

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

RUDOLPH AND SLETTEN, INC.
1750 Creekside Oaks Drive, Ste. 150
Sacramento, CA 95833-3640

Employer

Docket No. 01-R1D5-478

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed in the above entitled matter by Rudolph and Sletten, Inc. (Employer) under submission, makes the following decision after reconsideration.

JURISDICTION

Commencing on February 5, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted a regional planned inspection at a place of employment maintained by Employer at Sterling Vineyards, 1100 Dunaweal Lane, Calistoga, California (the site). On February 7, 2001, the Division issued a citation to Employer alleging general violations of sections¹ 1670(a) [no fall protection] and 1675(j) [secured portable ladder] of Title 8, California Code of Regulations, with proposed civil penalties totaling \$525.

Employer filed a timely appeal contesting the existence and classification of the alleged violations and the reasonableness of both the abatement requirements and the proposed civil penalties and raised several affirmative defenses.

On November 27, 2001, a hearing was held before Bref French, Administrative Law Judge (ALJ), in Santa Rosa, California. Ronald Medeiros, Attorney, of Robert D. Peterson Law Corporation, represented Employer. Mary Allen, Staff Counsel, represented the Division.

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

At the commencement of the hearing, Employer stipulated that the civil penalties were correctly proposed and calculated in accordance with the Division's policies and procedures. Employer limited the scope of its appeal to whether or not the safety orders were violated and contended that the inspection was invalid.

On April 3, 2002, the ALJ issued a decision denying Employer's appeal and assessing a total of \$525 in civil penalties for the two violations.

On May 8, 2002, Employer filed a petition for reconsideration. On June 11, 2002, the Division filed an answer. The Board took Employer's petition under submission on June 27, 2002, and stayed the decision of the administrative law judge pending a decision after reconsideration.

EVIDENCE

Citation 1, Item 1, General, Section 1670(a)

Citation 1, Item 2, General, Section 1675(j)

Employer was cited for failing to provide fall protection to employees working in a demolition chute who were exposed to a fall in excess of 11 feet (item 1) and for failing to ensure that a portable ladder was tied, blocked or otherwise secured (Item 2). The evidence was summarized by the ALJ, in part, as follows.

Item 1, Section 1670(a)

James McCarthy (McCarthy) testified for the Division that he was assigned by District Manager Gerald Lombardo to conduct a "regional planned" inspection at the Sterling Vineyards Winery where Employer was engaged in construction work. The Division had received information of a hazardous condition (or "potential problems") pertaining to construction activities at a worksite controlled by Employer, or one of its subcontractors, at the Vineyards. When a complaint designated as "non-formal" is received, whether or not the Division conducts an on-site inspection is at the discretion of the District Manager. In this case since the Division received a non-formal (anonymous) complaint regarding construction which is designated by the Division as a high hazard activity, an inspection was conducted as a "high hazard regional planned inspection".

On February 5, 2001, McCarthy went to Sterling Vineyards² to obtain permission to inspect construction activities at the site. From the public road McCarthy could see construction involving the removal of stucco. At the Sterling corporate headquarters, McCarthy conducted an opening conference with "Joanne", whom he knew from previous contacts at the Vineyards. He

² According to McCarthy, Sterling Vineyards owns the land and operates the Vineyards.

told her he wanted to inspect the construction work and asked for the name of the prime contractor. She identified Employer as the prime contractor. McCarthy stated that Joanne gave him "permission to see the grounds" without excluding any areas.

Joanne directed McCarthy to Ed Wheeler (Wheeler) whose business card identified him as Sterling's Director of Engineering & Environmental. McCarthy told Wheeler that he wanted to inspect for "possible work condition violations" at the construction locations and asked to be taken to where the work was being done. Wheeler indicated that Sterling Vineyards had contracted with Employer as the primary contractor to remodel and make structural repairs on certain winery facilities. Wheeler stated that Sterling Vineyards had "control" of the subcontractors and was required to provide a "safe work place" for the subcontractors, but that if there were any "safety issues" it was up to the subcontractors to correct them.

Wheeler and Brian Jones, who Wheeler identified as his assistant, took McCarthy to a deck on a hilltop site where Employer was demolishing part of a patio area. There were no Sterling employees engaged in construction activities at that location. McCarthy was concerned about a chute he observed because it was a "curious looking device" and he "wondered how it was being used." From the deck overlooking the chute, Wheeler called over Louie Cimo (Cimo), who identified himself as Employer's labor foreman and safety coordinator for the labor crew. McCarthy testified that, during an opening conference with Cimo, he identified himself as a Cal/OSHA enforcement officer; gave Cimo his business card; explained that he was there "to inspect construction work practices"; and advised Cimo that Employer could be cited for violations. He did not ask Cimo for permission to inspect or if he had authority to consent to an inspection since Cimo identified himself as Employer's labor foreman. According to McCarthy, Cimo stated that he was "happy to co-operate"³; that "Employer was big on (concerned with) safety"; and he (Cimo) "knew about Cal/OSHA" having attended OSHA safety classes. Subsequently, Jim Payne (Payne), who identified himself as a second superintendent for Employer, joined them and indicated that he wanted to observe the inspection. McCarthy conducted an abbreviated opening conference with Payne.

