

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

In the Matter of the Appeal of:

**TREASURE ISLAND MEDIA, INC.
351 9TH Street, Suite 302
San Francisco, CA 94103**

Employer

DOCKETS 11-R6D1-1093
through 1095

DECISION

Background and Jurisdictional Information

TREASURE ISLAND MEDIA, INC. (“Employer” or “TIM”) is an adult film production and distribution company. From November 4, 2009 through March 25, 2010, the Division of Occupational Safety and Health (the Division) through Senior Safety Engineer Eugene Murphy conducted an inspection at 351 9th Street, Suite 302, San Francisco California. On March 25, 2010, the Division cited Employer for the following alleged violation of the occupational safety and health standards found in Title 8, California Code of Regulations¹:

| <u>Cit/Item</u> | <u>Alleged Violation</u> | <u>Classification</u> | <u>Penalty</u> |
|------------------------|--|------------------------------|-----------------------|
| 1-1 | §3202(a) Failure to develop IIPP | General | \$410 |
| 1-2 | §2340.16(a) Inadequate access to electrical equipment | General | \$135 |
| 1-3 | §2500.1(a) Non-compliant wiring and use of flexible cords | General | \$205 |
| 1-4 | §2473.2(a) Missing cover on the junction box | General | \$135 |

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

| | | | |
|------|--|---------|---------|
| 1-5 | §3214(c) Non-compliant handrails on stairs | General | \$305 |
| 1-6 | §3215(c) No fire alarm | General | \$205 |
| 1-7 | §3215(e) Failure to have emergency lighting | General | \$205 |
| 1-8 | §3216(c) Non-functioning light bulbs at front and rear exits | General | \$305 |
| 1-9 | §3220(a) No site specific emergency action plan | General | \$305 |
| 1-10 | §3225(b) Erroneous Exit signs on non-exit doors | General | \$205 |
| 1-11 | §3234(g)(4) Failure to have guardrail | General | \$205 |
| 1-12 | §5194(e)(1) Use of bleach to clean up biological waste/OPIM from work surfaces | General | \$205 |
| 1-13 | §6151(c)(4) Failure to maintain fully charged portable fire extinguisher | General | \$135 |
| 1-14 | §6151(e)(2) Failure to inspect fire extinguishers in electrical utilities room | General | \$205 |
| 1-15 | §3202(a) Failure to maintain 36" clearance between storage and sprinkler deflector | General | \$205 |
| 2-1 | §5193(c)(1) Failure to establish exposure control plan re: exposure to OPIM | Serious | \$9,000 |
| 3-1 | §5193(d)(1) Failure to observe universal precautions during production of films | Serious | \$9,000 |

Employer filed timely appeals contesting whether the safety orders were violated, whether the classifications were correct, whether the abatement requirements were reasonable, whether the proposed penalties were reasonable and raising twenty-two affirmative defenses. In the Employer's Closing Trial Brief, all affirmative defenses were waived except for (1) status of limitations; (2) safety order was not violated; (3) incorrect classification; (4) no employment relationship; (5) no employee exposure; (6) lack of jurisdiction, vagueness, lack of due process; (7) the proposed penalty is unreasonable; and (8) the abatement requirements are unreasonable.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Board), at Oakland, California on February 7, February 8, April 23 and April 24, 2013. The Employer was represented by Karen Tynan, Esq. The Division was represented by Kathryn Woods and Tuyet-Van T. Tran. Each party presented testimony, documentary evidence and filed closing and reply briefs. The matter was submitted for decision on June 14, 2013. The ALJ extended the submission date to December 7, 2013, on her own motion.

Prehearing Motions

At the hearing on February 7, 2013, the Parties stipulated to the resolution of Citation 1, Items 1 through 15, as set forth in the summary table attached hereto. The parties' settlement disposed of all Citations except for Citation 2-1 and Citation 3-1.

Posthearing Motions

On May 14, 2013, a motion to place evidence under seal or in the alternative, redact same was filed in writing by Kathryn J. Woods, Staff Counsel for DOSH. During the hearing, exhibits were introduced and testimony was heard which involve confidential information, including the legal names and HIV status of certain individuals. In order to protect the statutory and constitutional rights of these individuals, the ALJ placed the record under seal. California Health and Safety Code Section 120975 protects against the compelled disclosure "to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV" during a proceeding. The parties were ordered to file input on or before June 28, 2013 concerning this issue. No response to the motion was filed by the Employer and no input regarding the sealing of the record was provided by either party. Appendix I is an order setting forth the evidence which will remain under seal. Attachment A, Legal Names and Stage Names of Models, under seal. The code letter refers to each of the individuals mentioned in the decision, e.g. "#A."

Summary of Evidence

All Dockets

The Division submitted the Jurisdictional Documents as Division Exhibit 1.

Evidence of employee status of film participants

18 U.S.C. §2257 requires records to be kept regarding all performers engaging in activity governed by §2257 - "actual sexually explicit conduct" - to show that they are at least 18 years of age as of the dates of the production and provides:

(a) Whoever produces any book, magazine, periodical, film, videotape, digital image, digitally- or computer-manipulated image of an actual human being, picture, or other matter which -

- (1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct;
- (2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

In order to comply with § 2257, the employer created a form in which each of the "Participants" in its productions released his rights and stated that he was over 18 years of age at the time of the production. Division Exhibit 8 is a blank Paul Morris Productions Participant Release and Certification form designed by the Employer to comply with § 2257. It is identical to Division Exhibits 7, 9, 14 through 28 and 36. These 17 identical forms state the participant's name, shoot number, date of birth, date of signature and signature. The shoot number included the date that the participant provided services to the Employer, as well as a code for the type of scene which was filmed. The relevant terms are:

For and in consideration of my participation as a voluntary participant with Paul Morris/Paul Morris Productions (all hereinafter referred to as "Paul Morris") to serve as a model, in the event such materials that are produced (via videos, photographs,

chromes, audio tapes, and/or through any medium now or hereafter known) are used, rented, or sold, and in further consideration of the publicity to be received by the undersigned by the use of such materials, I hereby give Paul Morris or his agents, representatives . . . the absolute right and permission to copyright in its pictures, magazines, books, video recordings, audio recordings and/or other media, whether known or unknown at this time, and for any other purposes as they may see fit, in their sole and absolute discretion, those materials. . . . Such materials may be used in any way by the Users for purposes of trade, advertising, publicity or promotion of any kind without restriction. World rights and multiple usages of all Materials are hereby granted and forever released by me. I acknowledge that I will not receive any further compensation regarding the Materials in the future. I further acknowledge that any performance or contribution by me regarding the Materials shall be considered a work made for hire under the United States Copyright Act, and I hereby assign any such past performances or contributions to Paul Morris.

I hereby waive Paul Morris and Paul Morris Productions of any responsibility for my physical health or wellbeing, and swear and attest that my physical state is such that all and any acts that might be engaged in during this project cannot negatively impinge on said condition. I further swear and attest that I will never hold Paul Morris Productions, Paul Morris, or his employees or representatives responsible in any way or fashion for developments or changes in the status of my physical health or wellbeing and furthermore will I [sic] never engage in litigation that is in any way related to this work.

I hereby represent that I am of legal age (18 or older) and have read the authorization and release prior to its execution. [Emphasis added]

Division Exhibit 13, Paul Morris Productions Check Register, 11/04/2008 through 11/04/2009, shows that each “participant” was issued a check indicating payment as an “independent contractor” and the check was dated on or around the same date that the work was performed. The “Shoot No.” (e.g. “F092609”, contained the date of the shoot) and “Date of signature” were the same. In order to protect identifying characteristics from disclosure, “participants” who signed the forms in evidence, will be identified in this Decision by letter, as shown in the left hand column of the chart below.

| Code | Exh. No. | Date of Birth | Date of Signature | Shoot No. | Check No. | Amount of Check |
|------|----------|---------------|-------------------|-----------|----------------------|-----------------|
| A | 7 | Nov. 1961 | 9/26/09 | F092609A | 6340 | \$550 |
| B | 9 | Apr. 1981 | 9/25/09 | F092509 | 6326 | \$750 |
| C | 14 | Oct. 1982 | 9/24/09 | F092409 | 6325 | \$450 |
| D | 15 | Jan. 1987 | 9/25/09 | F092509A | unknown ² | unknown |
| E | 16 | Jan. 1984 | 9/25/09 | F092509A | 6329 | \$650 |
| F | 17 | May 1964 | 9/25/09 | F092509 | 6343 | \$700 |
| G | 18 | Aug. 1977 | 9/25/09 | F092509 | 6330 | \$550 |
| H | 19 | May 1971 | 9/26/09 | F092609 | 6332 | \$500 |
| C | 20 | Oct. 1982 | 9/26/09 | F092609 | 6337 | \$550 |
| I | 21 | Oct. 1967 | 9/26/09 | F092609 | 6331 | \$600 |
| J | 22 | Nov. 1976 | 9/26/09 | F092609 | 6335 | \$650 |
| D | 23 | Jan. 1987 | 9/26/09 | F092609 | 6336 | \$275 |
| E | 24 | Jan. 1984 | 9/26/09 | F092609 | 6338 | \$850 |
| K | 25 | May 1967 | 9/26/09 | F092609 | 6347 | \$750 |
| L | 26 | Aug. 1977 | 9/26/09 | F092609 | 6328 | \$550 |
| M | 27 | Jan. 1971 | 9/26/09 | F092609A | 6341 | \$650 |
| B | 28 | Apr. 1981 | 9/26/09 | F092609A | 6342 | \$700 |
| N | 36 | Aug 1972 | 2/20/09 | F022009 | 6013 | \$400 |
| O | 38 | Dec. 1966 | 9/22/09 | SP092209 | unknown | unknown |

Testimony of Matt Mason (aka Michael Triolo)

Matt Mason is the General Manager of Paul Morris Productions, dba, Treasure Island Media (“TIM”). Mason oversees customer service, accounting, IT and web programming, marketing, shipping, and manages external producers. He is responsible for business development and creating new ideas for sources of revenue. The Chief Financial Officer who did the book-keeping for TIM reported to Mason.

