

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

CHEVRON U.S.A. INC.
841 Chevron Way
Richmond, CA 94801

Employer

DOCKET 13-R6D3-0655
through 0662

DECISION

Statement of the Case

Chevron U. S.A. Inc. (“Employer”) operates a large oil refinery in Richmond, California. Beginning on August 30, 2012, the Division of Occupational Safety and Health (“the Division”) through Associate Safety Engineers Robert Salgado, Michael Doering and others conducted an injury investigation at the Chevron refinery in Richmond. On January 30, 2013, the Division issued eight citations to Employer for violations of occupational safety and health standards found in Title 8, California Code of Regulations.¹ Four of the citations alleged failures to properly maintain electrical circuitry or conduit around electrical wires; one alleged a failure to properly mark a self-contained eyewash/shower station; one alleged a failure to maintain fire protection equipment properly; and two alleged a failure to comply with “management of change” requirements. The Division classified all violations as “serious” and in addition classified citations 6 and 8 as “willful.” Specific aspects of the citations are described as appropriate below.²

The Employer filed timely appeals of all citations, contesting the existence of each alleged violation, all classifications and the reasonableness of the proposed penalties and abatement requirements.

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

² Citations 1, 2, 3 and 5 allege violations of safety standards related to electrical equipment, particularly electrical conduit. Citation 4 alleges a violation of the safety standard involving an eyewash facility. Citation 7 alleges a violation of the standard pertaining to the condition of fire fighting and fire protection equipment. Citation 6 alleges three violations of section 5189(l), concerning management of change. Citation 8 alleges nine violations of section 6845, which has to do with maintaining the integrity of piping systems, and which incorporates by reference a document issued by the American Petroleum Industry

United Steelworkers Local 5, which represents workers at Employer's Richmond refinery, sought and was granted party status.

The matter was heard on nine days, beginning on February 19, 2013 and ending on June 30, 2013 in Oakland, California before Martin Fassler, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). The Division was represented by attorney Allyce Kimerling. Employer was represented by attorneys Thomas L. VanWyngarden, Genus Heidary and David S. Hoffman, all of the firm Katten Muchin Rosenman LLP. United Steelworkers Local 5 was represented by Mike Smith. The Division and Employer presented testimony, and documentary evidence. Division and Employer submitted post-hearing briefs, the last of which were submitted on September 15, 2014, and the matter was submitted for decision at that time. The submission date was later extended by the Administrative Judge, at his own initiative, to January 2, 2015.

Issues Presented

1. Did any of the torn or incomplete metal electrical conduit referred to in Citation 1 violate any provision Title 24, Part 3, section 250-78, and thus violate section 2395.78?
2. Was there an opening in an electrical fitting at the end of a rigid metal conduit at D & R, Plant 37 that was not effectively closed? (Citation 2)
3. Did Employer fail to replace missing covers on the two rigid conduit bodies, one near South ISOMAX, Furnace 305, and the other at the distillation and refining unit, next to furnace F-447? (Citation 3)
4. Was the area around or behind the eyewash/shower station near V206 in SRU, painted a bright color? (Citation 4)
5. Does section 5189(j)(3), which requires correction of deficiencies on equipment which is operating outside acceptable limits defined by section 5189(d), apply to the repair of electrical conduit that may be linked to such equipment? (Citation 5)
6. Did Citation 5 provide adequate notice to Employer of the factual bases of the allegation of violation of a safety order?
7. Did Employer implement its own Management of Change requirements with respect to the three valve repairs identified in Citation 6?
8. Did Employer fail to inspect and maintain firefighting or fire protection equipment? (Citation 7)
9. Did Employer violate a requirement of American Petroleum Institute Publication 570 concerning the removal of temporary leak sealing in a timely fashion, and thereby violate section 6845? (Citation 8)

Findings of Fact

1. There is no evidence that any element of the wiring referred to in Citation 1 was in violation of a requirement of Title 24, Part 3, section 250.78, which is incorporated into section 2395.78.
2. The unused opening in the metal conduit referred to in Citation 2 was not properly covered.
3. There is insufficient evidence that there was a realistic possibility of serious physical harm arising from the actual hazard created by the violation alleged in Citation 2.
4. There were two missing conduit covers on rigid conduit bodies in the locations referred to in Citation 3.
5. There is insufficient evidence that there was a realistic possibility of serious physical harm arising from the actual hazard arising from the violation alleged in Citation 3.
6. The areas behind and around the eyewash/shower station referred to in Citation 4 were not painted a bright color.
7. As there was no evidence about the quantity of sodium bisulfite used in the area of the eyewash/shower station, or of its concentration during use, or of the form of sodium bisulfite used, there is insufficient evidence that the lack of a bright color in the areas around and behind the eyewash/shower station would result in a realistic possibility of serious physical harm.
8. There are no “acceptable limits,” within the meaning of section 5189(j)(3) that would apply to repair of broken or damaged electrical conduit, as alleged in Citation 5.
9. The investigative summary document that the Division provided to Chevron in connection with Citation 5 did not include reference to “acceptable limits” or to Employer’s system of prioritizing needed electrical repairs.
10. With respect to Management of Change numbers 16210 and 21513, Employer did not implement its own Management of Change requirements, with respect to the time requirements for replacement of valves.
11. There was insufficient evidence of a “realistic possibility” that the hazards created by the violations in Citation 6 would lead to serious physical harm or death.
12. The fire water main referred to in Citation 7 is not movable firefighting or fire protection equipment.

ANALYSIS

Did any of the torn or incomplete metal electrical conduit referred to in Citation 1 violate any provision Title 24, Part 3, section 250-78, and thus violate section 2395.78?

Section 2395.78, the basis for Citation 1, provides as follows:

§2395.78. Bonding in Hazardous Locations.

Regardless of the voltage of the electrical system, the electrical continuity of metal noncurrent-carrying parts of equipment, raceways, and other enclosures in any hazardous location as defined in Article 59 of these Orders shall be assured by any of the methods specified for services that are approved for the wiring method used.

(Title 24, Part 3, Section 250-78.)

Citation 1 alleges as follows:

On or before 08/30/12 the employer failed to assure the electrical continuity of the electrical systems installed within hazardous locations throughout the refining plant. The following instances were not corrected as of the dates indicated below:

1. An electrical conduit and connection fitting installed under the first deck of Jet Stripper C-732, located in North ISOMAX adjacent to turbine pump 737, were completely separated from the conduit junction body. As of September 20, 2012, the vertically mounted rigid metal conduit (RMC) an exposed wiring remained unrepaired.
2. A bonding jumper was completely detached from a fixed grounding lug that was securely threaded to the connector on the end of a Liquid-Tight Flexible Metal Conduit (LFMC.) As of September 27, 2012, the loose bonding wire remained disconnected from the electric conduit serving controller #FV415 and associated equipment operating within D&R, Plant 37.
3. Two sections of flexible metallic conduit (FMC) at ground level in front of tubes #33 and #66 on the fourth deck of South ISOMAX, F-350, A-Cell/A -Train, sustained physical damage that left the interlocked helical coiling strips separated and stretched to the point where their bonding and grounding capabilities were significantly

impaired. As of October 19, 2012, the damaged conduit and exposed wiring remained unrepaired.

Section 2395.78 is within a lengthy “Subchapter 5, Electrical Safety Orders.” which applies to electrical systems in a variety of workplaces; it refers to electrical systems in “hazardous locations” as defined in Article 59. Article 59, beginning with section 2540.1, defines hazardous locations as those which include “flammable vapors, liquids or gases, or combustible dusts or fibers which may be present. . .” The section states that hazardous locations may be found in occupancies such as “aircraft hangars, gasoline dispensing and service stations, bulk storage plants for gasoline or other volatile flammable liquids, paint finishing process plants . . . and petroleum and chemical processing plants.”

As the work place in these appeals was a petroleum processing facility, it is a “hazardous location” within the meaning of section 2395.78.

The last line of section 2395.78 – “(Title 24, Part 3, Section 250-78)” - is a reference to Title 24 of the California of Regulations. Title 24 contains the California Building Code. Part 3 is the electrical code, and sets out numerous requirements for electrical wiring within buildings.

