BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
L & S FRAMING, INC.	**1692164**
Employer	**DECISION**

Statement of the Case

L&S Framing, Inc. (Employer) is a general construction contractor. Beginning August 18, 2023, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Shannon Lichty (Lichty), conducted an inspection of a residential construction project located at 8315 Biscayne Drive in Roseville, California, in response to an accident that occurred on July 27, 2023.

On January 26, 2024, the Division issued one citation to Employer alleging a violation of California Code of Regulations, title 8, section 1704, subdivision (b)(2).[1] The citation alleges that Employer failed to ensure that a nail gun was operated and maintained in accordance with the manufacturer's recommendations.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, and the reasonableness of abatement and the penalty.[2] Employer also asserted a series of affirmative defenses.[3]

This matter was heard by Christopher Jessup, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board), from Sacramento County, California. The parties and witnesses appeared remotely via the Zoom video platform on September 12 and 13, October 22 through 24, 2024, and August 20, 2025. Perry

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] During the hearing, the parties reported that the matter had been satisfactorily abated, so the issue of the reasonableness of abatement was no longer in dispute.
[3] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.,* Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Poff, attorney with Donnell, Melgoza and Scates, LLP, represented Employer. P. Ann Surapruik, Staff Counsel, represented the Division. The parties stipulated that the transcript of the audio recording is the official hearing record. The matter was submitted for decision on February 15, 2026.

Issues

1. Did Employer fail to ensure that an employee operated a pneumatically-driven nail gun in accordance with manufacturer's instructions?

2. Did Employer establish that it was not responsible for the violation based on the Independent Employee Action Defense?

3. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

4. Did the Division comply with the provisions of section 6432, subdivision (b), before issuing the citation with a Serious classification?

5. Did Employer rebut the presumption that the classification of the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

6. Did the Division establish that the citation was properly characterized as Accident-Related?

7. Is the proposed penalty reasonable?

Findings of Fact

1. Levinson Galindo Garcia (Garcia) was employed by Employer on July 27, 2023, the date of the accident.

2. Garcia was installing siding using a pneumatically-driven nail gun, a Metabo HPT NR83A5, just before the accident.

3. Employer's Code of Safe Practices (COSP) instructs employees to operate and maintain nail guns in accordance with the manufacturer's instructions.

4. Employer was not in possession of the manufacturer's operating instructions (Manual) for Garcia's nail gun at the time of the accident.

5. Garcia had not seen the Manual for his nail gun prior to the accident.

6. Garcia received hands-on training for the use of nail guns, but the training did not use the particular make and model of his nail gun.

7. Different nail guns have different features, including triggers. As such, the various models have separate Manuals for each model, even if they are the same brand.

8. The Manual for Garcia's nail gun includes the instruction not to keep a finger on the trigger of the nail gun when not intending to drive a nail into a surface.

9. Garcia had his finger on the trigger of the nail gun as he was nailing siding onto a house. As he stood to get his knee off the air hose connected to the nail gun, he attempted to put the nail gun into his tool belt, discharging a nail into his leg.

10. The Manual for Garcia's nail gun does not contain an instruction related to securing the nail gun hose to prevent it from being inadvertently pulled or getting caught.

11. Employer's accident investigation report uses uncertain, equivocal language regarding the circumstances of the accident and does not identify the cause of the accident.

12. Garcia did not realize that his finger was on the trigger at the time of the accident.

13. As a result of the accident, Garcia suffered a puncture wound that required in-patient hospitalization for surgery to remove the embedded nail.

14. The Division sent Employer a Notice of Intent to Classify Citation as Serious, via email only, 14 days before the citation was issued.

15. Prior to issuing the citation, the Division requested Employer's Injury and Illness Prevention Program, COSP, Heat Illness Prevention Plan, training documentation, nail gun policies and procedures, and its accident report.

16. Employer had 23 injuries resulting from the use of nail guns during 2022 and 2023.

17. Employer knew or should have known of the issues with its nail gun safety training.

18. Garcia's injury resulted from leaving his finger on the trigger of the nail gun as he tried to put it into his tool belt.

19. The penalty was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to ensure that an employee operated a pneumatically-driven nail gun in accordance with manufacturer's instructions?

Section 1704, subdivision (b)(2), provides:

Pneumatically Driven Nailers and Staplers.

(b) General.

