BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **ARANA RESIDENTIAL AND COMMERCIAL PAINTING, INC.** **819 San Leandro Boulevard** **San Leandro, CA 94577** **Employer**	Inspection No. **1568252** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Employer operates a painting service. The Division of Occupational Safety and Health (the Division) conducted an accident investigation in response to a report of injury that occurred on December 10, 2021, at Employer's jobsite in Piedmont, California. An employee was climbing a scaffold when he slipped and fell, which resulted in a non-serious injury. The incident was reported to the Division by both the fire department and on behalf of Employer by Employer's workers' compensation insurance broker and safety consultant.

On April 7, 2022, the Division issued Employer four citations, alleging 14 violations of California Code of Regulations, title 8. [1] Three alleged violations remain at issue. Citation 1, Item 1 alleged a Regulatory violation of section 3203, subdivision (b), asserting that Employer failed to keep required records of scheduled and periodic safety inspections and employee safety training. Citation 1, Item 6 alleged a General violation of section 1512, subdivision (b), asserting that Employer failed to ensure the availability of a suitable number of persons trained in first aid at the job site. Citation 2 alleged a Serious violation of section 3203, subdivisions (a)(4) and (a)(6), asserting that Employer failed to identify, evaluate, and correct unsafe work practices.

Employer timely appealed all citations. This matter was heard by Jennie Culjat, Administrative Law Judge (ALJ), on August 22, 23, 24, and 29, 2023, via Zoom. Alka Ramchandani-Raj and Eric L. Compere of Littler Mendelson, P.C. represented Employer. Kathryn Tanner, Staff Counsel, represented the Division. On September 29, 2023, ALJ Culjat issued a Decision finding that Employer consented to the inspection, affirming and modifying the penalty for Citation 1, Item 1, affirming and modifying the penalty for Citation 1, and 6, and affirming Citation 2 only as to a violation of section 3203, subdivision (a)(6), and modifying the penalty.

[1] Unless otherwise specified, all section references are to California Code of Regulations, title 8.

Employer's timely Petition for Reconsideration (Petition) followed. Employer argues, primarily, that it did not consent to the Division's inspection. Employer also asserts that the ALJ erred in upholding the violations alleged in Citation 1, Items 1 and 6, and Citation 2.

In making this decision, the Board has 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.

ISSUES

1. Did Employer consent to the Division's inspection?
2. Did Employer fail to maintain records of scheduled and periodic safety inspections?
3. Did Employer fail to ensure the availability of a suitable number of persons appropriately trained to render first aid at the jobsite?
4. Did Employer fail to correct the workplace hazard of employees accessing different levels of scaffolding through areas other than the designated ladder?

FINDINGS OF FACT

1. On December 10, 2021, Employer's employee, Jim Chacon Campos (Campos), slipped and fell off a scaffold he was climbing, which resulted in injury. Campos's injury was reported to the Division by the fire department and Employer.
2. Jose Nevarez (Nevarez), Associate Safety Engineer, went to inspect the jobsite twice. No workers were present on either occasion.
3. After his two attempts to contact Employer at the jobsite, Nevarez contacted Employer by telephone and reached Kristin Carmichael (Carmichael), Employer's workers' compensation insurance broker and safety consultant.
4. The Division sent Employer a request that Employer submit various documents to the Division for review.
5. Carmichael sent Nevarez a number of emails on behalf of Employer, indicating Employer's intention of submitting requested documents and scheduling employee interviews. Catherine Baldi (Baldi), Employer's owner, was copied on the emails.
6. Employer did not submit any of the requested documents during the inspection, but produced many of the documents at hearing.
7. Employer did not produce records of scheduled and periodic inspections.
8. Employer had a person trained and certified in First Aid at the job site, but that person was not present at the job site when the accident occurred.
9. Employer allowed an employee to climb approximately four to six feet up the outside of scaffolding in order to reenact Campos's accident.

DISCUSSION

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

The primary issue presented in Employer's Petition is whether Employer consented to the Division's investigation. Employer argues that it did not consent, and that the Division therefore violated Fourth Amendment rules regarding administrative searches, by issuing the citations as "penalties" after Employer refused to respond to document requests.

Employer's Petition also reiterates Employer's mistaken and unsupported belief that the Division lacked jurisdiction to investigate the accident because the employee's injury was minor, and thus "not reportable" under section 342. (Petition, pp. 6, 14, 16.) The plain language of the Labor Code requires us to dismiss this argument. We nonetheless address it here because it is relevant to the issue of whether Employer's conduct demonstrated a lack of consent, discussed below.

Section 342 subdivision (a), provides, "Every employer shall report immediately to the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment." This reporting requirement for employers does not in any way limit the Division's authority to investigate a workplace injury or accident.

The California Occupational Safety and Health (Cal/OSH) Act grants the Division broad authority to inspect or investigate all places of employment, for the purpose of protecting workplace health and safety. (Lab. Code, §§ 6307, 6314, subd, (a).) Labor Code, section 6313, subdivision (a), provides that the Division "*shall investigate*" any workplace fatality or serious injury. Labor Code, section 6313, subdivision (b), provides that the Division "*may investigate* any other industrial accident or occupational illness which occurs within the state in any employment or place of employment [.]" (Both emphases added.) A workplace injury or accident need not be "reportable" under section 342 for the Division to exercise its jurisdiction in investigating the injury or accident. The Division's inspection in this matter was well within its jurisdiction.

Returning to Employer's main argument that it did not consent to the inspection, Employer asserts that in the absence of Employer's consent, the Division was required to obtain a warrant, or an administrative subpoena, to procure relevant documents, rather than using informal document requests. (Petition, pp. 12-13.)

If an employer refuses consent to the Division inspecting or investigating a place of employment, the Cal/OSH Act provides procedures for the Division to obtain an inspection warrant or a subpoena. (Lab. Code § 6314, subds. (b), (c).) Labor Code, section 6314, subdivision (b), provides, "If permission to investigate or inspect the place of employment is refused, or the facts or circumstances reasonably justify the failure to seek permission, the chief or his or her authorized representative may obtain an inspection warrant[.]" In addition, Labor Code section 6314, subdivision (c), provides that the Division "may issue subpoenas to compel the attendance of witnesses and the production of books, papers, records, and physical materials, administer oaths, examine witnesses under oath, take verification or proof of written materials, and take depositions and affidavits for the purpose of carrying out the duties of the division."