A note at the end of section 3202 (c) explains the significance of a reference to Title 24 at the end of a workplace safety regulation within Title 8:

NOTE: Identification of Building Regulations. The basic building regulations for employment and places of employment contained in Title 24, State Buildings Standards Code are part of these safety orders. Pursuant to Health and Safety Code section 18943(c), such building regulations are identified in these safety orders by the addition of a reference to the appropriate section of the State Building Standards Code (Title 24), which is added to the end of the safety order section:

(Title 24, Part X, Section XXXX)

Section 2395.78, has a reference to Title 24 in exactly the form described in section 3202. Based on this reference, and in light of the phrasing of section 2395.78 – “shall be assured by any of the methods specified for services that are approved for the wiring method used” - it is apparent that section 2395.78 requires each employer to use an appropriate method for assuring “the electrical continuity of metal noncurrent-carrying parts of equipment;” and that these appropriate methods, applicable for different wiring methods, are specified in Title 24, Part 3, Section 250-78.

Therefore, to prove the allegations of Citation 1, for the instances listed, the Division must prove that the condition of the conduit or connection fitting listed in Instance 1; or the bonding jumper and conduit listed in Instance 2; or the conduit referred to in Instance 3, was in violation of some requirement of “methods [of maintaining electrical continuity] specified for services that are approved for the wiring method used,” as these methods are defined by Title 24, Part 3, Section 250-78. The Division would have to provide evidence that allows a finding that any one of the instances listed in the citation was in violation of some aspect of Title 24, Part 3, section 250-78.

Neither party introduced any provision of Title 24, Part 3. The Division’s only witness with respect to Citation 1 was Robert Salgado. Salgado made no mention in his testimony of any provision of Title 24, Part 3.³

An examination of Title 24 of the California Building Codes (which may be found on-line, at the web site of the California Building Standards Commission) does not provide clarity needed to decide whether the citation is well-based. Part 3 appears to be approximately 30 pages long. Article 250, which is ten pages long, is entitled “Grounding and Bonding.” It has ten major divisions, concerning different types of electrical systems, and the grounding and bonding requirements for each. Part 3 does not include any section “250-78.” It appears likely that Part 3 was re-written after the latest amendment (1986) of section 2395.78, and that section 2395.78 was not re-written to take account of the new requirements of Title 24, Part 3. Since there is no section 250-78, the requirements of section 2395.78 for the settings identified in the citation are not apparent, and no evidence in the record eliminates that uncertainty.

Exhibits 5, 6, and 7 are photographs that depict shortcomings or gaps in electrical conduit or fittings. Salgado’s testimony identifies the location of these portions of cable and conduit. However, the Division offered no testimony to identify the requirements of Title 24, Part 3 that are applicable to the specific locations, particularly to the wiring methods used in those locations, nor did the Division present evidence of Employer’s failure to meet any requirement (or violate any prohibition) of Title 24, Part 3.

As there is no evidence on which to base a finding on which provision of Title 24, Part 3 (if any) is applicable to any of the conduit and

³ Significantly, the citation sets out most of section 2395.78 – but the citation did not include the reference to Title 24 that is an essential element of section 2395.78.

fitting points referred to in the citation, there is no basis for a finding that Employer has violated section 2395.78.⁴ Therefore, Employer's appeal of Citation 1 will be granted.

Was there an opening in an electrical fitting at the end of a rigid metal conduit at D & R, Plant 37 that was not effectively closed? (Citation 2)

Citation 2 is based upon section 2473.1(b) which provides:

2473.1 Conductors Entering Boxes, Cabinets or Filings

(b) Unused openings in cabinets, boxes and fitting shall be effectively closed.

The factual allegation of Citation 2 is, "On or before September 27, 2012, the Employer failed to effectively plug an unused opening on the end of a Rigid Metal Conduit (RMC) fitting installed within a hazardous location at D & R, Plant 37, feed to temperature controller #38T1091B."⁵

"Fitting" is defined by section 2300 as:

Fitting. An accessory such as a locknut, bushing, or other part of a wiring system that is intended primarily to perform a mechanical rather than an electrical function.

To establish the violation as alleged in the citation, the Division must provide evidence that on September 27, 2012 or some earlier date there was an unused opening at the end of an unused rigid metal conduit fitting installed within a hazardous location at D & R Plant 37, and that it was part of the feed to the temperature controller identified as "#38T1091B."

Salgado testified that he took the photographs that are in evidence as Exhibit 11 during his inspection of the Employer facility on September 27, 2012. The photographs, taken at varying distances from a portion of rigid metal conduit, all depict a circular opening at the end of a metal conduit, with white tape wrapped around the upper edge and across a portion of the upper opening. Some of the circular opening is covered by the tape, some is not.

⁴ The Division's post-hearing briefs make no reference to Title 24 provisions.

⁵ The citation as originally issued used the date October 27, 2012. During the hearing, the Division moved to amend the citation to correct the date to September 27, 2012, saying that the initial use of the October 27 was a result of a typing error. Employer did not object to the proposed amendment and the motion was granted.

Salgado testified that no wire extended out of the conduit he observed, and, looking into it, he saw no wire within the conduit. Salgado believed it to be an unused opening. On a second walk-around, Salgado testified, he was accompanied by Chevron's head operator for that refinery unit (who Salgado identified as Paul Peterson); that person confirmed that wire in the adjacent metal cylinder led to a temperature controller.

No other witness testified about the equipment or objects at issue here.

The evidence is sufficient to support findings that there was an unused opening in a metal conduit, which is within the definition of "fitting," at the location identified in the citation, and that opening was not effectively closed. Thus, there was a violation of the succinct requirement of section 2473.1(b).

Employer argues that because there was no evidence that there was a live electrical wire within the conduit, the citation is invalid. For this argument, it relies on the title of section 2473.1 ("Conductors Entering Boxes, Cabinets or Fittings"), and federal precedent construing similar provisions of the federal OSHA law. The argument is not persuasive. Section 2473.1 includes three paragraphs (a), (b) and (c) – with seven numbered sub-paragraphs within (c). Although (a) refers to conductors and (c) refers to cable, paragraph (b) refers specifically to "unused openings." Thus, it sets forth a requirement for adequate closure of "fittings" even in the (perhaps temporary) absence of live wires or cable.

Although the violation is established there is insufficient evidence to support a "serious" classification. Labor Code section 6432 provides that "There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation . . . is not sufficient by itself to establish that the violation is serious."

Salgado believed that the conduit was intended to be used for some sort of instrumentation wiring, but he had no information more specific than that. He testified, if moisture were to enter the rigid metal conduit which was not properly covered, it might, if it were to accumulate on or around electrical wire, cause a short, which might in turn lead to a fire and then to serious physical harm. In addition, Salgado testified that the opening might provide a means for the migration of gases, liquids or flammable vapors into the electrical wiring that led to the temperature

controller. This, in turn might result in malfunction of switches within the temperature controller, and might then lead to the ignition of heated flammable gases and an explosion.

In light of the limited evidence available concerning the actual use of the inadequately covered conduit, Salgado's testimony about the possible sequence of events is insufficient to support a finding that there is a "realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." As noted, there is no wire visible arising from the partially open conduit, and Salgado, looking into it, did not see any wire. Although the adjacent metal fitting apparently leads to a temperature controller, that metal fitting appears to be distinct from the conduit with the improperly covered opening. Thus, testimony about the possibility of either moisture or vapors entering the opening in the one conduit and eventually leading, through a second conduit, and then possibly to a temperature controller, and then possibly resulting in a malfunction of a temperature controller, which might then lead to serious physical harm, is too speculative to be considered sufficient evidence of a realistic possibility of serious physical harm arising from the actual hazard.⁶

The violation will be re-classified as "general" and the penalty will be recalculated accordingly. The starting point for calculation of a penalty for a general violation depends on the "severity" rating assigned to it. If it is possible that an employee might lose more than one day from regular work as the result of a general violation, the starting point is \$2,000 (regulation section 335(1)(A)). The facts here support adopting that starting point. The penalty is then adjusted based on "extent" and "likelihood" ratings, and good faith, size and history credits. Employer stipulated during the hearing that the Division's penalty calculations were carried out in conformance with applicable regulations. For citation 2, the Division did not apply any reductions for extent and likelihood, but applied a 25 per cent adjustment for Employer's good faith and history, and then a 50 per cent abatement credit. Those percentages will be applied here, leading to a penalty of \$750 for this violation.

Did employer failed to replace missing covers on the two rigid conduit bodies, one near South ISOMAX, Furnace 305, and the other at the distillation and refining unit, next to furnace F-447? (Citation 3)

⁶ Also, there was no evidence about the operation of the temperature controller, and the possibility of dual controls, or other safety devices that protect it.

Citation 3 is based on section 2473.2(a) which provides, in relevant part:

- (a) All pull boxes, junction boxes, and fittings shall be provided with covers identified for the purpose. If metal covers are used, they shall be grounded. In completed installations, each outlet box shall have a cover, faceplate, or fixture canopy. Covers of outlet boxes having holes through which flexible cord pendants pass shall be provided with bushings designed for the purpose or shall have smooth, well-rounded surfaces on which the cords may bear.