[…]

(2) All pneumatically-driven nailers and staplers shall be operated and maintained in accordance with the manufacturer's operating and safety instructions.

The Alleged Violation Description (AVD) for Citation 1 asserts:

Prior to and during the course of the inspection, the employer failed to ensure a nail gun was operated and maintained in according [*sic*] with the manufactures [*sic*] recommendations. In the following instances:

1. The employer failed to ensure that the employee did not touch the trigger unless he intended to drive a nailer [*sic*] into the work area whenever the air supply is conned [*sic*] to the tool.
2. The employer failed to ensure the employees secured the hose at a point close to the area where the work was being done to prevent the hose from being inadvertently pulled or getting caught when utilizing the tool outside.

As a result, on or about 7/27/2023, and [*sic*] employee was seriously inured [*sic*] when a nail became lodged in his leg when the house [*sic*] that waw [*sic*] attached got caught and inadvertently caused the tool to [hit] his leg while his finger was on the trigger.

In order to establish a violation of section 1704, subdivision (b)(2), the Division must prove that (1) an employee was using a pneumatically-driven nailer, (2) there was a manufacturer's operating instruction that was not followed, and (3) an employee was exposed to the hazard created by the failure to follow the instruction.

There was no dispute that Garcia was using a pneumatically-driven nailer at the time of the accident. Further, Garcia's job duties regularly required that he use a nailer to install siding on newly-constructed homes. As such, Garcia was exposed, as part of his regular job duties, to the hazards of using a nailer to the extent that his use did not follow the manufacturer's operating instructions. Therefore, the primary issue for both instances of the citation is whether there was a manufacturer's operating instruction that was not followed.

a. Instance One

Did the manufacturer's instructions contain an instruction related to keeping fingers away from the trigger when not driving a nail into a surface?

Garcia was using a Metabo HPT NV 65AH2 pneumatically-driven nailer at the time of his accident. (Exh. 11.) The Metabo Instruction and Safety Manual contains numerous warnings and instructions to keep fingers away from the trigger unless intending to drive a fastener to avoid accidental discharge. (Exh. 10.) Additionally, Employer's Safety Officer, and designated company representative at the hearing, Jon Wagner (Wagner), testified that Employer acknowledges that having a finger on the trigger in the manner done by Garcia at the time of the accident was not consistent with the manufacturer's recommendations. (Hrg. Tr. Oct. 24, 2024, p. 70, ln. 17-21.) However, despite this acknowledgement, Employer argues that the Division did not establish that Exhibit 10 was the correct manufacturer's operating instructions in effect at the time of the accident.

Notably, during the inspection the Division requested that Employer produce a copy of a Manual for the nail gun that Garcia was using at the time of the accident. Employer did not produce any Manuals in response to the request. Lichty testified that she downloaded the Manual from the internet based on the make and model number identified in a photograph, given to her by Garcia, of the nail gun involved in the accident. (Exh. 10 and 11.) Lichty was unable to confirm that the Manual was the version in existence at the time of the accident, however, neither party provided evidence of other versions of Manual. Additionally, Employer did not provide evidence, through testimony or documents, that would cast doubt on the Manual as the relevant set of manufacturer's operating instructions for the nailer. Notwithstanding the potential for other versions of the Manual to exist, Wagner's acknowledgement of the safety instruction makes it more likely than not that the manufacturer's operating instructions include the prohibition of placing a finger on the trigger when not driving a fastener. As such, it is found that the

manufacturer's operating instructions contain an instruction regarding keeping fingers away from the trigger when not driving a nail into a surface.

Did Garcia fail to keep his finger away from the trigger when he was not driving nails?

Based on the entirety of Garcia's testimony[4], the preponderance of the evidence supports that the accident occurred in the following manner: The accident happened while Garcia was working on installing siding to a structure. Just prior to the accident, Garcia had been kneeling on the hose for his nail gun when he attempted to nail the siding. Garcia discovered that the hose was caught under his left knee and he was unable to extend the nail gun to the surface of the siding that he needed to nail. Then Garcia stood up, which released the hose and caused it to unravel. The accident occurred when Garcia moved to put the nail gun in his tool belt, and, because his finger was still on the trigger, the nail gun fired a nail into his leg.