Mason testified that Paul Morris (aka Charles Steven Key) is the owner and creative lead of TIM. TIM’s website advertises that its videos feature “unprotected no condom DVDs.” (Division Exhibit 29.) According to Mason, TIM creates DVDs of “real live sex” for distribution to wholesale and retail stores around the world. The replication is done in a San Francisco warehouse. The materials may also be obtained via online streaming video.

Mason testified that TIM employed approximately twenty people on a continuing basis, including Morris and Mason. In 2009, TIM employed the owner, General Manager, five Editors, two of whom are also Cameramen, one

² The PMP check register does not contain an entry for that “Participant” for September 25, 2009. However, checks were issued to “D” on August 25, 2009 for \$700 and August 26, 2009 for \$700.

Personal Assistant, two Casting/Production – Assistant Camera/Lights staff, one Customer Service staff, one 2257 Record Keeper/Piracy Infringement Protection staff, two Shipping Assistants, one Sales Manager, one IT – Technical Manager and Developer, one IT Webmaster and one Human Resources, Chief Financial Officer. (Division Exhibit 31, Treasure Island Media Employees and Managers.) TIM also “employs” participants who are paid by check on the day of their services and are listed as “Independent Contractors” in the PMP check register.

According to Mason, TIM requires all persons who are filmed on the premises to complete a form (Exhibit 8) “when they come through the door” to use the webcam facilities or group shoot, and scans the ID of each person, to verify his age. A person who uses a webcam³ to film himself is not paid unless his footage is used in a film produced by TIM. The “participants” are selected through various procedures, including 1) the person submitting an on-line application, 2) the person walking into office, or 3) the person letting one of the TIM staff know of the interest in being filmed. The on-line application form, Treasure Island Media Model Application (Division Exhibit 6), requests information concerning size of “cock,” body type, willingness to perform bareback (unprotected sex), HIV status, hepatitis status, current health problems or STDs, male enhancers used, types of sex acts with partners the applicant is comfortable engaging in, sex toys used, prior modeling or escort work. No one is selected as a “participant” who is not HIV positive. There was no requirement to provide evidence of test results prior to selection to confirm the accuracy of health status.

In September 2009, during the San Francisco Folsom Street Fair, TIM produced a DVD titled “The 1000 Load Fuck” (“TTLF”), which was released in December 2009 (Division Exhibit 2).⁴ Marketing materials were created and uploaded to the TIM website (Division Exhibit 3, Website pages marketing sale of TTLF (7 pages)).⁵ The DVD depicts men having sex.

Mason disputed the meaning of the “shoot codes” used on the Participant Release and Certification forms and testified that “F” was not used for “Fuck”, but rather referred to scenes filmed in Florida and “O” did not mean “oral”, but designated off-site or out of state. (4/24/13, TS 89-91 and 118-119).⁶

³ A “webcam” is a video camera, which feeds the images to a computer via cable and usually can be operated by remote control.

⁴ TIM maintains that the Division failed to establish that TTLF was created in San Francisco or that TTLF was created in 2009. A preponderance of the evidence including Exhibits 2 and 3 establish that major portions of the TTLF was filmed and released in 2009 in San Francisco.

⁵ Division Exhibit 3 has screen shots taken from the film TTLF and describes the creation of the thousand loads used in the film as taking two years and hundreds of sperm donors.

⁶ The references to the hearing transcripts are designated by the date, followed by TS, followed by the page and line numbers.

TTLF has no plot or specific script.⁷ The film consists of adult men, usually nude, sometimes almost nude, having sex with other men. (TTLF 36:05, TTLF 42:07, TTLF 44:09, TTLF 42:09 through 42:41) The incidents involve bareback sexual contact between one man's penis and another man's anus or mouth and the use of props, such as a turkey baster to squirt semen into various orifices.

Testimony of Eugene Murphy

Senior Safety Engineer Eugene Murphy testified on behalf of the Division. He worked for the Division for the past six and a half years as a Senior Safety Engineer. He held prior positions as Acting Regional Manager from December 2003 to June 2006 and as Senior Industrial Hygienist prior to December 2003.

Murphy received training on bloodborne protection by taking at least six courses on that subject between 1992 and the present. He attended a day-long course in June 1992 taught by National Institute for Occupational Safety and Health Director John Howard, which was offered in conjunction with the Centers for Disease Control. In 1993, Murphy attended the U.S. OSHA Technical Institute for a five day course, one of which dealt with bloodborne protection standard. In 2000, he took a twelve hour course on the bloodborne protection standard. He attended a half-day training session on enforcement of the bloodborne protection standard in November 2002 and attended the California Department of Public Health class, which included two hours on bloodborne protection standard and sharps injuries in September 2006.

Murphy was assigned to conduct an investigation based on a complaint. He went to 351 Ninth Street, Suite 302 in San Francisco on November 4, 2009 with another Division Inspector, Deborah Gold. No consent to complete the inspection was provided and steps were taken to obtain a warrant from San Francisco Superior Court.

The following day, November 5, 2009, after negotiation with the employer, permission to conduct the inspection was granted and interviews of the IT Webmaster, #V⁸, Casting/Production Coordinator, #R, and Human Resources/ Chief Financial Officer, #Q. Murphy and Gold returned on November 9, 2009 and spoke with Mason, who was represented by attorney Joshua Henderson, and interviewed other employees Editing and Post Production, #S, Graphic Designer, #T, Customer Service, #U. On November 23, 2009, Murphy and another Division Associate Safety Engineers Keith Koterbay spoke with Mason, who was represented by Ian Boyd, TIM's attorney. They interviewed Editor, #P, Casting and Production Director, #N, and Owner,

⁷ References to specific scenes in TTLF will be designated by the DVD time. (Exhibit 2)

⁸ Codes #P through #Y designate references to other employees of TIM. (Attachment A)

Charles Steven Key aka Paul Morris. Gold and Murphy conducted additional interviews on December 3 and 21, 2009.

On November 5, 2009, Murphy requested a copy of TIM's written policies or procedures regarding the use of condoms or other barrier protection; Mason told him that TIM was working on an exposure control plan. Mason sent him a document entitled "Treasure Island Media Bloodborne Pathogens and Sexually Transmitted Diseases Exposure Control Plan" on December 22, 2009. (Division Exhibit 32). Murphy testified that this plan does not satisfy Section 5193(c)(1), which requires engineering controls and work practice controls and the use of personal protective equipment, specifically condoms. (2/8/13 TS 91).

Murphy wrote a letter to Mason requesting all written health and safety programs, including those involving the use of condoms or other barrier protection. (See Division Exhibit 12, Letter to Mason from Murphy, dated February 2, 2010) A letter dated February 8, 2010² from Ian Boyd, in response to the Division's document request stated "no programs existed at the time" (Division Exhibit 33).

Murphy testified that he was told, during the investigation, that TIM is an adult film studio which films men engaging in anal and oral sex, including masturbation and group sex, and creates documentary style gay bareback videos. Solo masturbation scenes were shot in the front lobby of the TIM offices. Murphy was told by #R and #P that they cleaned up semen and OPIM from the solo scenes using Purrell® wipes. The Division investigators found bleach and Formula 409® elsewhere on the premises, which could have been used to clean up. As a result of the series of conditions found during the investigation, the Division concluded that the employees were exposed to semen and OPIM and the regulations required an Exposure Control Plan.

Murphy testified that #N, the Casting Director and #Q, Chief Financial Officer told him that TIM conducted filming in September in California. He was also informed by #P and #Q that various shoots had taken place over the past year. Other evidence corroborated the fact that filming was done in California.

Division Exhibit 13-2, an 18 page printout of the check register provided by TIM, dated February 10, 2010, lists various checks issued. The checks were issued the day before the shoot. The date the check was issued corresponds to the day before the shoots took place, according to #P and #Q. The check register memo column states the city and per diem paid for that event. Further corroborating evidence that TTLF was filmed locally in San Francisco California in September 2009 is the fact that check register (Ex. 13-2 page 16) indicates

individuals who are identified as performers in TTLF were paid by check. There are no per diem checks issued during the late September 2009 period.⁹

Testimony of #N

#N testified that he was employed by TIM as Casting Director from 2007 until 2010. He was responsible for developing the screen list by asking applicants relevant information, including what they like to do sexually, past experience, and health issues. They were always asked their HIV status and the date of their last HIV test. He testified that TIM practiced “serodiscordance”, meaning that HIV- positive men had sex with other HIV- positive men in scenes for TIM. #N performed in TIM films, on occasion, including February 20, 2009. (Division Exhibit 36)

#N did the casting for TTLF in preparation for the film done during the 2009 Folsom Street Fair in San Francisco. He had worked with some of the people in prior films and for that reason did not need to cast them a second time. He arranged for the location of the shoot, a private home in San Francisco used for three days. Some of the participants stayed in the private home with him during that period.

The concept for TTLF was to use a turkey baster to shoot loads of semen from dozens of people in order to shock the viewer. Using a turkey baster to shoot one thousand loads of the collected ejaculate into various orifices was a long held fantasy in the porn community. #N assisted in the collection of the loads for use in the film, TTLF.

#N obtained the releases from the participants who were selected (Division Exhibit 8 Form). He explained the codes used on the Participant Releases. The Shoot number consisted of a letter, indicating the type of scene, e.g., O for “oral” and F for “fuck”, followed by the month, day and year of the shoot. These forms were filled out by #N or another casting agent, #R. TIM referred to certain participants who worked exclusively for TIM as “exclusives”.

TIM paid a per diem to reimburse #N for travel expenses and meals for trips to other locations, such as a trip to Los Angeles (check number 6176, on page 7, dated April 8, 2009), to ILM in Chicago, (check number 6221, page 9, dated May 18, 2009) and to San Diego, (check number 6228, page 12, dated July 7, 2009). (See Division Exhibit 13-2) Similar per diem checks were written on the same dates for #P, #X and #W. The check register also notes that direct deposit payments every two weeks to #N as well as other regular employees from another account, but the amount that they were not paid was not disclosed.

⁹ TIM’s practice was to issue per diem checks to TIM staff for shoots outside San Francisco, e.g., per diem checks were issued on April 8, 2009 for #W, #N, #X, #P for a shoot in LA.

