BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **CYBERNET ENTERTAINMENT, LLC** **dba KINK.COM** 1800 Mission Stteet San Francisco, CA 94103 *Employer*	**DOCKETS 14-R6D1-0364 through 0367** **DECISION**

Statement of the Case

CYBERNET ENTERTAINMENT, LLC, dba KINK.COM ("Cybernet" or "Employer") is an internet pornography producer and distributer. Beginning on August 28, 2013, the Division of Occupational Safety and Health ("the Division") through Douglas Neville, Associate Safety Engineer, conducted an investigation of The San Francisco Armory, 1800 Mission Street, San Francisco, California (the site). On January 30, 2014, the Division cited Employer for three general violations, one regulatory and three serious violations of California Code of Regulations:[1]

- Citation 1, Item 1, alleging a General violation of Section 2500.8(a)(3) for running flexible power cords through multiple window transoms on the fourth floor;
- Citation 1, Item 2, alleging a Regulatory violation of Section 3203(b)(2) for improperly maintaining records of safety training;
- Citation 1, Item 3, alleging a General violation of Section 3400(c) for failure to have a consulting physician to approve first aid materials;
- Citation 1, Item 7, alleging a General violation of Section 3203(a) for failure to establish, implement and maintain an effective Injury and Illness Prevention Program;
- Citation 2, Item 1, alleging a Serious violation of Section 5193(c)(1) for failure to develop and implement procedures or schedule for methods of compliance with an effective exposure control plan re: hazards of bloodborne pathogens (BBPs);
- Citation 3, Item 1, alleging a Serious violation of Section 5193(d)(1) for failure to observe Universal Precautions, as required;

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

- Citation 4, Item 1, alleging a Serious violation of Section 5193(d)(2) for failure to require the use of engineering controls and work practice controls during production activities.

Employer timely appealed the citations, contesting the existence of the violation, the classification of the citation, and the reasonableness of the abatement requirements and the proposed penalty for each of the citations. Employer also raised twenty-two affirmative defenses for each of the citations.[2]

The matter was heard in Oakland, California before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on May 20, 2014, July 9, 10, 15, 2014, September 3, 4, and 5, 2014.[3] The Division was represented by Willie N. Nguyen, and Corey Friedman, Staff Counsel. Cybernet was represented by Karen Tynan, Esq. The parties presented testimony and documentary evidence.[4] Each party submitted a post-hearing brief and the case was submitted on October 10, 2014.[5] The submission date was later extended by the ALJ on her own motion to March 12, 2015.

Issues:

A. Were the performers in Employer's films employees or independent contractors?
B. Were flexible power cords running through multiple window transoms on the fourth floor of the Employer's worksite?
C. Did Employer's failure to name the trainer and specific subject of training in the safety training records occur within the six month statute of limitations?
D. Did Employer fail to have a consulting physician approve first aid materials?
E. Did Employer fail to identify, evaluate and correct electrical hazards and exposure to sexually transmitted illnesses?
F. Did Employer fail to develop an effective exposure control plan re: hazards of bloodborne pathogens, including engineering controls and

[2] Employer limited the defenses raised to the following issues: failure to follow policies and procedures manual, greater hazard, violation of freedom of speech, lack of due process, lack of jurisdiction, lack of particularity, no employee exposure, no employment relationship, statute of limitations and vagueness.
[3] At the hearing, the parties stipulated to the resolution of four Items in Citation 1: the appeal of Citation 1, Item 4, was withdrawn by employer, Citation 1, Item 5, was resolved with a lower penalty, Citation 1, Item 6, was withdrawn by Division, and Citation 1, Item 8, was reduced to a notice in lieu.
[4] Appendix A lists exhibits received and witnesses who testified. Certification of the Record is signed by the ALJ.
[5] The post-hearing briefs were limited to 30 pages, therefore the last 4 pages of the Division's post-hearing brief was not considered.

work practices, hepatitis B vaccination, post-exposure evaluation and follow-up, and recordkeeping?

G. Did Employer fail to observe required Universal Precautions?

H. Did Employer fail to require the use of engineering controls and work practice controls during production activities associated with adult content videos to minimize employee exposure to blood and Other Potentially Infectious Materials (OPIM)?