Cimo told McCarthy that there were six laborers at the site. Cimo stated that "last Thursday or Friday" he and Geoffrey Reed (Reed) had been in the chute depicted in photograph Exhibit 2. Materials were placed in the chute by wheel barrel or thrown into it. McCarthy was told by Cimo that he and Reed would walk down the chute backwards while kicking debris down the ramp to a dumpster. When McCarthy asked Cimo about fall protection, Cimo indicated that he "didn't see any problem." According to Cimo, the workers were not tied off to a catenary line or required to use safety harnesses.

³ On cross-examination, McCarthy stated that he wrote on the Division's form 1A information intake sheet that "during an opening conference with Louie Cimo, Cimo stated that he was familiar with Cal/OSHA and agreeable to inspection process".

From the landing above the chute, McCarthy photographed the plywood chute depicted in Exhibit 2, which was located in a pre-existing stairwell. He stated that the chute did not have guardrails on either side above the sidewalls. McCarthy measured the chute as 47 inches wide and the sidewalls as 14 inches high. He opined that if employees slipped on the debris in the chute, they could fall over the edge to the ground below, as depicted Exhibit 5. With a tape measure, McCarthy measured the distance from the ground to the upper part of the chute as between 11 feet and 11 feet, 11 inches, as marked by McCarthy on Exhibits 2 and 4, and noted on a sketch he drew of the site. (Exhibit 6) McCarthy took the photos marked as Exhibits 2 and 4 on February 7, 2001, after guardrails were installed by Employer to abate the violation.

At the conclusion of the inspection on February 5, 2001, McCarthy went to Employer's job trailer for an exit conference with Jim Russell (Russell), who identified himself as Employer's "first superintendent." McCarthy told Russell that he was there "to inspect construction work practices and that any violations could result in citations." He discussed the inspection he had conducted but when he told Russell that Employer would be cited and fined for violations, Russell became "uncooperative" and directed McCarthy to Kelli Moulden (Moulden). McCarthy subsequently spoke with Moulden, who identified herself as Employer's safety representative for the Sacramento area, and arranged an interview with Reed. Before McCarthy left the site, Wheeler told him that there was "no problem" with McCarthy returning to the site to interview Reed.

On February 7, 2001, McCarthy returned to the Vineyards and met with Reed, Russell and Moulden, who presented her business card. When interviewed, Reed stated that he was in the chute on February 5, 2001, and described how he and other crew members "walked backwards" down the chute to kick materials into the dumpster. Russell told McCarthy that he had been "chastised" and "made to feel uncomfortable" by Employer and "did not want to cooperate any further with Cal/OSHA."

Gerald Lombardo (Lombardo) testified for the Division that as the District Manager for the Division's Santa Rosa office he determined that there was insufficient information from the caller to designate the inspection at Sterling Vineyards as a "complaint" inspection. Prior to receiving the call, Lombardo was aware that construction was going on at Sterling Vineyards in locations visible from the public road. Since construction is considered a high-hazard activity the inspection was designated as a "high hazard regional planned inspection."

Reed testified for the Division that on February 5, 2001, he was employed by Employer as a laborer on the Sterling Vineyards project. He identified the chute depicted in Exhibit 2 as the "trash chute" that the crew used to slide trash that had been "demo'd out of the job" to the dumpster. There were no railings on the chute (as depicted in Exhibit 5) when he and the other crewmembers used a broom to push debris or roll larger materials down

the chute. He did not recall seeing Cimo working in the chute. He did not tell McCarthy that he "walked backwards" down the chute but that he "walked forward" as he pushed the debris "all the way down the chute to the bottom." Reed stated that he went down the chute in the manner he described "over 100 times" in one month.

Cimo testified for Employer that on February 5, 2001, as the labor foreman and safety co-coordinator for Employer at Sterling Vineyards, he was in charge of a five person demolition and cleanup crew and responsible for their safety. On February 5, 2001, Brian Jones, Sterling's project manager, called Cimo over to meet McCarthy, who was with Ed Wheeler near the trash chute at Portica Plaza, an area overlooking the trash chute. McCarthy, who identified himself as "with Cal/OSHA", stated that he wanted to look at the jobsite, but never told Cimo that he would "issue violations." McCarthy did not ask him for "consent to inspect", however, when McCarthy asked to speak to Cimo, he said, "Go ahead." The witness indicated that he "did not have that authority" [to consent to an inspection] and "did not consent to anything." Cimo denied telling McCarthy that he was familiar with Cal/OSHA or agreeable to an inspection. He indicated that he had never been involved with an "OSHA inspection" where "citations were issued" but knew about citations from safety training on OSHA requirements. Prior to the inspection, Employer had told him that if an OSHA inspector was onsite he was to notify a superintendent or safety manager, however, he thought it was "okay" to speak to McCarthy since he was not told by management prior to the inspection not to speak to him.

Cimo stated that the trash chute depicted in Exhibit 2, was in the same unguarded condition as when he entered it. Cimo testified that he told McCarthy that he would climb in the chute, put his hands on the side walls, and push the debris with his feet while backing down the chute to the dumpster. Cimo, Reed and one other employee used the chute on a daily basis.

