BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1438716**
MON FONG LIN **6197 MCABEE ROAD** **SAN JOSE, CA 95120** **Employer**	**DECISION**

Statement of the Case

Mon Fong Lin (Appellant or Lin) is an individual who owns property where demolition work was being performed on October 17, 2019. The Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Richard Haskell, performed an inspection of Lin's property located at 660 Hale Avenue in Morgan Hill, California (job site).

On April 13, 2020, the Division cited Appellant for six alleged safety violations: failure to obtain a registration from the Division for asbestos-related work; failure to establish a written Injury and Illness Prevention Program; failure to adopt a written Code of Safe Practices related to operations; failure to provide training on heat illness; failure to establish a written Heat Illness Prevention Plan; and failure to monitor airborne concentrations of asbestos to which employees may be exposed.

Appellant filed timely appeals of the citations, contesting the existence of the violations, the classifications of the citations, and the reasonableness of the penalties. Additionally, Appellant asserted the Independent Employee Action Defense for each citation. At the time of the hearing in this matter, Appellant stipulated that the only matter in dispute was whether the Division had jurisdiction to issue the citations to her as an employer.

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On May 7, 2021, ALJ Lewis conducted the hearing from Sacramento County, California, with the parties and witnesses appearing remotely via the Zoom video platform. April Lin Walsh-Padilla, attorney with the Law Office of April Lin Walsh-Padilla, represented Appellant. Charles Jackson, Senior Safety Engineer, represented the Division. The matter was submitted on May 7, 2021.

Issues

1. Did the Division have jurisdiction to cite Appellant as an employer?

2. Did Appellant obtain a registration for asbestos-related work at the job site?

3. Did Appellant establish a written Injury and Illness Prevention Program?

4. Did Appellant adopt a written Code of Safe Practices related to the demolition operations?

5. Did Appellant fail to train the workers at the job site on heat illness signs and symptoms prior to commencing work?

6. Did Appellant establish a written Heat Illness Prevention Plan?

7. Did Appellant monitor airborne concentrations of asbestos to which workers might be exposed?

8. Should the penalties be waived because of the fact that Lin was required to pay a second contractor to complete the work that the unlicensed contractor had unlawfully begun?

Findings of Fact

1. On September 19, 2019, Appellant entered into a contract with Miguel Lara (Lara) to engage Lara's services performing demolition of two buildings, and hauling debris created by the demolition, at a property owned by Appellant.

2. The contract entered into by Lara and Appellant was for $48,000.

3. Lara did not have a contractor's license from the California Contractors State License Board.

4. The flooring in the buildings demolished by Lara contained 20 percent asbestos fibers.

5. Appellant did not obtain a registration for asbestos-related work prior to Lara performing the demolition project.

6. Appellant did not have a written Injury and Illness Prevention Program, a written Code of Safe Practices, or a written Heat Illness Prevention Plan.

7. Appellant did not perform any monitoring of the area where Lara was working to determine the airborne concentration of asbestos.

8. Appellant hired a licensed contractor to complete the project after the Division ordered Lara to stop working.

Analysis

1. Did the Division have jurisdiction to cite Appellant as an employer?

The California Occupational Safety and Health Act of 1973 (the Act) was established "for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions… ." (Lab. Code, §6300.) If a person or entity is not an "employer" under the Act, it is not subject to citation by the Division for alleged violations of safety orders promulgated under the Act. (*Strategic Outsourcing, Inc.*, Cal/OSHA App. 10-0734, Denial of Petition for Reconsideration (Sept. 16, 2011).)

a. Employment relationship

Labor Code section 6303, subdivision (b), defines "employment" as including "the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service." Household domestic service has been defined to specifically exclude demolition of a house:

> As an activity, household domestic service is commonly associated with services relating to the maintenance of a household or its premises [citation omitted] and does not connote work contracted for which a building permit must be issued, significant portions of the house are demolished and rebuilt, and entirely new rooms are framed and constructed.