These provisions apply only where an employer has refused consent to an investigation. Consent to an inspection has thus "long been recognized as an exception to the warrant requirement." (*Rudolph and Sletten, Inc*., Cal/OSHA App. 01-478, Decision After Reconsideration (Mar. 30, 2004), citing *Beacom Construction Co*., Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981).)

"The determination of whether consent was given to the inspection is fact specific and requires examination of the particular circumstances under which the consent was granted." (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016), citing *People v. Henderson* (1990) 220 Cal.App.3d 1632, 1651 and *Enters v. Marshall* (1978) 578 F.2d 1021, 1024 [in determining whether the employer consented to an OSHA inspection, the court looks to the totality of the circumstances].)

We must therefore examine the factual circumstances under which, Employer argues, consent to the Division's inspection was not granted.

A. Factual Background.

On Friday, December 10, 2021, Campos, the injured employee, fell while climbing up the side of a scaffold, instead of using a designated ladder. He was transported to the hospital by the Piedmont Fire Department shortly before noon. The fire department reported the incident to the Division, describing the fall as from a height of approximately 20 feet, and stating that Campos might require hospitalization for back injuries. (Exhibit 3.)

The same day, based on the information received from the fire department, District Manager Wendy Hogle-Lui (Hogle-Lui) assigned Nevarez to investigate. Nevarez went to the jobsite that day, but no one was there. He took photos of the house and scaffolding from the public street but did not enter the jobsite. (Exhibits 5, 6, 7, 8, 9.) Nevarez consulted with Hogle-Lui, and planned to return to the jobsite on Monday.

After the close of business on Friday, December 10, 2021, Carmichael left a voicemail message with the Division's answering service, reporting the accident on Employer's behalf. (Exhibit 4.) Carmichael was not an employee of Employer, but represented Employer in safety-related matters, and had been instructed by Baldi to report the accident. (HT Day 2, p. 526.) While the fire department estimated the fall to be from approximately 20 feet, Carmichael described the fall as being from four to six feet. (Petition, p. 6; Exhibit 4.) Carmichael left another voicemail message on Saturday, December 11, 2021, with an update that Campos had been released from the hospital on Friday night with only minor injuries.

On Monday, December 13, 2021, Associate Safety Engineer Spencer Wojcik (Wojcik) contacted Carmichael by telephone to complete the accident report that Carmichael had called in over the weekend. Wojcik was unaware that Hogle-Lui had already assigned the matter to Nevarez. (HT Day 3, p. 431.)

Carmichael testified that Wojcik told her the matter would not be investigated. (HT Day 4, pp. 628-630.) According to Carmichael, this was consistent with her past experience as a workplace safety consultant. (HT Day 4, p. 630.) Carmichael testified that Campos's injury was "not serious," and therefore "not reportable," but Employer had nonetheless reported it out of an abundance of caution. (HT Day 4, pp. 627-628, 631, 635; Exhibit 14, p. 8.)

Wojcik, by contrast, testified that he told Carmichael no such thing, and further, the determination of whether a matter will be investigated is made not by him but by a district manager. (HT Day 3, p. 430.) Wojcik had no further involvement in the inspection.

Meanwhile, also on Monday, December 13, 2021, Nevarez returned to the worksite as planned, but again found no one there. At that time, Nevarez was unaware that Carmichael had reported the incident, or that Carmichael had spoken with Wojcik. After further consultation with Hogle-Lui, Nevarez contacted Employer by telephone to conduct an opening conference. Baldi referred the call to Carmichael.

In their respective testimony, Carmichael and Nevarez gave different accounts of this conversation. In neither account, however, is there any indication that Carmichael, Employer's authorized representative, denied consent to the inspection.

According to Nevarez, Carmichael identified herself as Employer's "workers' compensation coordinator." (HT Day 1, p. 54.) Nevarez testified that he found this title "confusing," and that he initially "wasn't sure if she was part of the workers' comp insurance company or working for the employer. After asking her a few questions, she indicated that she was employed by the employer, and her job title was a workers' comp coordinator." (HT Day 1, p. 54.) Carmichael also told Nevarez that she was experienced with the Division's inspection process. (HT Day 1, p. 56.)

Nevarez testified that he requested, and obtained, Carmichael's consent to proceed with the inspection; in addition, Carmichael provided some information about Employer's safety program and about the accident during this opening conference, which indicated to Nevarez that Employer consented to the inspection. (HT Day 1, pp. 56, 60, 70; Exhibit 10.)

Carmichael, by contrast, testified that Nevarez never asked for consent, that she never consented to the inspection, and that she had no authority to do so. (HT Day 4, pp. 634, 636.) She also testified, however, that she never told Nevarez she lacked such authority. (HT Day 4, p. 674.) Furthermore, Carmichael testified that she never explicitly stated to Nevarez that Employer did not consent to the inspection. (HT Day 4, p. 679.) Baldi similarly testified that she never told Nevarez that Carmichael was not an employee or did not have the authority to consent to the inspection. (HT Day 3, pp. 573, 602.)

Carmichael also testified that she argued with Nevarez over the propriety of the inspection, based upon her mistaken belief that because Campos's injury was not "serious" or "reportable," the Division had no jurisdiction to investigate it. (HT Day 4, pp. 631-632, 635.)

After this conversation, Nevarez emailed a document request to Employer, along with his credentials. (Exhibit 12; Exhibit B.) Carmichael forwarded this email to Baldi. (HT Day 3, p. 546.) Employer was therefore aware that the Division had opened an investigation in this matter.

In response, Baldi emailed both Nevarez and Hogle-Lui and requested to know the "written policy" authorizing the Division to conduct the inspection. (Exhibit 14; Exhibit BB; Exhibit AV.) Baldi provided Campos's discharge papers from the hospital, documenting that he was released from the emergency room without being admitted to the hospital and had been medically cleared to return to work. (Exhibit BB.)