Item 2 - Section 1675(j)

McCarthy testified for the Division that while in the St. Dunstons Room wine cellar with Cimo and Wheeler on February 5, 2001, he observed a man start down a portable aluminum ladder from a platform above the wooden floor. The platform measured 6 feet, 8 inches high, as depicted in photograph Exhibit 3. McCarthy directed the man to stop since the ladder was not secured at the top or platform level against displacement. The base of the ladder had rubberized pads for skid protection; however, the pads could "skip out" from the weight of someone stepping on the top of the ladder, which was at a steep angle. When McCarthy put his hand on the ladder he could move it easily. The man on the ladder, who subsequently identified himself as Mark Kaseman (Kaseman), a foreman carpenter, told McCarthy that the ladder did not need to be secured. McCarthy wrote in his notes that Kaseman told him he had used the ladder in that condition "at least 2-3 times this morning."

Mark Kaseman testified for Employer that on February 5, 2001, he was employed by Employer as a carpenter at Sterling Vineyards. He went to the St. Dunstons Room to get a builders level. He picked up the ladder off the plywood floor; set it up against the platform (as depicted in Exhibit 3); set the ladder's "shoes" in the locked position; checked to see that it had "a good footing," then went up onto the platform and through a door to an office in back. Five minutes later he came out the door onto the platform, handed Cimo the level, went down the ladder, and left. McCarthy did not stop him from going down the ladder. He did not recall if McCarthy said anything to him.

The ladder had previously been blocked and tied-off at the platform. Kaseman unblocked and untied it as it was in the way of other employees installing "sleepers" (setting up 2 by 4's) on the plywood floor.

Kaseman denied telling McCarthy that he used the ladder "unsecured" two or three times that morning. Kaseman stated that he used the ladder twice that morning. Both times it was "in a secure position" and may still have been blocked and tied-off the first time he used it.

ISSUES

1. Did the Division conduct an invalid inspection of Employer's worksite without consent which compels exclusion of all evidence presented by the Division in support of the violations?
2. Does the evidence establish violations of sections 1670(a) and 1675(j)?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

In its petition for reconsideration, Employer contends that: "the Division's inspection was illegal as it was conducted without [Employer's] consent; that all evidence offered by the Division in support of Citation 1, Items 1 and 2, was gained as a result of its improper inspection; that all evidence which was gained as a result of the Division's improper inspection should be excluded; and that absent any valid evidence in support of Citation 1, Items 1 and 2, each alleged violation should be dismissed."

Employer's claim of illegality of the inspection is based upon an alleged lack of consent to the inspection. Absent consent required under the Act which would justify a warrantless inspection, Employer maintains that the Division's inspection violated its rights under the 4th Amendment to the U.S. Constitution and under the California Constitution.

The critical question in this case is whether there was consent for the Division to inspect under the Act. As further discussed below, "consent" is a

question of fact. Consistent with criminal cases which have defined the Fourth Amendment's constitutional protections for searches and seizures and recognized "consent" as an exception to the warrant requirement, the Board has relied upon such cases in interpreting "consent" under the Act and also views consent as a well-recognized exception to the warrant requirement in Cal/OSHA cases challenging the validity of an inspection. (*Beacom Construction Co.*, Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981)⁴

Accordingly, if consent is found to exist *under the facts*, then the inspection is valid and there is no violation of the 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. Absent a violation of those rights, there would be no basis for suppressing any evidence obtained during the inspection.⁵

On the other hand, if consent or other facts or circumstances reasonably justify the failure to seek permission are found *not* to exist, then a constitutional analysis becomes necessary to determine the validity of the warrantless inspection in areas where an employer has "a reasonable expectation of privacy." The remedy for such an invalid inspection to suppress some or all evidence obtained by the Division thus only may be considered when there are determinations that no consent to inspect existed, no other justification for the warrantless inspection was established, *and* the inspection intruded in areas where an employer had a reasonable expectation of privacy.

We will now address these matters in their stated order.

1. The Validity of the Inspection Based Upon Consent

a. Consent Under the Act

The Cal/OSH Act (Act) provides the Division with authority "[t]o make an investigation or inspection...upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect during regular working hours, and at other reasonable times when necessary for the protection of safety and health, and within reasonable limits and in a reasonable manner." (Labor Code section 6314(a))⁶

⁴ The warrant requirement constitutes the general rule for searches and seizures under the 4th Amendment.

⁵ The judicially-created exclusionary rule is based upon the Fourth Amendment of the U.S. Constitution which protects against unreasonable searches and seizures where a reasonable expectation of privacy exists. (*Mapp v. Ohio* (1961) 367 U.S. 643 [the right to privacy in the Fourth Amendment is enforceable against the States through the Fourteenth Amendment of the U.S. Constitution]; *People v. Tillery* (1989) 211 Cal.App.3d 1569) The exclusionary rule is thus asserted for the purpose of suppressing evidence obtained by law enforcement as a result of an invalid search or seizure of a person or property.

⁶ Similar language in the federal Occupational Health and Safety Act was held unconstitutional *to the extent* it purports to authorize inspection of business premises without a warrant or its equivalent. (*Marshall v. Barlow's, Inc.*, (1978)436 U.S. 307)

The Act further provides a *procedure* for inspection or investigation by the Division. Specifically, Labor Code section 6314(b) provides that if *permission* to investigate or inspect is refused, or the facts or circumstances reasonably justify the failure to seek permission, the Division may obtain an inspection warrant.⁷ (Labor Code section 6314(b)) We interpret the word "permission" in Labor Code section 6314(b) as synonymous with the term "consent" in our analysis.⁸ Thus, the section provides inspection procedures and alternatives for securing access to a worksite.⁹

In seeking permission or consent to inspect, the presentation of credentials is a valid request to inspect. (*Scribner Construction*, Cal/OSHA App. 93-2161, Decision After Reconsideration (Sept. 1, 1998); see also, Labor Code section 6314(a)) It would follow that presentation of credentials along with a statement informing the employer of the purpose of the inspection would also manifest a request to inspect.