Garcia explained that the trigger for the nail gun was very sensitive and that the nail gun discharges a nail when the nail gun is pressed against a surface. Garcia also explained that he did not realize that his finger was on the trigger until the nail had already gone into his leg and that, at the time of his injury, he was trying to put the nail gun into his tool belt in order to get the hose situation resolved. Garcia testified credibly that his finger was on the trigger inadvertently and that such a light pressure is required for activation that he did not realize that he had his finger on the trigger.

Employer argues that, according to Garcia's testimony, his finger was on the trigger at the time of the accident because he intended to nail a sheet of siding to a wall. (Employer's Post Hearing Brief p. 9.) However, Employer's brief acknowledges that there was other testimony demonstrating that Garcia was attempting to put the nail gun in his tool bag. (*Id.*) The record clearly refutes the interpretation advanced by Employer. Employer's counsel received direct clarification from Garcia during cross examination where Garcia stated that he placed his nail gun in his tool belt or "pouch." (Hrg. Tr. Oct. 22, 2024, p. 67, ln. 2-5.) Garcia continued and explained, "I was just putting the gun away because I was trying to figure out what was going on with the hose. So I was putting it away."[5] (Hrg. Tr. Oct. 22, 2024, p. 68, ln. 14-16.)

[4] Garcia's testimony regarding some of the accident details appeared to suffer from slight confusion. It is unclear if the confusion arose from his inability to accurately describe what happened, confusion regarding the parties' questions posed to Garcia, difficulty with recollection, an issue with interpretation of his description from Spanish into English, or some other issue. However, it is noted that Garcia did not appear to be intentionally deceitful or misleading in his answers.

[5] It is noted that Exh. 10 also contains the instructions "Disconnect the Nailer from the air source before making adjustments, […] when not in use, leaving work area, […], elevating, lowering or otherwise moving the Nailer to a new location," and "Do not attach the hose or Nailer to your

Despite Employer's legal argument that the Division failed to establish that Garcia was not driving nails into the siding at the time that the gun discharged, Wagner's testimony contradicts that argument. Wagner testified that Garcia's actions with his finger on the trigger were in violation of the manufacturer's instructions and Employer's training. (Hrg. Tr. Oct. 24, 2024, p. 70, ln. 17-21.) Thus, Employer has acknowledged that Garcia's finger was on the trigger when he was not attempting to drive a nail into the siding.

Based on Garcia's testimony that he had difficulty discerning whether his finger was on the trigger when carrying the nail gun, it is clear that Garcia's training was insufficient to ensure compliance with the manufacturer's operating instructions. Indeed, the Manual does not merely state to never carry the nailer with a finger on the trigger, it goes on to explain that operators should "Always carry the Nailer by the handle only." (Exh. 10.) As Employer did not provide Garcia with the Manual during his training and did not train Garcia on the Manual, it is apparent that his training did not properly prepare him to operate the nailer in accordance with the manufacturer's operating instructions. Even assuming, *arguendo*, that the manufacturer's operating instructions merely stated to keep fingers off of the trigger when not attempting to drive a nail, Garcia's testimony made it clear that the training did not prepare Garcia to comply with that instruction in the actual performance of his job duties.

The Division established that Garcia failed to follow the manufacturer's instructions by keeping his finger off the trigger of the nail gun when he was not driving nails into the siding. Accordingly, Instance One is affirmed.

b. Instance Two

Did the Manual contain an instruction related to securing the nail gun hose to prevent it from being inadvertently pulled or getting caught?

The Appeals Board has held that the Division must present evidence of the manufacturer's operating instructions. (*S&S Services,* Cal/OSHA App. 08-2132, Denial of Petition for Reconsideration (Sept. 9, 2010).) It stands to reason that, if the Division does not prove what the recommendations were, it cannot establish that an employer failed to follow those recommendations. (*Angelus Block Co., Inc.,* Cal/OSHA App. 1113026, Decision After Reconsideration (Apr. 25, 2024).)

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body." These safety instructions did not receive argument or attention from the parties, however, it appears that placing the nailer on the tool belt while still connected to the hose also did not comply with the manufacturer's safety instructions.

There is no provision in the Manual related to the "securing" of the air hose. The Division did not address the matter in briefing. Accordingly, the Division failed to establish a violation as alleged in Instance Two.

