (2002) 536 U.S. 194, 207; see also, *United States v. Robson* (1973) 477 F.2d 13, 19; *United States v. Thriftmart, Inc.* (1970) 429 F.2d 1006, 1010.)

In addition to the foregoing testimony, John Nolte's authority to grant consent was also indicated when he prepared the response to the Division's

³ Employer objects that the hearing and the gathering of witness testimony did not comply with the requirements of the Evidence Code, but such arguments fail because the Evidence Code does not strictly apply to Board proceedings. (See, section 376.2; see also, Labor Code section 6612.)

1BY, wherein he again identified himself as the foreman. It was also corroborated by the testimony of employee Kevin Sage, who stated he worked under the direction of John Nolte when in the shop. Additionally, it is noted that John Nolte is not just a foreman; he is also the son of a shareholder and officer for the Corporation, Ernie Nolte, leading to an inference, when considered in aggregate with other record evidence, that John Nolte had authority to consent to the inspection.

Even assuming John Nolte did not have actual authority to grant consent to the administrative search, Davila's belief in John Nolte's apparent authority was reasonable and therefore the search remains valid. (*See, People v. Roman* (1991) 227 Cal.App.3d 674, 679; *Terry v. Ohio* (1968) 392 U.S. 1, 21-22; *People v. Superior Court (Walker)*, (2006) 143 Cal. App. 4th 1183, 1199.) Here, the facts were sufficient for Davila to reasonably believe John Nolte had authority to consent to the inspection.

Employer next contends that John Nolte only consented to the inspection because he was intimidated by armed members of the task force accompanying Davila. Employer argues that consent to the search was not freely given. Whether consent to a search was freely given, or was instead a submission to express or implied governmental authority is primarily a question of fact to be resolved by reference to all the surrounding circumstances. (*Carlson v. Superior Court* (1976) 58 Cal.App.3d 13, 19.) Davila was not armed. The evidence demonstrated that Davila was accompanied on the inspection by some armed members of the Department of Insurance, who were also part of the Labor Enforcement Task Force (LETF). However, their weapons remained holstered and they conducted themselves peaceably. John Nolte admitted that the weapons were not openly displayed, and stated he only noticed the weapons by accident. We conclude that the fact that members of the task force carried holstered weapons and wore body armor does not by itself invalidate consent nor demonstrate that consent was not freely given under these facts.

2. Did spoliation of evidence occur and, if so, what is the proper remedy?

Employer argues spoliation of evidence occurred, mandating dismissal of the citations. "Spoliation of evidence means the destruction or significant alteration of evidence or the failure to preserve evidence for another's use in pending or future litigation. [citations omitted.]" (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223.) Such conduct is condemned because it can destroy fairness and justice, increase the risk of an erroneous decision, and also increase the costs of litigation as parties attempt to reconstruct the destroyed evidence or develop other evidence. (*Ibid.*) "While spoliation of evidence may be sanctioned, a court [or the Board] may consider the extent of prejudice, if any, suffered by the moving party as a result of the loss of evidence, and fashion a

remedy appropriately.” (*Clark Pacific Precast LLC, Donald G. Clark Corp. & Robert E. Clark Corp. dba Clark Pacific*, Cal/OSHA App. 09-0283, Denial of Petition for Reconsideration (Oct. 25, 2012), *citing Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1227, *McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 213-214.) Sanctions are intended to remedy discovery abuses, not to punish. “Accordingly, sanctions should be tailored to serve that remedial purpose, should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery, and should be proportionate to the offending party's misconduct.” (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223, *citing, McGinty v. Superior Court* (1994) 26 Cal.App.4th 204, 210–212) In appropriate circumstances, one available remedy is drawing of a negative inference that the lost evidence contained something damaging to the opponent’s case. (*Harbor Sand & Gravel Inc.*, Cal/OSHA App. 01-1016, Decision After Reconsideration (June 5, 2003), *citing Evidence Code 413.*)

It is not disputed that the Division’s original inspection file was not preserved for hearing. Jan Hami (Hami), District Manager for the Northern District LETF, testified she removed the original inspection file from the Division’s office in order to review it after the citations were issued. She left the file in her car. Her car was broken into and the file was stolen. She filed a police report documenting the theft.⁴ Hami said she instructed Davila to recreate the file following the theft. Davila and Hami testified they were able to recreate much of the file. For instance, Davila was able to reconstitute his pictures, which identified and documented many of the purported violations. (Exs. 4-14.) Davila relied on these pictures when testifying. However, the Division was unable to recreate certain portions of the file, including: Davila’s original investigative notes; the Division’s document request sheets provided to Employer; the Cal/OSHA 1A, documenting the persons Davila talked to, documenting many of the things discussed in the opening conference, and providing a list of employees interviewed; and, the Division could not fully recreate all of the Cal/OSHA 1B’s, which contain summaries of evidence related to the various citations. Employer was not informed of the loss of the file until later in the proceedings.