It is widely accepted that the law does not require that an inspector inform Employer of its right to refuse to permit inspection. (*Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985), citing *People v. James* (1977) 19 Cal.3d 99, 115-116; *United States v. Thriftmart, Inc.*, (1970) 429 F.2d 1006 (9th Cir.), cert. denied 400 U.S. 926 (1970) [fact that FDA inspectors did not warn defendant's warehouse managers of their rights to insist upon a warrant did not render their consent to inspect unknowing or involuntary] While a person must knowingly and voluntarily waive his or her constitutional rights for a waiver to be effective in the criminal context, the standard is less rigid in an administrative regulatory context. *Aman & Mayton, Administrative Law*, 2nd ed., 2001, West Group, § 20.7.3, p. 795.¹⁰

Consent must be a product of free will and not a mere submission to an express or implied assertion of authority; consent may be expressly or impliedly withdrawn. (*People v. Shelton* (1964) 60 Cal.2d 740) The voluntariness of consent is a *question of fact* to be determined in light of all the

⁷ Under the Act, consent is one of two ways to obtain access to a worksite prior to seeking an inspection warrant whereas consent is a recognized exception to the warrant requirement under the U.S. Constitution (4th Amendment) and California Constitution (Art. 1, § 13). In both contexts, the inquiry is the same---whether there was free and voluntary consent. The Supreme Court in *Marshall v. Barlow's Inc.*, *supra*, in holding that the Federal OSH Act was unconstitutional, discussed Federal OSHA regulations (e.g. 29 U.S.C. § 1903.4 (1977)) which provided a procedure that inspectors request entry and, in the event of refusal, may obtain compulsory process (warrant). The court indicated that such procedural provisions undercut the Secretary's argument that the Federal Act expressly allowed for warrantless inspections without notice to employers. (*Barlow's*, *supra*, 436 U.S. at 317-320)

⁸ Each word is provided as a synonym for the other in *Roget's College Thesaurus*, Random House, 2000, pp. 149, 529.

⁹ The statutory language does not, as Employer suggests, establish an *exclusive* requirement of consent or permission by an employer to inspect.

¹⁰ "The primary purpose of a Cal-OSHA inspection is not to discover evidence of a crime but rather to enforce standards designed to assure safe and healthful working conditions for employees." (*Schwasser v. Occupational Safety and Health Appeals Board*, 214 Cal.App.3d 625, 632, citing Labor Code section 6300 [lesser standard of administrative probable cause is required for inspection warrant; if investigation evolves into a criminal investigation, a showing of traditional probable cause would be required])

circumstances. (*Beacom Construction, supra*, citing *People v. James* (1977) 19 Cal.3d 99, 106 and *People v. Reyes* (1974) 12 Cal.3d 486, 501.)

The Division has the burden of proving, by a preponderance of evidence, free and voluntary consent as a justification for a warrantless inspection. (See, *People v. James, supra*, 19 Cal.3d 99, 106, fn 4.)¹¹

b. Consent by Sterling Vineyards

"A warrantless search may be reasonable not only if the defendant consents to the search, but also if a person other than the defendant with authority over the premises voluntarily consents to the search." (*People v. Jenkins* (2000) 22 Cal.4th 900, 971, citing *United States v. Matlock* (1974) 415 U.S. 164, 170-171)) The consent of one who possesses common authority over or other sufficient relationship to the premises or effects is valid against the absent or non-consenting person with whom that authority is shared. (*People v. Jenkins, supra*, 22 Cal.4th 900, 976)

The Board has held that an owner of property who retains control or access over its property has the authority to consent to an inspection, including inspection of subcontractors on their site. (*Caves Construction, Cal/OSHA App. 90-498, Decision After Reconsideration* (May 8, 1991); see also, *Metro-Young Construction Co., Cal/OSHA App. 82-674, Decision After Reconsideration* (Apr. 24, 1986) [owner and general contractor's consent applied to inspection of subcontractor's work despite subcontractor's refusal])¹²

Inspectors may reasonably rely on "apparent" authority for consent by a third party, even if there is no actual authority. (See, *Illinois v. Rodriguez*, (1990) 497 U.S. 177, 186 *People v. Roman* (1991) 227 Cal.App.3d 674, 679) The Division may carry its burden by showing that the inspector had an *objectively reasonable belief* that the person consenting to the search had the authority to do so and that consent included the areas inspected. (See, *People v. Jenkins, supra*, 22 Cal.4th 900, 974, citing *Illinois v. Rodriguez, supra*, 497 U.S. 177, 186.