#N testified that the TIM sets were wiped clean using sanitizers, such as Purell®, as well as bleach and 409 cleaner®. (02/07/13 TS 182-183). TIM never used condoms during filming, according to #N. (02/08/13 TS 58-59).

Testimony of Dr. Janice Prudhomme

The Division called Dr. Janice Prudhomme (Dr. Prudhomme) as an expert witness with respect to the bloodborne pathogens. Dr. Prudhomme has been employed by the Division as a Public Health Medical Officer III since May 2009. Her duties are described in detail on Division Exhibit 37, page 3, Curriculum Vitae. Prior to working for the Division, she worked for the California Department of Public Health, Occupational Health Branch from 2001 to 2009. She is Board Certified in Internal Medicine (1992) and Preventive Medicine in Occupational and Environmental Medicine (1996).

Dr. Prudhomme obtained a B. S. degree in nutritional science and clinical dietetics from the University of California (Berkeley) in 1983, a D. O. (doctor of osteopathy) degree from Kirksville College of Osteopathic Medicine (1989) and an M. A. degree in sports medicine from Northeast Missouri State University (1989). Dr. Prudhomme was an internal medicine intern (1989-1990) and resident (1990-1992) at California Pacific Medical Center in San Francisco. She earned a Master in Public Health, Environment Health Studies from University of California (Berkeley) in 1995.

During her internship, Dr. Prudhomme worked with AIDS patients in 1983 at San Francisco General Hospital with respect to clinical dietetics training. She provided direct patient care to patients with HIV, AIDS and Hepatitis C from 1989 to 1992 while in her internal medical residency at California Pacific Medical Center.¹⁰ Three months or more of her training experience was spent treating men with opportunistic infections and AIDS. She was chief resident in the Occupational and Environmental Medicine Program. She has also worked in occupational health at California Pacific Medical Center, University of California, San Francisco, at Alta Bates Hospital, Sutter Health, and Kaiser Permanente. In those positions, which she held from 1993 through 2007, Dr. Prudhomme provided direct patient care.

Dr. Prudhomme provided technical assistance at the Department of Public Health and at the Division to employers regarding post-exposure evaluations. While at Alta Bates and Kaiser, she developed a surveillance

¹⁰ The Employer requested to disqualify Dr. Prudhomme as an expert regarding AIDS based on the fact that she is a doctor of osteopathy, as opposed to a doctor of medicine and the fact that it has been 21 years since she treated an AIDS patient. (Employer Trial Brief, p 5-6.) There was no showing that these facts affected her knowledge of the requirements for evaluating post-exposure to bloodborne diseases or complying with the bloodborne pathogen regulations at issue here. The Employer did not call any expert to testify at the hearing or refute her medical expert opinion.

program and post exposure evaluations regarding employee exposure to bloodborne pathogens. She conducted an extensive review of medical research on bloodborne pathogen regulations in preparation for her testimony.¹¹

The bloodborne pathogen standard (§ 5193) was adopted to prevent, contain or minimize the exposure for employees to bloodborne pathogens and to assess accidental exposure and provide prophylaxis, if warranted. The bloodborne pathogen regulations concern three types of illnesses, HIV, HCV and HBV. Section 5193 defines an “exposure incident” as “a specific eye, mouth, other mucous membrane, non- intact skin, or parenteral contact with blood or other potentially infectious materials (“OPIM”) that results from the performance of an employee's duties.” OPIM includes semen, vaginal fluid, cerebral spinal fluid, synovial fluid and other fluids that could be contaminated with bloodborne pathogens.

Dr. Prudhomme testified to the types of conduct which were observed in TTLF which constitute “exposure incidents.” These included unprotected oral and anal sex, with and without contact with ejaculatory material. For example, a one minute and seven second scene in TTLF depicts a number of “exposure incidents”. (Division Exhibit 2, TTLF frames 41:58 to 43:05) (4/24/13 TS 109-110) Each of the instances of “exposure incidents” depicted in Division Exhibit 2 are “occupational exposures” because it is reasonably anticipated that the individuals were exposed to bloodborne pathogens.

An “occupational exposure” means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties. The exposure may result in direct contact of the pathogens with the blood stream, if there is also chapping, fissuring or the development of microscopic tears in the skin.

Nature and treatment of HIV

HIV is a viral infection that affects the person's immune system. Over time, the breakdown in the immune system can cause the person to develop infections. The prevention of HIV includes engineering controls, such as barrier protection, such as dental dams and condoms. At this time, no vaccine for HIV exists and there is no cure. There is treatment of AIDS through various courses of medications, which limits the replication of HIV, so that the virus cannot take hold and make the immune system nonfunctional.

¹¹ The research articles Dr. Prudhomme reviewed included documents from the Center for Disease Control and Prevention, L.A. County Department of Health Services, including three written by Peter Kerndt regarding transmission in the adult film industry.

By treating HIV early on, it is possible to contain the virus, so that it does not spread to other people and so that the health of the exposed person can be restored. Once it has taken hold in the body, the virus has ways to sequester itself and is considered to be present, even if contained by medications. HIV is known to mutate easily and may render the virus non-susceptible to medications. There is a likelihood that the person will need to change the medical regimen and find other drugs that will work. There are side effects to different medications, such as nausea, GI upset, pancreatitis, impact on the blood, kidney stone formation, and increased susceptibility to cardiac disease, organ failure and neurologic side effects. There are also a host of opportunistic infections which may develop, if the individual stops taking their medications.

The treatment of an individual with HIV continues for the rest of the patient's life. The baseline HIV illness with no medication leads to AIDS and is a fatal disease in 95% of the individuals. There is no vaccine for HIV. One prevents infection of the HIV during oral or anal sex by using barrier protection, such as a condom or dental dam.¹²

Nature and treatment of Hepatitis C

Hepatitis C is a viral infection that targets the liver cells and destroys them. It can be contracted through exposure to blood or sexual transmission. Many will not realize they have Hepatitis C for between six weeks and five months. If one becomes symptomatic during the acute phase, the person could develop jaundice, have a low-grade fever, nausea, joint pain, or abdominal pain. Eighty to eighty-five percent of infected individuals develop chronic liver disease, which renders them susceptible to end stage liver disease, or cirrhosis. Of those, sixty to seventy percent will develop liver disease, including many who will be diagnosed with cancer of the liver. The health effects of cirrhosis of the liver include: a need for a liver transplant, bleeding to death because of the absence of the clotting factor, inability to process bilirubin and encephalopathy. However, ten to fifteen percent of exposed individuals would mount the appropriate antibody immune response and clear the infection. Liver transplant patients will need to take immune-suppressive medications for the rest of their lives. The medications have a number of side effects, including toxicity to other organs and allergic reactions to liver, kidney and pancreas.

One can prevent infection during oral or anal sex, by using barrier protection. If Hepatitis C is diagnosed and treated promptly with antiviral medication and protease inhibitors, the virus can go into remission. If an

¹² A "dental dam" is a rectangular sheet of latex originally used in dentistry. It allows oral stimulation of the anus, penis, or other body parts, without transmission of bodily fluids or skin contact, to protect against the transmission of sexually transmitted diseases.

exposed employee is not tested appropriately, the patient is not treated, and the virus may progress to destruction of the liver over a ten to twenty year period. There is no vaccine for Hepatitis C.

Nature and treatment of Hepatitis B

Hepatitis B is a different viral infection that targets and destroys liver cells. Like Hepatitis C, it also causes an acute infection. Noticeable symptoms develop about four weeks post exposure. Symptoms include jaundice, abdominal pain, nausea, low grade fever. 75% to 85% of people clear the virus and become permanently not susceptible to Hepatitis B if they do clear. The liver is impaired during the first two to four month period. Fifteen percent to twenty-five percent of the people infected with Hepatitis B go on to have chronic Hepatitis B infection, which has the same consequences that Hepatitis C has: end stage liver damage, cirrhosis, hepatocellular cancer requiring a liver transplant. There is no cure for Hepatitis B, once one is infected. Treatment for complications of the liver disease are available, e.g., antiviral medication.

The regulation's requirements

The regulations require that a person who has an exposure incident be given an opportunity for a post-exposure evaluation by a health care provider. The purpose would be to obtain information about his or her Hepatitis B, Hepatitis C and HIV status, whether the person received adequate protection through a vaccination and whether a post exposure prophylaxis should be used. There is a vaccine for Hepatitis B which is considered to be highly effective in immunizing the patient for the rest of his or her life. The vaccine can be taken in three doses, if given prior to an exposure incident. After exposure, a patient can be given immunoglobulin to fight the infection that the person has come in contact with, as well as start the person on the vaccination program or complete the program that they started.

“Universal precautions” (the phrase used in § 5193) is an infection control standard whereby one assumes that all blood or OPIM contains bloodborne pathogens and takes actions to prevent transmission of infectious disease by using barrier protection. Failure to use a condom during sex results in the risk of contracting HIV, Hepatitis B and/or Hepatitis C.

Dr. Prudhomme testified regarding the reason a post-exposure evaluation is important in the case where both the source and the receptive person were HIV positive. The health care provider would want to ask a complex series of confidential questions of both persons, such as, if their viral loads have been tested, what is the competency of the immune systems, whether they have resistant strains and whether they are truly both HIV positive. The risk of Hepatitis B and Hepatitis C can be exceedingly damaging to someone with HIV positivity, so the status of each person would need to be checked out. Dr.

Prudhomme explained how the post-exposure evaluation follow-up required by the regulation can prevent those types of exposure incidents from occurring in the future. Use of barrier protection, such as dental dams and condoms, would prevent infection of HIV, Hepatitis B and Hepatitis C viruses during oral or anal sex. A delay in the post exposure evaluation means that the patient will miss the 72 hour window of opportunity to initiate treatment to prevent the infection.

Testimony of Deborah Gold

Deborah Gold (Gold), the Deputy Chief for Health and Engineering Services, has worked for the Division for nearly twenty years. Gold is responsible for supervising the medical unit, the research and standards unit, and the industrial hygiene laboratory and overseeing the training unit. Prior to her current position, she served as a senior safety engineer, senior industrial hygienist, associate industrial hygienist and assistant industrial hygienist.

Gold obtained a master's degree in public health (industrial hygiene) from U.S. Berkeley in 1993 and a bachelor of arts from Antioch College in 1972. She is certified by the American Board of Industrial Hygiene and is a member of the American Public Health Association and the American Conference of Governmental Industrial Hygienists.