(*Cortez v. Abich* (2011) 51 Cal.4th 285, 294.)

It was undisputed that Lin entered into an agreement with Lara, engaging him to work on a demolition project at her property. The property was not Lin's residence and this was not

"household domestic service." Lara was hired to demolish two buildings and haul away debris resulting from the demolition. Therefore, Lin and Lara had an employment relationship.

b. Employer

Labor Code section 6304 specifies that "employer" has the same meaning as it has pursuant to Labor Code section 3300, subdivision (c), which provides that an employer is "every person … which has any natural person in service." Lin had at least one person, Lara, in her service, as he was performing services at the job site on her behalf. Accordingly, Lin was an employer.

c. Independent contractors v. Employees

The key question is whether Lara was Lin's employee or an independent contractor. Labor Code section 2750.5 provides, in relevant part:

> There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.

Labor Code section 2750.5 contains factors that may be analyzed to rebut the presumption that a worker is an employee and establish that a worker was an independent contractor. However, those factors are predicated on the worker having a contractor's license.[1] Courts analyzing the independent contractor issue have further held that the contractor's license is the threshold factor to determine status: "[R]egardless of the factors contained in subdivisions (a), (b), and (c), a valid contractor's license is a necessary condition of independent contractor status." (*Nick Hagopian Drywall v. Workers' Comp. Appeals Board* (1988) 204 Cal.App.3d 767, 771.) Under Labor Code section 2750.5, where an unlicensed contractor is performing work for which a license is required, that unlicensed contractor is deemed an employee of the hirer. Labor Code section 2750.5 "absolutely denies independent contractor status to a person required to have such a license who is not licensed." (*Foss v. Anthony Industries* (1983) 139 Cal. App. 3d 794, 797.)

The Business and Professions Code governs the types of projects that require a contractor's license. "Contractor" is defined as "any person who undertakes to … construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building … or the

[1] "In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required … shall hold a valid contractors' license as a condition of having independent contractor status." (Lab. Code §2750.5.)

cleaning of grounds or structures in connection therewith." (Bus. & Prof. Code, §7026.) Projects with a cost of $500 or more require a contractor's license:

> Notwithstanding any other provision of this chapter, a person who is not licensed pursuant to this chapter may advertise for construction work or a work of improvement covered by this chapter only if the aggregate contract price for labor, material, and all other items on a project or undertaking is less than five hundred dollars ($500), and he or she states in the advertisement that he or she is not licensed under this chapter.

(Bus. & Prof. Code, §7027.2.)

Lin and Lara entered into a contract in the total amount of $48,000 for the project being performed at the job site. There was no dispute that Lara, who was performing demolition work at the job site, was unlicensed. Because the work required a contractor's license and Lara did not have a license, he was an employee of Lin pursuant to Labor Code section 2750.5.

d. Appellant's arguments

(1) Ignorance of the law

It is a long-standing legal tenet that ignorance of the law does not excuse one from the consequences of the law. (*Arthur Andersen v. Superior Court* (1998) 67 Cal. App. 4th 148.) As set forth above, the Business and Professions Code specifies the types of projects requiring a contractor's license and establishes a maximum dollar amount for which it is legal for an unlicensed individual to contract.

Lin obtained two estimates for the demolition project. Lara's estimate was approximately $10,000 less than the first estimate. Lin wanted to save money, so she entered into an agreement with Lara. Lin asserted that she was unaware that a contractor's license was required to perform the demolition work on her property.

Lin testified that she never asked Lara if he had a contractor's license. Lara never claimed that he held a contractor's license for demolition or asbestos removal. Lin asserted that she was simply unaware that a contractor's license was required to perform the demolition work on her property. Lin did not make any effort to research whether a license was required and whether Lara had one. Lin entered into a contract and paid Lara $48,000 with no regard for whether he was licensed, insured, or qualified to perform the demolition of two buildings on her property.