¹¹In its appeal form filed with the Board, Employer asserted the invalidity of the inspection as an affirmative defense. Generally, as the party raising the defense, it was Employer's burden to prove its defense. In *Scribner Construction*, the Board cited *People v. Carson* (1970) 4 Cal.App.3d 782, 785-786, as authority for fixing the burden not on the prosecutor to establish a valid search but upon the defendant to raise the issue and prove that a search was invalid. However, *Carson* further instructs that while the initial burden of introducing or producing evidence to make out this prima facie case of illegality is on the defendant movant, when the defendant makes a prima facie case of the illegality (e.g., absence of a warrant), the burden then shifts and rests on the prosecution to show proper justification for the inspection based upon a recognized exception to the warrant requirement. (*Id.*, at 786; *People v. James, supra*, 19 Cal.3d 99, 106)

¹²Consent sufficient to validate a warrantless inspection may be granted by someone other than the target of the search. (See, *Frazier v. Cupp*, 394 U.S. 731 (1969). Such valid third-party consent may be given by any individual who possesses common authority over, or other sufficient relationship to, the premises or effects to be inspected. *United States v. Matlock, supra*, 415 U.S. 164, 169-171. Such common authority does not derive from mere ownership of the property but rests on mutual use of the property by persons having joint access or control. *Id.* at 171, n. 1.

In this case, we find that McCarthy entered Sterling Vineyards and proceeded to Sterling's on-site corporate office where he spoke with "Joanne", Sterling's personnel manager, who he knew from previous contacts (inspections) with Sterling. After telling Joanne that he wanted to inspect the construction work at the vineyards, and asking her for the name of the prime contractor, Joanne gave McCarthy "permission to see the grounds" without limitation.¹³ Joanne identified Employer as the prime contractor and directed McCarthy to Ed Wheeler who met McCarthy in Sterling's office.

McCarthy held an opening conference with Wheeler, who produced a business card that identified him as Sterling's Director of Engineering & Environmental. McCarthy told Wheeler that he wanted to inspect for "possible work condition violations" at the construction sites; asked to be taken to where the work was being done, and stated that he "wanted to speak to somebody in charge there." Wheeler did not voice any objection on behalf of Sterling to McCarthy's request to proceed further onto its property to inspect the construction sites, which Wheeler confirmed were controlled by Employer as the primary contractor. Wheeler stated that Employer had contracted with Sterling Vineyards to remodel and make structural repairs on certain winery facilities. Wheeler complied with McCarthy's request by directing him to and meeting with him at a hilltop site overlooking the trash chute where Employer was demolishing part of a patio area. There they were joined by Brian Jones, who Wheeler identified as his assistant.

Given the above facts, we find that there was an objectively reasonable belief by McCarthy that Sterling, as owner of the property who retained access to the construction activities, had authority over the property and access to the areas of construction activity as to which consent to inspect was given, and that the extent of its consent extended to all of the construction areas on its property. Conversely, there was no evidence offered by Employer which disputed McCarthy's testimony regarding consent provided by Sterling which the ALJ credited.¹⁴

¹³ The ALJ found that Joanne's response to McCarthy's request purportedly granting *permission to inspect*, which was objected to by Employer at the hearing, was admissible hearsay under section 372.6 which supplemented McCarthy's testimony as to how he came in contact with Wheeler and explained why he sought out Employer's worksites. More specifically, the Board finds that it supplements and explains McCarthy's subsequent and immediate conduct in meeting with Wheeler who then showed the inspector the construction site. The consistency between Joanne's statement and the subsequent conduct of McCarthy and Wheeler renders the statement reliable. Alternatively, a statement is *not* hearsay where the statement is not being offered to prove the truth of the facts stated in the statement but to prove, as a relevant and disputed fact in the action, that the recipient or hearer of the statement learned certain information by hearing or reading the statement and, believing such information to be true, acted in conformity with such belief. (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 905) Here, the statement of Joanne tends to prove its effect upon McCarthy who, upon hearing Joanne's statement, believed he had permission to inspect the site without limitation and that he acted in conformity with such belief by meeting with Wheeler and subsequently inspected the site. Thus, Joanne's statement is judicially recognized as not hearsay and is admissible.

¹⁴ Also, the Board agrees with the ALJ's finding, that it can reasonably be inferred from Wheeler's action in directing McCarthy to Employer's construction site and meeting him there that Sterling did not object to McCarthy's continuing presence on Sterlings' property.

Accordingly, we find that Sterling's consent (through Joanne and Wheeler) to inspect the premises permitted a reasonable inspection of the areas of Employer's construction activity on Sterling's property which included the outdoor demolition chute and St. Dunstons Room.

c. Consent by Employer

The Board also finds that the inspection of Employer's worksite was performed under consent by Employer in view of the circumstances in this case.

The Board finds that McCarthy asked Wheeler if he could be taken to someone in charge of Employer's activities. At the hilltop overlooking the demolition chute, Wheeler called Cimo over to introduce him to McCarthy. McCarthy testified that, after Cimo identified himself as Employer's labor foreman, he conducted an opening conference with him wherein he identified himself as Cal/OSHA enforcement (officer); gave Cimo his business card; explained the reasons for the inspection which was "to inspect workplace conditions involving Rudolph & Sletten"; and advised Cimo that Employer could be cited for violations. He did not actually ask Cimo for permission to inspect the area; rather, he reasonably concluded that he had permission to inspect when Cimo responded that Employer was "very concerned about safety issues", and he (Cimo) was "happy to co-operate." On his intake information sheet, McCarthy memorialized his observation that Cimo "was agreeable to inspection process."¹⁵

The Board further finds that McCarthy's identification as a Cal/OSHA enforcement officer and his statement of the purpose of his visit to inspect constituted a valid request to inspect. The fact that McCarthy was speaking with Employer's labor foreman and safety coordinator who supervised the labor crew at the site who was both cooperative and responsive to McCarthy's questions, established a reasonably objective belief by McCarthy to view Cimo's conduct and failure to assert any objection to the inspection as consent.