In an email dated Friday, December 17, 2021, Hogle-Lui explained to Baldi the provisions of the Labor Code authorizing the inspection, stating, "Please note the Division's authority to conduct inspections at every place of employment is covered under the authority of the California Labor Code, Sections 6307 and 6314. In this inspection Labor Code 6314(b), specifically applies. Regardless, if you reported the accident occurring at your workplace in a timely manner in accordance to [sic] Title 8 330(h), 342(a) it does not diminish the authority for the Division to conduct an inspection. The compliance officer assigned to this case will investigate accordingly as the representative of the Division and will determine if any violative conditions exist." (Exhibit AU.)

Employer either ignored or misunderstood this information. According to her testimony, Baldi concluded from these provisions that the Division was required to seek a warrant to proceed with the inspection. (HT Day 3, pp. 554, 605-606.) Baldi testified that the Division should have understood from Employer's conduct that it did not consent to the inspection. (HT Day 3, pp. 602, 604, 606.) However, neither Carmichael nor Baldi ever told Nevarez, Hogle-Lui, or any other Division representative, that Employer did not grant the Division permission to conduct an inspection and the Division should obtain a warrant in order to proceed. (HT Day 3, p. 605; HT Day 4, p. 678.)

Instead, in a series of emails exchanged between Employer and the Division from December 17, 2021, to March 17, 2022, Carmichael made a number of statements manifesting cooperation with the investigation. Baldi and Carmichael copied one another on each email, and Baldi was aware of Carmichael's actions during the course of the inspection.

In these communications, Employer repeatedly asserted the mistaken belief that the Division has jurisdiction to investigate only "reportable" injuries, and that because Campos was not seriously injured, the incident was "not reportable," and the Division was not authorized to investigate it. (Exhibit 14; Exhibits AV, AT, AH, AB, BB, V.) Employer also repeatedly requested that the Division issue a "1AX," a Notice of No Violation After Inspection. (*Id*.)

In an email dated December 17, 2021, Carmichael explained that her daughter had required emergency surgery, and stated, "I will respectfully request you extend our time[.]" (Exhibit AT.)

On December 20, 2021, Nevarez sent Employer an email stating, "My District Manager already sent an email on Friday December 17, to Catherine Baldi and yourself informing you of the Divisions authority and decision to assign this accident for an investigation. At this point, any programs and documents that are not provided the Division will assume that those do not exist and may issue citations for none [sic] compliance. Please advise on my request for employee interviews, and let me know if you have any questions." (Exhibit AP.) Carmichael later testified that she found this email from Nevarez "threatening." (HT Day 3, p. 647.)

On the same day, December 20, 2021, Carmichael replied, "We have plenty of documentation requested to submit however due to my family emergency I communicated with you about I was not available to be at the office to gather all documents you requested. I'll be in tomorrow and we are a small business. […] We take this serious [sic] and will provide you everything as soon as possible." (Exhibit AO.) Carmichael later testified that this response was, "This is a reply back to Jose, just basically -- you know, I was exhausted, I'm tired, saying that, you know, we have plenty of documentation, you know, to say this is not reportable. It's not, you

know, a serious injury." (HT Day 3, p. 648.) However, Carmichael's language in the email indicates Employer's cooperation, and intent to respond to the document request.

In an email to Nevarez, dated December 21, 2021, in response to a request from Nevarez to schedule employee interviews, Carmichael stated, "I checked with Catherine [Baldi] and the 22nd does not work for everyone as we are closing due to rainy weather and the holidays. Can you provide another couple dates and times for interviews? We are currently working on getting all documents to you ASAP. I'll be sending documents in a separate email for each subject. Things will be coming over as soon as possible. Thank you for your kindness and understanding." (Exhibit AN.)

On January 5, 2022, in an email to Nevarez, Carmichael once again stated that Chacon's injury was "not a serious reportable injury" and again requested a 1AX. (Exhibit V.) Carmichael attached a copy of Campos's medical clearance to return to work. (*Id*.)

On March 7, 2022, again in response to an email request from Nevarez to arrange for the scheduling of employee interviews (Exhibit AG), Carmichael stated, "Work is slow right now and the guys are not working this week to be interviewed." (Exhibit AH.) This response indicated consent to conducting the interviews, not refusal to allow the interviews. In the same email, Carmichael again stated, "Please advise if we can move forward with the 1AX as medical documentation provided clearly stated this was not a serious injury by medical or OSHA standards." (*Id*.)

On March 11, in an email to Hogle-Lui, Carmichael again stated, "We are respectfully re-requesting that we process a lAX closing document on the case for the incident reported […] Inspector Wojic [sic] advised me there was no need for further investigation as it was not a serious injury." (Exhibit 14; Exhibit V.) As stated above, Wojick flatly denied ever telling Carmichael such a thing. (HT Day 3, p. 430.)

On March 17, 2022, at 9:21 a.m., the Division sent a second document request to Employer. (Exhibit 15.)

In an email to Nevarez, dated March 17, 2022, 9:58 AM, Carmichael stated, "Please see the Second request for lAX response below I sent to your District Manager Wendy Hogle-Liu. I have not heard from Wendy yet as of today. We would like to schedule a meeting or conversation with Wendy regarding the 1AX requests and the fact that no serious injury occurred." Carmichael attached the March 11 email to Hogle-Lui, referenced above. (Exhibit 14; Exhibit Z.) Again, there is no indication in this communication that Employer did not consent to the inspection.

Hogle-Lui responded on March 17, 2022, at 3:20 PM, "[P]er your email you are requesting a 1AX for an ongoing accident investigation being conducted out of my office. I have already addressed this with you in the email below. I am providing the email again to reiterate the Division's authority to conduct inspections under the California Labor Code." (Exhibit AC.) The Division explained to Employer not once but twice the basis of the Division's authority and jurisdiction. Employer continued to either ignore or dismiss this explanation of the plain language of the Labor Code.