Lin was not cited for hiring an unlicensed contractor. The presumption created by Labor Code section 2750.5 is not rebutted by an employer's lack of knowledge of the provisions of the section. Lin cannot escape the responsibilities created by the relationship she bargained for and solicited by merely claiming that she was unaware of the licensing requirement. That relationship carried with it the obligation to comply with the safety orders, which ultimately resulted in citations.

Accordingly, Lin's ignorance of the laws governing contractor's licenses does not relieve her of liability for the citations issued by the Division.

(2) Lack of control over Lara's work

Despite the fact that there was no dispute that Lara was unlicensed, Lin argued that the Appeals Board should consider other factors to determine whether Lara could have been considered an independent contractor. Lin argued that she exercised no control over the work Lara performed, did not provide the tools and instrumentalities, the parties did not have an ongoing working relationship, and Lara was paid only for this one job rather than on an hourly or regular basis. However, as set forth above, while there are factors to analyze when determining whether a worker was an employee or an independent contractor, those factors are inapplicable when the work being performed requires a contractor's license. (Lab. Code §2750.5.)

There is a public policy behind requiring people to hire contractors with valid licenses. The Contractors State License Board "protects consumers by regulating the construction industry through policies that promote the health, safety, and general welfare of the public in matters relating to construction." (<www. https://cslb.ca.gov/About_us/> Accessed May 11, 2021.) In *Foss v. Anthony Industries*, *supra*, 139 Cal.App.3d 794, the Court found that it was consistent with that public policy to deny employers the opportunity to raise the independent contractor defense if the employer "has hired a worker who has not shown the competence and financial responsibility prerequisites to obtaining a contractor's license[.]" (*Id.* at 799.)

Appellant was an employer who had at least one employee, Lara. As such, the Division had jurisdiction to issue citations for violations of applicable safety orders.

2. Did Appellant obtain a registration for asbestos-related work at the job site?

California Code of Regulations, title 8, section 341.6, subdivision (a),[2] provides:

(a) An employer who will be engaging in asbestos-related work, as defined, in subsection (b), involving 100 square feet or more of surface area of asbestos-

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

> containing material, computed in accordance with subsection (e) of this section, shall apply for and obtain a registration from the division prior to the commencement of any such work.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 17, 2019, the employer, who was engaged in asbestos-related work involving 100 square feet or more of surface area of asbestos-containing material (the demolition and removal of multiple structures on the site), failed to apply for and obtain a registration from the division prior to the commencement of any such work.

Section 341.6, subdivision (b), defines "asbestos-related work" as:

> [A]ny activity which by disturbing asbestos-containing construction materials may release asbestos fibers into the air and which is not related to its manufacture, the mining or excavation of asbestos-bearing ore or materials, or the installation or repair of automotive materials containing asbestos.

"Asbestos-containing construction materials" is defined as "any manufactured construction material which contains more than 1/10th of [one percent] asbestos by weight." (§341.6, subd. (c).)

After the Division commenced its inspection on October 17, 2019, Associate Safety Engineer Richard Haskell ordered the demolition work at the job site to cease. Lin obtained an asbestos study on October 18, 2019, which revealed that the flooring material being demolished contained 20 percent asbestos fibers.

Appellant did not dispute the existence of asbestos-containing construction materials at the job site. Appellant also did not contest that Lara was involved in the removal of the asbestos-containing materials. Appellant did not obtain registration for the asbestos-removal work performed by Lara. Accordingly, the Division established the existence of a violation and Citation 1, Item 1, is affirmed.

3. Did Appellant establish a written Injury and Illness Prevention Program?

Section 1509, subdivision (a), requires that "[e]very employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." Section 3203 provides that employers must have a

written Injury and Illness Prevention Program (IIPP) that meets minimum requirements. In Citation 1, Item 2, the Division references the entirety of section 3203, subdivision (a), which provides:

> (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:
>
> (1) Identify the person or persons with authority and responsibility for implementing the Program.
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
> (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees. [...]
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> […]
> (5) Include a procedure to investigate occupational injury or occupational illness.
> (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:
> […]
> (7) Provide training and instruction:
> […]

In Citation 1, Item 2, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 17, 2019, the employer failed to establish a written Injury & Illness Prevention Program in accordance with this section.