During 2004 to 2009, Gold, along with others, developed the standard on aerosol transmissible disease, Title 8 California Code of Regulations, Sections 5199 and 5199.1 which became effective in 2009. While working for the U.S. Postal Service from 1986 to 1989, she worked to develop a program for handling packages of blood, well before the blood-borne pathogen standard was written. During her years at UC Berkeley, shortly after the Federal blood-borne pathogen standard, 29 C.F.R. §1910.1030, had just been adopted in California, Gold attended classes on infectious diseases, occupational disease, industrial hygiene practices, blood-borne pathogens and the blood-borne pathogen standard. Her training on blood-borne pathogens led to her involvement in drafting of FAQs on § 5193, the new standard for the Division. She was also assigned as trainer on blood-borne pathogen and biological hazards for the Division's employees. She also attending meetings, spoke at conferences, wrote papers and developing programs regarding this standard and HIV prevention.

In 2008, at a preventative medicine think tank on the adult film industry at UCLA, Gold gave a presentation. The AIDS Healthcare Foundation requested that the Division develop amendments to the regulation which would address the hazards in the adult film industry. She worked on developing the regulation with Centers for Disease Control ("CDC"), National Institute for Occupational Safety and Health, California Department of Public Health, Association for Professionals and Infection Control, as well as other groups and medical experts on the proposed revision and control measures.

During her employment with the Division, Gold completed thirty inspections involving the blood-borne pathogen standard and of those, seven dealt with the adult film industry, and of those, five involved inspections of production companies. In addition, she was also involved in settlement negotiations and investigations in other cases involving the bloodborne pathogen standard.

Gold explained that the purpose of § 5193 is to prevent exposure or contact with blood or other potentially infectious materials (OPIM) of another person to prevent infection with one or more blood-borne pathogens, such as HIV, Hepatitis B, and Hepatitis C. The regulation does that by mandating a written program which requires engineering controls and work practices, as well as personal protective equipment, if the hazards cannot be eliminated.

The “engineering controls” in the context of the adult film industry include editing techniques to set up scenes to appear as the semen is being ejaculated onto somebody’s eyes, or mouth or anus or other mucus membrane, when it is not happening in actuality. Personal protective equipment would include barriers, such as condoms and dental dams. The safety order requires employers to conduct a post-exposure evaluation and follow-up, which may include offering as a prophylaxis certain drugs to prevent infection as well as offering a Hepatitis B vaccination at no charge.

Under the infection-control approach referred to as “observe universal precautions” all of the OPIM are required to be treated as if they are infectious material, no matter who the source is.¹³ Whenever an employer has one or more employees who have an “occupational exposure”, defined as reasonably anticipated contact of the eyes, skin, mucous membrane or parenteral contact with OPIM, the employer is required to have a bloodborne pathogen program.

A permanent variance from the Standards Board can be sought to use control measures other than those specified in the standard, if an employer believes it can offer equivalent safety to that afforded by the standard. There are also two types of temporary variances, one which allows an approved experiment to use alternate control measures for one year, and the other which can be granted if the employer cannot come into compliance immediately, particularly where there is a new standard.

¹³ Gold explained “serosorting”, a contrary approach, which was adopted in some countries, but has not been endorsed by the CDC and violates Section 5193. It is the practice of using HIV status as a decision-making point in choosing sexual behavior. The term is used to describe the behavior of a person who chooses a sexual partner assumed to be of the same HIV serostatus for the purpose of engaging in unprotected sex with the intent to reduce the risk of acquiring or transmitting HIV. (4/24/13 TS, 7-8, 64-65)

Evidence of employee status of film participants

Gold participated in the inspection with Murphy at the employer's site on November 4, 5, 9, December 3 and 21, 2009 and attended the closing conference on March 25, 2010. They met with Matt Mason, the General Manager and #Q, Human Resource and Chief Financial Officer on the first day of the inspection. Division Exhibit 31 lists persons identified as holding a position in management, which was sent by the employer's attorney to Murphy in response to the Division's document request. Gold and Murphy interviewed various individuals as stated by Murphy, above. (4/24/13 TS 15-18)

According to #Y, the codes used on the Participant Release and Certification forms referred to the type of scene, "F" for fuck, "O" for oral, "S" for solo or "SP" for special project, followed by the date it was shot and the scene number. Division Exhibit 39 is the Participant Release and Certification signed by Participant "O", which had a shoot number, e.g., "cum/baster test shoot SP092209", referring to the use of the turkey baster in the video, TTLF. TTLF was also referred to as "Project 105". The editing was completed two weeks before the interview of the Editor on November 9, 2009. (4/24/13 TS 22-25)

The hiring process was referred to as "casting" and involved applications which were submitted by the participants. Gold was told that if the individual wanted to use condoms, he was told he could go someplace else and if he was not HIV positive, he was told to go elsewhere. TIM would arrange the time and place of a scene, how much each person would be paid, and brought the camera crew in to do the filming. #N, the Casting Director told Gold and Murphy that he had the authority to remove people from the set and he maintained a list of people who were not invited back. (4/24/13 TS 47-48)

When #Q was interviewed in November and December 2009, #Q explained how payments by check were made for the participants, as well as payments for travel and other expenses. He discussed with them how the checks to pay the participants were created in the normal course of business, while he looked at the check register on his computer screen. (4/24/13 TS 29-36) Division Exhibit 39 are Gold's notes regarding the details given by #Q and what she observed on his computer screen, including Quicken Books, the spreadsheet program used by TIM to track payments in their checking account. The Division was eventually provided with a copy of the spreadsheet of the checking account on a CD. (Division Exhibit 13-2) The amount paid to participants who appear in TTLF are shown with their legal names and the checks are dated in late September 2009. Each person was paid as an "independent contractor". The check register and interviews of employees confirmed that this was done in San Francisco, California in September 2009, during the Folsom Street Fair. Payments for per diem expenses to travel to other locations in California in 2009 are also listed in the check register for

some employees of TIM. There were also shoots in California, including Los Angeles in April and San Diego in July. (4/24/13 TS 41-43)

Gold explained that Citation 2 was issued because the employer did not establish, implement and maintain an effective exposure control plan which contained all of the elements of Section 3203, including exposure determinations, review of the plan and employee participation. The employer provided an exposure control plan which was in the process of being developed, but which failed to contain all of the elements of Section 3203 (Division Exhibit 32).

Citation 3 was issued because the employer failed to observe universal precautions in that it did not institute engineering work practice controls to eliminate or minimize contact with blood or OPIM. In the selection process, the employer asked the person to state his HIV status. HIV negative people were paired with HIV negative people for scenes which involved unprotected oral or anal sex. The employer filmed the bareback sex, which involved occupational exposure to OPIM.

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Citation 2, Item 1, §5193(c)(1), Serious

Findings and Reasons for Decision

The production crew and participants hired by the Employer are employees and not independent contractors.

Section 5193 covers the Adult Film Industry.

Employees were exposed to blood or OPIM during the course of their work.

The citations were issued within the six month statute of limitations.

The Division established that the Employer failed to establish, implement and maintain an effective exposure control plan.

The proposed penalty of \$9,000 is not reasonable.

The factual allegations of Citation 2, Item 1 are:

On November 5, 2009, Treasure Island Media, Inc., dba Paul Morris Productions, at 351 9th Street, Suite 302, San Francisco, CA failed to write or otherwise establish, implement and maintain an effective exposure control plan. Employees were exposed to semen and Other Potentially Infectious Materials, due to work activities during filming and set cleaning.

- a. As of November 5, 2009, the employer had not conducted the exposure determination required by subsection (c)(3).
- b. The employer has not developed procedures for:
 - (d) methods of Compliance, including engineering controls and work practices;
 - (f) Hepatitis B Vaccination, Post-Exposure Evaluation and Follow-up;
 - (g) Communication of Hazards to Employees; and
 - (h) Recordkeeping;
- c. The employer had not developed effective procedures for review of the program, and for involving employees in reviewing and updating the plan as it applied to procedures in their work areas.

Employer was cited under §5193(c)(1), which reads as follows:

(c) Exposure Response, Prevention and Control

1) Exposure Control Plan.

(A) Each employer having an employee(s) with occupational exposure as defined by subsection (b) of this section shall establish, implement and maintain an effective Exposure Control Plan which is designed to eliminate or minimize employee exposure and which is also consistent with Section 3203.

(B) The Exposure Control Plan shall be in writing and shall contain at least the following elements:

- 1. The exposure determination required by subsection (c)(3);

2. The schedule and method of implementation for each of the applicable subsections: (d) Methods of Compliance, (e) HIV, HBV and HCV Research Laboratories and Production Facilities, (f) Hepatitis B Vaccination and Post-exposure Evaluation and Follow-up, (g) Communication of Hazards to Employees, and (h) Recordkeeping, of this standard;

3. The procedure for the evaluation of circumstances surrounding exposure incidents as required by subsection (f)(3)(A).

6. An effective procedure for identifying currently available engineering controls, and selecting such controls, where appropriate, for the procedures performed by employees in their respective work areas or departments;

8. An effective procedure for obtaining the active involvement of employees in reviewing and updating the exposure control plan with respect to the procedures performed by employees in their respective work areas or departments.

The Division has the burden of proving each element of its case by a preponderance of the evidence. *Cambro Manufacturing Co.*, Cal/OSHA App. 84-923, DAR (Dec. 31, 1986), p. 4.¹⁴ Appeals Board precedent holds that, with the exception of regulatory violations, the Division has the burden of proving that employees of the cited employer were exposed to the hazard addressed by the Safety Order. (See, e.g., *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, DAR (Mar. 5, 1981).) In this instance, the Division must prove that the safety order applies, that it was violated, and that Employer's employee was exposed to the hazard it was intended to protect against.

