

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

In the Matter of the Appeal of:

McCarthy Building Companies, Inc.
20401 S.W. Birch, Suite 300
Newport Beach, CA 92660

Employer

**Inspection No.
1235941**

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it, and having taken McCarthy Building Companies, Inc.'s (McCarthy or Employer) Petition for Reconsideration (Petition) under submission, renders the following decision after reconsideration.

Jurisdiction

McCarthy was the general contractor for the construction of a solar power plant at a site known as the California Flats Solar Project. Beginning May 15, 2017, the Division of Occupational Safety and Health (the Division) through Senior Safety Engineer Greg Clark (Clark), conducted an inspection at McCarthy's worksite located at 19855 East Highway 41, in Shandon, California (site or worksite).

On November 15, 2017, the Division issued three citations to McCarthy alleging four violations of safety orders within title 8 of the California Code of Regulations.¹ Citation 1, Item 1, classified as General, alleges that McCarthy failed to medically evaluate employees who were required to use respirators. Citation 1, Item 2, classified as General, alleges that McCarthy failed to retrain employees who were required to use respirators.² Citation 2, classified as Serious, alleges that McCarthy failed to implement methods and/or procedures for correcting unsafe or unhealthy conditions related to Valley Fever exposure. Citation 3, classified as Serious, alleges that McCarthy failed to use appropriate respirators when effective engineering controls were not feasible. The Division thereafter issued amended citations to McCarthy correcting the date(s) of the alleged violations described in the original citations.

McCarthy filed a timely appeal contesting the existence of each alleged violation, the reasonableness of abatement, the classification of each violation, and the proposed penalties.

¹ References are to title 8 of the California Code of Regulations unless otherwise specified.

² During the hearing, the parties settled Citation 1, Item 2. The Division agreed to withdraw Citation 1, Item 2, in exchange for McCarthy waiving its right to cost recovery pursuant to Labor Code section 149.5. Therefore, this citation will not be discussed further.

Additionally, McCarthy raised numerous affirmative defenses to each citation, including the due diligence defense.

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the Appeals Board in Los Angeles, California, on May 20, 2021, May 12 and 13, 2022, March 2 and 3, 2023 and November 7, 2023.³ ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video platform. William Cregar and Tuyet Tran, Staff Counsel, represented the Division. Attorneys Chad Wishchuk and Marlene Nowlin of Finch, Thornton and Baird, LLP, represented Employer.

This matter was submitted on November 1, 2024, and on November 20, 2024, the ALJ issued a Decision affirming Citation 1, Item 1, Citation 2, and Citation 3, and their associated penalties.

McCarthy filed a timely petition for reconsideration challenging the ALJ's Decision. McCarthy alleges that the Decision improperly affirmed the citations, improperly affirmed the Serious classifications for Citations 2 and 3, improperly denied its due diligence affirmative defense, and that the citations were not issued within the six-month statute of limitations. The Division filed an answer. The Board took McCarthy's petition under submission. Issues not raised in the Petition are deemed waived. (Lab. Code, § 6618.)

In making this decision, the Board engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence

Issues⁴

1. Did the Division establish a violation of section 5144, subdivision (a)(1), by a preponderance of the evidence?
2. Did the Division establish a violation of section 1509, subdivision (a), by a preponderance of the evidence?
3. Did the Division establish a violation of section 5144, subdivision (e)(1), by a preponderance of the evidence?
4. Does the statute of limitations set forth in Labor Code section 6617 bar the issuance of the citation(s)?

³ The parties stipulated that the hearing would be transcribed by a certified court reporter retained by Employer's counsel, and that the court reporter's transcript would serve as the official record of the hearing.

⁴ For ease of analysis, the issue raised in the citations are addressed in reverse numerical order. In addition, while McCarthy's Petition addresses additional issues, we do not list them all here. We find it unnecessary to resolve some issues as a result of the Board's findings on other issues, discussed herein, wherein the Board vacates certain citations.

5. Did McCarthy establish the due diligence defense to the citations?

Findings of Fact

1. Valley fever, also known as coccidioidomycosis, is a disease caused through inhalation of the spores of a fungal organism called *coccidioides immitis* or *coccidioides posadasii*, with the former species being more prevalent in California (hereinafter referred to as “cocci”).
2. Cocci spores are minute particles two to three microns⁵ in size and in a state of comminution. Their small size makes it possible to inhale them into the respiratory tract and lungs when they are airborne.
3. Cocci spores can be released into the air through wind, mechanical disturbance of soil, and by construction activities.
4. The cocci fungus has a predilection for undisturbed soil that is sandy, dry, and alkaline—and it typically resides in the top two to 12 inches of soil.
5. Monterey County is one of approximately eight to ten counties with moderate to higher rates of Valley Fever compared to other California counties. Valley Fever is considered endemic in Monterey and San Luis Obispo Counties.
6. However, even if Valley Fever is considered endemic within a county that does not mean cocci spores are homogeneous throughout the soil or that they exist everywhere in that county.
7. The inhalation of even a few spores can lead to a Valley Fever infection.
8. For most people, Valley Fever is not a serious illness. In a small percentage of people, however, inhalation of spores may result in pneumonia, destruction of lung tissue, and disseminated infection elsewhere in the body. A Valley Fever infection can travel to the skin, bones, spinal cord, and brain.
9. There is no reliable, commercially available test that will detect the presence of cocci in air or soil.⁶
10. There are medical and laboratory tests that can be performed to determine whether a person has acquired a past or present cocci infection.
11. The Cal Flats Solar Project Site (Cal Flats) site is a large, multi-employer solar energy construction project in southeastern Monterey County, with a small portion of the project in San Luis Obispo County.
12. The Cal Flats site covered approximately 3,000 acres. The main road on the project was approximately 13 miles long.
13. Conditions were described, at times, as hot, dry, and dusty.
14. The site was owned by First Solar and McCarthy was the general contractor. There were also multiple subcontractors at the site.
15. McCarthy was responsible for, among other things, highway and road improvements,

⁵ A micron is one millionth of a meter or one thousandth of a millimeter. It is also about 0.00004 inches.