In an email to Hogle-Lui, dated March 17, 2022, at 4:43 pm, Carmichael responded, "It is our policy and intent to fully cooperate with Cal/OSHA." (Exhibit AB; Exhibit 14, p. 8.) The email further stated, "In accordance with T8CCR342 given the nature of this situation, this is not a

reportable incident, and does not warrant an accident related inspection. Given these facts, merits and details, we are requesting a 1AX to close out the case file. We appreciate your correspondence and cooperation in closing out this case with a 1AX. We look look [sic] forward to receiving the 1AX as soon as possible. We appreciate your support and service to the community." (*Id.*)

On March 18, 2022, Nevarez emailed both Carmichael and Baldi an Intent to Classify Citations as Serious. (Exhibit 14; Exhibit 20.) On April 5, 2022, Nevarez emailed both Carmichael and Baldi indicating that he had left them voice messages explaining that the investigation was closing and that he would like to conduct a closing conference. (Exhibit 14.) On April 6, 2022, Nevarez and Carmichael had a phone conversation in which Carmichael agreed to hold the closing conference on April 11. (*Id.*)

The Division's closing letter was sent on April 7, 2022. (Exhibit 21.)

On April 11, 2022, Nevarez emailed both Carmichael and Baldi to notify them that he had attempted to reach them by telephone to conduct the closing conference but that he had been unable to reach them. (Exhibit 14.) The email reminded Carmichael that she had agreed to proceed with the closing conference on April 11, 2022. (*Id.*) That same day, Carmichael responded that she was unavailable due to illness and asked that the closing conference be rescheduled. (*Id.*)

On April 19, 2022, Carmichael emailed Nevarez about status of the closing conference, asking to reschedule it. (Exhibit. 14.) On April 20, 2022, Nevarez responded indicating that the closing conference could be conducted by telephone and asked for dates of availability. (*Id.*) On that same day, Carmichael responded that she and Baldi would reach out once the citations were received. (*Id.*) On April 22, 2022, Baldi emailed Nevarez that Employer received the citations, and Carmichael would respond with their availability. (*Id.*) Baldi responded, "We need to coordinate. We take this very seriously and we will be in touch." (*Id.*)

Employer's statements indicate consent to the inspection and an intent to produce the requested documents. In addition, Carmichael did provide the Division with some documents, such as a witness statement and a video re-enactment of the accident. (Exhibits BF, BE, 19.) This conduct also suggests consent to the inspection.

B. Analysis.

As noted above, whether an employer consented to a Division inspection is a question of fact. (*Rudolph and Sletten, Inc.*, *supra*, Cal/OSHA App. 01-478.) The Board has held, "if consent is found to exist *under the facts,* then the inspection is valid and there is no violation of the [Cal/OSH] Act. Further, since consent is a recognized exception to the warrant requirement under the U.S. and California Constitutions, there would be no violation of Employer's constitutional rights." (*Id.* [Emphasis in original.])

For consent to be valid, it must be "voluntary, otherwise authorized, and appropriately obtained." (*Clark Pacific, dba Pacific Embedded Product*s, Cal/OSHA App. 10-0188, Denial of Petition for Reconsideration (Aug. 31, 2011) (*Clark Pacific*) citing *People v. Henderson* (1990) 220 Cal App. 3d 1632, 1650-1651; *Forty-Niner Sierra Resources, Inc. dba Forty-Niner Subaru/Isuzu*, Cal/OSHA App. 90-166, Decision After Reconsideration (Jul. 15, 1991).) An employer or its representatives may refuse or withdraw consent "expressly or impliedly by their conduct." (*Rudolph and Sletten, Inc.*, *supra*, Cal/OSHA App. 01-478.)

Employer offers three main arguments in support of its assertion that it did not consent to the Division's inspection, and the inspection was therefore invalid and a violation of its Fourth Amendment rights. First, Employer argues that Carmichael was not authorized to give consent to the inspection. Second, Employer argues that even if Carmichael did possess such authority, she never gave consent. Third, Employer argues that the Division should have inferred a lack of consent from Employer's conduct. On the third point, Employer asserts, specifically, that Employer questioned the validity of the inspection while it was ongoing, requested the matter to be closed with a finding of no violations, and refused to provide the Division with the requested documents.

1. Did Carmichael have authority to consent to the inspection?

Employer argues that Carmichael was not authorized to give consent to the inspection. (Petition, p. 8.) The Board has held, "an inspection by the Division is not invalid if made with the consent of an individual who the safety engineer reasonably and in good faith believes has authority to consent to the inspection." (*Rudolph and Sletten, Inc.*, *supra*, Cal/OSHA App. 01-478; *Nolte Sheet Metal, Inc.*, *supra*, Cal/OSHA App. 14-2777.) Even assuming Carmichael did not have actual authority to consent to the search, an inspector may rely on consent provided by a person who, in the inspector's reasoned judgment, has the apparent authority to do so. (*Nolte Sheet Metal, Inc.*, *supra*, Cal/OSHA App. 14-2777*,* citing *People v. Jenkins* (2000) 22 Cal. 4th 900, 974.)

Neither Carmichael nor Baldi ever told Nevarez, or any other Division representative, that Carmichael lacked the authority to consent to the inspection. Carmichael was the Division's initial point of contact with Employer; she both reported the incident and held an opening conference with Nevarez. She continued to be Employer's primary contact person. Carmichiael copied Baldi on all communications with the Division. Baldi never directed Nevarez to communicate with herself rather than Carmichael. Carmichael worked on behalf of, and at the direction of, Employer throughout the inspection process.

Further, Carmichael made statements in her emails, when referring to Employer, using the terms "we" and "our," such as, "we are a small business," (Exhibit AO) and, "we are closing due to rainy weather and the holidays," (Exhibit AN) implying that she was part of Employer's business. Baldi also made statements such as, "We proactively reported the incident," referring to Carmichael's phone calls to the Division. (Exhibit 14.)

All of these statements and conduct support a finding that Carmichael did have the authority to consent to the inspection. In the alternative, these statements and conduct lead to a reasonable belief that Carmichael had authority to consent to the inspection. Even assuming Carmichael did not possess such authority, we find that Nevarez's belief that Carmichael had authority to consent to the inspection was reasonable and based upon good faith.