**Employer's Release Forms and Check Register
Produced in Discovery Are Admissible as Business Records**

The employer objected to the admission of Division Exhibits 7, 9, 13, 13-2, 14 through 28, 36 and 38 as not having been properly authenticated as Business Records, and requests these exhibits not be admitted into evidence because they are hearsay. Section 376.2 of the Appeals Board's Rules of Practice and Procedure provides that hearsay evidence may be used in an

¹⁴ Later references in this Decision to Decisions After Reconsideration will use the abbreviation "DAR" and Denial of Petition for Reconsideration will use the abbreviation "DPR".

administrative hearing to explain or supplement other admissible evidence. However, if a hearsay objection is made and that objection would be sustained in a civil action, any findings of fact cannot be based solely on that hearsay evidence. In other words, hearsay evidence will be given no weight if that hearsay evidence is not supported by other admissible evidence. (C.A. *Rasmussen, Inc.*, Cal/OSHA App., 08-0219, DAR (Jul. 19, 2012).)

Division Exhibit 8, a blank Participant Release and Certification form, was authenticated through the testimony of Matt Mason (Evidence Code section 1414). The exhibit is a blank form created by TIM and routinely used by TIM to comply with 18 U.S. C. § 2257 record keeping requirements. Division Exhibits 7, 9, 14 through 28, 36 and 38 are identical in form to Exhibit 8 and were produced by TIM during discovery. These forms state the name, date of signature, and “shoot number,” and the information on each form corresponds to the information on the PMP check register. Extensive testimony from Senior Safety Engineer Eugene Murphy and Matt Mason describe the manner in which the forms were filled out - each participant was given a form to fill out on the day before or day of the shoot, so that TIM would be in compliance with Section 2257. A check would be issued to the participant and tracked in the check register. This testimony established that the PMP Participant Release and Certification forms as business records under Evidence Code §1271 because each of these forms a) was made in the regular course of business, b) at or near the time of the act, condition, or event, c) the custodian testified to its identity and mode of its preparation and) the sources of information and methods and time of preparation were such as to indicate its trustworthiness.

Division Exhibit 13 (page 16) is one page of a printout of the PMP check register for November 4, 2008 through November 4, 2009, which was provided by TIM in discovery to the Division. Exhibit 13-2 (pages 1-18) is the complete document. Murphy, Gold and Mason testified regarding the creation of checks to pay the participants in the normal course of business. Mason stated that there were many inaccuracies in the check register, e.g. the “model searching fee” was a “merchant fee.” (4/24/13 TS 124:20 - 125:4)

The check register was admitted as a business record under Evidence Code §1271. Preponderant evidence at the hearing establishes that the checks on the record corresponded to payments made on or about the time of the shooting of TTLF in San Francisco in September 2009.

Participants are “employees” not “independent contractors”

TIM maintains that the participants are not “employees” but are “independent contractors”. TIM does not dispute that the production crew are employees. To sustain the citation, the Division must prove that a relationship of employer/employee existed between TIM and the worker exposed to the

hazard. (*Moran Constructors, Inc.*, CAL/OSHA APP. 74-381, DAR (Jan. 28, 1975).) The threshold question is whether the relationship between TIM and the “Participants” was that of an “employer” under the definition in the Occupational Safety and Health Act of 1973 (the Act).

Labor Code §6304¹⁵ provides:

“Employer” shall have the same meaning as in Section 3300.

Labor Code §6304.1(a) provides:

“Employee” means every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment.

Under Labor Code §§ 6303 and 6304.1, an “employee” and an “independent contractor” are distinguishable based on the right of control, as in the analysis set out by the California Supreme Court in *S. G. Borello & Sons Inc. v. Department of Industrial Relations* (1989), 48 Cal. 3d 341. This approach was adopted by the Appeals Board in *McDonald’s Van Ness*, Cal/OSHA App. 00-1621, DAR (Sep. 26, 2001) and earlier decisions.

The payment of wages or compensation, the withholding of federal and state income taxes, the payment of workers' compensation premiums based upon the earnings paid to a worker, all factors considered in establishing a customary employer-employee relationship but do not displace the primary considerations of control and direction. (*Nash Construction Co., Inc.* Cal/OSHA App. 80-973, DAR (Feb. 8, 1985).) In *Shiho Seki dba Magical Adventure Balloon Rides*, Cal/OSHA App. 11-0477, DPR (Aug. 31, 2011) the Board determined that the injured worker was an employee and not an independent contractor, using the legal test provided by the California Supreme Court in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 356. The label used by the parties is not dispositive. (*S. G. Borello, supra*, at 349; *Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, at 176.

Borello provides that the most important factor in determining the type of employment relationship is (1) the right to control the manner and means of accomplishing the desired result. And the Court also recognized that given “the infinite variety of service arrangements,” the following “secondary indicia” may also be considered: (2) the alleged employee's opportunity for profit or loss

¹⁵ California Labor Code section 3300 defines “employer” as “every person including any public service corporation, which has any natural person in service.” California Labor Code §3351, states: “Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed . . .”. There is no material difference between § 3351 and § 6304.1(a) for the purposes of this appeal. (*Shiho Seki, supra*.)

depending on his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer's business. The Board in *Shiho Seki, supra*, noted that “the Supreme Court stated early in the *Borello* opinion that, “[t]he label placed by the parties on their relationship is not dispositive; and subterfuges are not countenanced.” (*Borello, supra* at p. 349.)¹⁶

Examining the facts in this case, a preponderance of the evidence established that TIM controlled the work of the participants. Control over the performers was established by evidence that TIM screened the participants according to their sex act preference, and excluded them from selection if they were not willing to do the act in question. (#N) (04/23/13 TS 26-28) The participant’s release forms were coded, which indicates that the type of scene was planned in advance and was shot on a particular date. (04/23/13, TS 34-36). TIM paid travel expenses for some of the participants. (04/23/13, TS 30 et. seq.). TIM rented the private home in San Francisco where the film was shot. TIM hired the camera and lighting crew, directed the scenes, and arranged the schedule of the shoots. TIM drove participants to the location and TIM edited and produced the product. As discussed below, TIM paid the participants. None of the participants testified to the contrary. The Division established that TIM exercised the “right to control the manner and means of accomplishing the desired result” with respect to the participants in “TTLF”, which satisfies the first *Borello* element.

The second *Borello* element, the opportunity for profit and loss, also establishes an employee relationship, not an independent contractor arrangement. The participants were paid for each day of the participation and had no ability to share in the profits from sales of the “materials”.

Employer argues that because participants brought props, such as costumes and dildos, which were used on the job, the third *Borello* element establishes an independent contractor status. However, the evidence also showed that TIM staff brought lights, cameras and other supplies needed, such as the turkey baster used to inject the “thousand loads” into participants various orifices and TIM the collected OPIM used in “TTLF”. (02/08/13, TS 54,

¹⁶ The authority cited to support the argument that the selection of a person to perform a task is not an aspect of control is inapposite. Employer Reply Brief, pp. 2-4. *Angelotti v. The Walt Disney Company* (2011) 192 Cal. App 4th 1394 held that using another company to hire the talent used in the entertainment industry to does not mitigate the *Borello* factors which indicate the existence of an employment relationship. In this case, TIM hired the “participants” using an application form, screening process and interviews to select the persons who would be employed for various scenes.

60, 64, 74, 152). As noted in *Shiho Seki*, even when a worker is required to purchase his own work equipment such as safety shoes and gloves, which could suggest an independent contractor arrangement, “[i]t is possible, however, that the workers are required to provide their own equipment in order to bolster the argument that they are independent contractors, as well as to save costs.” The mere fact that participants brought props to the site does not convert an employee into an independent contractor, under the facts present here.

The fourth *Borello* element is whether the service rendered requires a special skill. The employer argues that “the participants [] use their own artistic and sexual instincts to create a real life sex performance”. There was no evidence that this involved a special skill, required a business license, or involved special training. The skills involved here are not skills which the TIM management does not have, as compared to jobs involving plumbing, bricklaying, electrical work or trenching. (Compare *Hickey v. Arkla Industries, Inc.*, 699 F.2d 748, 752 (5th Cir.1983) (noting that the worker was able to exert initiative in the operation of his business by controlling his advertising, marketing and sales methods, and choice of products to sell) with *Reich v. Circle C Investments, Inc.*, 998 F.2d 324,328 (5th Cir 1993) (topless dancers did not have the skill to defeat an employee-employer relationship.)

The degree of permanence of the working relationship is the fifth *Borello* element. Some of the participants were in multiple productions, some were TIM “exclusives”, some participated on more than one day, and others were involved on a one-time basis. Matt Mason and other witnesses identified some of the participants as “exclusives”, but “he was clear that all performers could do whatever other work they wanted to do and work for other production companies at their own discretion”. (Employer’s Trial Brief, page 8) The Division need not establish that the participants were solely or exclusively employed by TIM to satisfy this element of *Borello*.

The sixth *Borello* element is whether the service rendered is an integral part of the employer’s business. The materials produced by TIM are adult films featuring sexual performances. The work of the participants is the same as that found in the other materials produced by TIM and is not outside of the normal activities of TIM. In fact, the actions of the participants were the key element of the film productions that TIM relied on for its revenue. The participants’ actions were not incidental or peripheral to Employer’s business, but were central. An independent contractor relationship is not established when one hires labor to do the same job as is done in the business on a regularly occurring basis. Based on the foregoing factors, the “Participants” are found to be “employees” of TIM pursuant to Labor Code §6304.1(a) and TIM is therefore an Employer subject to the Act.

TIM claims that this case is unique and distinguishable from *Borello* and its progeny because “the film is copyrighted and registered, and the participants are prevented from demanding royalties or any other type of payment.” (Employer’s reply brief, p. 6) However, by denying the participants media rights based on the United States Copyright Act, TIM created the relationship that must be viewed as “employer/employee” under federal copyright law, as explained below.

Under the United States Copyright Act of 1976, copyright ownership “vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). However, an employer is entitled to copyright ownership in works produced by its employees. In *Community for Creative Non-Violence (“CCNV”) v. Reid*, 490 U.S. 730 (1989), the U.S. Supreme Court identified certain factors that characterize an “employer-employee” relationship as defined by agency law.¹⁷ Were the Appeals Board to rule that the participants were “independent contractors”, each of the participants and the employer would be joint owners of the “Materials”. The fact that the participants were paid under rubric of “work made for hire”, whereby TIM maintains the copyright of the materials, establishes that they were employees.