On October 21, 2019, the Division requested a copy of Lin's written IIPP. No IIPP was provided to the Division and Appellant did not assert that there was an IIPP in existence. The Division established that Appellant did not have an IIPP and a violation of section 1509, subdivision (a), is affirmed.

4. Did Appellant adopt a written Code of Safe Practices related to the demolition operations?

Section 1509, subdivision (b), requires that "[e]very employer shall adopt a written Code of Safe Practices which relates to the employer's operations. The Code shall contain language equivalent to the relevant parts of Plate A-3 of the Appendix."

In Citation 1, Item 3, the Division alleges:

> Prior to and during the course of the investigation, including but not limited to, on October 17, 2019, the employer failed to adopt a written Code of Safe Practices in accordance with this section.

On October 21, 2019, the Division requested a copy of Lin's written Code of Safe Practices (CSP). No CSP was provided to the Division and Appellant did not assert that there was a CSP in existence. The Division established that Appellant did not have a CSP and a violation of section 1509, subdivision (b), is affirmed.

5. Did Appellant fail to train the workers at the job site on heat illness signs and symptoms prior to commencing work?

Section 3395, subdivision (h), provides, in relevant part:

> (h) Training.
>
> (1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:

(A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
(B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.
(C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.
(D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).
(E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life threatening illness.
(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.
(G) The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.
(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

In Citation 1, Item 4, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on October 17, 2019, the employer failed to provide effective training on the topics set forth in subsection (h)(1) to each supervisory and non-supervisory employee

before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness.

Employer did not dispute that she did not provide Lara or any other workers at the job site with training on the risk of heat illness. The Division established that Appellant did not provide heat illness prevention training, and a violation of section 3395, subdivision (h), is affirmed.

6. Did Appellant establish a written Heat Illness Prevention Plan?

Section 3395, subdivision (i), provides:

(i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:

(1) Procedures for the provision of water and access to shade.
(2) The high heat procedures referred to in subsection (e).
(3) Emergency Response Procedures in accordance with subsection (f).
(4) Acclimatization methods and procedures in accordance with subsection (g).

In Citation 1, Item 5, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on October 17, 2019, the employer failed to establish a written heat illness prevention plan as required by this subsection.

On October 21, 2019, the Division requested a copy of Lin's written Heat Illness Prevention Plan (HIPP). No HIPP was provided to the Division and Appellant did not assert that there was an HIPP in existence. The Division established that Appellant did not have an HIPP and a violation of section 3395, subdivision (i), is affirmed.

7. Did Appellant monitor airborne concentrations of asbestos to which workers might be exposed?

Section 1529, subdivision (f)(1)(A), provides:

(f) Exposure assessments and monitoring.

(1) General monitoring criteria.

(A) Each employer who has a workplace or work operation where exposure monitoring is required under this section shall perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed.

In Citation 1, Item 6, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on October 17, 2019, the employer failed to perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed.

Appellant did not dispute that she did not perform asbestos monitoring at the job site. Lin testified that she asked Lara if he thought there was asbestos in the buildings and accepted his word that the lack of a fireplace and air-conditioning meant there was no asbestos present. Appellant's failure to determine whether the workers at the job site would be exposed to dangerous airborne concentrations of asbestos is a violation of section 1529, subdivision (f)(1)(A). Accordingly, Citation 1, Item 6, is affirmed.

8. Should the penalties be waived because of the fact that Lin was required to pay a second contractor to complete the work that the unlicensed contractor had unlawfully begun?

In order to promote the purposes of the Act, "the Division…justifiably relies on the deterrent effect of monetary penalties as a means to compel compliance with safety standards." (*Maria De Los Angeles Colunga dba Merced Farm Labor*, Cal/OSHA App. 08-3093, Decision After Reconsideration (Feb. 26, 2015); *Delta Transportation, Inc.*, Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012).)