2. Did Employer consent to the inspection?

The Board has recognized that for an employer's consent to be effective, it must be a "product of free will and not a mere submission to express or implied authority; […] The voluntariness of consent is a *question of fact* to be determined in light of all the circumstances." (*Rudolph and Sletten Inc.*, *supra*, Cal/OSHA App. 01-478.)

Employer argues that Carmichael did not give consent to the inspection. Employer also implies that the Division improperly subjected Carmichael to duress to extract her involuntary consent to the inspection. (Petition, pp. 1, 15, 17, 20.)

Carmichael made a number of statements demonstrating consent to the inspection and indicating that Employer intended to produce the requested documents. These statements are detailed in the fact section above. Although Baldi was copied on all the emails between Carmichael and the Division, Baldi never clarified that Employer had no intention of producing the documents unless presented with a warrant. Nor did Baldi ever direct Carmichael to do so. Employer's conduct can be reasonably interpreted to indicate consent to the inspection.

In addition, Carmichael testified that she was familiar with the Division's authority and jurisdiction, and that she had handled approximately 30 previous Division inspections for other employers. (HT Day 4, pp. 671-672.) The ALJ reasonably concluded that a person so experienced with these procedures would not continue to participate in an inspection where consent had not been given or fail to mention in her many subsequent emails to the Division that Employer had refused consent to the inspection. (Decision, p. 11.)

Next, Employer asserts, "Mr. Nevarez subjected Carmichael to duress by threatening the issuance of citations for failing to provide documents, which Ms. Carmichael felt was threatening. (HT 647:7-648:1 & Ex. AP.)" (Petition, p. 15) The "duress" to which Employer refers is an email from Nevarez to Carmichael, dated December 20, 2021, in which Nevarez stated, "At this point, any programs and documents that are not provided the Division will assume that those do not exist and may issue citations for none [sic] compliance." (Exhibit AP.) Far from "threatening," this email is more reasonably interpreted as a simple, and truthful, warning that failure to provide requested documents could result in citations. Even if we were to assume, *arguendo*, that the email was threatening, there is nothing in the email that suggests that Carmichael or Baldi's "free will was overborne" by this email. (*People v. Weaver* (2001) 26 Cal. 4th 876, 924.)

Employer further asserts that the very language of the Document Request Sheet is "unconstitutional" because it "threatens potential citations for non-compliance with the request, 'If the copies are not provided by that date [the due date] it will be interpreted as an admission that the documents do not exist and possible Citations and Monetary Penalties could result.'" (Petition, p. 20.) Again, this language is most reasonably interpreted as a simple statement of fact to alert employers of the consequences of failing to provide requested documents.

Contrary to Employer' characterization, the record does not show that Carmichael's consent was extracted under threat or duress. The wording of the document request sheet was standard, as was the Division's conduct during the investigation. There is no indication in the record that Nevarez, or any other Division employee, intimidated, harassed, threatened, or inappropriately pressured Carmichael or Baldi at any point.

3. Did Employer's conduct demonstrate a refusal of consent?

As noted above, an employer or its representatives may refuse or withdraw consent "expressly or impliedly by their conduct." (*Rudolph and Sletten, Inc*., *supra*, Cal/OSHA App. 01-478.)

Employer argues that its actions demonstrated a lack of consent. Specifically, Employer argues, it "continuously objected to the validity of the inspection and refused to produce documents

pursuant to those objections." (Petition, p. 20.) Employer also asserts that Employer repeatedly requested that the Division close the inspection with a finding of no violations. (*Id*., pp. 8, 9, 10, 14.) Employer asserts that this "conduct … was not the conduct of an employer who was consenting to an inspection." (*Id*., p 16.) However, the record supports the ALJ's conclusion that Employer's actions are more reasonably interpreted as delay tactics, rather than refusal of consent.

First, Employer asserts that Employer's objections to the "validity of the inspection" should have been interpreted as non-consent. (Petition, p. 20.) However, Employer's objections to the inspection's "validity" were not based on Employer's refusal of consent. Instead, Employer repeatedly questioned the Division's jurisdiction to conduct the inspection, based on Employer's mistaken belief that because Campos's injury was "not reportable" under section 342, the Division had no jurisdiction to investigate it. (Petition, pp. 1, 6, 7, 14, 16.) Although the record does demonstrate that Employer "continuously objected to the validity of the inspection" based on this misunderstanding (*id*., p. 20), this is not the same as refusing consent.

Next, Employer asserts that Employer's requests the inspection be closed with a finding of no violations should be interpreted as refusal of consent. (Petition, p. 14.) In communications with the Division, Employer repeatedly requested that the Division issue a "1AX," a Notice of No Violation After Inspection. (Exhibit 14; Exhibits AV, AT, AH, BB, V.) As the ALJ correctly noted, investigations are often contentious by their nature. (Decision, p. 12.) Employer's disagreement over whether any violation existed, and its desire for the inspection to be closed, are not tantamount to refusing consent, particularly in light of Employer's statements and conduct indicating its intention to cooperate with the investigation.

Finally, Employer asserts that the Division should have inferred a lack of consent from its refusal to produce documents. (Petition, pp. 14, 16, 20, 21.) As detailed in the fact section above, Employer repeatedly indicated that the documents were forthcoming, delayed and provided excuses for not submitting the requested documents, but never manifested a refusal to do so.

On balance, Employer's statements and actions belie its argument that it refused consent to the inspection. We therefore affirm the ALJ's finding that Employer consented to the Division's investigation. Because we find that Employer consented to the inspection, we find no merit to the assertion that the inspection violated Employer's Fourth Amendment rights. (*Rudolph and Sletten Inc.*, *supra*, Cal/OSHA App. 01-478.)

2. Did Employer fail to maintain records of scheduled and periodic safety inspections?

> Section 3203, subdivision (b), provides:
>
> (b) Records of the steps taken to implement and maintain the Program shall include:
>
> (1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year; and

> Exception: Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected.
>
> (2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

In Citation1, Item 1, the Division alleged:

> Prior to and during the course of the inspection, including, but not limited to, on December 12, 2021, the employer failed to provide records of inspections to identify unsafe conditions and work practices and of employee safety and health training to the Division upon request.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc.*, *supra*, Cal/OSHA App. 14-2777.)