¹⁵ Cimo testified that that he was Employer's labor foreman and safety coordinator responsible for supervising six laborers. Cimo denied: that he had authority to consent to an inspection; that he had any knowledge of the purpose for McCarthy's visit at the site; that he told McCarthy that he was "familiar with Cal/OSHA" or "agreeable to the inspection". He testified that he had no idea that the Division's inspection was "for citations" and thought that Wheeler, Jones, and McCarthy were only "walking the job." The ALJ stated that Cimo's testimony seemed somewhat rehearsed in an attempt to fit the facts into correct legal concepts regarding "consent" and that, based upon his testimony, Cimo was not as unsophisticated as he would have it appear. The ALJ noted that Cimo's testimony was inconsistent as to when and why he called Payne. The ALJ's analysis of Cimo's testimony indicates that the ALJ did not credit his testimony with respect to his lack of authority to consent, his lack of knowledge regarding the visit vis-a-vis McCarthy's testimony. The Board will not disturb the ALJ's credibility determinations absent substantial evidence to the contrary since the ALJ was present to hear the testimony and observe the witnesses' demeanor while testifying. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-19; *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281; *Lortz & Son Mfg. Co., OSHAB 80- 61 8, Decision After Reconsideration* (Aug. 28, 1981))

Additionally, Payne, Employer's second superintendent, joined them while McCarthy was speaking to Cimo on the deck above the chute. McCarthy conducted an abbreviated opening conference with Payne, after which Payne chose to act as an observer and remained with the group for the rest of the inspection. There is no evidence that, at the time of the opening conferences, Employer's labor foreman or Employer's second superintendent, objected to McCarthy's inspection of the construction site.¹⁶ Nor is there any evidence that the two representatives withdrew consent expressly or impliedly by their conduct.

Misrepresentation and coercion are important circumstances to be considered in assessing whether consent is voluntary. *Schneckloth v. Bustamonte*, (1973) 412 U.S. 218.¹⁷ There is no credible evidence in the record to support any misrepresentation by McCarthy of facts regarding his credentials or the purpose of the visit, or that he otherwise coerced Cimo to permit the inspection.

Employer also argues that Cimo was not authorized to consent to an inspection and that Employer had a policy requiring notification to its management of any request to inspect. The Board has rejected an employer's reliance upon the law of agency as controlling a determination of consent. In *Gaehwiler Construction, supra*, the Board held that "[a]n 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", citing *People v. Parker* (1975) 45 Cal.App.3d 24, 31. Here, McCarthy was introduced to Cimo upon request (to Wheeler) to meet with the person "in charge" for Employer where McCarthy was informed by Cimo that he was Employer's labor foreman. Upon McCarthy identifying himself and the purpose of his visit, Cimo did not immediately contact his supervisors but, to the contrary, expressed a willingness to cooperate and answered McCarthy's questions. Additionally, the Division cannot be charged with knowledge of Employer's policy regarding procedures for notifying Employer's management of a request to inspect.

In view of the totality of the evidence regarding McCarthy's initial meeting with Cimo and Payne, their cooperative conduct throughout the inspection, and the lack of any words or actions by them which could have manifested a lack of consent or objection to the inspection, the Board finds that there was consent by Employer permitting the Division to inspect the areas of Employer's construction activities at the site.

¹⁶ In *Stephenson Enterprises, Inc. v. Marshall*, (1978) 578 F.2d 1021, 1023-24 (5th Cir.), a federal court held that consent may be inferred where an employer's representative voices no objection throughout a walkaround inspection during which violations were plain to see.

¹⁷ e.g., *Daniel Intern. Corp., Brown & Williamson Project*, 9 BNA OSHC 1980, 1985 n. 13, 1981 CCH OSHD ¶ 25,492, p. 31,792 n. 13 (No. 15690, 1981), rev'd on other grounds, 683 F.2d 361 (11th Cir.1982) (since the record did not reveal coercion or misrepresentation, it was enough that the compliance officer presented his credentials and described the nature of the inspection).

Since the Board finds that both Sterling and Employer effectively consented to the inspection, the inspection was valid and not violative of Employer's 4th Amendment rights. Thus, the Board need not address the remedy sought by Employer to exclude all evidence obtained by the Division to support its citations for the two subject violations.

2. Employer Also Did Not Demonstrate It Has a Reasonable Expectation of Privacy in the Areas Inspected

As discussed above, the Board finds that there was, in fact, consent to the Division's inspection. The Board also finds that Employer did not establish a reasonable expectation of privacy sufficient to establish the invalidity of the inspection on constitutional grounds.

The courts have recognized that employers may have a reasonable expectation of privacy that is protected by the 4th Amendment of the U.S. Constitution. (*Marshall v. Barlow's, Inc.*, (1978) 436 U.S. 307, 313-315 [warrantless inspection of business premises].)