⁶ There are limited tests that can be done for research purposes.

- trenching, laying underground electrical cable, installing the solar module racking and solar panels, and tying all the electrical work into the substation.
16. McCarthy and its subcontractors performed work at the site that disturbed soil. This work included using earth moving equipment to disturb and move soil.
 17. The Monterey County Health Department (the County) required First Solar to prepare a Valley Fever mitigation plan.
 18. First Solar prepared the Valley Fever Management Plan (VFMP) and submitted it to the County. Exhibits B.1 through B.6 constitute the VFMP prepared by First Solar.
 19. McCarthy adopted and implemented the VFMP as part of its site-specific safety program.⁷
 20. McCarthy implemented numerous engineering controls and other safe work practices to reduce the likelihood of employee exposure to Valley Fever spores. These included, without limitation: speed limits at the site meant to limit the creation of airborne dust; water trucks (26 trucks at the peak of the project) that would water down the roadways at the site ten hours a day; dust goggles; dust masks⁸ issued for use in “unforeseen conditions”; the use of task hazard analyses that included daily prework meetings; clothing with long sleeves, long pants, and gloves were required, and coveralls were available; restrooms were available at the site for changing clothes, although this was optional; portable showers were available; and, handwashing stations were available throughout the site and handwashing was discussed. In addition, employees had stop-work authority if conditions became dusty; employees received training and education related to dust prevention and Valley Fever awareness; every soil disturbing activity at the site had a water truck assigned to it; and, a “zero opacity rule” meant to prevent creation of dust.
 21. There is no reliable evidence that any employee acquired a Valley Fever infection at the worksite.
 22. There is no evidence that any cocci spores actually existed at the Cal Flats site, or that employees were exposed to any cocci spores at the site.
 23. During his inspection, Clark never observed any employees in a condition requiring the usage of a respirator.
 24. Clark admitted that, due to the stage of the project at the time of his inspection, any employee exposure had largely ceased.

Analysis

1. Did the Division establish a violation of section 5144, subdivision (a)(1), by a preponderance of the evidence?

⁷ McCarthy required that its subcontractors implement their own site-specific safety plans.

⁸ Section 5144, subdivision (b), indicates that a dust mask is a filtering facepiece, meaning “a negative pressure particulate respirator with a filter as an integral part of the facepiece or with the entire facepiece composed of the filtering medium.” In other words, a dust mask is merely a type of negative pressure particulate respirator. An N-95 mask is therefore properly considered a negative pressure particulate respirator.

Citation 3 alleges a Serious violation of section 5144, subdivision (a)(1), which states:

(a) Permissible Practice

(1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

Citation 3, as amended, alleges:

Instance 1: Prior to and during the course of the inspection, including, but not limited to, May 17, 2017, the employer did not require its own employees to use appropriate respirators when effective engineering controls were not feasible, or while they were being instituted, to protect against exposures to harmful dust contaminated with *Coccidioides* fungal (Valley Fever) spores during soil disturbance operations and other dust-generating activities and while working in dusty windy environments at the Cal Flats Solar site.

Instance 2: Prior to and during the course of the inspection, including, but not limited to, May 17, 2017, the employer did not require employees of Papich Construction, Sachs Electric, Granite Construction Company, Dudek, and Althouse & Meade to use appropriate respirators when effective engineering controls were not feasible, or while they were being instituted, to protect against exposure to harmful dust contaminated with *Coccidioides* fungal (Valley Fever) spores during soil disturbance operations and other dust-generating activities and while working in dusty windy environments at the Cal Flats Solar site.

The Division has the burden of proving all elements of a violation by a preponderance of evidence. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) As part of its burden, the Division bears the burden of proving employee exposure to the violative condition addressed by a safety order. (*Ibid.*)

To establish a violation of this section, the Division must prove that the citation concerns a relevant source of atmospheric contamination, and either (or both) that:

- (a) the employer failed to use accepted engineering control measures as far as feasible to prevent atmospheric contamination, and/or
- (b) that when effective engineering controls are not feasible to prevent atmospheric contamination, or while being instituted, appropriate respirators were not used.⁹

The Division must also prove that one or more employees at the site were exposed to the identified hazard. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021) (*Papich*.)

Is the safety order applicable and does the citation concern a relevant source of atmospheric contamination?

In this case, the citation alleges exposure to harmful dust contaminated with cocci fungal spores, which cause Valley fever. McCarthy argues, as a matter of law, that exposure to Valley Fever does not fall within the parameters of the cited regulation for multiple reasons. McCarthy asserts that cocci spores do not constitute a harmful dust as that term is used in section 5144 and, therefore, the regulation is inapposite. (Petition, p. 29.) McCarthy argues that the cited regulation, section 5144, subdivision (a), is inapplicable to outdoor workplaces. (Petition, pp. 28-30.) McCarthy also argues that section 5199—governing aerosol transmissible diseases—is the only regulation that explicitly mentions cocci, and that its requirements only apply to healthcare workplaces and laboratories. (Petition, pp. 28-30.)

To begin with, we easily dispense with McCarthy’s arguments that section 5144 does not govern outdoor workplaces. We find nothing in section 5144 that limits its protections to indoor workspaces. Indeed, the regulation does not use the word indoor or outdoor, and we will not import a limitation that is not supported by the plain text. The Board must be careful not to insert what has been omitted, or to omit what has been inserted: we have no power to rewrite plain regulatory language. (e.g., *Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1709; *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 65.)