TIM negotiated a contract with each of the participants for services. (Division Exhibits 7, 9, 14 through 28, Paul Morris Productions Participant Release and Certification form) (“participant’s release form”) This form was signed by each participant, and provides that the “materials”, including the DVD “TTLF”, are considered to be “a work made for hire” (“WMFH”). The participant’s release forms evidence TIM’s intention to apply the exception to the Copyright Act and provides:

I further acknowledge that any performance or contribution by me regarding the Materials shall be considered **a work made for hire** under the United States Copyright Act, and I hereby assign any such past performances or contributions to Paul Morris. (Emphasis added)

TIM structured the participant’s release form as an employment contract between TIM and the participants, so that TIM could designate the Materials as work created by an employee as part of his or her job, as opposed to an “independent contractor” who would own the rights to the “Materials”. The

¹⁷ The *Reid* Court unanimously held that an artist who is not a regular salaried employee is nevertheless an “employee” under the “work for hire” provision of the 1976 Act when operating under the supervision and direction of the hiring party. Control by the employer over the work (e.g., the employer may determine how the work is done, has the work done at the employer’s location, and provides equipment or other means to create work) is the primary factor. (*Shiho Seki, supra*).

form was signed and dated by the participant and the participant was given consideration in the form of a check. TIM had all the employees sign these agreements which evidence an intention to create an employment relationship by this contract, not to negate the employer/employee status. Under California law, the determination is based on the reality of the workplace and control, rather than on the nominal agreement. (*Shiho Seki, supra*).

The Adult Film Industry is Covered by Section 5193

The Employer raises an issue regarding whether California OSHA has jurisdiction over the adult entertainment industry (AEI) and requests judicial notice be taken of the regulatory history of Section 5193. TIM argues that since § 5193 was enacted in reaction to the HIV/AIDS crisis and its focus was healthcare workers, its provisions should not apply to the adult entertainment industry. TIM requests a finding that the regulation is not applicable to the AEI, based on this history.

The California Occupational Safety and Health Act gives Cal/OSHA jurisdiction over virtually all private employers in California, thus including employers in the adult film industry. In developing the bloodborne pathogen regulations, Cal/OSHA analyzed the impact on a number of occupations, mostly related to healthcare, but the AEI and the entertainment industry were not discussed in the regulatory history.¹⁸ Section 5193 was adopted in 1992 in response to the federal bloodborne pathogen standard, 29 C.F.R. Section 1910.1030, which was adopted in 1991. The state standard closely parallels the federal standard. In addition to general health and safety hazards associated with film and video production, workers in the adult entertainment industry face particular hazards because actors perform sex acts in the course of making the films or videos. Many diseases can be transmitted through blood, semen, vaginal fluid and fecal material, or by mucous membrane contact.

TIM cites no evidence from the history of adoption of § 5193 that the Standards Board intended to exclude the production of adult films from its requirements.

The terms of the California Occupational Safety and Health Act are to be given a liberal interpretation for the purpose of achieving a safe working environment. (*Carmona v Division of Industrial Safety*, 13 Cal 3rd 303 118 Cal. Rptr. 473 (Jan 13, 1975).) The bloodborne pathogen standard applies to all workplaces (except those in the construction industry) where employees are exposed to blood or other potentially infectious materials. The regulations, by their terms apply “to all occupational exposure to blood or other potentially

¹⁸ Public health is a substantial government interest, *Vivid Entertainment, LLC v Fielding*, (C. D. CA No. CV-13-00190, 2013 U.S. Dist. LEXIS, 2013 WL 4451068, (August 16, 2013), note 5.

infectious materials” (§ 5193[a]. Accordingly, the adult entertainment industry is covered by Section 5193.

TIM Employees were exposed to Bloodborne Pathogens

The Division has the burden of proving that there was employee exposure to a violative condition addressed by a safety order. (See, *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, DAR (Jan. 28, 1975).) To find "exposure" there must be reliable proof that employees are endangered by an *existing* hazardous condition or circumstance. (*Huber, Hunt & Nichols, Inc.*, Cal/OSHA App. 75-1182, DAR (Jul. 26, 1977).)¹⁹

Section 5193 defines the terms necessary to evaluate employee exposure.

“Bloodborne Pathogens” means

pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HCV) and human immunodeficiency virus (HIV).

Section 5193 defines an “exposure incident” as “a specific eye, mouth, other mucous membrane, non- intact skin, or parenteral contact with blood or other potentially infectious materials (“OPIM”) that results from the performance of an employee's duties.” OPIM includes semen, vaginal fluid, cerebral spinal fluid, synovial fluid and other fluids that could be contaminated with bloodborne pathogens.

The Appeals Board discussed the Secretary of Labor's statement of reasons in the Federal Register (56 Fed. Reg. 64004 (Dec. 6, 1991)) for adopting the federal bloodborne pathogen regulation (29 C.F.R. 2910.1030) in *Conard House*, Cal/OSHA App. 95-931, DAR (Jul. 27, 1999). The probability of direct contact with blood or bodily fluids containing blood was recognized as the dominant factor in determining the existence of occupational exposure. (*Id.*, at 64088-64089.) The Secretary stated that "reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or OPIM that may result from the performance of the employee's duties" is the basis of occupational exposure. (*Id.*, at 64089)

The employer argues that there was insufficient evidence that employees

¹⁹ Direct evidence is not necessary to prove employee exposure since it may also be proved by indirect (circumstantial) evidence demonstrating that employee exposure is more likely than not. (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, DAR (Sept. 26, 2001), citing *Truestone Block, Inc.*, Cal/OSHA App. 82-1280, DAR (Nov. 27, 1985).)

were exposed to semen and points out that in “solo scenes”, there was no evidence of exposure because each individual used a webcam and was in a room by himself. The evidence established that certain of these individuals were allowed to create footage of the “solo scenes” which may have been used in “materials” produced by TIM. According to Mason, these individuals were not paid for their efforts, unless the footage was actually used.²⁰

However, the gravamen of this citation involves the actual occupational exposure of TIM employees to bloodborne pathogens by virtue of their proximity to OPIM and semen when they are in the room where the filming is done. Portions of TTLF shown at the hearing establish that members of the film crew were present in the room and exposed to semen and OPIM.²¹ This exposure occurs for employees who are part of the camera crew and for those performing sex acts, as well as those who clean ejaculates in the rooms used by individuals. The sex acts in “TTLF” and other TIM materials are incidents of occupational exposure, as they involve contact with the rectum, mouth or other body parts.

Exhibit 2, “TTLF” contains shots of cameramen who were in very close range to OPIM. The equipment, including camera lens as well as the faces and arms of the cameraman, were inches from the spray which was being filmed. The exposure to blood, semen and OPIM is reasonably foreseeable for those employees who exposed to it as part of their job duties. There was sufficient contact with the hazard during the filming of “TTLF” to establish an occupational exposure.

#N testified credibly that the sets were wiped using sanitizers, such as Purell, as well as bleach and 409 cleaner. (02/07/13, TS 182-183) Testimony that the individuals in solo scenes cleaned up themselves and eliminated possible exposure to bloodborne pathogens by TIM employees who cleaned the room after its use is may be accurate but is not conclusive on this point. The use of improper methods of clean-up was credibly testified to by #N who

²⁰ The individuals who did “solos” in private rooms and produced semen used in the turkey baster were not paid for their efforts, and thus are not “employees”.

²¹ Section 5193 provides Other Potentially Infectious Materials “OPIM” means:

- 1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any other body fluid that is visibly contaminated with blood such as saliva or vomitus, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids such as emergency response.
- 2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead);
 - a) Any of the following, if known or reasonably likely to contain or be infected with HIV, HBV, or HCV:
 - (1) Cell, tissue, or organ cultures from humans or experimental animals;
 - (2) Blood, organs, or other tissues from experimental animals; or
 - (3) Culture medium or other solutions.

testified the TIM employees cleaned up the ejaculate that remained in the room. TIM employees who carried out those duties had one or more instances of “occupational exposure” to semen and OPIM.

Citations were issued within the six month statute of limitations.

The Division is required to issue a citation within six months of the last occurrence of a violation.²² TIM disputes that the citation here, which was issued on March 25, 2010, was issued within six months of the exposure to the hazard.

Any incident(s) which occurred on September 25, 2009 or later, within California, and which exposed employees to hazards, would be within the six-month limitation period, and might properly be the basis of a citation. TIM argues that the Division’s evidence regarding the date and location of the filming was “vague and contradictory”.²³ However, it is undisputed that “TTLF” was filmed in 2009 during the weekend of the Folsom Street Fair. Murphy and Gold testified that the Folsom Street Fair in San Francisco was on September 27, 2009. This is consistent with documentary evidence in the record. The release forms and check register (Division Exhibits 7, 9, 13, 13-2, 14 through 28, 36 and 38) establish that the participants (#A through #O) signed the participants release forms and were paid by checks dated September 24 through September 28, 2009. The checks were prepared on the day before the filming. Each of the participants who signed the forms appeared in “TTLF”, as shown on the credits of the DVD (Exhibit 2). The exposure to the hazard (exposure to OPIM) during the filming of “TTLF” occurred in late September 2009, on September 25, 2009 or later.

No effective exposure control plan was in effect at the time of the filming of TTLF in September 2009. (See Exhibit 33, Boyd’s February 8, 2010 letter to Murphy stating that no programs existed at the time; and Mason’s statements to Murphy in November 2009 that TIM was working on an exposure control plan. (2/8/13 TS 90-93).)²⁴ No abatement occurred prior to the issuance of the citations. TIM exposed its employees to hazardous conditions on September 25, 2009 and on several days following, and did not have an exposure control plan in place on those days. The citation was issued on March 25, 2010, less than six months after some or all of the filming days – the days on which the safety

²² Section 6317 provides: “No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation.”

²³ Although there was evidence that some of the footage for TIM materials were filmed at locations outside of California, there was no evidence presented regarding the extent to which this was the case or how that affected the jurisdiction of the Appeals Board regarding the employees involved in the filming of TTLF in California.

²⁴ TIM presented no evidence that it adopted an effective exposure control plan after its February letter to Murphy.

standard was violated. Therefore, the citation was issued within the six month statute of limitations.

Employer did not maintain an effective exposure control plan.