One must establish his or her standing with respect to the place inspected. (*People v. Jenkins, supra*, 22 Cal.4th 900, 972) An employer has the burden of establishing that it has a "reasonable expectation of privacy" in the particular place searched in order to claim a Fourth Amendment challenge. (See, *Id.*)¹⁸

In this context, for the expectation of privacy to be reasonable, it must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. (*People v. Jenkins, supra*, 22 Cal.4th 900, 972, citing *Minnesota v. Carter*, 525 U.S. 83, 88 (1998))¹⁹

In the past the Board has considered employer arguments regarding a reasonable expectation of privacy. (*Caves Construction, supra*, Cal/OSHA App. 90-499, Decision After Reconsideration (May, 8, 1991) and *Metro-Young*

¹⁸ In addition to the express reference to the 4th Amendment of the U.S. Constitution, Employer also alludes to a violation of its rights under the California Constitution but provides neither specific grounds nor citation to a provision upon which it relies. Employer has not provided a basis for establishing an independent State ground that exceeds the protections provided under the 4th Amendment. Indeed, the California Supreme Court has stated on more than one occasion that, in the search and seizure context, neither section 1 ("right to privacy") nor section 13 (prohibition against unreasonable searches and seizures) has been held to establish a broader protection than that provided under the 4th Amendment. (*Hill v. N.C.A.A.* (1994) 7 Cal.4th 1, 30; *People v. Crowson* (1983) 33 Cal.3d 623, 629, reversed on other grounds in *People v. Guerrero* (1988) 44 Cal.3d 343). In any event, both under the right to privacy (Art. 1, § 1) and the State constitutional provisions regarding search and seizure (Art. 1, § 13), one must first establish an objective reasonable expectation of privacy (*People v. Seaton* (1983) 146 Cal.App.3d 67, 81) which is discussed above.

¹⁹ The touchstone of Fourth Amendment analysis has been the question whether a person has a "constitutionally protected reasonable expectation of privacy." *Katz v. United States*, (1967) 389 U.S. 347, 360 (Harlan, J., concurring). The Fourth Amendment does not protect the merely subjective expectation of privacy, but only "those expectations that society is prepared to recognize as 'reasonable.'" (*Id.*, at 361; *People v. Mayoff* (1986) 42 Cal.3d 1302 [the privacy expectation must be objectively reasonable])

Construction Co., *supra*, Cal/OSHA App. 92-675, Decision After Reconsideration (Apr. 24, 1986) This is a fundamental consideration for warrantless searches and seizures under the Fourth Amendment.

In *Caves Construction*, *supra*, the employer did not demonstrate a reasonable expectation of privacy concerning work its employees performed on the property of another. No evidence was presented that its contract with the owner of the property required the owner of the property to protect its privacy with respect to that work, or that the owner of the property made representations to that effect which the employer may have reasonably relied upon.²⁰

In *Metro-Young Construction*, the Board distinguished cases involving the right of a co-possessor or co-occupant of a private residence to be free from an unreasonable search. The Board held that a subcontractor on a construction site did not have an analogous expectation of privacy since third parties (i.e., the general contractor and the owner's representative) controlled the construction site where the employer was operating.

In this case, the Board finds that Employer has not made the requisite showing that it had a reasonable expectation of privacy in the particular areas inspected by the Division in order to establish its Fourth Amendment challenge. McCarthy had an open and unobstructed view of the demolition chute when he was taken to the construction area overlooking the remodeling work at Portica Plaza. Although there was evidence that Employer's work area at the Portica Plaza near the demolition chute was closed (taped-off) to the public during the construction, such limitation appears to have been more for the safety of those excluded and to prevent interference with the work being done than because of any need or desire for privacy.

Also, Employer did not demonstrate any expectation of privacy it may have had in the St. Dunstons Room where the Division inspected and determined a safety order violation after observing an employee of Employer using an unsecured ladder. While the photograph of the ladder shows construction tools, lights and some equipment, such evidence does not in and of itself establish any reasonable expectation of privacy for Employer for that particular area.²¹

²⁰ In *Caves Construction*, the Board held that the property owner's relationship with the contractor was substantially similar to the relationship between a general contractor and subcontractor on a construction project. The Board has held in a number of cases that a general contractor's consent applies to inspection of the subcontractor's activities on a construction site. (E.g., *R. Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999); *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 85-649, Decision After Reconsideration (Sept. 1, 1987); *Rossi Construction Company*, Cal/OSHA App. 84-486, Decision After Reconsideration (Feb. 7, 1986); *Stott Erection, Inc.*, Cal/OSHA App. 85-1106, Denial of Petition for Reconsideration (Dec. 24, 1985))

²¹ The Board acknowledges that there may have been areas or facilities where Employer had a reasonable expectation of privacy such as secured material facilities, supply, equipment, or tool storage areas as well as Employer's jobsite trailer (temporary office) located on Sterling's property. Since there is no evidence that the Division inspected or obtained evidence from such areas for purposes of the citations, the Board

In the absence of a showing by Employer of a reasonable expectation of privacy at the patio demolition site and the St. Dunstons Room, the Board finds that the Division's inspection of those areas was not unreasonable within the meaning of the Fourth Amendment.²²

3. The Evidence Establishes General Violations of the Safety Orders

a. Item 1 - Section 1670(a)

Employer asserts that the ALJ erred in finding a violation of the safety order²³ because she improperly determined that Employer had the burden of proving that employees working in the trash chute were not subject to any fall hazard; and in any event, the evidence establishes that employees pushing debris down the chute were not exposed to any existing fall hazard given the slight slope of the debris chute, the placement of an employee's body in the center of the chute, and the use of the side walls as handholds.

Employer correctly states that the Division is required to establish violations by a preponderance of evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The general fall protection order found in section 1670(a) applies to work performed at the perimeter of a structure²⁴ at a height of 7 and 1/2 feet or more.