We next address McCarthy’s argument that section 5144 does not apply to Valley Fever since Valley Fever is identified within the aerosol transmissible disease standard set forth in section 5199. Provided we determine that cocci spores constitute a relevant atmospheric contaminant for purposes of section 5144 (discussed below), we see nothing preventing Valley Fever from being addressed by both standards. It is not unusual for a particular hazard to be addressed by more than one safety order. (*In re Cabrillo Economic Development Corp.*, OSHAB 11-R4D3-3185, Decision After Reconsideration, (Oct. 16, 2014).) Absent the existence of a conflict between the regulations, we may give concurrent effect to both provisions. (*Walsh/Shea Corridor Constructor*, Cal/OSHA App. 1093606, Decision After Reconsideration (Feb. 9,

⁹ When a safety standard includes two or more distinct requirements, a violation of the safety standard occurs if an employer violates any one of the requirements. (*Fedex Freight, Inc.*, Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).) Relevant here, a violation may be found if the Division demonstrates element (a) or element (b).

2018).) Here, we see no possibility for a conflict between the two regulations, particularly since section 5199 is limited to “health care facilities, services, or operations . . . ”

We next turn to McCarthy’s argument that cocci spores do not constitute dust as that term is used in section 5144. (Petition, p. 29.)

The cited safety order is part of Article 107 (commencing with section 5139), Group 16 (Control of Hazardous Substances), Subchapter 7 (General Industry Safety Orders),¹⁰ Chapter 4, Title 8. The stated purpose of Article 107 is to set up “minimum standards for the prevention of harmful exposure of employees to *dusts*, fumes, mists, vapors, and gases.” (§ 5139 [emphasis added].) Section 5144, subdivision (a), states that it is designed to address “those occupational diseases caused by breathing air contaminated with *harmful dusts*, fogs, fumes, mists, gases, smokes, sprays, or vapors...” and “the primary objective shall be to prevent *atmospheric contamination*.” (§ 5144, subd. (a) [emphasis added].) Therefore, to determine whether the safety order applies, we must preliminarily decide whether the identified hazard (cocci spores) can be defined to constitute a harmful dust, i.e., a relevant source of atmospheric contamination.

Relying on the Board’s decision in *Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021) (*Papich*), the ALJ concluded that the safety order applies because cocci spores meet the definition of “harmful dust.” (Decision, pp. 13-15.) The ALJ also noted that the spores meet the definition of a contaminant. (*Papich, supra*, Cal/OSHA App. 1236440.) For reasons detailed below, we agree with the ALJ.

However, before addressing the merits, and as we noted in *Papich*, we observe that the discussion of whether cocci spores constitute dust is more academic than practical. (*Papich, supra*, Cal/OSHA App. 1236440.) “[A]s a practical matter, there does not appear to be any meaningful way to differentiate a spore from the other components that generally constitute soil or dust— rather, the evidence demonstrates the spores are merely part of an amalgamation that forms dust, and are only 3 to 5 microns in size.” (*Ibid.*) However, even if it is appropriate to consider cocci spores as distinct items, separate from the surrounding amalgamation, we find that it constitutes dust.

Turning to the merits of McCarthy’s definitional argument, “dust” is defined as “Particles of solid matter . . . in such a state of comminution that they may be inhaled.” (§ 5140.) Here, as discussed in *Papich*, cocci spores easily meet most of the requirements to constitute dust. The cocci spores are microscopic particles of solid matter that can be inhaled when airborne. (*Papich, supra*, Cal/OSHA App. 1236440.)

McCarthy argues that cocci spores do not meet the definition of dust because they are not in “a state of comminution.” (Petition, pp. 28-30.) “Comminute” is commonly defined as “to reduce to minute particles: PULVERIZE”¹¹ and “To reduce to powder; pulverize.”¹² (*Papich*,

¹⁰ The General Industry Safety Orders “establish minimum standards and apply to all employments and places of employment. . .” (§ 3203, subd. (a).)

¹¹ Merriam-Webster Dictionary (Online) <www.merriam-webster.com/dictionary/comminute> [accessed Feb. 18, 2026].

supra, Cal/OSHA App. 1236440.) Dr. Marvin Pietruszka, McCarthy’s medical expert witness, testified that live cocci spores are not comminuted or in state of comminution. He testified that a cocci spore in a comminuted state would essentially be a degenerated or dead cocci spore, which is no longer a harmful substance.

We have carefully reviewed McCarthy’s argument. In short, we understand McCarthy, and Dr. Pietruszka, as arguing that a cocci spore cannot be comminuted because it cannot be further reduced or pulverized without killing the spore. McCarthy also argues that a dead spore is not a harmful substance. In other words, if the word “comminute” is equated to the word “pulverize,” it is difficult to say that a cocci spore is in a state of comminution.

However, even if we were to accept McCarthy’s argument, there are alternative definitions for the word “comminute” beyond pulverization. As an adjective, the word comminute is also defined as “comminuted; divided into smaller parts.”^[3] As a verb, it is defined as “to break (a bone) into several small fragments” and “to divide (property) into small lots.”^[4] Therefore, the word “comminute” or “comminution” may also be defined to mean something that is divided into “smaller parts,” “smaller fragments,” or “smaller lots.”

When more than one definition of a word exists, the Board will apply the definition of the word that is most protective of workers. The Board must keep the purpose behind the Occupational Safety and Health Act of 1973 in mind and must interpret regulations liberally to promote worker safety. (*Papich, supra*, Cal/OSHA App. 1236440 [citing Lab. Code, § 6300; *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107].)