A citation may be upheld on the basis of a single instance. (*Golden State Boring & Pipe Jacking, Inc.*, Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020).) Here, the Division established a violation in Instance One. Accordingly, Citation 1 is affirmed.

2. Did Employer establish that it was not responsible for the violation based on the Independent Employee Action Defense?

Employer asserted the Independent Employee Act Defense (IEAD) applies in this matter. In *Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020), citing *Fedex Freight Inc.*, Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018), the Appeals Board explained:

> There are five elements to the IEAD, all of which must be shown by an employer in order for the defense to succeed: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contrary to employer's safety rules. (*Synergy Tree Trimming, Inc.,* [Cal/OSHA App.] 317253953, Decision After Reconsideration (May 15, 2017) [other citations omitted].)

As the IEAD is an affirmative defense, Employer bears the burden of proof to establish that all five elements of the IEAD are present by a preponderance of the evidence. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.)

a. Was Garcia experienced in the job being performed?

This requirement is satisfied when an employer shows that the employee had sufficient experience performing the work that resulted in the alleged violation. (*West Coast Communication*, Cal/OSHA App. 05-2801, Decision After Reconsideration (Feb. 4, 2011).)

At the time of his accident, Garcia had worked for Employer for over two years and had used a nail gun daily to perform his job applying siding to homes. As such, Employer satisfied the first element of the IEAD.

b. Did Employer have a well-devised safety program?

The second element of the IEAD requires the employer to have a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments. (See *Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).)

Employer's written Injury and Illness Prevention Program (IIPP) was admitted into evidence as Exhibit D. The written IIPP includes all the topics required by section 3203, subdivision (a). The Division did not assert that Employer had any deficiencies in its written safety program.

There was extensive testimony about the daily and weekly safety meetings conducted by Employer and the training that occurred throughout an employee's tenure with Employer. Employer had written materials for the safety training and Employer keeps written records of its training.

Employer has a written COSP that contains several safety practices related to the operation of nail guns. However, in a recent Decision After Reconsideration, the Appeals Board reviewed Employer's COSP and found it to be deficient. (*L&S Framing, Inc*., Cal/OSHA App. 1692964, Decision After Reconsideration (Dec. 3, 2025).) The eight nail gun provisions in the COSP that the Appeals Board previously reviewed are the same as those in the COSP admitted into evidence in the instant matter.

> 14. Never use a nail gun that is not equipped with a safety spring or is in questionable working condition.
> 15. Never remove the safety spring from a nail gun.
> 16. Unplug air hose at nail gun when not in use.
> 17. Unplug air hoses at compressor during lunch or break.
> 18. Do not carry pneumatic fasteners by the hose.
> 19. Do not carry pneumatic fasteners with your finger on the trigger.
> 20. Operate and maintain pneumatic fasteners according to manufactures [*sic*] instruction. [. . .]
> 22. All compressors, tanks, and other pneumatic equipment, air hoses, and lines shall be properly maintained.

(Exh. D, p. 7.)

In *L&S Framing, Inc*., *supra,* Cal/OSHA App. 1692964, the Appeals Board explained:

> First, as correctly concluded by the ALJ, the record demonstrates that Employer did not require its employees to follow all the safety rules set forth in the COSP. [Citation omitted.] The COSP requires that employees "[o]perate and maintain pneumatic fasteners according to manufactures [*sic*] instruction." [Citation omitted.] However, the evidence supports the conclusion that Employer never made the safety manual available to employees. […] As the ALJ correctly noted, "This is not the same as requiring employees to read the manual or prohibiting employees from using pneumatically-driven nail guns until they had read and understood the manual." [Citation omitted.]

(*L&S Framing, Inc*., *supra,* Cal/OSHA App. 1692964.) The Appeals Board went on to explain that Employer's COSP failed to include warnings and instructions contained in the manufacturer's instruction and safety manual for the nail gun in a manner sufficient to cover the safe operation of the nail gun absent the manufacturer's instruction and safety manual. (*Id.*)

In the instant matter, Employer acknowledged that it did not have the Manual for the nail gun that Garcia was using. (Hrg. Tr. Oct. 24, 2024, p. 75, ln. 1-2.) Additionally, the nail gun training that was performed multiple times and documented thoroughly was not necessarily training the employees on the specific nail gun they used. (Hrg. Tr. Oct. 24, 2024, pp. 26-30.) As such, it is apparent that the deficiencies noted in *L&S Framing, Inc*., *supra,* Cal/OSHA App. 1692964, are present in this matter for the same reasons considered in that matter.