The factual allegations of Citation 3 are:

On or before August 30, 2102, the employer failed to provide covers on electrical conduit boxes installed in hazardous locations throughout the refining plant. The following instances were not corrected as of the dates indicated below.

1. As of September 19, 2012, the Employer failed to replace a missing cover on a rigid conduit body installed in a hazardous location containing natural/methane gas on the fourth floor deck of South ISOMAX, Furnace 305, C-CELL.
2. As of September 27, 2012, the employer failed to replace a missing cover on a rigid conduit body installed in a hazardous location at the distillation and refining unit, located 15 feet above the ground next to furnace #F-447.

Section 2473.2(a) includes four separate requirements. The one that appears to be applicable for both of the two “instances” listed in the citation, is the first: “All pull boxes, junction boxes and fittings shall be provided with covers identified for the purpose.”

Where a citation alleges that there were two instances of an employer’s violation of a single safety order, evidence to support either one will be sufficient to sustain the citation. *Petersen Builders Inc.* Cal/OSHA App. 91-052, DAR, (Jan. 24, 1992), fn. 4. To establish a violation, the Division must provide evidence that, for either of two instances, there was a “fitting” that lacked a suitable cover.

The evidence includes photographs, both taken on September 19, 2012, of two conduits lacking covers. Exhibit 14 shows a horizontal metal conduit with an end fitting open at the top, revealing within it undamaged insulated wiring. This was the conduit body referred to in Instance 1 of the citation. Exhibit 15 shows a T-junction fitting connecting one horizontal and one vertical rigid metal electrical conduit,

with an open space where a cover would fit, with undamaged, insulated wires visible within the fitting; the curved cables appear to extend slightly outside the interior of the conduit. This was the rigid conduit body referred to in Instance 2 of the citation. Salgado took the photographs and observed the two fittings and the absence of covers.

The first conduit was located about one foot above floor level, as seen in the second photo in Exhibit 14. It was on the fourth deck of a processing area known as the "South ISOMAX" unit. The second instance of uncovered conduit was about fifteen feet above floor level, and could be seen from ground level.

Salgado is a licensed electrician who has worked as a building inspector, a firefighter, a deputy fire marshal and a fire chief. He testified that based on the appearance of the cables in each instance, he believed the cables contained instrumentation wiring that ran to temperature sensors, alarms, or pressure gage type equipment. He testified on direct examination that he believed the object designated in Instance 1 was part of circuitry operating a furnace, which was processing natural gas. Salgado was able to feel considerable heat being generated by that furnace as he walked alongside it during the inspection. On cross-examination, however, Salgado acknowledged that he did not know the function of the cables that are seen in the photographs depicting either instance 1 or instance 2.

Neither party presented any evidence, other than Salgado's testimony on direct and cross-examination, about the subjects of this citation.

There is sufficient evidence to support findings that both the conduit bodies referred to in Citation 3, both of which are "fittings" within the definition in section 2300, were lacking suitable covers. Employer does not contend otherwise.

Employer argues that the Division's evidence is insufficient to sustain the citation because the Division presented no evidence to prove the specific cables within the uncovered conduit contained energized wires. There is no specific requirement to that effect in the safety order. It appears to require specific safeguarding of electrical cables even when they are not energized, or believed to be unenergized. In addition, section 2305.1, stating the purpose and applicability of the electrical safety orders include the requirements that electrical equipment be properly guarded apply when electrical circuits are not energized. Section 2305.1 provides,

The purpose of these Electrical Safety Orders is to provide minimum safety requirements and assist in the elimination of accidents which may result from the operation, installation, removal, use and maintenance of electrical equipment and tools.

That is, the safety orders are intended to require safety precautions when electrical equipment is being “installed” or “removed,” thus when there is no complete circuit in existence, and wires are not energized.

While the evidence is sufficient to support the violation, there is insufficient evidence to support the “serious” classification. The legal standard was cited above, in connection with Citation 2: Labor Code section 6432 provides that “There shall be a rebuttable presumption that a ‘serious violation’ exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation . . . is not sufficient by itself to establish that the violation is serious.”

It is apparent from the photographs in Exhibit 14 that in both instances the cables within the conduit were undamaged, and no loose wires were visible. The Division’s evidence in support of the “serious” classification consists solely of Salgado’s testimony. Salgado acknowledged he did not know the purpose of either of the cables seen in Exhibit 14. While Salgado’s description of the possible consequences of incompletely covered conduit may accurately reflect concerns about the possible consequences of accumulation of moisture and presence of chemical vapors, his testimony does not establish that there is a “realistic possibility” of serious physical harm arising from the actual hazard here. Therefore, the citation will be re-classified as “general” and the penalties re-calculated accordingly. For the reasons described above with respect to Citation 2, the penalty for Citation 3 will be reduced to \$750.

Was the area around or behind the eyewash/shower station near V206 in SRU, painted a bright color? (Citation 4)

Citation 4 alleges:

As of September 26, 2012, an eyewash/shower station located near V206 in SRU, where exposure to corrosive or severely irritating liquids is possible, had been painted dark green, the same color as surrounding beams, making it difficult for an injured worker with corrosive or irritating material in his/her eyes to access the eyewash.

The legal basis of the citation is regulation section 5162(a) which reads as follows:

Emergency Eyewash and Shower Equipment

Plumbed or self-contained eyewash or eye/facewash equipment which meets the requirements of section 5, 7, or 9 of ANSI Z358.1-1981, Emergency eyewash and shower Equipment, incorporated herein by this reference, shall be provided at all work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption.

“ANSI” is the well-understood acronym for the American National Standards Institute. Its publication numbered Z358.1-1981 is in evidence as Exhibit 21. Based on the evidence, and the mutual understanding of the parties, the relevant portion of the 16-page document is section 7.4.5 which provides:

Each eye/face wash location shall be identified with a highly visible sign. The area around or behind the eye/face wash, or both, shall be painted a bright color and shall be well-lighted.

To establish a violation of section 5162(a), there must be evidence that: (1) the eyewash station identified in the citation was in an area in which exposure to corrosive or severely irritating liquids was possible; and (2) the area around or behind the eye wash area was painted dark green; and (3) the dark green could not be considered to be a “bright color.”

Section 5162 is part of Article 109 of the safety orders, which applies to “the use, handling and storage of hazardous substances in all places of employment.” The recent decision *Big Lots*, Cal/OSHA App. 11-1929 (Mar. 25, 2013), is the only Board precedent construing the provision in section 5162(a) that refers to “work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption.” In *Big Lots* employees unloading trucks delivering household cleaning products were occasionally exposed to chemicals that met the definition of “hazardous substance” in section 5161. Although the products were normally boxed, there were occasional leaks of material because of container damage in transit. The Board held that the work area fell within the scope of section 5162, despite the

employer's contention that because the cleanser at issue was a "standard and common household cleaning product" section 5162(a) did not apply to workplaces where employees were occasionally exposed to it. The Division introduced into evidence the material safety data sheets of several products sold at the store, which stated they are corrosive and/or severe eye irritants. "That such products are common household cleaning products does not change their chemical composition or the hazard they pose to employees," the Board wrote.

The phrase "bright color" is not defined in the ANSI document or in the safety order, nor has it been construed by the Appeals Board. A standard dictionary⁷ offers these definitions of "bright": "shining" "sparkling," "of high saturation or brilliance." "Bright implies emitting or reflecting a high degree of light."

Division investigator Michael Doering was told by Chevron employees who were assigned to accompany him on a "walk-around" in the refinery that Employer uses sodium bisulfite for refinery processes in a particular area; the area is seen in the photos that are Exhibits 20 and 20A. Exhibit 20 is a vertical photograph of an area of the refinery showing numerous horizontal and vertical pipes of various widths, a few vats, three columns supporting at least one additional level of equipment, and the underside of a second level of the refinery. The second level appears to be at least 20 feet above the ground level. The pipes and vats are within an area marked by a bright orange or yellow curb that is 8 to 12 inches high. This curb acts as a short "fence" circumscribing a large apparently rectangular area filled with pipes, vats and related equipment. In Exhibit 20A, this yellow curb may be seen extending at least 30 feet into the photo background. In the foreground is the eyewash/shower station, described below. The photo appears to have been taken from a position five or six feet in front of the eyewash station. Exhibit 20A is a horizontal photo of the same area, taken from a few feet farther away and depicting a larger area, including another column, additional equipment and the five lowest steps of a stairway apparently leading up to the second level. Trees are visible in the background, in the right of the photo, beyond the machinery and equipment.