Next, applying the definition of “comminution” that is more protective of worker safety, we conclude, as we have in previous decisions, that individual cocci spores are in a state of comminution. The record indicates cocci spores may constitute a smaller part of something larger. The cocci fungus produces microscopic filamentous stalks consisting of spores attached to other spores. The disturbance, disintegration, and erosion of the surrounding soil results in the disintegration of the filamentous stalks releasing the individual cocci spores. The spores themselves, once liberated by disturbing the soil, are themselves particles of solid matter which, by virtue of their tiny size, can be inhaled. Based on this process, we conclude that cocci spores can constitute “a smaller part” or “smaller fragment” of a larger body, therefore meeting the definition of comminution, and meaning that the spores meet the definition of a dust.

There is also no genuine dispute that the cocci spores can be harmful when inhaled. In a small percentage of people, inhalation of spores may result in pneumonia, destruction of lung tissue, and disseminated infection elsewhere in the body.

¹² American Heritage Dictionary (Online) <<https://ahdictionary.com/word/search.html?q=comminute>> [accessed Feb. 18, 2026].

^[3] Collins Dictionary (Online), <<https://www.collinsdictionary.com/us/dictionary/english/comminute>> [accessed Feb. 18, 2026].

^[4] Dictionary.com (Online) <<https://www.dictionary.com/browse/comminute>> [accessed Feb. 18, 2026].

In summary, we find that section 5144 applies to the hazard presented by cocci spores in outdoor workplaces, and we specifically conclude that cocci spores meet the definition of a harmful dust.

Were one or more employees at the site exposed to harmful dust?

For ease of analysis, we next address whether the Division demonstrated that employees were exposed to air contaminated with harmful dusts in the form of cocci spores. The existence of exposure is critical to affirming a violation. Even if an employer fails to comply with the requirement of a safety order, the citation will be vacated in the absence of employee exposure to the relevant hazard.

“In addressing whether there is exposure to harmful dust, we are faced with the unique question of what exposure standard to apply.” (*Papich, supra*, Cal/OSHA App. 1236440.) Under the Board’s typical analysis, exposure will be found if the Division demonstrates that employees are actually exposed or have reasonably predictable access to a zone of danger. (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) (*Dynamic Construction*)). Alternately, as discussed in *Papich*, the Board may apply a “harmful exposure” inquiry. (*Papich, supra*, Cal/OSHA App. 1236440.) We first address the Board’s typical exposure analysis.

The Board’s typical exposure analysis has two facets. Exposure may be demonstrated by: (1) showing “actual exposure” to the zone of danger or (2) demonstrating reasonably predictable access to the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) (*Benicia Foundry*); *Dynamic Construction, supra*, Cal/OSHA App. 14-1471.)

“Actual exposure” may be found when the Division demonstrates an employee was actually exposed to a hazard created by the violation, i.e., the employee has been or is within a zone of danger created by the violative condition. (*Dynamic Construction, supra*, Cal/OSHA App. 14-1471; *Benicia Foundry, supra*, Cal/OSHA App. 00-2976.) However, to be clear, *actual exposure* neither means nor requires an *actual injury*; it simply means proof that employees have been or are in the zone of danger. (*Ibid.*) “The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent.” (*Ibid.*) The zone of danger is relative to the wording of the safety order and nature of the hazard. (*Ibid.*)

Starting in 2003, the Board adopted a secondary standard for finding exposure, which derived from the Board’s federal counterpart, the Occupational Safety and Health Review Commission.¹³ The Board held:

[T]he Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing

¹³ The Board’s exposure standards were informed by Federal OSHA precedent. (See, e.g., *Gilles & Cotting, Inc.*, 3 OSHC (BNA) 2002, 1976 OSHD (CCH) P20,448 (O.S.H.R.C. February 20, 1976).)

employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger.

(*Benicia Foundry, supra*, Cal/OSHA App. 00-2976) Stated another way, the Board held exposure may be demonstrated, without proof of actual exposure, by showing that the area of the hazard was accessible to employees such that “it is ‘reasonably predictable by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger.’” (*Benicia Foundry, supra*, Cal/OSHA App. 00-2976; see also *Dynamic Construction, supra*, Cal/OSHA App. 14-1471.) “Reasonable predictability” requires consideration of such things as “the nature of the work, the work activities required, and the routes of arrival and departure....” (*Benicia Foundry, supra*, Cal/OSHA App. 00-2976; *Dynamic Construction Services, Inc., supra*, Cal/OSHA App. 14-1471.)

The Board has also recognized limits to the reasonably predictable access standard. The inquiry is not merely whether something is theoretically possible. (*Dynamic Construction, supra*, Cal/OSHA App. 14-1471.) The reasonable predictability standard requires consideration of the “likelihood” of employee access to make sure exposure determinations are not made solely on tenuous theoretical or hypothetical possibilities. (*Ibid.*)

Here, the ALJ inferred that Rainer Lipp, a former McCarthy employee, was actually exposed to the hazard of Valley Fever. (Decision, pp. 15-16.) The ALJ’s Decision stated,

Dr. Pietruszka admitted that Valley Fever infection is common in endemic areas. As noted previously, the site was located within an area where Valley Fever was endemic. Lipp testified that, while working at the site, he “sometimes” wore a dust mask, but acknowledged that he got in trouble for not wearing a mask on at least one occasion. As noted previously, Lipp credibly testified that activities at the site, including driving his water truck, generated dust, and he described the site as hot and dusty. Nothing in the record contradicts this portion of Lipp’s testimony, and his testimony is credited and afforded great weight. It is reasonable to infer from the evidence that Lipp was actually exposed to the hazard of Valley Fever spores due to his presence at the site, which was located within a county where Valley Fever was endemic, and the fact that he did not always wear a dust mask or N-95 respirator.