Employer did not have a well-devised safety program because Employer's COSP was deficient and had provisions that were not effectively enforced and Employer failed to provide the manufacturer's operating instructions to an employee that was required to follow those instructions and Employer failed to train the employee on the manufacturer's operating instructions for the nail gun he actually used in the performance of his job duties. Accordingly, Employer did not establish the second element of the IEAD.

c. Did Employer effectively enforce its safety program?

"While an employer may have a well-defined safety program on paper, an employer must also demonstrate that it effectively enforces that safety program to meet the IEAD. Proof that Employer's safety program is effectively enforced requires evidence of meaningful, consistent enforcement." (*FedEx Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

As discussed in the second element, Employer did not enforce its own safety program due to its failure to train employees on the appropriate nail guns and to provide Garcia with the Manual applicable to his nail gun.

Garcia testified that he had never seen the Manual for the nail gun involved in the accident, which was a tool that he had purchased himself and brought to work with him. Additionally, Garcia testified that he was unaware that a copy of the Manual was available upon request. (Hrg. Tr. Oct. 22, 2024, p. 55, ln. 23-25, and p. 56, ln. 1-2.)

Employer's Human Resources Manager, Edgar Avalos (Avalos), testified that Employer maintains Manuals for the various nail guns that the employees typically use, and that it was his understanding that they had the Manual for the nail gun Garcia used. However, as set forth above, Wagner testified that Employer did not have a copy of the Manual for the nail gun that Garcia used. (Hrg. Tr. Oct. 24, 2024, p. 75, ln. 1-2.) Avalos testified that different nail guns have different features and specifically identified that the models have different triggers. As such, the various models have separate Manuals for each model, even if they are the same brand. (Hrg. Tr. Oct. 24, 2024, p. 22, ln. 20-25 and p. 23, ln. 1-2.) The nail gun training provided to Garcia did not use the same make and model gun that Garcia was using at the time of his accident. (Exh. H and I.; Hrg. Tr. Oct. 24, 2024, pp. 26-30.)

Additionally, as part of Employer's safety program, Employer conducts accident investigations and prepares a report. However, Employer's accident report, admitted into evidence as Exhibit J, falls far short of identifying the root cause of the accident: "Apparently the [injured worker] may have embedded a nail in his right leg while utilizing a nail gun." (Exh. J.) In addition to the ambiguous language regarding the description of the accident, the report provides no information under the section "Causes/Factors." The accident report evaluated by the Appeals Board in *L&S Framing, Inc*., *supra,* Cal/OSHA App. 1692964, contained similar language: "may have discharged a nail into his right leg while working on a ladder." The Appeals Board took issue with the language and stated that "the equivocal 'may have' language in the accident investigation summary is an attempt to obfuscate the truth and avoid identifying the root cause of the accident." (*L&S Framing, Inc*., *supra,* Cal/OSHA App. 1692964, fn. 2 and 3.) The failure to conduct a thorough accident investigation that seeks to find the root of the problems in order to correct them demonstrates that Employer's enforcement of its safety program is lacking.

Thus, Employer did not establish that it enforced a well-devised safety program.

d. Did Employer have a policy of sanctions against employees who violate the safety program?

"Element four requires a demonstration that the employer has a policy of sanctions which it enforces against employees who violate the safety program." (*Synergy Tree Trimming, Inc*., *supra,* Cal/OSHA App. 317253953).) The Appeals Board has determined that employers may

show compliance with this element through producing records of disciplinary actions related to safety. (*Paramount Farms, King Facility*, Cal/OSHA App. 2009-864, Decision After Reconsideration (Mar. 27, 2014).)

Employer's safety program requires progressive discipline that included writeups, retraining, suspension, and termination, as needed. Employer produced several notices of safety infractions that had been issued to employees for various safety violations. (Exh. E.) However, despite this, Wagner testified that Employer cannot "take action" against an employee if they are involved in an injury because it can be seen as discrimination. (Hrg. Tr. Oct. 24, 2024, p. 71, ln. 3-21.) As such, Employer calls into question whether it enforces its policy of sanctions in all appropriate instances. Additionally, as set forth in the analysis of elements two and three of the IEAD, Employer does not have a well-devised safety program that is effectively enforced. Employer does not conduct effective accident investigations with the goal of fixing safety problems, rather, it appears to avoid root cause analysis for accidents to attempt to avoid potential liability. However, without appropriate root cause analysis and well documented accident investigations, it is not clear that Employer makes efforts to prevent accidents from repeating through disciplining employees effectively or providing training on the issue that gave rise to the accident. Therefore, Employer failed to establish the fourth element of the IEAD.

e. Did Garcia commit a safety infraction that he knew was contra to Employer's safety requirements?