Section 5193(c)(1) requires the employer to establish, implement, and maintain an effective written exposure control plan which meets eight minimum requirements. Where there is an occupational exposure to a bloodborne pathogen, the employer must: 1) develop an exposure control plan; 2) minimize or eliminate exposure using engineering, work practices and protective equipment; 3) provide hepatitis vaccinations; 4) conduct and document exposure incident evaluations; 5) communicate hazard information in the form of training, signs and labels; and, 6) maintain medical and training records. No exposure control plan existed at the time of the inspection nor was one implemented at any time prior to the issuance of citation.

The Division demonstrated that on November 5, 2009, it requested that Employer provide policies regarding the use of condoms or other barrier protection. When these documents were not received, Murphy wrote a letter to Mason requesting all written health and safety programs in effect at TIM. (See Division Exhibit 12, Letter to Mason from Murphy, dated February 2, 2010) Mason admitted to Murphy that TIM was working on an exposure control plan; TIM's attorney, Ian Boyd, conceded that "no programs existed at the time". (emphasis added) (2/8/13 TS 90-93) (See Division Exhibit 33, Letter to Murphy, dated February 8, 2010)

Although TIM submitted Division Exhibit 32, "Treasure Island Media Bloodborne Pathogens and Sexually Transmitted Diseases Exposure Control Plan" to the Division, this plan does not satisfy Section 5193(c)(1), which requires engineering controls and work practice controls and the use of personal protective equipment, specifically condoms. Moreover, no plan to provide personal protective equipment was ever implemented. (Division Exhibit 33.) There was also no evidence that TIM offered a Hepatitis B Vaccination, provided a post-exposure evaluation and follow-up, communicated the hazards to employees or set up any recordkeeping to document the instances of "occupational exposure," much less a written control plan with each of the required elements. The Division established a violation of Section 5193(c)(1) by the failure to establish, implement and maintain an effective written exposure control plan.

The Serious Classification

To sustain a serious violation, the Division was required to establish the serious classification by showing that there was a substantial probability that employees would suffer serious exposure resulting in serious physical harm or

death if a violation occurred. (Labor Code § 6432(a)(2)²⁵.) "Serious exposure" is defined as any exposure of an employee to a hazardous substance when the exposure occurs as a result of an incident, accident, emergency, or exposure over time and to such a degree or amount to create a substantial probability that death or serious physical harm could result from the exposure. (Labor Code § 6302(i)).

The term "substantial probability" refers to "the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation." (Lab. Code, § 6432, subd. (b).) The Division does not have to show that death or serious injury actually occurred. *See, e.g., Helix View Healthcare Center*, Cal/OSHA App. 92-1800, DAR (Jun. 19, 1995). "A 'probability' is something likely to occur. A 'substantial probability' then, is something more likely to occur [or be expected] than not." (*Abatti Farms/Produce*, Cal/OSHA App. 81-0256, DAR (Oct. 4, 1985); *see also Pacific Steel Casting Co.*, Cal/OSHA App. 79-1514, DAR (Nov. 15, 1984).)

Testimony offered by a Division investigator may be accepted as sufficient to support the allegation, if the investigator testifies to sufficient experience and observations of incidents similar to the nature of the incident at issue in a pending case, and if his testimony supports his conclusion. *See, e.g. Davis Brothers Framing Inc.* Cal/OSHA App. 05-634, DAR (Apr. 8, 2010); *Webcor Builders* Cal/OSHA App. 06-3031, DPR (Jan. 11, 2010). The opinion must be based upon a valid evidentiary foundation such as expertise on the subject, reasonably specific scientific evidence, experience-based rationale, or generally accepted empirical evidence. (*See R. Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, DAR (Nov. 29, 1999).)

The Division presented sufficient evidence to support a finding of serious physical harm to an employee if contact with the semen or OPIM were to occur. HIV is a serious and life-threatening disease and affects the person's immune system. Dr. Prudhomme testified that the HIV virus rendered the person more susceptible to contracting other sexually transmitted diseases and viruses. For example, when a patient who is HIV positive is exposed to Hepatitis B virus and is not offered a Hepatitis B Vaccination or Post-Exposure Evaluation and follow-up, the opportunity to arrest the development of Hepatitis B during the early stages is lost. Pairing one or more person who is HIV positive with others who are HIV positive is not a safe practice. Such persons would be exposed to other viruses and sexually transmitted diseases of the other persons, coupled with their own immuno-compromised condition. At the time of the inspection, Mason told Gold and Murphy that TIM did not have an exposure control plan. (4/24/13 TS 20:23-21:10) Based on preponderant evidence, the failure to have

²⁵ The change in Labor Code section 6432(a), effective January 1, 2011 is inapplicable to this case, as the citation was issued on March 25, 2010.

bloodborne pathogen program would more likely than not result in serious injury.

In addition to the above-mentioned evidence, the Division presented the testimony of the Division's Deputy Chief for Health and Engineering Services, Deborah Gold, who provided her opinion, based on her experience as supervisor of the medical unit, the research and standards unit and the industrial hygiene laboratory. Gold also was involved in the development of the blood-borne pathogen standard in California and in numerous investigations of the adult film industry and Section 5193. Her testimony is that TIM was required to have a bloodborne pathogen program because there is reasonably anticipated contact with other potentially infectious materials and blood. She cited the fact that TIM employees were engaged in and filming bare-backing sex, an occupational exposure to OPIM. (4/24/13 TS 8:24 et. seq.).

The Division established that an employee who was exposed to bloodborne pathogens, would more likely than not suffer a serious injury, including death. The serious classification was established by a preponderance of the evidence, based on the testimony and physical evidence presented. When a Division witness provides an opinion, based on his experience in the field of safety, that an exposure incident would more likely than not result in serious injury, and there is no evidence to controvert such testimony, nor is such testimony impeached or otherwise called into question under cross-examination, the Division has met its burden of proof to show the serious classification is correct. (*Forklift Sales of Sacramento, Inc.*, Cal/OSHA App. 05-3477, DAR (Jul. 7, 2011) *Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, DAR (Jul. 28, 2012).) The Division has met its burden of proof to show the classification of serious is correct.

The employer had the burden of proving that it could not have known of the violative condition by exercising reasonable diligence. An employer must establish that the violation occurred at a time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. *Vance Brown, Inc.*, Cal/OSHA App. 00-3318, DAR (Apr. 1, 2003).) TIM did not present any evidence that it did not know that the camera crew and participants in its films were exposed to semen and OPIM. Based on the Participant Release Form, which attempts to shield TIM from responsibility for "developments or changes in the status of [] physical health or wellbeing", lack of employer knowledge of the hazard is not supported. The remaining affirmative defenses were not established and are denied.

The proposed penalty of \$9,000 is not reasonable.

Although the Employer did not assert that the proposed penalty was miscalculated, or the regulations were improperly applied, or that the totality of the circumstances warrant a reduction, the Appeals Board has jurisdiction to

correct an error in the penalty calculation. *Hypower, Inc., dba Hypower Electric Services, Inc.*, Cal/OSHA App. 12-1498, DAR (Sept. 11, 2013).) The Division proposed a penalty of \$9,000. Upon review, the proposed penalty of \$9,000 for a violation of 5193(c)(1) was derived based on incorrectly applying the regulations, Section 333 through 336.

The proposed penalty in Citation 2 was based on the fact that the violation was classified as "serious" with "high" extent and "medium" likelihood. (See Division Exhibit 34, proposed penalty worksheet) All serious violations begin with a base penalty of \$18,000. Section 336(c)(1). If the Extent is High, 25% of the base penalty is added. *Id.* If the likelihood is medium, there is no further adjustment made. *Id.* Based on the "serious" classification, with "high" extent and "medium" likelihood, the gravity-based penalty was increased by \$4,500 to \$22,500.

A further adjustment is made based on the "penalty adjustment factors", which were assessed in the proposed penalty worksheet by the Division as 15% for good faith, 20% for size and 10% for history, totaling 45%. Section 336(d)(1) provides for a 20% reduction if there are between 26 and 60 employees. The basis for crediting TIM with over 26 employees, rather than twenty employees which Mason stated in his testimony, is that there were a number of participants who were not counted as "employees".

Section 336(d)(2) provides for a 15% reduction if the good faith of the employer is "fair." Section 336(d)(3) provides that a 10% reduction is given if the employer's history of compliance is "good", as defined by section 335(c). This is supported by the fact that there were no prior inspections of TIM by the Division. Based on a review of the record, these adjustments are established as proper.

However, Division Exhibit 34 shows that the Division incorrectly reduced the penalty by 20%, not 45%. Applying these factors to the gravity-based penalty of \$22,500 results in an adjusted penalty of \$12,375, not \$18,000. The penalty calculation is further reduced to \$6,185 after applying the 50% abatement credit. A penalty of \$6,185 is reasonable and will be assessed.

DOCKET 10-R6D1-1095

Citation 3, Item 1, §5193(d)(1), Serious

Findings and Reasons for Decision

The production crew and participants hired by the Employer are employees and not independent contractors.

Employees were exposed to blood or OPIM during the course of their work.

Employer failed to observe universal precautions during production of films.

The proposed penalty is not reasonable because the hazard is substantially identical or duplicative of Citation 2-1.

The factual allegations of Citation 3, Item 1 are:

Treasure Island Media, Inc. does not observe universal precautions during production of films. They have not instituted engineering and work practice controls to eliminate or minimize contact with blood & semen, including, but not limited to, the use of barrier protection such as condoms.

Employer was cited under §5193(d)(1), which reads as follows:

(d) Methods of Compliance.

(1) General. Universal precautions shall be observed to prevent contact with blood or OPIM. Under circumstances in which differentiation between body fluid types is difficult or impossible, all body fluids shall be considered potentially infectious materials. They also do not ensure personal protective equipment, including condoms, are available and used to eliminate or minimize contact with OPIM.

The definition of “Universal Precautions” is set forth in Section 5193:

"Universal Precautions" is an approach to infection control. According to the concept of Universal Precautions, all human blood and certain human body fluids are treated as if known to be infectious for HIV, HBV, HCV, and other bloodborne pathogens.

Production crew and participants are employees.