(Decision, p. 16.)

The ALJ also found exposure under the reasonably predictable access standard. (Decision, p. 16.) The Decision stated,

Even if the Division had not established actual exposure, sufficient evidence establishes that it was *reasonably* predictable that employees at the site were exposed to the hazard presented by Valley Fever spores. Vlasak credibly testified that the site encompassed approximately 1,500 acres and extended 13 miles from end to end. He further credibly testified that there were over 1,300 workers present at the site on a daily basis during the peak of the project. Photographs offered into evidence show that the site was rural, with undisturbed topsoil on raw land located within the project area and the surrounding area, including on hillsides. (See, e.g., Exhibits 11, 22, 23, and N.) Wind was a concern at the site, and the presence of wind at the site was documented by Clark. (Exhibit 11.) Dr. Papanek credibly testified that both mechanical disturbance of soil and wind can release Valley Fever spores into the air, and his testimony on this point was not rebutted by Dr. Pietruszka. Therefore, Dr. Papanek's testimony is credited and is afforded great weight. These facts make it reasonably predictable that employees working at the site would come into contact with Valley Fever spores carried on dust generated by work at the site or carried by wind onto and throughout the site.

[...]

There is no dispute in the record that Employer directed work at the site that disturbed topsoil and generated dust, although Employer implemented measures to mitigate dust. When viewed as a whole, the evidence establishes that employees under the direction and control of Employer were exposed to the hazard of Valley Fever.

(Decision, pp. 16-17 [italics added].)

After careful review of the record and the ALJ's decision, we disagree with the ALJ's exposure findings. While the evidence may have been sufficient to demonstrate a theoretical or hypothetical possibility of exposure, we conclude that the Division failed to demonstrate exposure by a preponderance of the evidence under either facet of the Board's typical exposure analysis. We reach this holding because: (1) there was no definitive evidence that cocci spores existed at the site; (2) there was no reliable evidence that any employee acquired Valley Fever at this site; (3) there were multiple demonstrated weaknesses in the Division's evidentiary showing and witness testimony; and (4) McCarthy utilized significant engineering controls to address the potential for Valley Fever. Each of these points is discussed in greater detail below.

First, the record fails to demonstrate that cocci spores actually existed at the site. As the ALJ correctly noted, the record indicates that "there is no commercially available test or method for testing for the presence of Valley Fever spores in the environment." (Decision, p. 15.)

Clark testified that there are no commercially available tests to detect the presence of Valley Fever. While Valley Fever is assuredly present in Monterey and San Luis Obispo Counties, Clark could not definitively state whether cocci spores existed anywhere at this specific worksite. Clark did not (and could not) conduct any tests of the soil, dust, or the wind at the site. Clark stated there is no specific wind or dust measurement that supports any of the citations issued against McCarthy. Further, Clark stated that just because cocci spores are endemic in a county does not mean that they are present everywhere in that county.

Dr. Paul Papanek, the Division's medical expert witness, also did not personally assess whether soil conditions at the site caused the risk of cocci to be so high that respirators were required. Dr. Papanek was also not aware of any lab tests that were conducted.

On this record, we cannot say with any degree of certainty that any cocci spores existed at this site, much less that they presented a zone of danger to employees at this site.

Second, as the ALJ noted, "The Division offered no direct proof that employees contracted Valley Fever at the site . . ." (Decision, p. 15.) Here, although the record contains some vague allusions to Valley Fever cases among employees at the worksite, the evidence pertaining to these cases lacked reliability.

Clark said three Valley Fever cases were identified and linked to employees that worked for McCarthy and worked at the site. However, the Division never elaborated on those facts, nor did it produce evidence supporting this assertion. It is not clear how the Division linked three cases to the worksite. While the evidence indicates that there are medical and lab tests that can be used to determine whether someone has acquired a Valley Fever infection, the Division offered no evidence indicating that three separate employees had tested positive for Valley Fever. Moreover, Dr. Papanek, the Division's medical expert witness, offered no specific opinions on whether anyone contracted Valley Fever as a result of working at this site. He did not diagnose, or conduct a medical review of, any employee that worked at the site.

Next, Rainer Lipp, a former McCarthy employee, testified that he was diagnosed with Valley Fever while he worked for McCarthy. However, as the ALJ noted, Dr. Pietruszka, Employer's medical expert, reviewed Lipp's medical records and credibly testified that he did not get Valley Fever working at the site, but rather from an earlier infection—a conclusion Dr. Pietruszka reached based on the existence of a slow-growing granuloma. (Decision, pp. 15-16.)

The Division also cross-examined witnesses in regard to letters pertaining to a purported investigation of a cluster of Valley Fever cases at the site by the California Department of Public Health. While these letters appear to allude to Valley Fever cases at this worksite, the Division never laid a foundation for the letters, never offered the letters into evidence, and did not overcome contemporaneous hearsay objections.

Next, even if we were to assume, *arguendo*, that some employees tested positive for Valley Fever at this worksite, the Division never identified whether those workers also lived in areas where Valley Fever is endemic. Dr. Papanek and Clark both admitted that it is difficult to prove that a worker acquired Valley Fever from the worksite if the worker also lives in an

endemic area. Dr. Pietruszka also testified that many of the people who live in an endemic area have already been exposed to cocci spores and Valley Fever. In sum, there is simply no reliable evidence in the record that any employees acquired Valley Fever at this site.

Third, the record evidence demonstrates multiple weaknesses in the Division's investigation and witness testimony. Clark, the Division investigator, conducted his inspection of the worksite on May 15, 16, 17, and 25. Clark admitted that due to the stage of the project during his inspection any employee exposure to cocci spores had largely ceased by that time.