"The final element requires the employer to demonstrate that the employee causing the infraction knew he was acting contra to the employer's safety requirements." (*Synergy Tree Trimming, Inc*., *supra,* Cal/OSHA App. 317253953.) In *Macco Constructors, Inc*., Cal/OSHA App. 83-147, Decision After Reconsideration (Oct. 2, 1987), the Appeals Board describes the purpose of the IEAD as follows:

> The independent employee action defense is designed to relieve an employer from the consequences of willful or intentional violation of one of its safety rules by non-supervisory employees, when specified criteria are met.

The Appeals Board has specifically found that inadvertence is not a conscious disregard of a safety violation.

> Whether an action was inadvertent or constituted a conscious disregard of a safety rule is a question that must be examined in each case, in light of all facts and circumstances. In the case at issue, the Employer is unable to demonstrate that [the employee's] actions were anything less than an unfortunate one-time error. Put another way, the Employer has not shown that [the employee's] actions were

> intentional and knowing, as opposed to inadvertent, or that [the employee] was conscious of the fact that his actions constituted a violation of a safety regulation or rule at the time of the incident. Indeed, the evidence preponderates to a finding that [the employee] acted inadvertently.

(Synergy Tree Trimming, Inc., *supra,* Cal/OSHA App. 317253953.)

Garcia testified repeatedly that he did not even realize that his finger was on the trigger at the time of the accident. He said, "You don't really realize when you have your finger on the trigger, because the trigger is soft, it is very soft." (Hrg. Tr. Oct. 22, 2024, p. 27, ln. 25.) Additionally, Garcia testified that, "What happened was an accident, nobody wants to put a nail in their leg. What happened was an accident." (Hrg. Tr. Oct. 22, 2024, p. 68, ln. 4-6.) He continued:

> I have the gun in my hand and I was trying to put it away. When you're working, you don't really notice whether you have your finger on the trigger or outside the trigger because you don't feel it. That's what I meant, that I didn't realize it.

(Hrg. Tr. Oct. 22, 2024, p. 69, ln. 11-15.)

Although Employer argues that Garcia was trained and was aware of the rule that he was not supposed to keep his finger on the trigger when he was not discharging a nail, there is no evidence that Garcia's actions were willful or intentional. The accident resulted from an unfortunate mistake. Thus, Employer failed to establish the fifth element of the IEAD.

Employer failed to establish the second through fifth elements and, therefore, has not met its burden of proof with regard to the affirmative defense of the IEAD.

3. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

Labor Code section 6432, subdivision (a), in relevant part states:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment or in connection with any employment that results in:

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body.
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Lichty, an Associate Safety Engineer, testified that her Division-mandated training is current. Therefore, under Labor Code section 6432, subdivision (g), Lichty was deemed competent to offer testimony to establish each element of the Serious violation and to offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a Serious violation. Lichty testified that the actual hazard created by an employee having a finger on the trigger of a nail gun when not using it for nailing is the accidental discharge of the nail gun which can result in puncture wounds, broken bones, or death.

Further, Garcia actually suffered a wound that required in-patient hospitalization for surgery to remove the embedded nail. As such, not only was there a realistic possibility of serious physical harm, but the accident resulted in actual serious physical harm.

Accordingly, the Division established a rebuttable presumption that Citation 1 was properly classified as Serious.

4. Did the Division comply with the provisions of section 6432, subdivision (b), before issuing the citation with a Serious classification?

Employer raises a procedural challenge to the classification of the citation as Serious. Employer contends the Division failed to comply with the requirements of Labor Code section 6432, subdivision (b), which sets forth procedural prerequisites the Division must follow prior to issuing a Serious citation. Labor Code section 6432, subdivision (b)(1), states:

> (1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable attempt to determine and consider, among other things, all of the following:
>
> (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.