The Board's examination of the ALJ's finding that Employer failed to establish the angle of the debris chute, the height of the side walls, or that employees used the sidewalls as handholds, indicates that the ALJ was addressing *Employer's contention* stated in Appellant's Response to Division's Post-Hearing Brief, p. 22. Since such points do not pertain to any required element for establishing a violation of the safety order, the matters amounted to assertion of an affirmative defense to the violation. As the party advancing such affirmative defense, Employer had the burden of producing evidence in support of its stated contentions (*Gal Concrete Construction, Inc.*, Cal/OSHA

need not reach the question as to which areas at the site Employer may have had a reasonable expectation of privacy.

²² Employer's request for application of the exclusionary rule for the alleged violation of its Fourth Amendment rights referred to the exclusion of all evidence obtained as a result of the Division's inspection. Much of the evidence obtained by the Division, however, was established through the inspector's personal observations and statements by Cimo and Kaseman in response to questions from McCarthy during the inspection. The statements are not protected by the Fourth Amendment and Employer made no claim of Fifth Amendment (self incrimination) violations for statements obtained by the Division's inspector.

²³ Section 1670(a) states: "Approved personal fall arrest, personal fall restraint or positioning systems shall be worn by those employees whose work exposes them to falling in excess of 7-1/2 feet from the *perimeter of a structure*, unprotected sides and edges, leading edges, through shaftways and openings, sloped roof surfaces steeper than 7:12, or other sloped surfaces steeper than 40 degrees not otherwise adequately protected under the provisions of these Orders." (italics added)

²⁴ "Structure" is defined in section 1504 of the Construction Safety Orders as: "That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner."

App. 89-317, Decision After Reconsideration (Sept. 27, 1990); *Central Coast Pipeline Construction Company, Inc.*, Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).) The Board finds no error in the ALJ's finding that Employer failed to establish the facts it asserted in defense of the violation.

The ALJ found and the Board agrees that it is undisputed that the trash chute was unguarded when employees entered it; that based on the Division's photographic evidence (Exhibits 2, 4 and 5), and McCarthy's credible testimony including his measurements of the fall distance, Employer's employees were working at the *perimeter of a structure*—a 47-inch wide trash chute—at heights in excess of 7 and 1/2 feet without any approved fall protection. The evidence establishes that employees working on top of the chute to move debris downward inside the chute were exposed to a fall hazard from the perimeter of the entire length of the chute with fall distances ranging from 8 feet to 11 feet, 11 inches.

Therefore, based upon an independent review of the record and the findings of the ALJ, the Board finds a violation of section 1670(a).

b. Item 2 – Section 1675(j)

Section 1675(j) states:

Portable ladders in use shall be tied, blocked, or otherwise secured to prevent their being displaced."

Employer maintains that the ALJ erred in finding a violation of the safety order because the subject ladder McCarthy observed was equipped with *rubber pads*. Employer cites *J & J Plastering, Inc.*, Cal/OSHA App. 85-343, Decision After Reconsideration (July 8, 1986) as authority providing that installation of *safety shoes* was an acceptable method to secure portable ladders against displacement.²⁵ Since the subject ladder in this case had *rubber pads*, Employer states it was secured against displacement by safety shoes.

The ALJ determined that Employer did not establish that the ladder had safety shoes. No testimony was presented to establish that rubber pads were "safety shoes" and that such pads effectively secured the ladder against displacement. The ALJ correctly noted that the Board in *J & J Plastering* stated that "[t]he fact that the ladder was equipped with safety shoes is not dispositive" and that, whatever method is used, the ladder must be secure against displacement. (*Id.*)

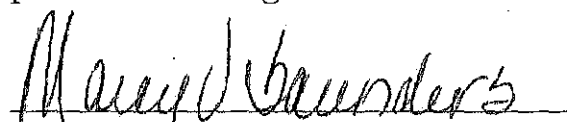
²⁵ In *J & J Plastering*, the employer was cited for violation of section 1675(d). The safety order has been amended and renumbered to be included within section 1675(j). The Board suggested the following means to secure against displacement: (1) By nailing a cleat on the floor in front of the ladder, (2) By fastening the feet rigidly to the floor, (3) By having the feet on the ladder shod with steel points, (4) By lashing or fastening the ladder at the top, and (5) By installing safety shoes.

The Board again agrees with the ALJ's finding that Employer did not provide any evidence to establish that the rubber pads are "safety shoes", and further, that the use of such means effectively secured the subject ladder against displacement. Employer simply asks the Board to accept its conclusionary proposition that rubber pads are safety shoes without evidentiary support and the Board is not prepared to accept such proposition without any showing that the rubber pads on this particular ladder constituted safety shoes, and that the rubber pads effectively secured the ladder against displacement.

Since the evidence established that the subject ladder was not tied, blocked or otherwise secured against displacement, a violation of the safety order was established by the Division.²⁶

DECISION AFTER RECONSIDERATION

Employer's appeal is denied and the violations are affirmed. Civil penalties totaling \$525 are assessed.


MARCY V. SAUNDERS, Member


GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

FILED ON: MAR 30 2004

A.M.



²⁶ Employer also states that the ALJ improperly relied upon the opinion testimony of Kaseman, Employer's employee, who was observed by McCarthy using the ladder, to determine the violation of the safety order since he was not a representative of Employer whose statements could be attributed to Employer and without evidence of any particular expertise regarding the requirements of the safety order. The Board need not consider this argument because the above analysis independently establishes a violation of the safety order.