I. Was the abatement required for the violations alleged in Citation 2, 3 and 4 substantially similar?

Findings of Fact:

1. The performers are employees, not independent contractors.
2. Flexible power cords ran through multiple window transoms on the fourth floor of the Employer's worksite and at least one of the three flexible cords was energized or had live electrical current at the time of the investigation.
3. Citations concerning safety training records on April 13, 2012 and July 31, 2012 were not issued within the six month statute of limitations.
4. Employer's consulting physician, Jay J. D'Lugin, MD, MS did not approve the first-aid materials with respect to the supplies needed for hazards which are specific to the adult film industry and involves exposure to blood and OPIM.
5. Employer failed to identify, evaluate and correct the electrical hazard of running energized flexible cords through transoms, required in its Injury and Illness Prevention Program (IIPP).
6. The performers, by virtue of the job duties involved in shooting the films described herein, reasonably anticipate contact with blood or OPIM.
7. Employer's IIPP did not identify, evaluate and correct the hazard of exposure to sexually transmitted illnesses during the course of producing adult videos.
8. Employer's exposure control plan (ECP) did not include engineering controls and work practices designed to eliminate or minimize employee exposure for the performers who had contact with blood-borne pathogens. Examples of engineering controls and work practices which should have been included in the ECP prior to exposure include: effective communication and training on hazards, pre-exposure prophylaxis such as a hepatitis B vaccination and HIV antibody testing.
9. The testing protocol used by Employer is not effective to eliminate or minimize employee exposure to blood-borne pathogens because it ignores the high rate of transmission during acute infection when most infected people do not know that they are positive for a sexually transmitted infection (STI).

10. Employer failed to observe Universal Precautions by treating all body fluids as potentially infectious materials.
11. Employer failed to require the use of engineering controls and work practice controls during production activities associated with adult content videos to minimize employee exposure to blood and Other Potentially Infectious Materials (OPIM) such as: effective communication, use of barriers such as condoms, post-exposure evaluation, anti-retroviral therapy, medical follow-up and recordkeeping.
12. Abatement of the violation in Citation 2 is the same as steps necessary to abate the violations in Citations 3 and 4: effective communication and training of performers on hazards of exposure to sexually transmitted illnesses, pre-exposure prophylaxis, such as a hepatitis B vaccination and HIV antibody testing, use of barriers during the course of producing adult videos, post-exposure evaluation, anti-retroviral therapy, medical follow-up and recordkeeping.

Analysis:

A. The performers were employees, not independent contractors.

The Act holds employers responsible who have or exercise sufficient control over employees affected by a regulated condition, and which condition the cited employer has the ability to abate at the work site. (*The Office Professionals*, Cal/OSHA App. 92-604, Decision After Reconsideration (Jun. 19, 1995); *Petroleum Maintenance Company*, Cal/OSHA App. 81-594, Decision After Reconsideration (May 1, 1985).) The California Occupational Safety and Health Act of 1973 (the Act), Labor Code Section 6304 provides that the definition of "Employer" has the same meaning as in Labor Code Section 3300. Section 3300(c) states that "every person. . . , which has any natural person in service" is an employer and, "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" is an "employee." (Labor Code § 6304.1.) For purposes of Labor Code Section 6304, an employer's status is determined at the time the violations were committed.

To determine whether workers are employees or independent contractors, the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341(*Borello*) adopted a six factor test to determine employee versus independent contractor status. This test was adopted by the Board in *McDonald's Van Ness*, Cal/OSHA App. 00-1621, Decision After Reconsideration (Sep. 26, 2001), fn. 3. The six factors are: 1) The right to control the manner and means of accomplishing the desired result; 2) The alleged employee's opportunity for profit or loss 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. *(Id.,* pp 354-355.) "The label placed by the parties on their relationship is not dispositive; and subterfuges are not countenanced." *(Id.,* p. 349.)

Analysis of the first factor, right to control the manner and means of accomplishing the desired result, favors a finding of employee status. The right to control the manner and method in which the workers perform the work was the most critical factor in determining independent contractor or employee status. (*Shiho Seki dba Magical Adventure Balloon Rides*, Cal/OSHA App. 11-0477, Denial of Decision After Reconsideration (Aug. 31, 2011), citing *Borello, supra* at 356-358, *Sully-Miller Contracting Company v. California Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 693 and *Greenway v. Workers' Compensation Appeals Board* (1969) 269 Cal.App.2d 49, 55.)

Control over the performer by Cybernet was demonstrated by documents and testimony. Cybernet hires between 800 to 1,000 paid performers for its films each year.[6] (HT Sept 4, 2014, p. 146.)[7]

Cybernet's rules provided that the director was responsible for the safety of performers on the set; she had authority to stop the shoot and to enforce Cybernet's rules. (Designator AA, HT Sept. 3, 2014 p 189.) On July 31, 2013, Designator H, the guest director for a segment of "Public Disgrace", was on site at The San Francisco Armory and at a bar during the filming. Also present and under Cybernet's control were the rest of Cybernet's team, including the Producer, Videographer, and Editor & Production Assistant, Designator LL.