Further, while Clark identified numerous theoretical vectors for exposure, he admitted that he never saw any employees in conditions requiring the use of a respirator. Indeed, the record is replete with examples of Clark identifying theoretical hazards but failing to observe any employee exposure to such hazards. For example, Clark testified that worksite vehicles known as "buggies" created dust, but he admitted he never saw the buggies generate dust in a manner that violated any safety standard. Clark saw dust devils at the worksite but never observed any workers in the vicinity of the dust devils. Clark suggested that wind could cause exposure but admitted that the wind was generally light while he was present. Clark said lunch areas could lead to exposure but never observed anyone eating outside. Clark said open-cab earth moving equipment could lead to exposure but never saw such equipment being used at the site. And while Clark observed an Ozzie padder in operation, he did not see it create dust near anyone's breathing zone.

Fourth, we also observe that Employer implemented numerous engineering controls and other safe work practices to reduce the likelihood of employee exposure to Valley Fever spores in the event that they existed. These included: speed limits at the site meant to limit the creation of airborne dust; water trucks (26 trucks at the peak of the project) that would water down the roadways at the site ten hours a day; dust goggles; dust masks issued for "unforeseen conditions"; the use of task hazard analyses that included daily prework meetings; clothing with long sleeves, long pants, and gloves was required, and coveralls were available; restrooms were available at the site for changing clothes, although this was optional; portable showers were available; and, handwashing stations were available throughout the site and handwashing was discussed. In addition, employees had stop-work authority if conditions became dusty; employees received training and education related to dust prevention and Valley Fever awareness; every soil disturbing activity at the site had a water truck assigned to it; a "zero opacity rule" meant to prevent creation of dust; there was regular sweeping; and, storm water pollution prevention measures were put in place. In short, we cannot say that these numerous engineering controls were insufficient for a hazard that was not definitively shown to be present at this worksite.

In sum, when all of the evidence in the record is considered, we cannot conclude that the Division demonstrated that employees were actually exposed or had reasonably predictable access to a zone of danger for Valley Fever. While the Division may have demonstrated that exposure was theoretically or hypothetically possible, it did not sufficiently demonstrate

exposure by a preponderance of the evidence under either facet of the Board’s typical exposure analysis.¹⁴

We next address exposure under the alternate “harmful exposure” inquiry. (*Papich, supra*, Cal/OSHA App. 1236440.) Again, the cited safety order is part of Article 107 (commencing with section 5139), Group 16, Subchapter 7, Chapter 4, Title 8. The stated purpose of Article 107 is to set up “minimum standards for the prevention of *harmful exposure* of employees to dusts, fumes, mists, vapors, and gases.” (Section 5139.) As discussed in *Papich*, Article 107 repeatedly uses the term “harmful exposure.” (§§ 5140, 5141.) Section 5140, which governs the definitions for this Article, also contains a special definition for “harmful exposure.” “Harmful exposure” is defined as, “[a]n exposure to dusts, fumes, mists, vapors, or gases: ... (b) Of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function.” (§ 5140.) Further, although section 5144, subdivision (a), does not itself use the term “harmful exposure,” the Board has historically held that whether there was “harmful exposure” is the actual required inquiry due to the surrounding regulatory context. (*Papich, supra*, Cal/OSHA App. 1236440 [citing *Nielsen Freight Lines*, Cal/OSHA App. 79-647, Decision After Reconsideration (Aug. 17, 1984); *Plessy Precision Metals*, OSHAB 74-891, Decision After Reconsideration (May 17, 1976)].)

However, even if we apply a harmful exposure analysis, we still conclude that the Division failed to establish harmful exposure for the reasons discussed above.

Ultimately, because the Division failed to demonstrate exposure, which is an essential element necessary to meet its burden of proof on the citation, we vacate Citation 3.

2. Did the Division establish a violation of section 1509, subdivision (a), by a preponderance of the evidence?

Citation 2, Item 1, asserts a Serious violation of section 1509, subdivision (a). That section states,

(a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with

¹⁴ We do not reach this holding lightly. We recognize that Valley Fever represents a threat of grave injury to some employees. We have wrestled with the issue of how, and what evidence is necessary, to determine whether employee exposure to Valley Fever exists. We have also litigated the issue. The problems are manifold: there is no reliable test to determine if cocci spores are present; the spores are not homogeneous throughout a worksite, nor are they homogeneous throughout an endemic county; and, even if a medical tests substantiates a Valley Fever infection, it is not always clear that exposure occurred at a particular worksite or time, particularly for workers that also live in endemic areas. Nonetheless, we do not mean to suggest that it is impossible demonstrate employee exposure to Valley Fever. We continue to conclude that exposure was sufficiently demonstrated in *Papich*. (*Papich, supra*, Cal/OSHA App. 1236440.) The *Papich* case involved the same worksite and some of the same work activities. However, the *Papich* record contained additional evidence and concessions that were not present in this record, including (for example): concessions from Papich’s safety coordinator confirming that there were Valley Fever cases among workers at the site; additional medical expert witness testimony, and a medical article regarding Valley Fever cases at a Monterey solar farm (Exhibit 20), all corroborating the conclusion that exposure to Valley Fever existed. The medical article evidenced there were a number of confirmed cases at a site that exceeded the background county rates.

section 3203 of the General Industry Safety Orders.