In addition to statements made to Doering by Employer representatives during his walk-around, information that sodium bisulfite was used in that area was included in some documents that Chevron gave to the Division, which Doering reviewed, in connection with

⁷ *Merriam Webster's Collegiate Dictionary, Tenth Edition* (1995).

Employer's "Management of Change" procedures (some of which are at issue in Citations 6 and 8).⁸

A "Hazardous Substance Fact Sheet" (Exhibit 22) issued by the New Jersey Department of Health, a well-recognized source of information about hazardous materials, identifies sodium bisulfite as a hazardous material. According to the fact sheet, "sodium bisulfite can affect you when inhaled," and "sodium bisulfite is corrosive when in liquid solution with water." It states that "the following acute (short-term) health effects may occur immediately or shortly after exposure to sodium bisulfite:

* "Contact can severely irritate and burn the skin and eyes"

* "Inhaling sodium bisulfite can irritate the nose and throat causing coughing and wheezing."

The same fact sheet states that exposure may cause a skin allergy, and inhaling sodium bisulfite can irritate the lungs.

Sodium bi-sulfite is listed as a chemical contaminant in table AC-1 following section 5156.

Employer presented no witness who testified about the area shown in Exhibits 20 and 20A, or about the allegations of the citation generally.

The evidence described above is sufficient to support a finding that sodium bisulfite is a substance that can cause corrosion, severe irritation, and a finding that it was used by Employer in the area in which the eyewash station was placed.⁹

The eye-wash/shower station itself consists of: a water pipe rising from floor level; a blue water filter attached to that pipe a few feet above ground level; a silver stainless steel bowl as a sink; a metal pole rising above the sink; at about six feet above floor level, a green and white sign

⁸ The citation alleges that the violation took place in "V206 in SRU" within the refinery. In his testimony, Doering did not identify the location of the eyewash station, nor did any other witness. It appears that the photos themselves, which depict an area that appears to be approximately 30 feet by 40 feet, provide enough information for Employer to identify the location. In addition, Doering testified that he spoke to the Chevron representatives who accompanied him about the shortcomings that he perceived in the location of the eyewash station. Thus, it is found Employer was aware of the location which is the subject of Citation 4.

⁹ As Employer offered no evidence to counter Doering's testimony that he had been told that sodium bisulfite was used in the area, it is inferred that Doering's testimony on this point is accurate. Evidence Code section 413.

attached to the pole; about four feet above that, a horizontal pipe extending out from the vertical pipe; at the end of the horizontal pipe is a shower head; also attached to the horizontal pipe is a chain, and at the lower end of the chain is a metal triangle, which can be pulled to start the flow of shower water. None of this equipment is attached to a wall; it is free-standing.

The horizontal metal pole to which all the other equipment is attached appears in both photos to be painted a dark green. The eyewash/shower station stands a few feet in front of a large iron or steel column, which is painted approximately the same shade of green. Other similar columns nearby – one of them probably no more than five feet away – are painted the same color as the column near the eyewash station.

The ANSI standard incorporated by section 5162(a) requires that “the area around or behind the eye/face wash, or both, shall be painted a bright color . . .” As the eyewash facility is free-standing, there is nothing immediately around or behind it. As the pole on which it is mounted is painted a shade of dark green very similar to the color of the nearby columns, the pole’s color does not stand out or call attention to the facility in any way. No area around or behind the eye-wash station is painted a bright color – except for the curb that essentially “fences in” the numerous pipes, vats and other equipment. Because this bright colored fence extends very far in each direction, it would offer no guidance to an employee trying to locate the eye wash facility, especially if the employee’s vision is limited by a contaminant. The water filter that covers 15 to 18 inches of the vertical pole is a blue that may be considered “bright,” but it is not “an area” around or behind the station, as required. The evidence is sufficient to establish a violation of the ANSI requirement that “The area around or behind the eye/face wash, or both, shall be painted a bright color.”

There is insufficient evidence to support the “serious” classification. Labor Code section 6432 provides that “There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation . . . is not sufficient by itself to establish that the violation is serious.” The Division has not introduced sufficient evidence to demonstrate this “realistic possibility.”

Although sodium bisulfite is a substance that can cause corrosion or severe irritation, and Employer uses it in this area on occasion, Doering (Division’s only witness for this citation) testified that he did not

know how sodium bisulfite was used in the areas of the eye wash station; he did not know the specific location in which it was used; he did not know the concentration in which it was used; he did not know the volume in which it exists when it is used; and he did not know if it was used in solution (as opposed to being used as a powder). Therefore, while there is an abstract possibility that the violation here could result in serious physical harm, there is no evidence to support a finding that there is a realistic possibility of such harm arising from the hazard cited. Therefore, the classification of the violation will be reduced from “serious” to general” and the penalty will be reduced accordingly, from \$6,750 to \$750, for the same reasons as were described with respect to Citation 2.

Does section 5189(j)(3), which requires correction of deficiencies on equipment which is operating outside acceptable limits defined by section 5189(d) apply to the repair of electrical conduit that may be linked to such equipment? (Citation 5)

Section 5189(j)(3) provides as follows:

(j) Mechanical limits

...

(3) Equipment deficiencies. The employer shall correct deficiencies in equipment which are outside acceptable limits defined by the process safety information in subsection (d) before further use, or in a safe and timely manner provided means are taken to assure safe operation.

The factual allegation of Citation 5 is:

On or before August 30, 2012, the Employer failed to ensure that every broken or damaged electrical conduit, fitting, receptacle or vapor proof light fixture installed at each processing unit in the refining plant was effectively repaired or replaced in a timely manner.

Section 5189(b) states that the requirements of section 5189 “apply to . . . a process which involves a Category 1 flammable gas (as defined in Section 5194) or a flammable liquid with a flashpoint below 100° F on site in one location, in a quantity of 10,000 pounds or more.”

Section (j)(3) includes a reference to “deficiencies in equipment which are outside acceptable limits defined by the process safety

information in subsection (d).” Therefore, to understand the requirements of section 5189(j)(3) it is necessary to examine the references to “acceptable limits” that are defined in subsection (d). Subsection (d) includes two references to limits. The first is in subsection (1)(B). It provides:

(d) Process Safety Information . . . Copies of the safety information shall . . . include:

(1) Information pertaining to hazards of the acutely hazardous and flammable materials used in the process. The information shall consist of at least the following:

(B) Permissible exposure limits as listed in Section 5155. [Section 5155 includes limits for numerous airborne contaminants].

The second reference in subsection (d) to “limits” is in subsection (2)(D), which refers to:

(D) Safe upper and lower limits for process variables such as temperatures, pressures, flow level and/or compositions . . .

When these definitions are applied to analyze the meaning of section 5189(j)(3) the most logical inference is that section (j)(3) refers to the correction of deficiencies in any equipment that is operating beyond the acceptable limits defined elsewhere; that is, it applies to the equipment that emits (or removes) airborne contaminants; or equipment which measures or controls temperatures, pressure, or flow level of materials being processed. Put another way, the equipment to which the safety order applies is the equipment to which the limits must be applied.

There appear to have been no Board decisions construing section 5189(j).

The Appeals Board has declined to find employers in violation of safety orders, as alleged in Division citations, when the safety orders relied on by the Division were not intended by the Standards Board to extend to the facts presented in a particular case. That was the holding and rationale of *Brunton Enterprises Inc.* Cal/OSHA App. 08-3445, DAR (Oct. 11, 2013), and in *Carris Reels of California*, Cal/OSHA App. 95-1456, DAR (Dec. 6, 2000). A similar result was reached in *Travenol Laboratories, Hyland Division* Cal/OSHA App. 76-1073 (Oct. 16, 1980),

in which the Board found that the safety order on which the citation relied did not apply to the machine at issue.

The citation here seeks to apply a safety order to circumstances to which the order does not apply - to electrical lines and surrounding conduit that does or may lead to refinery process equipment which handles material with defined "acceptable limits." But the language of the safety order does not lend itself to imposing time requirements on repair of the electrical cables or conduit: these cables and conduit segments do not have their own "acceptable limits . . . defined by . . . subsection (d)." Section 5189(j) does not impose requirements as to the timeliness of the repairs of these electrical cables and surrounding conduit. There was no evidence presented that any conduit or wire shortcomings led to any impairment of any machine's ability to function within the defined acceptable limits, although Salgado testified that electrical shortcomings might, in given circumstances, lead to malfunctioning of such equipment. Employer's appeal of Citation 5 will be granted.