"Shall" as used in this statute means "mandatory." (Lab. Code § 15.) "In sum, the Labor Code instructs the Division to consider the factors listed in subdivision (b)(1) prior to issuing a citation as serious; this provides an employer with the opportunity to furnish information to the Division that may militate in favor of issuance of a less than serious citation." (*Echo Alpha, Inc.,*

John Stagliano, Inc., Evil Angel Productions, and John Stagliano, Inc. dba Evil Angel Video (*Echo Alpha*), Cal/OSHA App. 14-0802, Decision After Reconsideration (Dec. 24, 2015).)

In an effort to comply with the requirements of Labor Code section 6432, subdivision (b)(1), the Division attempted to send Employer a Notice of Intent to Classify Citation as Serious (1BY), as set forth in subdivision (b)(2). Labor Code section 6432, subdivision (b)(2), provides:

> The division shall satisfy its requirement to determine and consider the facts specified in paragraph (1) if, not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision.

a. Service of the Notice of Intent to Classify Citation as Serious (1BY)

Employer argues that the 1BY was ineffective because it was not properly served. The 1BY itself contains the statement "Via personal delivery, U.S. Mail with proof of service, or facsimile." (Exh. 2.) As such, it appears that the Division's expectation is that the 1BY should be served via one of those methods. Lichty testified that she emailed Employer's counsel a copy of the 1BY on January 12, 2024. (Exh. 23.) Lichty did not send Employer the 1BY by any other method.

Section 6432 does not specify a particular method delivering the 1BY to an employer. Although Lichty's actions may not have been in compliance with the Division's expectations for how the 1BY should be delivered, her failure to send it as set forth on the form itself does not violate the Labor Code.

b. Timing of Service of the 1BY

Employer argued that the provisions of Labor Code section 6432, subdivision (b), were violated by the Division because the 1BY was not delivered 15 days before the citation was issued. The citation was issued on January 26, which was only 14 days after the 1BY was emailed to Employer's attorney. Thus, Employer argues that the citation cannot be classified as Serious.

In cases where the Division fails to comply with the 15-day time requirement before it issues the citations, the Labor Code provides a remedy. Labor Code section 6432, subdivision (d) states, in part:

> "The trier of fact may also draw a negative inference from factual information offered at the hearing by the division that is inconsistent with factual information

> provided to the employer pursuant to subdivision (b), or from a failure by the division to provide the form setting forth the descriptions of the alleged violation and soliciting information pursuant to subdivision (b)."

Thus, the Appeals Board has the discretion to draw a negative inference should the Division fail to comply with section 6432, subdivision (b). (*West Coast Arborist, Inc.*, Cal/OSHA App. 1180192, Denial of Petition for Reconsideration (April 26, 2019); *Echo Alpha, supra*, Cal/OSHA App. 14-0802.) Additionally, the Court of Appeal has noted that in circumstances where the Division has failed to provide a form to an employer setting forth the alleged violation, Labor Code section 6432, subdivision (d), "provides the operation of drawing a negative inference against the Division under such circumstances." (*L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd.* (2023) 93 Cal. App. 5th 995, 1011.) As such, the Division is not prohibited from classifying a citation as Serious when it fails to provide a form setting forth the alleged violation, but rather, a negative inference may be drawn against the Division's evidence in support of that classification should it fail to provide the form.

Furthermore, the Appeals Board has consistently held that the 1BY is not the only method for complying with Labor Code section 6432, subdivision (b)(1). In *Echo Alpha, supra,* Cal/OSHA App. 14-0802, the Appeals Board found that the Division's attempts to obtain the information identified in Labor Code section 6432, subdivision (b)(1), through document requests constituted substantial compliance.

In the instant matter, the Division requested Employer's IIPP, COSP, Heat Illness Prevention Plan, training documentation, nail gun policies and procedures, and its accident report. (Exh. 17.) The information requested constitutes substantial compliance with Labor Code section 6432, subdivision (b)(1). Therefore, a negative inference is not warranted.