Designator N was told when and where to appear. Designator H, the director, questioned Designator N in the pre- and post- scene taped interviews; these questions were selected by the director, based on Cybernet's rules. According to Designator LL, Designator N was given a "safe word" to use to indicate when she wanted to stop the filming, but "it's primarily the director's responsibility to listen for the safe word" and stop the filming. (HT Sept. 5, 2014 p 54.) Designator H physically controlled the movements of Designator N.

[6] It also employs directors, videographers, editor production assistants, video editors, photo editors, and staff in the talent department, set dressing department, location coordination department, art department and lighting department; it admits that the individuals who work under those departments are "employees" of Cybernet. (HR July 9, 2014, p. 18)

[7] References to the unofficial hearing transcript are designated by the date of the hearing, followed by page numbers, e.g., "(HT May 20, 2014, pp 54)". The official record of the hearing in this appeal is the audio recording maintained by the Appeals Board. Persons who testified or were mentioned in the testimony were given an alphabetical designation.

Under Cybernet's policy, the director of the film is responsible for coming up with the narrative storylines, directing the performers regarding what they should say, where they should stand and what actions they should take. The director has control of the performers' actions.[8] Designator N had an employer/employee relationship with Cybernet, and was not an independent contractor.

Analysis of the second factor, opportunity for profit or loss depending on managerial skill, favors a finding of employee status. There was no opportunity for managerial skill in evidence. The performers were not given royalties or profit sharing. (Designator N, HT July 10, 2014, p. 33; Exhibits 19 and 20, Model Release, Consent and Waiver Agreement for Designator N and Designator V, the lead male performer in this film.) Cybernet set the pay rates for performers and "rarely" deviated from their standard rates. Designator N was informed by email that that she was to be paid a base rate of $1,100, plus a $200 audience fee, plus $100 or $200 for additional acts. (Exhibit 24.) There was no evidence that managerial skill was a factor in the wages paid or that there was a profit/loss fluctuation in the amount to be paid to the performers.

The third factor requires Cybernet to establish that the performers invested in their own equipment or materials required for the task, or employed helpers. When performers make no "investment in equipment or materials" or supply any "instrumentalities, tools," or worksites, independent contractor status is negated. (*Borello, supra*, at pp 331-355.) Designator H's clothing, makeup, shoes and underwear were provided by Cybernet and her hair and makeup were done by Cybernet's employees. (HT July 10, 2014 pp 34-35.) Cybernet provides a first aid kit, lube, condoms, sex toys, props, and personal care items, such as toothbrushes and mouthwash. (HT Sept 5, 2014 pp 38; pp 71-72.) The lighting and cameras are provided by Cybernet, as are the set crew, which includes directors, editor/production assistants, and employees in the set dressing department, art department, talent department and location coordination department, as well as untested "extras". (Designator A, HT July 9, 2014 pp 18-20.) This factor favors a finding of employee status.

Whether the service required a specialized skill, the fourth factor, favors a finding of an employment status here. Absent evidence that the individual is customarily engaged in an independently established business, the rebuttable presumption that the worker is an employee governs. Independent contractor status is shown by having a contractor or business license, or distinct and special skills. Cybernet does not require any special licenses, training, education, BDSM[9] experience or any prior experience in adult film. (Designator

[8] Designator J, director of the "Public Disgrace" web series, corroborated the role of the Director at Cybernet involves controlling the performers: "I can give them directions on I need you to – more energy, or I need you to act more scared, or – it's a skill that they have that I'm giving them, I'm requesting that they do." (HT Sept 5, 2014 pp 22:21-25.)

[9] "BDSM" refers to Bondage, discipline, sadism, and masochism.

N, HT July 10, 2014 pp 28-29.) Performers are not required to meet with the director prior to the day of the shoot, nor are they required to establish their pain tolerance, extreme flexibility, or breathing skills under duress.[10] They apply for the position by using the "how to become a model" page on Cybernet's website. (Designator A, HT July 9, 2014 pp 27-28.) The only document required is a photo ID to establish that the person is over age 18. (Exhibit 24.)

The fifth factor, degree of permanence of the working relationship, varies based on the individual performer. Designators D and O worked for Cybernet one time and did not have an agent at the time they initially contacted Cybernet and negotiated to be a performer; they did not return. Many performers also work for other production companies and on average work less than three times per year for Cybernet. Many Cybernet performers also have agents. Based on the high turnover rates, this factor weighs in the direction of an independent contractor status.

Analysis of the sixth factor, whether the service performed is an integral part of the alleged employer's business, favors a finding of employee status. Cybernet produces and distributes adult videos and the performers used in those videos are engaged in work which is integral to that business. An independent contractor relationship is not established when one hires labor to do the same job as the principal of the business.