Did citation 5 provide adequate notice to Employer of the factual bases of the allegation of violation of a safety order?

The phrasing of the citation raises an additional issue as to the validity of citation 5: was the citation specific enough to provide the Employer fair notice of the nature of the allegation against it, sufficient to allow Employer to prepare a defense to the allegation(s)? Employer argues that the citation does not meet the specificity requirements of Labor Code 6317 and Employer was denied adequate notice to allow it to defend against the allegation.

Labor Code section 6317 requires that "Each citation [issued by the Division] shall be in writing and shall describe with particularity the nature of the violation . . ." In a number of decisions issued shortly after enactment of the state's Occupational Safety and Health Act, the Appeals Board granted employer appeals of citations because of a lack of specificity in the citations.

In *Adia Personnel Services*, Cal/OSHA App. 90-1015, DAR (Mar. 12, 1992) the Board noted that the law requires the Division to give to the employer in each case "a sufficiently detailed description of the circumstances surrounding the alleged violation to satisfy the due process requirements incorporated in the statutory language of Labor Code section 6317." Citing previous cases, *Adia* noted that "the lack of specificity on the face of a citation may be cured by statements made by Division personnel to the employer during the inspection, closing conference or informal conference." In *Adia*, the Board noted "the Board

has emphasized that an employer must show prejudice in order to sustain an allegation that the description of the citation was not particular enough.” In *Adia*, the Board granted the employer’s appeal because (1) the citation paraphrased the language of the cited safety order; (2) the Division did not move to amend the citation, choosing instead to inform Adia of the unique hazards during its case in chief; (3) Adia was not informed of these hazards prior to the hearing through conversations with the Division or through discovery; (4) Adia was not prepared to defend against these allegations.

In this case, the factual allegation of the citation, quoted in full above, is too vague in itself to give notice to Employer of the specific instances that are the basis of the citation. It identifies no specific conduits, fittings, or processing units; nor does it refer to a specific practice or procedure with respect to repair of electrical problems.

When this issue arose during the hearing, the Division noted that prior to the hearing it had provided to Employer, as part of the pre-hearing discovery process, its Documentation Worksheet (Exhibit 17), prepared by the investigator responsible for the citation, which described the evidence on which the Division relied, and explained, briefly, his reasoning for believing that the evidence supported issuance of the citation. Exhibit 17 is a three-page document which refers to Citation 5, to section 5189(j)(3), to certain evidence, and provides brief explanations of the significance of the evidence.

Exhibit 17 is of limited use in this context, for several reasons. First, it refers to a single instance of an opening in a conduit body that was not covered or effectively plugged: a rigid metal conduit that “contained current feed to a temperature controller for “C590 tray #1.” This was the same conduit body that was the basis for a different citation - Citation 2. In contrast to this single conduit segment, the factual allegation of the citation is most logically read to refer to a widespread consistent practice. In fact, Salgado testified that the basis of the citation was Employer’s on-going practice of assigning a low priority to electrical system repairs. Employer assigned a numerical rating to indicate the urgency of any repair, with “1” requiring the most rapid response, and “6” allowing a significantly delayed repair time. Delgado testified that a “3” rating allowed 90 days to 6 months for the repair. He testified that a lot of the electrical repairs were given a 4, 5, or 6 priority rating. None of that information – about the priority rating system - was referred to on Exhibit 17.

They key document for the Division’s evidence in support of Citation 5 was Exhibit 73. This was a 21-page matrix, on oversize paper with 14 columns of information, which Chevron provided to Salgado at

his request, showing every electrical repair undertaken by Chevron in the previous five years. It included a very brief description of each repair needed, its location, the date the work order was entered in Chevron's system, the date on which the repair work was started, and the date on which it was completed, and other information. The Division provided testimony about three examples on this list:

- (1) The repair designated in work order 354512, on the next to last-page of the document [Bates stamp number 575). The work order was entered on April 12, 2012. The repair work was begun April 17, 2012. No completion date is listed. It is not clear if this is the delayed repair that is referred to in Exhibit 17, which was provided to Chevron before the hearing.
- (2) Work order 355802, on the last page of the exhibit. This was described as a broken enclosure door. The repair order was entered April 26, 2012. The repair was begun June 14, 2012, and completed on June 27, 2012.
- (3) Work order 361238, on the last page of the exhibit. This referred to exposed wires in a trench. The work order was entered on July 26, 2012. The repair work began on September 27, 2012. No completion date is noted.

All told, the exhibit lists 14 electrical repair items that were entered into the system between March 11, 2012 (six months before Salgado began his investigation) and August 7, 2012.¹⁰ Of those fourteen, three have no completion dates. Repair dates for the others ranged from March 21, 2012 through September 15, 2012.

Division counsel stated on the first day of the hearing that this citation had been discussed in one or more conferences between the Division and Employer, and further specifics were provided to Employer in those conferences. However, no evidence of such additional information disclosure was provided.

To summarize: the citation's factual allegation is a broad accusation of a pattern of failure to act in a timely manner, with no reference to specifics. The document provided by the Division to Employer in pre-hearing discovery refers to a failure to repair a single conduit (which was the basis for a different citation) but makes no reference to a general practice, or to the Employer's priority assignment system. At hearing, the evidence offered in support of the allegation included Salgado's testimony about the general repair priority-

¹⁰ Some repairs were entered more than once. The entries suggest that this was the result of a worker beginning the repair, but not completing it, and then re-entering the repair, with the same work order.

assignment program, and reference to three instances, one of which had a repair completed by the time the evidence was provided to the Division. Two of these three are definitely not the one instance cited in exhibit 17, on which the Division relied for issuance of the citation, and the third may or may not be the same as the identified in Exhibit 17.

In these circumstances, the evidence supports a finding that the Division failed to give Employer adequate notice of the substance of the allegations against it, sufficient to allow the Employer to defend against the citation. It appears from the evidence that prior to and during the hearing, Employer was forced to guess at what allegation(s) the Division intended to prove. That uncertainty is sufficient to satisfy the “surprise” element included in the *Adia Personnel Services* analysis.

Did Employer implement its own Management of Change requirements with respect to the three valve repairs identified in Citation 6?

Citation 6 alleges a violation of section 5189(l), which provides, in relevant part:

5189(1). Process Safety Management of Acutely Hazardous Materials.

- (1) The employer shall establish and implement written procedures to manage changes (except for “replacement in kind”) to process chemicals, technology, and equipment and changes to facilities.
- (2) The procedures shall assure that the following are addressed prior to any change:
 - (A) The technical basis for the proposed change;
 - ...
 - (D) Necessary time period for the change.

The factual allegations of Citation are the following:

As of the September 2012 dates indicated below, the Employer had not implemented its written procedures with regard to (A) Technical basis for the change, and (D) Necessary time period for the change, for the following three changes to its facilities.

1. As of September 12, 2012, MOC (Management of Change) number 16210, an injection fitting seal of a leak in a 3 inch block valve controlling flow at the east natural gas split at furnace F-305C on the 4th deck in South Isomax was in place 13 months beyond its MOC expiration date. The necessary time period for the change was not implemented.

2. As of September 27, 2012, MOC number 18408, a glove valve injection fitting on the 1S/C to 2S/C on a 400 degree hydrocarbon line in the D & R 4 Crude plant was 2 years and 7 months beyond its MOC expiration date. The necessary time period for the change was not implemented.
3. As of September 27, 2012, MOC number 21513, an injection fitting for valve packing on a motor operated valve controlling the flow of 600 psi flammable produce at the base of V-4030A in the D & R Penhex area had been in place since January 2010. It was not replaced, as recommended in the MOC, at the next opportunity. In the technical basis for the change, the maximum time period before replacement was stated to be 5 years. But it was not replaced at the turnaround in January 2011 and was given until December 31, 2017, a period of 8 years. Neither the maximum time period of 5 years, nor the instruction to replace “at the next opportunity,” was implemented.

Section 5189, entitled “Process Safety Management of Acutely Hazardous Materials,” is a very lengthy regulation which requires an employer in any industry that processes “toxic, reactive, flammable or explosive chemicals” to create systems for managing those chemicals within their businesses in a way to minimize the risks to which employees are exposed. Paragraph (l) is entitled “Management of Change (MOC).” Subparagraph 1 requires every employer to “establish and implement written procedures to manage changes (except for replacement in kind) to process chemicals, technology and equipment and changes to facilities.” Chevron’s Richmond oil refinery is a facility subject to the “management of change” regulations.