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

As set forth above, Appellant asserted that the only issue in dispute was her status as an employer. Appellant stipulated that, if it was determined that the Division had jurisdiction to issue the citations to her as an employer, she did not dispute the existence of the violations, the classifications, or the reasonableness of the penalties. In her closing argument, Appellant made the assertion that the penalties were unreasonable. However, that unreasonableness did not pertain to the calculation of the penalties. Rather, Lin argued that because she paid more than $100,000 for the project, she had already suffered "ample punishment" and, as such, the penalties for the citations are unreasonable and unnecessary to deter future violations.

Of note, Appellant's argument that the penalties are unreasonable appears to *blame* the Division for the added expense incurred after Lara ceased his unlicensed work. Lin asserted that, "As a result of OSHA's involvement, Ms. Lin had to pay a whole other company $57,000, which was on top of the $48,000 she had to pay Mr. Lara to begin with." (Lin's closing argument, Hearing Record at 1:25:10.) Lin's argument misses the mark. As set forth above, the safety regulations are in place to protect workers' health and safety. It was Lin's decision, not the Division's enforcement of established safety regulations, which caused her to pay more than she would have paid if she had hired a licensed contractor originally.

The deterrent effect of penalties serves to protect California workers by providing a disincentive for people to circumvent the safety regulations put into place to protect those workers. As set forth above, if someone hires an unlicensed contractor for a project that requires a contractor's license, that person becomes the worker's employer and is required to comply with all applicable safety orders. Allowing employers, as defined by Labor Code section 6304, to violate the safety orders would be inconsistent with the purpose of the Act and would undermine the deterrent value of penalties.

Lin's argument that she should not be required to pay the penalties set forth in the citations is rejected. Accordingly, the penalties are not waived and, pursuant to the parties' stipulation, are deemed reasonable.

Conclusions

The Division had jurisdiction to issue citations to Appellant because she employed the services of an unlicensed contractor to perform demolition services for which a contractor's license was required.

Appellant did not obtain a registration for asbestos-related work at the job site, in violation of section 341.6, subdivision (a).

Appellant did not establish an IIPP, in violation of section 1509, subdivision (a).

Appellant did not establish a CSP, in violation of section 1509, subdivision (b).

Appellant did not train the employee working at the job site about the risks of heat illness prior to commencing work, in violation of section 3395, subdivision (h).

Appellant did not establish a written HIPP, in violation of section 3395, subdivision (i).

Appellant did not monitor the airborne concentrations of asbestos to which the employee at the job site was exposed, in violation of section 1529, subdivision (f)(1)(A).

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty of $625 is assessed, as set forth in the attached Summary Table.

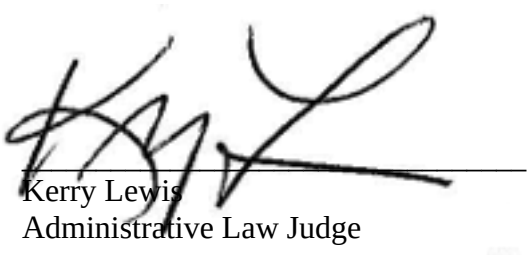
It is hereby ordered that Citation 1, Item 2, is affirmed and the penalty of $465 is assessed, as set forth in the attached Summary Table.

It is hereby ordered that Citation 1, Item 3, is affirmed and the penalty of $465 is assessed, as set forth in the attached Summary Table.

It is hereby ordered that Citation 1, Item 4, is affirmed and the penalty of $375 is assessed, as set forth in the attached Summary Table.

It is hereby ordered that Citation 1, Item 5, is affirmed and the penalty of $465 is assessed, as set forth in the attached Summary Table.

It is hereby ordered that Citation 1, Item 6, is affirmed and the penalty of $375 is assessed, as set forth in the attached Summary Table.



Dated: 05/24/2021

Kerry Lewis
Administrative Law Judge

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