Assuming the loss of the original file constituted spoliation, we are not persuaded that any sanctions are appropriate. While Hami’s conduct in

⁴ The ALJ determined Hami testified credibly that the file was stolen from her car. (Decision, p. 5, fn. 4.) The Board typically will not disturb an ALJ’s credibility determination on reconsideration, and we find no reason to do so here. (See *e.g., Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).) We give considerable weight to the ALJ’s determination that Hami testified credibly “because she is present to observe the witness' demeanor on the stand.” (*General Truss Co., Inc.*, Cal/OSHA App. 06-0782, Decision After Reconsideration (Nov. 15, 2011), *citing, Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312 [other citations omitted].) Additionally, notwithstanding Employer’s efforts to point to various purported inconsistencies in Hami’s testimony as well as purported lapses in her memory, after independently reviewing the entire record, we concur with the ALJ that Hami testified credibly with respect to the fact that the file was stolen from her vehicle.

leaving the file in the car was ill-advised, there is no evidence of a conscious or willful effort to suppress evidence by the Division. There is also no evidence, nor even any specific indication, that any significant relevant evidence actually existed in the missing records that would necessitate a remedial sanction. While Employer offers considerable speculation regarding the potential existence of relevant and/or exculpatory information in the lost portions of the file, the Board cannot fashion a remedy based on speculation; in general, discovery sanctions “should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery... [citations]” (*Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223; *see also, Harbor Sand & Gravel Inc.*, Cal/OSHA App. 01-1016, Decision After Reconsideration (June 5, 2003)—no remedy where the erasing of the tape was not prejudicial to employer given the facts of the case.) The loss of the original file does not justify the windfall of terminating sanctions requested by Employer, nor any other sanction, under the specific facts of this matter. We also observe no due process violation. The loss of the original file did not deprive Employer of the ability to make its defense. For a claim that a party was denied due process, the test is whether the party claiming it was aggrieved is able to obtain comparable evidence by other reasonably available means. (*Clark Pacific Precast LLC, Donald G. Clark Corp. & Robert E. Clark Corp. dba Clark Pacific*, Cal/OSHA App. 09-0283, Denial of Petition for Reconsideration (Oct. 25, 2012), *citing, People v. Garcia*, (2000) 84 Cal. App. 4th 316, 332 [other citations omitted].) Here, the bulk of the file and evidence was able to be recreated through other means.⁵ Additionally, all participants were available to testify and be cross-examined at hearing with regard to the facts of the case.

In reaching this holding, we do not mean to condone the Division’s conduct resulting in the loss of the file. The Division is cautioned that better care should be taken to preserve evidence and failure to do so can result in sanctions. (See, sections 372.7 and 350.1.) The Board is also troubled by Hami’s decision to delay disclosing the loss of the original file to Employer based on her determination that the loss of the file was not relevant to the informal conference or any proposal. While we ascribe no improbity to the Division’s conduct, the Division is cautioned that the loss of the original file, and the evidence therein, as well as any reconstitution efforts, should have been reported to Employer as early as possible to better preserve the integrity of the process and the appearance of integrity as well.

We now address the remaining arguments in the Petition.

⁵ It is noted that the much of the Form 1B’s were able to be reconstituted and Davila testified that they would have had some information from his investigative notes, although several were incomplete.

3. Did the ALJ properly affirm the classification of Citations 3, 5 and 6 as serious?

To the extent the Petition may be construed as challenging the existence of the violations asserted in Citations 3, 5, and 6 and not just the classification, the Petition is denied. The Board observes, as did the ALJ in her Decision, Employer did not contend within its Appeal Forms that those safety orders were not violated. (Ex. 1.) This appears to have been a reasoned decision by Employer as it contested the existence of some but not other violations. The Appeals Board has held an employer may not raise a violation's existence as an issue where on its appeal form, which the employer did not move to amend, it did not challenge the existence of the violation(s). (Section 361.3; *Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (July 19, 2000); *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000).) The record does not reflect any effort by Employer to amend its appeal form to raise the existence of foregoing violations. Thus, we conclude the violations asserted in these citations have been established.