The Division does not contend that employer failed to “establish” management of change procedures and documents. The Division’s citation, in essence, alleges that, with respect to three repairs undertaken to seal pipe or valve leaks, Chevron, initially complying with the requirements of section 5189(l), established times by which a repair that was deemed to be “temporary” would be replaced by a permanent device or method, but then failed to implement that permanent alteration or repair. Those failures, the Division contends, constitute a failure to implement its MOC system.

In another context, the Board has held that where a safety order requires an employer to “establish and implement” a plan of some kind, the order requires both actions: first, adoption of a written plan, and second, actual implementation of the plan. In *Contra Costa Electric Inc.*, Cal/OSHA App. 09-3271, DAR (May 13, 2014), in considering an allegation that the employer had failed to implement an IIPP that it had

adopted, the Board held: “An IIPP may be satisfactory as written on paper, but failure to implement that plan, through failure to correct hazards, may constitute a violation of section 3203(a)(6), as is alleged here. [citation omitted].” The same analysis applies here: Employer had established an MOC plan, and was required to implement its MOC plan.

Chevron assigned an “MOC” number to every repair that Chevron believed was subject to the “Management of Change” process. For each such repair, Chevron generated several documents. Ronald Post, a licensed mechanical engineer, employed as a “senior design engineer” in the plant support group testified about the procedures that Chevron follows in its management of change procedure, particularly for pipe repairs. A series of documents pertaining to the three numbered MOC repairs referred to in citation 6 - MOC numbers 16210, 18408, and 21513 – are in evidence as Exhibit C, E and J respectively. Exhibit 32 includes a synthesis of some of that information by the Division. Exhibit 36 is a 12-column chart prepared by Division investigator Doering listing a series of repairs carried out at various times, including the three at issue here, and notes those that appear to have been done in a way inconsistent with the Employer MOC plans or the regulation at issue in Citation 8. Exhibit 37 is a typed list that Chevron provided to the Division during the investigation of “the most recent “turn-arounds” prior to the September-October 2012 inspection.

The relevant information about each of those three instances, taken from the documents, is the following:

MOC 16210: The need for the repair was identified (“the MOC was opened”) on August 8, 2006, with an expiration of August 8, 2011. The location was in “F305C, on the fourth deck within the South Isomax Unit, and within the “H2A Train.” The descriptions of the problem and planned solution, appearing on in various blocks on pages 1, 2 and 3 of Exhibit C are these:

- VOC leak on 3” block valve for natural gas feed to F-305C east split.”
- Valve should be repaired or replaced at the next maintenance opportunity.
- For a temporary fix, shoot valve with sealant to try to stop leak or place a clamp on valve. Valve will n . . . [incomplete notation on exhibit].
- The 3” valve cannot be repaired on the run. Will need a shutdown to repair the valve.

The initial work was completed on August 11, 2006. The last turnaround of that unit prior to September 12, 2012 was in March 2010,

according to Exhibit 37. Doering observed the equipment that had been used for the temporary fix remaining in place at the indicated location on September 12 and September 18, 2012. (Exhibit 36).

MOC 18408: The need for the repair was identified (the MOC was “opened”) on April 23, 2008. The expiration date for the MOC was February 1, 2010. The description of the work needed (on Exhibit E) was:

- “Shoot to seal globe valve on the 1s/C to 2S/c to isolate the 2 S/C line so new piping can be added.” [description incomplete]
- Valve will be short through the lower bonnet flange. The valve will be filled with epoxy and the next flange pair downstream will be cracked to check for leak-by.

The location was in plant “4 Crude” within the “D & R” unit. The initial work on the valve was completed in either May or September 2008; Employer witness Post initially testified to May 23, 2008, then testified that the work was done close to September 23, 2008. The most recent turn-around for that unit was on October 7, 2011, according to Exhibit 37.

Doering testified that he observed the valve with the original temporary repair still in place on September 27, 2012. However, entries on Exhibit E, ninth and tenth pages, concerning MOC 18408, state that the valve was replaced in kind in the third quarter “pit stop” [brief maintenance work in a limited area] in 2009. That pit stop, Post testified, was the first maintenance opportunity in that unit since the MOC was opened in April 2008. The form with that information was completed on January 25, 2010. Post testified that Doering was mistaken in his belief that a valve he had observed on September 27, 2012 was the valve that had been repaired as part of MOC 18408. Post explained his reasons for believing that to be so by reference to the nature of the valve as “a twin seal style valve.” (transcript pages 1279-1282 and at pages 1477-1478). Post’s testimony on this point is credited. He is well acquainted with the Chevron refinery piping and valves, he testified that he made a particular effort to gather information about this particular allegation, his testimony was consistent on direct and cross-examination; his testimony is consistent with documents prepared in 2010; and the Division did not re-call Doering as a rebuttal witness.

MOC 21513: The need for the repair was identified (the MOC was “opened”) on January 27, 2010. The repair was in the Penhex plant within the D & R Unit. The description of the repair needed was:

XV-40-308A has a VOC packing leak. It was placed on the S/D list in 2005 due to a VOC leak. A piece of equipment can remain on the S/D list for a maximum of five years before it must be repaired. The S/D due date for this valve is 10/11/10. The Penhex is not scheduled to S/D for this type of repair until 2015. The valve cannot be properly isolated and cleaned up on the run. The alternative is to have TEAM inject the packing gland with packing

This valve packing work was completed in July 2010. The last turnaround for that unit prior to September 2012 was January 6, 2011. Doering observed the valve, with the injection fitting still attached, on September 27, 2012.

The evidence supports findings that Employer allowed two temporary valve repairs (MOC 16210 and MOC 21513) to remain in place, or to be repeated, beyond the expiration dates stated in Employer's own Management of Change documents. To that extent, Employer failed to implement its MOC plan, and thereby violated section 5189(l).

However, the evidence is insufficient to support the "serious" classification of this violation. As noted above, Labor Code section 6432 provides that "There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation . . . is not sufficient by itself to establish that the violation is serious."

The Division has not introduced sufficient evidence to demonstrate this "realistic possibility. . . [that] could result from the actual hazard created by the violation." The violation here is a failure to implement employer's own requirements for timely replacement or repair of two valves in which leaks had been detected. In each case, Doering observed repair equipment remaining in place. In one case, the packing material that had been put in place in 2005 was replaced by new packing material in 2010. There is no evidence to suggest that in either instance the sealant that had been inserted into the valve was inadequate in any way, or had degenerated or lost its effectiveness in any way, or that the valve had developed another or more extensive problem. There is no evidence that any air tests done in the area of either valve had revealed a continuing or renewed presence of contaminants. While the contaminants that had initially escaped through the loose or faulty valves were, presumably, flammable or otherwise hazardous, those facts establish the possibility, prior to the initial repair, of some potential

health threat to those working nearby. The information in the record does not establish a “realistic possibility” that the failure to take precautionary steps on a schedule established by Employer would result in serious physical harm or death.”

In its argument in support of a serious classification, the Division mis-states one aspect of the legal test under the 2010 amendment of section 6432. The older test adopted an approach of considering the likelihood of serious injury, assuming an injury were to occur as a result of the violation. The post-2010 statute does not call for adopting that assumption, although the Division post hearing brief makes that contention.

The violation will be re-classified as “general” and the penalty will be recalculated accordingly. The starting point for calculation of a penalty for a general violation depends on the “severity” rating assigned to it. If it is possible that an employee might lose more than one day from regular work as the result of a general violation, the starting point is \$2,000 (regulation section 335(1)(A)). The facts here support adopting that starting point. The penalty is then adjusted based on “extent” and “likelihood” factors. (Regulation sections 335[a][2] and 336[b]). The proper extent rating here is low, as there were only two violations found. Therefore, 25 per cent of the base penalty is subtracted, here \$500. No reduction will be made for likelihood. The penalty will be reduced by 25 per cent of the gravity-based penalty for good faith and history credits, - here \$375 - and reduced an additional 50 per cent for presumed abatement, bring the penalty to \$560.

Did Employer fail to inspect and maintain firefighting or fire protection equipment? (Citation 7)

Section 6773(b) provides as follows:

(b) Fire protection and fire fighting equipment shall be inspected, tested, and maintained in serviceable condition. A record shall be kept showing the date when fire extinguishers and hose lines were last inspected, tested, repaired, or renewed. Fire protection and fire fighting equipment after any use shall promptly be made serviceable and restored to its proper location.