Cybernet asserted that the performance of Designator N was "improvisational" in nature and under the performer's control. This was contradicted by the email setting forth the booking details for "Public Disgrace" which informed Designator N of her duties. (Exhibit 24, email from Cybernet's Talent Booker, Designator GG, dated June 4, 2013.) (Designator N, HT July 10, 2014, pp 31-33.)

Employer made the additional argument that it is a widespread adult film industry practice to use independent contractors rather than employees for performers. The Appeals Board held in *Shiho Seki dba Magical Adventure Ballon Rides,* Cal/OSHA App. 11-0477, Denial of Petition for Reconsideration (Aug. 31, 2011): "Two concepts militate against accepting that argument. First, the Board has often stated that industry practice is not a defense against a violation of a safety order. (*E.g., Webcor Construction, LP*, Cal/OSHA App. 07-5150, Denial of Petition for Reconsideration (Jun. 24, 2009) ["It is well settled that industry practice cannot supplant the mandates of safety orders." (citation omitted)].) Second, such industry practice must be viewed in the context of the court's statement in *Borello* quoted above: "The label placed by the parties on

[10] Designator LL testified that the performers have special skills which were not apparent to a layperson such as strong mental capacity, communication skills, pain tolerance, extreme flexibility, breathing skills under duress. However, Cybernet did not require potential employees to demonstrate these skills during the hiring process.

their relationship is not dispositive; and subterfuges are not countenanced." (*Borello, supra* at p. 349; citations omitted.)"

Cybernet retains, on a per diem pay basis, intermittent workers who follow its instructions on a moment by moment basis, including the position of their bodies. This extreme level of control by employer of intermittent workers establishes that these workers are employees. (Labor Code §6304.1(a).) Cybernet is therefore an employer of the performers and is subject to the Act.

B. Employer ran flexible power cords through multiple window transoms.

The Division cited employer for a violation of Section 2500.8(a)(3), which provides:

> Uses Not Permitted.
> (a) Unless specifically permitted otherwise in Section 2500.7, flexible cords and cables shall not be used:
> (3) where run through doorways, windows or similar openings;

Citation 1, Item 1 alleges:

> At and prior to the time of inspection, Cybernet Entertainment has energized 120 volt flexible power cords running through multiple window transoms on the fourth floor. The use of flexible cords in this manner is not specifically permitted in Section 2500.7.

The Division has the burden of proving a violation, including the applicability of the safety order and that flexible cords were used by the Employer. (*Reeves Extruded Products, Inc.*, Cal/OSHA App. 79-947, Decision After Reconsideration (Apr. 25, 1980).) Using the extension or flexible cords as temporary wiring in place of fixed wiring violates section 2500.8(a). *Science Applications International Corp.,* Cal/OSHA App. 03-680, Denial of Petition for Reconsideration (Apr. 17, 2009) citing *Bethlehem Steel Corp.*, Cal/OSHA App. 76-552, Decision After Reconsideration (May 21, 1981).

The Division established a violation of improper use of flexible cords through the testimony of Douglas Neville, Division Associate Safety Engineer, who took photographs during the inspection which showed flexible cords were used in place of permanent wiring. He observed that on the fourth floor of The San Francisco Armory, flexible power cords were used to power computers, lighting, cameras and other equipment used in filming and post-production editing of the films. One example was a room with three energized power cords bundled together, which were attached to the wall, went up through the

transom, and ran down the hall. Exhibit 4 is a photograph depicting a hand holding a voltage tester with red lights lit up, indicating that at least one of the three flexible cords is energized or has live electrical current. (Exhibits 3, 4, 6, 7, and 8.) (HT May 20, 2014, pp 54 – 60.) A "transom" is a window at the top of the door, which swings on a hinge that tilts out. (*Id.* p. 55) The hazards associated with running a flexible power cord through a transom is that if the transom was closed and pinched the flexible cord, it could expose some of the electrical conductors, cause a spark and start a fire; if the transom window were closed and it severed the flexible cord, someone could walk by and get a shock.

Employer was well aware of the fire hazard that was created by using temporary wiring by running the power cords through transoms. The COO, Designator A and Manager of Facilities and Building Operations, Designator D testified that the power cords were in use on August 28, 2013 through April 2014, when permanent electrical outlets were installed on the fourth floor. He explained that temporary wiring, including flexible cords and video cables, were used in place of fixed wiring.[11] Designator D admitted that video cables were used in addition to the SO cords on the fourth floor. "SO" refers to "S" for severe operating conditions and "O" for oil-resistant. Employer argued that they used SO power cords. (Exhibits G-1 and G-2) However, using SO cords is not a defense to the violation.[12] Employees working on the fourth floor were subject to hot weather in San Francisco in September and October and air conditioning which would enable them to work comfortably was not available due to the lack of electricity.