Section 3203, subdivisions (b)(1) and (b)(2), require an employer to maintain records of "scheduled and periodic inspections to identify unsafe conditions and work practices" and "safety and health training … for each employee[.]" The basis of Citation 1, Item 1, was Employer's failure to produce such records during the inspection. At the hearing, Employer produced a number of other documents that it had not produced in response to the Division's earlier document requests, and yet still failed to produce the safety inspection or training records. The ALJ therefore drew an inference that such records did not exist, and affirmed Citation 1, Item 1, only as to section 3203, subdivision (b)(1). (Decision, pp. 14-15.) "The Division need only show one missing component, of the many required by the safety order, in order to establish a violation. [Citations.]" (*Hill Crane Service, Inc.*, Cal/OSHA App. 1135350, Decision After Reconsideration (Sep. 24, 2021).)

Employer asserts that the ALJ erred by affirming Citation 1, Item 1. First, Employer argues that the Division unfairly issued the Citation as a penalty when Employer failed to produce the requested documents. Second, Employer argues that the ALJ impermissibly shifted the burden of proof to Employer in upholding Citation 1, Item 1. Third, Employer argues that the ALJ impermissibly drew a negative inference from Employer's failure to present the requested documents at the hearing. Finally, Employer argues that the Decision improperly failed to consider Employer's testimony that it conducted site-specific hazard assessments.

A. Was the issuance of Citation 1, Item 1 "a penalty for failing to respond to a document request"?

Employer argues that the issuance of Citation 1, Item 1 was "tantamount to a penalty for failing to respond to a document request." (Petition, p. 23.) Employer asserts that the citation amounts to improper "field enforcement" of an administrative subpoena.[2] (*Id.*)

Contrary to Employer's characterization, a citation is not a "penalty" in and of itself. A citation gives the employer notice of a violation alleged by the Division. (Lab. Code, § 6317, subd. (a).) The Cal/OSH Act provides that an employer may appeal a citation to the Occupational Safety and Health Appeals Board. (Lab. Code §§ 6600 *et seq*.)

This argument also presumes that Employer did not consent to the inspection. Because we find that Employer did consent to the inspection, the argument fails.

There is no dispute that the Division issued Citation 1, Item 1, because Employer did not provide the relevant, requested records -- which Employer is required to maintain by section 3203, subdivision (b) -- during the inspection,. (Decision, p. 14; Division's Answer, pp. 13, 17.) Employer's safety inspection and training records were well within the scope of documents that the Labor Code directs the Division to evaluate as part of an inspection. (Lab. Code, § 6314, subd. (a).) When an employer makes the decision not to provide the Division with requested records, it is both reasonable and within the Division's authority for the Division to conclude that the records do not exist and issue a citation on that basis.

B. Did the Decision improperly shift the burden of proof to Employer?

Employer argues that the Decision "impermissibly shifts the burden of proof onto the employer to prove it was in compliance with the cited safety standards," on the basis that "it absolves the Division of having to produce any evidence whatsoever." (Petition, p. 23.)

We disagree. Longstanding Board precedent holds that the Division must make "some showing" that the violation occurred, and that after this showing, the burden of going forward with evidence to refute that showing will shift to the employer. (*Lockheed California Company*, OSHAB 80-889, Decision After Reconsideration (July 30, 1982).) What "some showing" requires, regarding an employer's failure to produce requested records after it has consented to an inspection, and agreed to comply with document requests, is a question we have not previously considered in a Decision After Reconsideration. We conclude that the Division may establish a *prima facie* showing of a violation of section 3203, subdivision (b), by demonstrating that it requested legally required documents and did not receive them.[3] As a practical matter, holding otherwise would encourage employers to rebut a citation that alleges a violation of section 3203, subdivision (b), by simply refusing to respond to document requests. After this showing, the burden of going forward with evidence shifts to the employer. (See *El Katrina Dairy, Inc.,* Cal/OSHA App. 81-1258, Decision After Reconsideration (August 26, 1985).) In the absence of further evidence by Employer -- the party to whom the burden of producing evidence as to a particular fact has shifted -- a finding as to that particular fact is required to be made against that party. (See Evidence Code, § 550.)

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[2] To be clear, the Division issued no administrative subpoenas to Employer in this matter.

[3] We note that a number of ALJ Decisions, while not citable authority, have reached the same conclusion.

Here, the Division met its initial burden of proof when it presented evidence and testimony that it requested records which Employer is legally required to maintain, but did not receive them. (HT Day 1, pp. 62, 76-77; Exhibit 12.) When an employer has consented to an inspection, agreed to produce requested documents, and then does not produce the documents that are requested, the Division may infer that the documents do not exist, and issue citations as a result. Absent evidence to the contrary, the Board may conclude that the Division has made a *prima facie* showing that the employer lacks the documents in question. The Board has held, "Where the Division presents evidence which, if believed, is of such a nature as to support a finding if unchallenged, then the burden of producing evidence shifts to Employer to present convincing evidence to avoid an adverse finding as to Employer." (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004).)

Employer failed to present any evidence to challenge the Division's *prima facie* showing. If Employer had the requested records in its possession, it had both the incentive and opportunity to present the records at the hearing and failed to do so.

C. Did the ALJ impermissibly draw a negative inference from Employer's failure to present the requested documents at the hearing?

Employer argues that, while the Decision states, "No negative inference will be drawn from Employer's failure to submit documents during the inspection," the Decision then erroneously goes on to draw precisely such an inference. (Petition, p. 23.)

Here, the evidence demonstrates that Employer had agreed to comply with the Division's document requests, but despite that agreement, did not produce the training records that the safety order requires it to maintain. Employer produced a number of documents at the hearing, but not the records of safety inspections. Accordingly, it was within the ALJs authority to draw the inference that the documents did not exist. Employer identifies no legal authority to suggest that it may avoid its evidentiary burden by thwarting the discovery process.

In an administrative hearing, the Division's burden of proof by a preponderance of the evidence is not limited to the evidence presented by the Division. Full consideration is given to the negative and affirmative inferences to be drawn from all the evidence, including that which has been produced or not produced by Employer. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001).)