The citation addresses the requirements of section 3203, subdivision (a)(6), which states:

(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) When observed and discovered; and

(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 hazardous condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

Citation 2 alleges:

Instance 1:

Prior to and during the course of the inspection, including, but not limited to, on May 17, 2017, the employer did not implement methods and/or procedures to effectively correct unsafe or unhealthy conditions, work practices or procedures that could result in its own employees exposure to harmful dust contaminated with *Coccidioides* fungal spores, and contracting Valley Fever as a result of workplace activities such as soil disturbance, other dust-generating activities, and while working in windy environments at the Cal Flats Solar site.

Instance 2:

Prior to and during the course of the inspection, including, but not limited to, on May 17, 2017, the employer did not implement methods and/or procedures to effectively correct unsafe or unhealthy conditions, work practices or procedures that could result in employees of Papich Construction, Sachs Electric, Granite Construction Company, Dudek and Althouse & Meade exposure to harmful dust contaminated with *Coccidioides* fungal spores, and contracting Valley Fever as a result of workplace activities such as soil disturbance, other dust-generating activities, and while working in windy environments at the Cal Flats Solar site.

To begin with, we have no difficulty concluding that the safety order applies to McCarthy. Section 1509 is a part of the Construction Safety Orders, which “establish minimum safety standards whenever employment exists in connection with the construction, alteration, painting, repairing, construction maintenance, renovation, removal, or wrecking of any fixed structure or its parts.” (§ 1502, subd. (a).) McCarthy was responsible for, among other things, highway and road improvements, trenching, laying underground electrical cable, installing the solar module racking and solar panels, and tying all the electrical work into the substation. We easily conclude that the work performed by McCarthy as the general contractor falls within the parameters of the Construction Safety Orders.

Next, section 1509, subdivision (a), through incorporation of section 3203, subdivision (a)(6), requires employers to both have an IIPP containing written procedures for correcting unsafe or unhealthy conditions and it requires the employer to actually implement those procedures by taking appropriate action to correct hazards when discovered. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Proof of implementation requires evidence of actual responses to known or reported hazards. (*Ibid.*) Further, the corrective action taken by the employer must be sufficient in magnitude and scope to address the particular hazard. (*Ibid.*)

Here, we need not decide whether McCarthy failed to adequately implement its IIPP to address the hazard of Valley Fever because, even if that is so, the Division failed to demonstrate employee exposure to the hazard of Valley Fever for reasons already discussed. Exposure is an essential element of proof. Therefore, we vacate Citation 2.

3. Did the Division establish a violation of section 5144, subdivision (e)(1), by a preponderance of the evidence?

Citation 1, Item 1, asserts a violation of section 5144, subdivision (e)(1), which states,

(e) Medical Evaluation. Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this subsection specifies the minimum requirements for medical evaluation that employers must implement to determine the employee’s ability to use a respirator.

(1) General. The employer shall provide a medical evaluation to determine the employee’s ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee’s medical evaluations when the employee is no longer required to use a respirator.

The Division’s alleged violation states,

Prior to and during the course of the inspection, including, but not

limited to, on May 17, 2017, the employer did not determine through medical evaluation their own employee's ability to wear a respirator before allowing them to wear a respirator to protect against exposure to harmful airborne dust contaminated with *Coccidioides* fungal (Valley Fever) spores.

To establish a violation of this particular subdivision, in addition to exposure, the Division must demonstrate two elements: (1) an employee was fit tested or Employer required the use of a respirator in the workplace, and (2) the employer failed to provide a medical evaluation to determine the employee's ability to use a respirator.

Here, it is undisputed that McCarthy failed to provide a medical evaluation to gauge the employees' abilities to use respirators. The sole remaining issue is whether McCarthy required the use of respirators.

The ALJ concluded that McCarthy did require the use of the respirators. The ALJ's Decision stated,

Clark credibly testified that Employer required its own employees and subcontractors' employees to carry N-95 respirators with them at all times while on site. In addition, Employer's Site Specific Plan (Exhibits A, B.1 through B.6) incorporates a Valley Fever Management Plan adopted for the project by the site owner. Clark credibly testified that the Valley Fever Management Plan was required by Monterey County as a condition of approving construction of the solar project at the site. The Site Specific Plan acknowledges the hazard of dust-borne Valley Fever at the site, and requires that "all employees, during all phases of the project" must be issued dust masks "to be used in unforeseen conditions that pose an immediate risk" and further requires that N-95 respirators be used by employees as determined by the applicable Job Hazard Analysis for the task being performed. (Exhibit B.1, p. 12.) [. . .] Here, Employer's Site Specific Plan acknowledged that certain tasks would require the use of an N-95 respirator. Thus, it is reasonable to infer from the evidence that Employer required the use of such respirators under certain conditions at the site.

(Decision, p. 8.)

We concur with the ALJ's determination that mask usage was required in some instances. The record amply supports this conclusion. First, McCarthy's VFMP and related training corroborates the conclusion that mask usage was required. (Exs. B.1, B.3, and B.4, and D.) The VFMP repeatedly indicates that mask usage is required in unforeseen conditions that pose an immediate risk until the conditions can be mitigated. Next, Lipp, a former McCarthy employee, credibly testified McCarthy provided, and required that they wear, dust masks. He said he was scolded for not wearing a mask while working and told to put a mask on. He also saw other

employees get in trouble for not wearing their mask. Further, there was other evidence supplementing and explaining evidence indicating that mask usage was required, including portions of Clark’s interviews of Chris Vlasak, Jeff Dill, and Roger Remy. (§ 376.2 [hearsay may be used to supplement and explain].)

We next consider whether the evidence demonstrates exposure to the hazard identified by the safety order. Here, for reasons already discussed, the evidence did not establish there was exposure to Valley Fever at the site. However, that does not necessarily end our inquiry.