Employer contends the Division failed to meet its burden of proof to establish the serious classification. The Division's initial burden of proof for the serious classification is not particularly onerous. A rebuttable presumption of a serious violation exists when the Division establishes there is "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Labor Code section 6432, subdivision (a).) The term "realistic possibility" means that that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) To meet its initial burden, the Division must produce "some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MDB Management, Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) Davila is deemed competent by operation of law to establish each element of a serious violation because his training is up to date. (See, Labor Code section 6432, subdivision (g).) Davila has been employed with the Division for approximately 30 years and averages 100 inspections per year. He also has a degree in occupational safety and health.

Citation 3, Item 1 asserted a serious violation of section 4070, subdivision (a) [failure to guard belt and pulley drives]. During his inspection, Davila observed an unguarded belt and pulley drive on the end of a shear. The machine controls were located near the belt and pulley drive. The guard had vibrated off. Exhibit 10 is a photo he took depicting the violation. He said the entire belt and pulley drive should have been guarded. Davila said the violation created a realistic possibility of death or serious physical harm. The nip-point created by the belt and pulley drive could break bones and/or cause severe damage to fingers, hand, or other extremities. The Board credits Davila's

testimony and finds with respect to Citation 3 that the Division established a presumption of a serious violation.

Citation 5, Item 1 asserted a serious violation of section 4227, subdivision (a) [failure to properly guard metal shears]. Davila said he observed a shear that was not completely guarded. There was a portion of the shear that did not have a guard preventing fingers from entering where the blade traveled. Exhibit 12 is a photo he took depicting the violation. Davila said there is a realistic possibility of serious harm because the blade cuts through metal and could cut through hands and body parts that enter the point of operation of the blade. The Board credits Davila's testimony and finds with respect to Citation 5 that the Division established a presumption of a serious violation.

Citation 6, Item 1 asserted a serious violation of section 4310, subdivision (a)(2) [failure to properly guard band saw wheels]. Davila said he observed a band saw. The top of the band saw was not fully guarded, exposing the wheel. Exhibit 13 is a picture of the violation. Davila testified to a realistic possibility of serious harm because if someone put their hand in the exposed area an amputation could occur. The Board credits Davila's testimony and finds with respect to Citation 6 that the Division established a presumption of a serious violation.

Labor Code section 6432 provides a mechanism for Employer to rebut the presumption of a serious violation. It states:

If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

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

Labor Code section 6432, subdivision (b)(1) lists the following factors that are relevant to determining whether Employer rebutted the presumption:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.

(B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.

(C) Supervision of employees exposed or potentially exposed to the hazard.

(D) Procedures for communicating to employees about the employer's health and safety rules and programs.

(E) Information that the employer wishes to provide, at any time before citations are issued, including, any of the following:

(i) The employer's explanation of the circumstances surrounding the alleged violative events.

(ii) Why the employer believes a serious violation does not exist.

(iii) Why the employer believes its actions related to the alleged violative events were reasonable and responsible so as to rebut, pursuant to subdivision (c), any presumption established pursuant to subdivision (a).

(iv) Any other information that the employer wishes to provide.

Here, the record presented no evidence sufficient to rebut the presumption as to Citations 3, 5, and 6. There was no credible evidence that Employer provided training with respect to the hazards attendant to guarding violations. There was no credible evidence demonstrating the existence of procedures for discovering, controlling, or correcting guarding hazards. There was no credible evidence of any procedures for communicating to employees about the employer's health and safety rules. Davila testified the persons he interviewed were not even aware of any IIPP. Employer also failed to elucidate on its efforts to effectively supervise employees exposed to guarding hazards. In addition, Davila said the violations were in plain view, providing Employer notice of the presence of the violations. (See *e.g.*, *Fibreboard Box & Millwork Corp.*, Cal/OSHA App. 90-492, Decision After Reconsideration (June 21, 1991)—“the Board has long held that unguarded machine parts in plain view constitute a serious hazard”.)

While Employer offered some testimony in an effort to rebut the presumption, its evidence was not sufficient to do so. Ernie Nolte said there had been no previous accidents despite using many of the machines for decades. He also observed that some of the machines possessed the manufacturer's guards. While the absence of previous accidents and Employer's good faith reliance on the manufacturer's guards⁶ might have some minimal relevance to the classification, those factors are not sufficient to rebut the presumption under Labor Code section 6432, subdivision (c), particularly considering the dearth of evidence regarding Employer's efforts or procedures to identify, control, and train on relevant hazards. Employer's speculation regarding cleaning efforts is also not sufficient to rebut the presumption. Under the circumstances present here, we cannot state employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation.