As noted above, when the Division presents sufficient evidence to sustain a violation, the burden of proof shifts to Employer to avoid an adverse finding. An employer's "failure to offer evidence on a certain issue, though production of such evidence is within a party's power, may raise an inference that the evidence, if produced, would have been adverse." (*Macco Constructors, Inc.*, Cal/OSHA App. 84-1106 Decision After Reconsideration (Aug. 20, 1986), citing *Shehtanian v. Kenny* (1958) 156 Cal.App.2d 576. See also Evid. Code, §§ 412, 413; *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

Even if Employer did not comply with the Division's document requests during the inspection, Employer had both the incentive and opportunity to provide those documents during the hearing, if such documents existed, to disprove the citation. Since Employer still failed to do so, the ALJ drew a reasonable, and permissible, inference that the documents did not exist.

D. Did the Decision improperly fail to consider Employer's testimony that it conducted site-specific hazard assessments?

Employer next argues that the ALJ's Decision "ignores testimony by Ms. Baldi that site specific hazard assessments are conducted and documented on work orders—testimony that was uncontested by the Division." (Petition, p. 15.) This argument also fails.

First, Employer presents no legal authority in support of this argument and fails to cite to the hearing record, thereby waiving the contention. "A contention is waived by failure to cite to legal authority and to the record." (*Shimmick Construction Company, Inc*., Cal/OSHA App. 1080515, Decision After Reconsideration (Mar. 30, 2017), citing *Akins v. State of California* (1998) 61 Cal.App.4th 1, 50, and *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979 [court not required to consider points not supported by cited authority].)

In addition, an employer has the duty to both inspect the work site for hazardous conditions and to document these inspections. (§ 3203, subd. (b).) Employer's assurance that these hazard assessments were conducted, standing alone, is not sufficient.

We therefore affirm the ALJ's Decision, and uphold Citation 1, Item 1.

3. Did Employer fail to ensure the availability of a suitable number of persons appropriately trained to render first aid at the jobsite?

Section 1512, subdivision (b), provides:

> Appropriately Trained Person. Each employer shall ensure the availability of a suitable number of appropriately trained persons to render first aid. Where more than one employer is involved in a single construction project on a given construction site, the employers may form a pool of appropriately trained persons. However, such pool shall be large enough to service the combined work forces of such employers.

In Citation 1, Item 6, the Division alleged:

> Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer did not ensure the availability of a suitable number of appropriately trained persons to render first aid at the jobsite exposing employees to safety hazards.

Here, there is no dispute that no one trained in first aid was physically present at the job site at the time Campos fell from the scaffold. The dispute is over the proper interpretation of the safety order's requirement that an appropriately trained person be "available."

Baldi testified that Juan Rivas (Rivas), Employer's production manager, was the only employee at the job site who was trained and certified in rendering first aid. (HT Day 3, pp. 519, 578.) Baldi testified that Rivas and another employee told her Rivas had left the job site and was not present when Campos fell off the scaffolding, but was only gone for "a couple of minutes" when employees telephoned Rivas and told him to come back because of the accident. (HT Day 3, p. 579.) According to Baldi, Rivas returned to the job site within approximately two minutes. (HT Day 3, p. 580.) ALJ Culjat found this testimony credible. (Decision, p. 19.)

In affirming Citation 1, Item 6, the ALJ reasoned, "As the purpose of section 1512, subdivision (b), is to ensure immediate medical care, there is no allowance for even short absences of the appropriately trained person." (Decision, p. 19.) In support, ALJ Culjat cited *Triad Geotechnical Consultants, Inc*., Cal/OSHA App. 95-2231, Decision After Reconsideration (Nov. 10, 1999) (*Triad Geotechnical*).)

In *Triad Geotechnical*, the Board interpreted the safety order to require that an appropriately trained person must be "immediately available to render first aid to its employee at the site." (*Triad Geotechnical*, *supra*, Cal/OSHA App. 95-2231, citing *Oltmans Construction Company*, Cal/OSHA App. 84-715, Decision After Reconsideration (Jan. 17, 1986) (*Oltmans*).) This interpretation was based on the previous iteration of the safety order, then located at section 1512, subdivision (c). The Board noted, "At the time of the events in *Oltmans*, section 1512 required that the appropriately trained person be 'immediately available.' The language was later revised to require only that he or she be 'available.'" (*Triad Geotechnical*, *supra*, Cal/OSHA App. 95-2231, fn. 4.)

The Board has never held, however, that "immediately available" means physically present at the job site at all times. The Board in *Triad Geotechnical* interpreted "immediately available" to mean that "adequate first aid attention be provided […] for the recognition of and prompt care for injury or sudden illness *before* the arrival of licensed or certified professional health care personnel." (*Triad Geotechnical*, *supra*, Cal/OSHA App. 95-2231[emphasis in original; internal quotation marks omitted].)

The Board based this rationale on the definitions of "Emergency Medical Services" and "First Aid," both located in section 1504, subdivision (a). The Board reasoned that the Standards Board had simply transferred the "immediately available" requirement into the definition of "emergency services" in section 1504. (*Triad Geotechnical*, *supra*, Cal/OSHA App. 95-2231.) Section 1504, subdivision (a), defines "Emergency Medical Services" as, "The communications, transportation and medical and related services, *such as first aid*, rendered in response to the individual need for *immediate medical care* in order to reduce or prevent suffering and disability and reduce the incidence of death." (Emphasis added.) Section 1504, subdivision (a), defines "First Aid" as "The recognition of, and *prompt care for injury or sudden illness prior to the availability of medical care by licensed health-care personnel.*" (Emphasis added.) Read in context here, "immediate" means aid given before the arrival of medical professionals, i.e., paramedics or other first responders.

In a later matter, the Board further explained its interpretation of this safety order. In *Damon, Inc*., Cal/OSHA App. 13-1976, Denial of Petition for Reconsideration (Aug. 15, 2014), the Board concluded, "While the safety order does not require, and we do not interpret it to require, such person(s) to be on site at all times, *available* for purposes of rendering first aid to someone in need suggests such person be able to do so […] in the span of but a few minutes." (*Id*. [Emphasis in original].) Employer's argument that the safety order does not require a trained person to always be physically present at the jobsite, "but just be available within the span of a few minutes," is valid. (Petition, p. 24.)