The allegation of the citation was the following:

On or before August 30, 2012, the Employer failed to inspect, test and maintain a section of an exposed fire service main, thus leaving it in a non-serviceable condition. Fire protection systems served by this fire service main include onsite fire hydrants and

fixed monitor nozzles, strategically placed to provide fire protection in the following areas: Flare, gas recovery compressor, C-730 and associated furnace, north and south flare areas, cooling water tower, and the east side of TKN and RLOP plants.

As of September 20, 2012, the fire service main remained in a non-serviceable condition.

To prove a violation of section 6773(b) the Division must establish that the fire service main referred to in the allegation is within scope of either “fire protection [or] fire fighting equipment” within the meaning of section 6773(b); and that it had not been inspected and tested prior to August 30, 2012; or that it was not in serviceable condition on September 20, 2012.

The phrases “fire protection equipment” and “fire fighting equipment” are not defined in section 6773 or elsewhere. There appear to be no Appeals Board decisions construing section 6773(b). However, the last sentence of section of section 6773(b), specifically the requirement that equipment be restored to its proper location, requires an inference that the equipment in each of those two categories is equipment that is movable. Only equipment that is movable can be “restored to its proper location.” The phrase must be given the same meaning in its use in the first sentence of the section. If a phrase has a given meaning in one sentence of a regulation, it must be taken to have the same meaning in other sentences of the same section: it would make no sense to attach different meanings to the same phrase. See, *Michels Corp dba Michels Pipeline Construction*, Cal/OSHA App. 07-4274, DAR, (July 20, 2012) (harmonizing meaning of a word that appears in related regulations); and *Estate of Downing* 134 Cal. App.3d 256, at 265 (a word appearing in two related code sections is to be construed consistently in both).

The “fire service main” referred to in Citation 7 is a 10-inch diameter above ground water supply line. Salgado, who has worked as a fire fighter and as a fire marshal and fire chief, testified that in the firefighting profession, a water supply line of this kind is customarily considered to be “fire prevention equipment, part of a firefighting system.” While Salgado’s explanation of the common understanding of the phrase may be accurate, here the Standard Board, by adopting the specific language of section 6773(b) adopted a safety order applicable only to equipment that may be restored to its original location – that is, equipment that is movable. The Division offered no evidence that the Standards Board intended the phrase “fire protection equipment” to have one meaning in the third sentence of section 6773(b) and a different meaning in the first sentence of the same section.

The fire service main that is the subject of Citation 7 does not fall within that class of objects that are moveable, and therefore section 6673(b) does not apply here.

The Division's argument against this conclusion (in its post-hearing reply brief) is that it would also exclude from coverage fixed fire monitors on the refinery grounds, and that would be an absurd interpretation under *Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 103. That argument is unpersuasive. The language of the safety order is clear, and must be applied. As the Court of Appeal recently summarized the usual rules of statutory construction (which are applicable here):

When construing a statute, a court seeks to determine and give effect to the intent of the enacting legislative body. . . We first examine the words themselves because the statutory language is generally the most reliable indicator of legislative intent. The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context. If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. [Citations omitted]

Borikas v. Alameda Unified School District, (2013), 214 Cal. App. 4th 135, 146. *Carmona* does not provide either the Division of the Appeals Board license to expand a safety order to objects or circumstances not contemplated by a safety order. The Standards Board may have omitted reference to water mains in this section in the belief that they are covered in other sections, or that the integrity of water mains is within the jurisdiction of other public agencies.¹¹

Employer's appeal of the citation will be granted.

Did Employer violate a requirement of American Petroleum Institute Publication 570 about removing temporary leak sealing in a timely fashion, and thereby violate section 6845? (Citation 8)

¹¹ Sections 6165 and 6175 both include provisions that may be applicable to water supply systems, including water mains of this kind.

Section 6845(a) reads as follows:

6845 Piping, Fittings, and Valves.

- (a) The design, fabrication, and assembly of piping systems installed prior to July 26, 2006, shall comply with General Industry Safety Orders and ASME B31.3-1990, Chemical Plant and Petroleum Refinery Piping herein incorporated by reference. The design, fabrication, and assembly of piping systems installed on or after July 26, 2006, and the testing, inspection, and repair of all piping systems shall comply with Article 146 of the General Industry Safety Orders; API 570, Piping Inspection Code, Second Edition, October 1998, Addendum 3, August 2003; and ASME B31.3-2002, Process Piping; herein incorporated by reference.

The factual allegations of Citation 8 are:

As of September 2012, dates indicated, a total of nine temporary non-welding repairs identified below were not removed at the most recent turnaround:

1. MOC number 20968, a clamp covering two flanges and a valve at the outlet of furnace F-340 in South Isomax, conveying hot (>600 deg. F) natural gas. As of September 12, 2012, this was in place 2 years and 6 months past its last turnaround.
2. MOC number 18856, a valve packing injection fitting for a valve conveying natural gas to furnace F305 in South Isomax. As of September 18, 2012, this had been in place 30 months past its last turnaround.
3. MOC number 16210, an injection fitting in a block valve for the F-305 east split in South Isomax, conveying hot (>600 deg. F) natural gas. As of September 12, and 18, 2012. It had been in place for 6 years and was 30 months past the last turnaround.
4. MOC number 17395, a clamp covering the mating surface edge of two flanges for a feed gas orifice for furnace F 305 in South Isomax, conveying natural gas. As of September 12, 2012, it was still in place more than 5 years later and 30 months past the last turnaround.
5. MOC number 19758, a clamp enclosing an elbow at Stanchion A6 overhead in the TK plant of North Isomax, conveying nitrogen at up to 200 psi. As of September 20, 2012 was still in place 2 years and 7 months past the last turnaround.
6. MOC number 21513, an injection fitting in a valve on a 6 inch line conveying flammable liquid/vapor at the base of V-4030A in D & R PenHex. As of September 27, 2012, was still present 11 months beyond the last turnaround maintenance opportunity.

7. MOC number 21434, a valve packing injection fitting at 40 MOV inlet block valve for drier V4030A in D & R, Penhex, conveying hydrogen. As of September 27, 2012, this was still present 11 months beyond the last turnaround maintenance opportunity.
8. MOC number 18480, a globe valve injection fitting at on the 1 S/C to 2 S/C on the D-308312 line in D & R unit, 4 Crude plant, conveying hydrocarbon at 400 deg. F, 300 psi. As of September 27, 2012, this fitting was in place for 4 years, 5 months and was still present 11 months past the most recent turnaround.
9. MOC number 15197, consisting of 3 injection fittings, two for packing and one for a flange, on LT 92 top block valve to V4090, conveying C1 to C5 hydrocarbons and chlorine. As of September 27, 2012, these here injection fittings were still present, 7 years later, and 1 year and 8 months past the most recent turnaround.

The Division's contention with respect to Citation 8 was that Employer had not complied with one of the publications that was incorporated by reference in section 6845(a): API 570 - Publication 570 of the American Petroleum Institute – Second Edition, October 1998. That publication consists of 33 pages, not including the title page and the table of contents. More specifically, the Division's contention was that Employer had not complied with one paragraph of one section of API 570 – the second paragraph of section 8.1.4, which appears on pages 8-1 and 8-2. The full section is set out here:

8.1.4. Nonwelding Repairs (On-Stream)

Temporary repairs of locally thinned sections or circumferential defects may be made on-stream by installing a properly designed and fabricated bolted leak clamp. The design shall include control of axial thrust loads if the piping component being clamped is (or may become) insufficient to control pressure thrust. The effect of clamping (crushing) forced on the component shall also be considered.

During turnarounds or other appropriate opportunities, temporary leak sealing and leak dissipating devices, including valves, shall be removed and appropriate actions taken to restore the original integrity of the piping system. The inspector and/or piping engineer shall be involved in determining repair methods and procedures.

Procedures that include leak sealing fluids (“pumping”) for process piping should be reviewed for acceptance by the inspector or piping engineer. The review should take into

consideration the compatibility of the sealant with the leaking material; the pumping pressure on the clamp (especially when repumping); the risk of sealant affecting downstream flow meters, relief valves or machinery; the risk of subsequent leakage at bolt threads causing corrosion or stress corrosion cracking of bolts; and the number of times the seal area is repumped.

Section 8.1.4 is replete with ambiguity and uncertain meanings. There is insufficient information in the record to determine the meaning and applicability of section 8.1.4 in this context.