We observe that this particular cited subdivision addresses more than one hazard. Section 5144, subdivision (e) states that “Using a respirator may place a *physiological burden* on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. [emphasis added.]” Here, by requiring respirators without conducting a medical evaluation, McCarthy created a risk that an employee will be unable to tolerate the physiological burden. As such we find that exposure has been sufficiently demonstrated under the reasonably predictable access standard. (*Benicia Foundry, supra*, Cal/OSHA App. 00-2976; see also *Dynamic Construction, supra*, Cal/OSHA App. 14-1471.) In other words, it is reasonably predictable that employees have been, are, or will be in the zone of danger of physiological injury, when McCarthy required the use of respirators without medically evaluating whether the employee can withstand the physiological burden of such respirator usage.

All elements having been established, Citation 1, Item 1, is affirmed.

4. Does the statute of limitations set forth in Labor Code section 6617 bar the issuance of the citation(s)?

McCarthy argues that the citations are barred by the statute of limitations. We address this argument as to Citation 1, Item 1. Labor Code section 6317 requires that the Division issue a citation within six months after the occurrence of an alleged violation. However, as noted in the Decision, an exception exists for continuing violations.

Under the continuous violation exception, the Division must issue a citation within six months of exposure to a hazard unless the hazard is not abated and employees continue to be exposed to the hazard, whether or not an actual exposure event occurred during the prior six months. (*Pacific Telephone Co. dba AT&T*, Cal/OSHA App. 06-5053, Denial of Petition for Reconsideration (Aug. 11, 2011) citing *Los Angeles County Dept. of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002), citing *Johnson Controls, Inc.*, OSHRC No. 89-2614; *United Airlines, Inc.*, Cal/OSHA App. 83-595, Decision After Reconsideration (Apr. 24, 1986) [Exposure to inclement weather not shown in six months prior to violation, but violation continued as long as Employer failed to provide personal protective equipment.]

(Decision, pp. 19-20.)

The ALJ concluded that each violation was ongoing in nature and constituted a continuing violation. (Decision, p. 20.) We agree with the ALJ's conclusion as it pertains to Citation 1, Item 1. There is no evidence that McCarthy ever required a medical evaluation for its employees. Next, the requirement to wear masks was built into the VFMP, which was part of McCarthy's safety program and continued in operative effect during the Division's inspection, indicating a continuing violation existed. Accordingly, McCarthy cannot avail itself of the statute of limitations found in Labor Code section 6317.

5. Did McCarthy establish the due diligence defense to the citations?

We next consider whether McCarthy established the due diligence affirmative defense as to Citation 1, Item 1. The Board recognizes a due diligence affirmative defense available to controlling employers in California cited under the multi-employer worksite regulation. (*McCarthy Building Companies, Inc*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016) (*McCarthy*)). The due diligence defense recognizes that “[t]he general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired.” (*Harris Construction Company*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015).)

In determining whether the defense applies, the totality of circumstances will be considered. (*McCarthy, supra*, Cal/OSHA App. 11-1706.) Multiple factors are relevant to the determination of due diligence, including: (a) whether the controlling employer conducted periodic inspections of appropriate frequency; (b) whether the controlling employer implemented an effective system for promptly correcting hazards; (c) whether the controlling employer enforced the other employer's compliance with safety and health requirements with an effective, graduated system of enforcement and follow-up inspections; (d) whether the controlling employer researched the safety history of the subcontractor; and (e) whether the hazard was latent and unforeseeable.¹⁵ (*Ibid*; see also *Hanover RS Construction, LLC.*, Cal/OSHA App. 1205077, Decision After Reconsideration (May 26, 2011) (*Hanover*)).

In resolving whether to apply the defense, when some factors favor and others disfavor the defense, the Board does not consider or apply the foregoing factors mechanically. (*McCarthy, supra*, Cal/OSHA App. 11-1706.) “Rather, the respective weight assigned to each factor, or combination thereof, will properly depend on the circumstances of each case, including the type and severity of the hazard presented.” (*Ibid.*)

We have considered the totality of circumstances. However, we believe that one consideration or factor is dispositive of this defense as to Citation 1, Item 1. Specifically, we cannot say that McCarthy implemented an effective system for promptly correcting hazards. McCarthy repeatedly argued that the use of masks was voluntary. However, McCarthy's

¹⁵ The Board also considers factors set forth by the State of Washington in WISHA Regional Directive 27.00. (*McCarthy, supra*, Cal/OSHA App. 11-1706.)

argument was contradicted by the plain language of the VFMP, which was adopted as part of McCarthy's safety program. The VFMP repeatedly indicates that mask usage would be required in unforeseen conditions that pose an immediate risk until the conditions can be mitigated. (Exs. B.1, B.3, and B.4, and D.) We cannot say that McCarthy implemented an effective system when it misidentifies, and disputes, the plain safety requirements of its own safety program.

Moreover, while McCarthy required that employees utilize masks in unforeseen conditions, there is also a significant problem with this directive. The specific problem is that McCarthy never provided clear directions to employees on when masks should be utilized, leaving too much up to the discretion of the employee. (*Papich, supra*, Cal/OSHA App. 1236440.) McCarthy's practice of providing safety equipment, requiring its use, but only vaguely defining when its use is required, constitutes an impermissible delegation of a safety decision to employees.

As such, we conclude the due diligence defense was not proved.

Decision

The Division established Employer violated section 5144, subdivision (e)(1). Citation 1, Item 1, is affirmed. Since Employer makes no challenge to the penalty calculation, the penalty of \$700 is also affirmed.

The Division failed to establish a violation of section 1509, subdivision (a). Citation 2, Item 1, is vacated.

The Division failed to establish a violation of section 5144, subdivision (a). Citation 3, Item 1, is vacated.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member



FILED ON: 03/12/2026