The plain language of the safety order does not require a person trained in first aid to be at the job site at all times, only for such a person to be "available." (§ 1515, subd. (b).) The Board may not impose stricter and more specific requirements than those set by the Standards Board. (*Hylton Drilling Company*, Cal/OSHA App. 82-216, Decision After Reconsideration (Jan. 17,

1986); *Mobil Oil Corporation*, Cal/OSHA App. 00-222, Decision After Reconsideration (Apr. 29, 2002).)

It was the Division's burden to show, by a preponderance of evidence, that Rivas was not "available" to render prompt first aid, on short notice, before the arrival of professional health care personnel; in this case, the Piedmont Fire Department. As noted, the ALJ credited Baldi's testimony that Rivas was back at the job site within approximately two minutes. There is nothing in the record to indicate that Rivas was not back at the job site before the first responders arrived.

We find the Division failed to meet its burden of proof. Accordingly, we reverse the ALJ's Decision and vacate Citation 1, Item 6.

4. Did Employer fail to correct the workplace hazard of employees accessing different levels of scaffolding through areas other than the designated ladder?

In Citation 2, the Division alleged violations of both section 3203, subdivision (a)(4), and subdivision (a)(6). Only the alleged violation of section 3203, subdivision (a)(6) remains at issue.

> Section 3203, subdivision (a)(6) provides that an employer's IIPP must:
>
> (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 or 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 existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
>
> The Division alleged:
>
> Prior to and during the course of the inspection, including, but not limited to December 12, 2021, the employer failed to identify, evaluate, and correct unsafe work practices. Employees were allowed to climb to different levels of a scaffold through areas other than the designated ladder attached to the scaffold for access. An employee fell approximately 15 feet when he was climbing the side of a scaffold.

"Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards." (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) "Proof of implementation requires evidence of actual responses to known or reported hazards." (*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).)

The basis of the section 3203, subdivision (a)(6), violation is not the accident itself. After the Division opened its investigation, Rivas and another employee, Manuel Arana (Arana)[4], staged a video to re-enact the circumstances leading up to Campos's accident. Rivas then sent the video to Carmichael, who in turn submitted it to the Division. (Exhibit 19.) Baldi testified that she did not request this video, nor did she know about it before it was made, but she confirmed that Arana is the employee in the video. (Decision, p. 26, fn 9.) In the video, Arana can be seen climbing a scaffold on its outside bars, in a manner similar to Campos, and then "falling" onto the ground below. (Exhibit 19.) Based on the actions recorded in this video, the Division cited Employer for failing to correct the unsafe practice of allowing employees to climb on a scaffold instead of using a designated ladder.

In affirming Citation 2, ALJ Culjat reasoned, "Rivas, as a supervisor, not only failed to correct the hazard by prohibiting Arana from climbing the scaffold in a similar manner to Campos, but he participated in the creation of the reenactment video." (Decision, p. 26.) When a supervisor is involved in the violation of a safety order, the supervisor's knowledge of the violation is imputed to the employer. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Employer argues that "a single instance of an IIPP violation cannot be the basis for a citation." (Petition, pp. 24-25.) Employer cites *GTE California*, Cal/ OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991) and *David Fisher, dba Fisher Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991) (*David Fisher*). Employer further argues that the video itself cannot be the basis for a citation, because it was made "as part of its challenge to the validity of the inspection." (*Id*., p. 25.)

First, regarding the Board precedent cited by Employer, this matter presents the Board with an opportunity to clarify the import of those Decisions After Reconsideration (DARs). Although these two particular DARs are often cited by both employers and ALJs for the proposition that a single or isolated IIPP violation cannot be the basis for a citation, this is incorrect, and the DARs are incorrectly cited when used to establish that point. To the contrary, the Board has held that a single deficiency regarding an essential element of an IIPP or its implementation may support a violation. (See, e.g., *OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016); *Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision After Reconsideration (Oct. 17, 2003).)

In *GTE California*, *supra*, Cal/OSHA App. 91-107, the Board found that the employer established the Independent Employee Action Defense (IEAD) for an alleged violation of a safety order, requiring use of a safety belt and lanyard when working from an elevated device, when an employee knowingly violated that rule. The Board reversed the ALJ's finding that the employer failed to adequately enforce its safety program. The DAR in that matter does not involve an alleged IIPP violation. Nowhere in that DAR does the Board state that a single IIPP violation cannot be the basis of a citation.

Similarly, in *David Fisher*, *supra*, Cal/OSHA App. 90-762, the Board found that the employer established the IEAD for an alleged violation of safety orders requiring appropriate personal protective equipment when working around or transporting acid. The Board reversed the ALJ's finding that the employer failed to adequately enforce a policy of sanctions against

[4] Manuel Arana is the nephew of Baldi's husband.

employees who violated its safety program. Again, no IIPP violation was alleged, and the Board never stated that a single IIPP violation cannot be the basis of a citation.

Next, Employer provides no legal authority, nor could we locate any, for its assertion that a videotaped violation of a safety order cannot be the basis of a violation simply because the video was made in response to an ongoing Division investigation. Here, the action of a supervisor, in directing an employee to engage in an activity that had already caused an accident, and had prompted a Division investigation, would reasonably appear to involve a "deficiency regarding an essential element" of Employer's IIPP, and thus support the finding of a violation. (*OC Communications, Inc.*, *supra*, Cal/OSHA App. 14-0120.) In addition, the videotape is proof the violation occured, regardless of why it was made. An employer's desire for evidence in response to a safety inspection does not entitle an employer to generate that evidence by exposing an employee to a safety hazard.

We therefore affirm the ALJ's Decision upholding Citation 2.

DECISION

For the reasons stated, the ALJ's Decision is affirmed in part and vacated in part as follows: Citation 1, Item 1, is affirmed. Citation 1, Item 6, and its penalty, are vacated. Citation 2 is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 10/18/2024