Additionally, the Appeals Board held in *Echo Alpha, supra,* Cal/OSHA App. 14-0802, "no representative of Employer testified to suggest that Employer's response to the 1BYs would have been different had additional or more specific charging language been included. We therefore decline to draw a negative inference in this instance." In this matter, given the testimony of Garcia, his medical records, Employer's Accident Investigation, and other evidence presented during the course of the hearing, it is found that a negative inference would not overcome the evidence adduced at hearing because there was not countervailing evidence to support the conclusion that failing to follow the manufacturer's operating instructions poses a hazard that does not have a realistic possibility of serious physical harm or death. (See Exh. J, 12, and 21.)

Pursuant to the foregoing, a negative inference is not drawn and is found inappropriate in this matter.

5. Did Employer rebut the presumption that the classification of the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists 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. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (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) [; and]
>
> (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), provides that the following factors may be taken into account:

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

The violation for which Employer was cited was a failure to ensure that an employee operated the nail gun in a manner consistent with the manufacturer's operating instructions. Employer argued that it could not have known that Garcia would keep his finger on the trigger and shoot a nail into his leg because the action was of such short duration that it could not have been discovered. In order to successfully argue that it did everything else correctly and there was no way to anticipate or discover the momentary action with the nail gun, Employer needed to meet the rest of the criteria set forth in Labor Code section 6432, subdivisions (b) and (c).

As set forth above, Employer's safety program and nail gun training are ineffective. The evidence established that Employer did not comply with its own COSP with regard to the instruction that employees must operate and maintain their nail guns in accordance with the manufacturer's instructions. Notably, Employer did not even have a copy of the manufacturer's

instructions for Garcia's nail gun. Additionally, Employer's nail gun training used other brands of nail guns instead of the one that Garcia used and it is inferred, based on the evidence adduced at hearing, that Employer did not train Garcia on the manufacturer's operating instructions for his nail gun. Failing to review manufacturer operating instructions with an employee and failing to include equipment-specific information in training does not qualify as taking "all the steps a reasonable and responsible employer in like circumstances should be expected to take."

Of particular note with regard to the evaluation of whether Employer met the factors in Labor Code section 6432, subdivision (b)(1), is Employer's equivocating language in its accident investigation report in response to the accident, which reflects an intentional lack of candor in discovering and correcting the hazard. The language used in Employer's report demonstrates more of an effort to avoid admitting that there is a problem that needs to be remedied.

Finally, Employer's nail gun training, efforts in discovering and correcting hazards, and efforts to supervise employees using nail guns appear deficient in preventing the hazard or similar hazards. This is demonstrated through Employer's Log of Work-Related Injuries and Illnesses (300 Log) which reflects that Employer had 23 injuries resulting from the use of nail guns during 2022 and 2023. (Exh. 16.) It is found that Employer knew or should have known of the issues with its nail gun safety training given the many recorded injuries in such a relatively short period of time.

Accordingly, Employer did not establish that it met both elements of Labor Code section 6432, subdivision (c), and cannot rebut the presumption that the citation was properly classified as Serious.

6. Did the Division establish that the citation was properly characterized as Accident-Related?

For a citation to be classified as Accident-Related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction LP dba Webcor Builders,* Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The injury to Garcia was a puncture wound from when a nail discharged into his leg as his finger remained on the trigger while he figured out why the hose was restricting his reach with the gun. The violation, failing to operate the nail gun in accordance with the manufacturer's operating instructions that Garcia was not trained on, has a causal nexus to the injury.

Therefore, Citation 1 was properly characterized as Accident-Related.

7. Is the proposed penalty reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Employer asserted that the proposed penalty for Citation 1 was not reasonable.

The Severity of the violation for the citation was rated as High because it was classified as Serious. The Base Penalty for a Serious violation is $18,000. (§336, subd. (c)(1).) Additionally, an Accident-Related violation cannot be reduced except for Size. (§336, subd. (c)(2).) Lichty and Avalos both testified that Employer had more than 100 employees, so no reduction of the Base Penalty for the Size adjustment factor is warranted. (§ 336, subd. (d)(1).)

For Citation 1, the penalty of $18,000 is found to be reasonable.

Conclusions

The Division established a violation of section 1704, subdivision (b)(2), because Employer failed to ensure that Garcia operated the nail gun in accordance with the manufacturer's operating instructions. The citation was properly classified as Serious with an Accident-Related characterization. The penalty of $18,000 is reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the associated penalty of $18,000 is sustained.

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

/s/ Christopher Jessup

Dated: 02/24/2026

Christopher Jessup
Administrative Law Judge

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

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