4. Did Employer fail to properly guard a press brake point of operation in contravention to the requirements of section 4214(a)?

Unlike Citations 3, 5, and 6, the Board will reconsider both the existence and the classification of Citation 4. The Decision found the Employer did not contest the existence of this violation; Employer did not contend within its Appeal Form that the safety order was not violated. (Ex. 1.) However, while that is true, the Board observes that an amendment was made to this citation at the commencement of the hearing, changing the section number cited. New charges in amendments are deemed controverted by operation of law unless an alternate intent is clearly evidenced. (Government Code section 11507; Section 371.2.) Here, there was no explicit waiver after the amendment occurred, and thus the citation is deemed controverted. We address this citation fully on the merits.

Section 4214, subdivision (a), provides the following:

- a) Press brakes, mechanically or hydraulically powered, shall be guarded in a manner that will accomplish the following:
 - (1) Restrain the operator(s) from inadvertently reaching into the point of operation, or
 - (2) Inhibit machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or

⁶ We reiterate that a manufacturer's failure to equip a machine with an appropriate guard required by the safety orders is no defense to the existence of a guarding violation. (*Western Pacific Roofing Corp.*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996).)

- (3) Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

The Division had the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sunrise Growers Frozsun Foods*, Cal/OSHA App. 09-2850, Decision After Reconsideration (Mar. 27, 2014), *citing*, *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), *Leslie G. v Perry & Associates* (1996) 43 Cal.App.4th 472, 483, rev. denied.)

Davila said he observed a brake with a point of operation that created a pinch point. He said the brake was not satisfactorily guarded to prevent the operator's hands from entering the danger zone created by the pinch point. Exhibit 11 is a photo he took of the brake. While he acknowledged the machine would have been difficult to guard, he said hand restraints would have been a satisfactory method to restrain the operator's hands from the point of operation. Davila's testimony is credited and sufficiently establishes the existence of a violation.

Employee exposure to the violation is also established. Ernie Nolte said they had been operating the machine for over 25 years. His testimony demonstrates that it is reasonably predictable by operational necessity or otherwise that employees have been, are, or will be in the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).)

Under the standards discussed in the preceding section, the evidence also supports the serious classification. Davila said there was a realistic possibility of death or serious physical harm. The brake was a large piece of machinery capable of bending metal. He said if an employee's hand were to accidentally enter the point of operation there could be a serious injury, amputation or broken bones. The Board credits Davila's testimony and finds the Division established a presumption of a serious violation. Employer failed to rebut the presumption. Davila said the violation was in plain view and, as discussed above, there is no evidence regarding Employer's efforts or procedures to identify, control, and train on the relevant hazards, or provide appropriate supervision.

- 5. Did Employer fail to properly secure compressed gas cylinders in contravention to the requirements of section 4650, subdivision (e) [failure to secure compressed gas cylinders]?**

Employer's Petition also challenges the existence of the violation asserted in Citation 7, which asserts a violation of section 4650(e). That section states:

Compressed gas cylinders shall be stored or transported in a manner to prevent them from creating a hazard by tipping, falling or rolling. Liquified fuel-gas cylinders shall be stored or transported in a position so that the safety relief device is in direct contact with the vapor space in the cylinder at all times.

After reviewing the record, the Board concludes a preponderance of evidence supports the affirmance of this violation. Davila said he observed unsecured gas cylinders in a shop area next to the electrical panel. Exhibit 14 is a photo he took of the cylinders. At least one of those canisters was not secured. According to witness testimony, one canister was actually hooked up and/or had tubes going into it. Davila's testimony sufficiently establishes the existence of a violation. The location of the cylinders and the evidence that one was hooked up also demonstrates employee exposure under the standards discussed in *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).

Employer primarily challenges the affirmance of the violation on the ground that there was no clear evidence that the gas cylinders actually contained compressed gas. But, the presence of compressed gas within the compressed gas cylinders is irrelevant to the existence of the violation. The regulation's plain terms apply irrespective of whether the gas cylinders actually contain compressed gas. The violation is affirmed.

DECISION

The Board denies Employer the relief sought in its Petition. The ALJ's Decision is affirmed in all particulars challenged by the Petition.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 7, 2016