Here are identifiable ambiguities:

(1) Section 8.1.4 refers in two places to “valves.” Except for Instance 4, every factual allegation of Citation 8 refers to a valve repair of some kind. Employer contends that the valve repairs here involved the “valve bonnet, including a “valve stem and packing gland.” These, Employer contends, are not elements of a “piping system”, and thus not subject to API 570, based on API 570’s definition of “piping system.”¹²

(2) Do the first and second paragraphs refer to the same kinds of “temporary repairs”? Employer contends that is the case; and that the only repairs that are subject to the second paragraph of section 8.1.4 are “Temporary repairs of locally thinned sections or circumferential defects,” which is the subject of the first paragraph. None of the repairs identified in the nine instances of Citation 8 were repairs of either “locally thinned sections or circumferential defects.” Therefore, Employer argues, the requirements of the second paragraph do not apply. The Division argues to the contrary: that the second paragraph applies to all “temporary leak sealing and leak dissipating devices, including valves,” and therefore the requirements do apply.

(3) Does the phrase “temporary leak sealing and leak dissipating devices, including valves,” apply to modifications of original equipment even if, as is true in some instances here, Employer intends these modifications to become permanent? Employer and the Division differ on this question.

¹² Employer contend that the only leaks that can occur through the “valve bonnets” were not leaks of liquids, but leaks of extremely small quantities - measured in parts per million - of escaping vapors or “volatile organic compounds” – VOC’s – chemicals which can easily transport from liquids to gases at room temperature. Thus, Employer repeatedly contended that the references in API 570 to leaks did not refer to “VOC leaks.”

(4) A “turn-around” in the refinery industry generally refers to a period when a piping system is not used for any material processing, but is the subject of extensive cleaning, maintenance and perhaps modification – although the nature and length of these may vary. Section 8.1.4, second paragraph, requires that “During turnarounds or other appropriate opportunities, temporary leak sealing and leak dissipating devices, including valves, shall be removed and appropriate actions taken to restore the original integrity of the piping system.” Since the timing aspect of this provision suggests alternative times – “during turnarounds **or** other appropriate opportunities” - does an employer act properly if it decides that a leak sealing device may remain in place during a “turnaround” so long as the device maintains the original integrity of the piping system?

(5) If, during a turn-around, a refinery operator chooses to “repack” materials around a temporary leak seal in a valve, and that repacking process restores the original integrity of the piping system, is that “appropriate actions taken to restore the original integrity of the piping system” as required by section 8.4.1. second paragraph?

Neither party introduced any evidence to clarify the answers to these questions: neither party presented evidence from records of the Occupational Safety and Health Standards Board, which incorporated the API document into section 6845; and neither party offered evidence from the API deliberations.¹³ The API document itself offers some definitions, but does not answer the questions posed here.

The Appeals Board has held that the Division carries the burden of proving that the specific safety standard relied on in a citation is applicable in the given circumstances. In *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073 (Oct. 16, 1980), the Appeals Board granted an employer’s appeal where centrifuges used by the employer did not have points of operation that would have brought them within the requirements of section 4185(b). In *Oakmont Holdings*, Cal/ OSHA App. 04-1941 (Feb. 8, 2007), the Board granted an employer’s appeal of a citation for violation of section 3241(c), which sets out requirements for safe storage of materials. The citation was based on events that occurred as an employee began to move a slab of synthetic granite from storage for use. The Board held that the slab was not in storage at the time of the

¹³ Employer initially stated its intent of calling as a witness a Mr. Reynolds, who held a role within the API group that adopted Publication 570. The Division sought to exclude this testimony; the undersigned ALJ declined to exclude it. On the day designated for the Reynolds testimony, Employer stated that it did not intend to call Reynolds as a witness, offering no explanation.

incident, and therefore §3241(c) did not apply. Since the referenced safety standard did not apply, no violation could be found.¹⁴

Similar analysis is applied here. In light of the burden placed on the Division to prove the applicability of the safety order on which a citation is based, there are sufficient ambiguities about whether the key provisions of API 570 apply to the repairs identified by the Division in citation 8 to prevent a finding that Employer violated API section 570 - and thereby violated section 6845(a). For that reason, Employer's appeal of Citation 8 will be granted.¹⁵

Conclusions

1. As section 2395.78 requires a showing of a violation of a specific section of Title 24, the California Building Code, and no such showing was made, there is insufficient evidence to support Citation 1.
2. The unused opening in the metal conduit referred to in Citation 2 was not properly covered, and therefore section 2473.1(b) was violated. The evidence is insufficient to support a "serious" classification, so the violation will be re-classified as "general" and the penalty is recalculated as \$750.
3. There were two missing conduit covers on rigid conduit bodies in the locations referred to in Citation 3, and therefore employer violated section 2473.2(b). The evidence is insufficient to support a "serious" classification, so the violation will be re-classified as "general" and the penalty is recalculated as \$750.
4. The areas behind and around the eyewash/shower station referred to in Citation 4 were not painted a bright color, and therefore section 5162(a) was violated. The evidence is insufficient to support a "serious" classification, so the violation will be re-classified as "general" and the penalty is recalculated as \$750.
5. There are no "acceptable limits," within the meaning of section 5189(j)(3) that would apply to repair of broken or damaged electrical conduit, as alleged in Citation 5. In addition neither the citation nor the investigative summary document that the Division provided to

¹⁴ See also *Johnson Aluminum Foundry* Cal/OSHA App. 78-593, DAR (Aug. 28, 1979), among other decisions.

¹⁵ The presence of numerous ambiguities may be an inherent consequence of wholesale adoption by incorporation of a lengthy document, adopted by another organization, including hundreds or thousands of recommendations or requirements. Ambiguities may have to be eliminated by eventual consideration by the Standards Board of each section in turn, as cases arise.

Chevron in connection with Citation 5 gave Employer adequate notice of the factual allegations to be litigated. For each of those reasons, Employer's appeal of that citation will be granted.

6. With respect to Management of Change numbers 16210 and 21513, Employer did not implement its own Management of Change requirements, with respect to the time requirements for replacement of valves, and therefore Employer violated section 5189(l). The evidence is insufficient to support a "serious" classification, so the violation will be re-classified as "general" and the penalty is recalculated as \$560.
7. Because the fire water main referred to in Citation 7 is not movable fire fighting or fire protection equipment, Employer did not violate section 6773(b).
8. Because the Division has not provided sufficient evidence to establish that API 570, section 8.1.4, specifically the requirement to remove temporary leak sealing devices previously installed. "during turnarounds or other appropriate opportunities," applies to the circumstances referred to in Citation 8, Employer's appeal of Citation 8 will be granted.

ORDER

For the reasons stated above, citations 2, 3, 4, and 6 are sustained. Employer's appeals of Citation 1, 5, 7 and 8 are granted.

Dated: January 28, 2015

MARTIN J. FASSLER
Presiding Administrative Law Judge

SUMMARY TABLE

DECISION

In the Matter of the Appeal of:

CHEVRON U.S.A. INC
DOCKET 13-R6D3-0655 – 0662

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

Inspection No. 314332370									
DOCKET	CITATION	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	AFV	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSE BY DOSH AT PRE-HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD	
13-R6D3-0655	1	1	2395.78	S	Failure to maintain electrical continuity of metal noncurrent carrying parts of circuit/ Appeal granted by ALJ	X	\$6,750	\$6,750	\$0
13-R6D3-0656	2	1	2473.1(b)	S	Unused opening on metal conduit not effectively closed/ Re-classified as "general" by ALJ	X	\$6,750	\$6,750	\$750
13-R6D3-0657	3	1	2473.2(a)	S	Failure to provide covers on electrical conduit bodies/ Reclassified as "general" by ALJ	X	\$6,750	\$6,750	\$750
13-R6D3-0658	4	1	5162(a)	S	Failure to provide bright color in rear of or next to eyewash station/ Re-classified as "general" by ALJ	X	\$6,750	\$6,750	\$750
13-R6D3-0959	5	1	5189(j)(3)	S	Failure to ensure broken or damaged conduit replaced or repaired in timely manner/ Appeal granted by ALJ	X	\$6,750	\$6,750	\$0

13-R6D3-0960	6	1	5189(1)	WS	Failure to implement MOC procedures, 3 instances/Re-classified as "general" by ALJ	X		\$70,000	\$70,000	\$560	
13-R6D3-0961	7	1	6773(b)	S	Failure to maintain fire service main in serviceable condition/Appeals granted by ALJ		X	\$6,750	\$6,750	\$0	
13-R6D3-0962	8	1	6845(a)	WS	Failure to repair or replace temporary non-welding repairs in compliance with API Publication 570/ Appeal granted by ALJ		X	\$70,000	\$70,000	\$0	
Sub-Total									\$180,500	\$180,500	\$2,810

Total Amount Due*

\$2,810

Please do not send payments to the Appeals Board.
All Penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. 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:MJF

POS: 01/28/15