As set forth above, the employer’s production crew and participants are “employees” not “independent contractors”. (*S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 356; *McDonald’s Van Ness*, Cal/OSHA App. 00-1621, DAR (Sep. 26, 2001); *Sully-Miller Contracting Co.*,

Cal/OSHA App. 99-0896 DAR (Oct. 30, 2001); *Commercial Diving*, Cal/OSHA App. 91-921, DAR (Apr. 14, 1994.)

Employer failed to observe universal precautions during production of films.

Employees were found to be endangered by an *existing* hazardous condition or circumstance due to the fact that they are exposed to bloodborne pathogens, as discussed, *supra*, when they have contact with blood or OPIM. In Exhibit 2, "TTLF", condoms were not in use in several scenes involving exposure to OPIM. This is consistent with the information on TIM's website that its videos feature "unprotected no condom DVDs." (See Exhibit 29; #N (02/08/13 TS 58:7-10; 58:19-59:10).)

It is clear that TIM did not have work practices which would prevent exposure to ejaculate or OPIM. Occupational exposure, which occurs when there is "reasonably anticipated contact of the eyes, skin, mucous membrane or parenteral contact with blood or OPIM", requires employer to have a bloodborne pathogen program. There was no plan. Although TIM was aware of the prevalence of HIV, Hepatitis B and Hepatitis C in their workforce, they did not offer Hepatitis B Vaccination or obtain a signed declination for those wishing not to be vaccinated. Similarly, there was no post-exposure evaluation or follow-up, which is required by Section 5193.

The Division established a violation of Section 5193(d)(1) by TIM's failure to practice engineering controls or to require employees to don personal protective gear when engaged in filming which exposed them to blood or OPIM.

Since abatement of the hazard addressed in Citation 2, §5193(c)(1), is substantially similar to abatement of the hazard in Citation 3, §5193(d)(1), no civil penalties are assessed for Citation 3.

The Board requires the ALJ to assess whether penalty reduction is appropriate when there are multiple violations involving the same hazard and where a single means of abatement is needed. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, DAR (Sept. 6, 2012), citing *A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, DAR (Jun. 24, 2010).) The Board has held penalties which tend to be duplicative or cumulative, and are not needed to effectuate abatement, inconsistent with the spirit and intent of the Act. (*Strong Ties*, Cal/OSHA App. 75-856, DAR (Sept. 16, 1976). *Western Pacific Roofing Corp.*, Cal/OSHA App. 96-529, DAR (Oct. 18, 2000).) As the Board stated in *Strong Ties, supra*, "[t]here appears to be no reason why an employer should pay what is essentially a double penalty for what is in reality a single hazardous situation." While multiple citations involving a single hazard are appropriate

and typically will be upheld, the same is not true for duplicative penalties. (e.g., *West Valley Construction Co., Inc.*, Cal/OSHA App. 01-3017, DAR (May 16, 2008); *Western Pacific Roofing, supra.*)

Here, different sections of the bloodborne illness safety orders were involved with violations due to the failure to maintain an Exposure Control Plan to determine exposure to OPIM and failure to develop procedures, such as engineering controls and work practices, which include the observation of universal precautions during filming and set cleaning. Citation 2 and Citation 3 would have been capable of being abated by the same actions, because instituting engineering and work practice controls to eliminate or minimize contact with blood and semen includes the use of barrier protection such as condoms. Thus, the hazard addressed in the violations of the two sections and the facts in this case establish that imposition of a penalty for violation of §5193(c)(1) would be duplicative of imposition of a penalty for violation of §5193(d)(1), because the violations would have been capable of being abated by the same actions. Hence, the penalty for Citation 3 is vacated.

Decision

The evidence supports a finding that Employer violated sections 5193(c)(1) and 5193(d)(1). The penalty for Citation 2, is properly calculated as \$6,185 as indicated above and set forth in the attached Summary Table. The penalty for Citation 3 is vacated, for the reasons described herein, and as set forth in the attached Summary Table.

IT IS SO ORDERED.

DATED: January 6, 2014

MARY DRYOVAGE
Administrative Law Judge

Pursuant to §364.2(d), Title 8 California Code of Regulations, Employer shall post for 15 working days a copy of this Decision.

Pursuant to §364.2(b), Title 8 California Code of Regulations, the Division shall serve a copy of this disposition on any authorized employee representative if known to the Division to represent affected employees.

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
TREASURE ISLAND MEDIA, INC.
DOCKETS 10-R6D1-1093 /1095

| | |
|-------------------|----------------|
| Abbreviation Key: | Reg=Regulatory |
| G=General | W=Willful |
| S=Serious | R=Repeat |
| Er=Employer | DOSH=Division |

| |
|--------------------|
| IMIS No. 313833097 |
|--------------------|

| DOCKET | C I T A T I O N | I T E M | SECTION | T Y P E | ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON | A F F I R M E D | V A C A T E D | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT PRE- HEARING | FINAL PENALTY ASSESSED BY BOARD |
|--------------|--------------------------------------|------------------|------------|------------------|--|--------------------------------------|---------------------------------|---|--|--|
| | | | | | Employer withdrew appeal of Citation 1, Items 1-15, pursuant to settlement with Division. | | | | | |
| 10-R6D1-1093 | 1 | 1 | 3202(a) | G | [Failure to develop a written Injury and Illness Prevention Program, failure to conduct health and safety training for hazards, including prevention of sexually transmitted diseases, and failure to conduct health and safety inspections for hazards in the workplace.] | | | \$410 | \$410 | \$410 |
| | 1 | 2 | 2340.16(a) | G | [Failure to have access to wiring in junction box on 2 nd floor, boxes and trash in the working space in front of the electrical distribution & meter equipment.] | | | \$205 | \$0 | \$0 |
| | 1 | 3 | 2599.1(a) | G | [Use of flexible cords as a substitute for fixed wiring and attached to building surfaces, use of extension cords were placed between receptacles and powertaps, extension cords were attached to walls, floors and beams.] | | | \$205 | \$0 | \$0 |
| | 1 | 4 | 2473.2(a) | G | [Missing cover on the junction box on the SE wall in inventory storage area.] | | | \$135 | \$135 | \$135 |
| | 1 | 5 | 3214(c) | G | [Handrails not continuous & did not extend at least 12" beyond top & bottom risers.] | | | \$305 | \$305 | \$305 |
| | 1 | 6 | 3215(c) | G | [No fire alarm to warn occupants of the existence of fire within the building.] | | | \$205 | \$205 | \$205 |
| | 1 | 7 | 3215(c) | G | [Failure to have the emergency lighting units in both interior stairwells functioning throughout the exist paths; failure to have emergency lighting in IT area, shipping area, 23 rd floor landing rear exit or 1 st floor landing front exit.] | | | \$205 | \$0 | \$0 |

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
TREASURE ISLAND MEDIA, INC.
DOCKETS 10-R6D1-1093 /1095

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| DOCKET | C I T A T I O N | I T E M | SECTION | T Y P E | ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON | A F F I R M E D | V A C A T E D | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT PRE- HEARING | FINAL PENALTY ASSESSED BY BOARD |
|--------|--------------------------------------|------------------|------------|------------------|---|--------------------------------------|---------------------------------|---|--|--|
| | 1 | 8 | 3216(c) | G | Employer withdrew appeal of Citation 1, Items 1-15, pursuant to settlement with Division. | | | \$305 | \$305 | \$305 |
| | 1 | 9 | 3220(a) | G | [Light bulbs not functioning in Exit signs for Suite 302, both front & rear 1 st floor exits.] | | | \$305 | \$305 | \$305 |
| | 1 | 10 | 3225(b) | G | [Failure to have a written site specific emergency action plan for 351 9 th Street and did not address actions and responsibilities in the event of an earthquake or procedures to account for all employees after an emergency evacuation.] | | | \$205 | \$205 | \$205 |
| | 1 | 11 | 3234(g)(4) | G | [The double doors between shipping area and freight elevator were marked as EXITs and the doors lead to an adjoining area that did not provide a direct means of egress to an exit.] | | | \$205 | \$0 | \$0 |
| | 1 | 12 | 5194(e)(1) | G | [3 rd floor landing to the rear stairs which extends beyond the end of the top step, 8.5" perpendicular to the direction of travel for the run of the stairs, without guardrail to prevent entry to this area.] | | | \$205 | \$205 | \$205 |
| | 1 | 13 | 6151(c)(4) | G | [Use of bleach to clean up biological waste including OPIM from work surfaces; failure to develop a written hazard communication program.] | | | \$135 | \$0 | \$0 |
| | 1 | 14 | 6151(e)(2) | G | [Failure to maintain a fully charged portable fire extinguisher.] | | | \$205 | \$205 | \$205 |
| | 1 | 15 | 6170(a)(3) | G | [Failure to inspect portable fire extinguishers in electrical utilities room monthly.] | | | \$205 | \$205 | \$205 |
| | | | | | [Failure to maintain minimum clearance of 36 inches between top of storage and sprinkler deflector.] | | | \$205 | \$205 | \$205 |

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
TREASURE ISLAND MEDIA, INC.
DOCKETS 10-R6D1-1093 /1095

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| DOCKET | C I T A T I O N | I T E M | SECTION | T Y P E | ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON | A F F I R M E D | V A C A T E D | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT PRE- HEARING | FINAL PENALTY ASSESSED BY BOARD |
|--------------------------|--------------------------------------|------------------|------------|------------------|---|--------------------------------------|---------------------------------|---|--|--|
| | 2 | 1 | 5193(c)(1) | S | [Failure to establish, implement and maintain an effective exposure control plan where employees are exposed to semen and OPIM due to work activities during filming and set cleaning.] ALJ sustained violation. | X | | \$9,000 | \$9,000 | \$6,185 |
| | 3 | 1 | 5193(d)(1) | S | [Failure to observe universal precautions during production of films, failure to institute engineering and work practice controls to eliminate or minimize contact with blood & semen, including but not limited to, the use of barrier protection such as condoms.] ALJ sustained violation. Penalty vacated as single abatement is needed for Citation 2 and 3. | X | | \$9,000 | \$9,000 | \$0 |
| Sub-Total | | | | | | | | \$21,440 | \$20,485 | \$8,670 |
| Total Amount Due* | | | | | | | | | | \$8,670 |

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
PO Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ: MD/
POS: 1/6/14**