Designator D did not deny that the flexible cords were being used in place of fixed wiring, although he had the motive and opportunity to do so. Employer's failure to offset the inference that the flexible cords were used in place of fixed wiring weighs in favor of finding a violation. (See Evidence Code § 413; *Capital Building Maintenance Services, Inc.*, Cal/OSHA App. 97-680, Decision After Reconsideration (Aug. 20, 2001).) An inspector need not wait until an accident happens before issuing a citation. (*HFS Investments, Inc. dba*

[11] Exhibit F depicts a five circuit electrical distribution box, or "spider box" which was used to provide temporary electrical current used to run the equipment used in filming and post-production editing of the films on the fourth floor. (HT Sept. 3, 2014, pp 146-153.) The distribution box is plugged into the camlock on the wall of Designator CC's bedroom. Up to six lunchboxes can be run off the distribution box. The cables powered by the lunchboxes are attached to the picture rail frame that runs along the top of the corridor and through the transoms (Exhibit 6).

[12] Employer also objected to the citation based on the fact that the San Francisco National Guard Armory and Arsenal is listed in the National Registry. However, employer failed to present any authority for its argument that being listed in the National Registry is an exception to compliance with the safety order. Designator D admitted that there are no building codes or other rules that prevented the Armory from abating the violation by installing permanent wiring, which was allegedly completed in April 2014. (HT Sept. 3, 2014, pp 160.)

Hadley Auto Transport, Cal/OSHA App. 96-3079, Decision After Reconsideration (Jun. 6, 2001).)

The Division established a violation of Section 2500.8(a)(3) based on documentation and testimony that the flexible cords ran up the walls and through the transoms on the day of the inspection.

The Division classified the violation as general. A violation is classified as general or serious where it has an impact on employee safety or health. (*Santa Fe Mechanical Co., Inc.*, Cal/OSHA App. 94-2087, Decision After Reconsideration (Jun. 9, 1999).) Neville's undisputed testimony that the hazard associated with the violation could result in electrical shock, burns or fire was credible and is credited. Thus, the violation may be properly classified as general.

The gravity-based penalty of $750 was based on a "high" rating for severity and "low" rating for likelihood. (Section 336(b).) 10% history credit was given, resulting in a reduction of $75. (750 – 75 = 675.) An abatement credit of 50% was given, reducing the adjusted penalty to $335. (675 - 337.50 = 337.50, rounded down to 335). The Division correctly computed the proposed penalty as $335, which is assessed as reasonable.

C. Division failed to issue a citation for failure to properly maintain records of safety training containing name of trainer and specific subject of training within the six month statute of limitations.

The Division cited employer for a violation of Section 3203(b)(2), which provides:

> (b) Records of the steps taken to implement and maintain the Program shall include:
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> (2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

Citation 1, Item 2 alleges:

> At and prior to the time of inspection, Cybernet Entertainment, LLC improperly maintained records of safety training given to employees. Documentation of the EPA/Videographer Production Safety Training

(sign-in sheet dated 4/13/2012) did not include the type of training nor the training provider. Documentation of the Janitor Safety Training – In Use of Chemical & Procedures (sign-in sheet dated 7/31/12) did not include the training provider.

This violation was observed on 10/30/13.

Section 3203(b)(2) is a record keeping requirement which has a one year retention requirement. The statute of limitations, Labor Code 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 the occurrence of the violation." The six-month statute of limitations has been held by the Board to be jurisdictional. (*Kiewit/FCI/Manson (KFM) A Joint Venture*, Cal/OSHA App. 06-2452, Denial of Petition for Reconsideration (Apr. 2, 2009); *Shimmick Construction Company, Inc.,* Cal/OSHA App. 09-0399, Denial of Petition for Reconsideration (Jul. 19, 2012).)

Neville requested training records from the employer as part of the investigation. The Division alleges that two of the training records did not satisfy the requirements in Section 3203(b)(2). The Division did not request the training records in either the August 28, 2013 or October 4, 2013 Request for Documents form (Exhibits 10 and 11). It is unclear when the training records were requested. Although it was not required to disclose documents beyond the retention period, these records were provided to the Division on October 30, 2013. The training records for the EPA/Videographer Production Safety Training, dated April 13, 2012, show that the sign in sheet did not document the subject or topic of training nor the training provider. (Exhibit 9.) The training records for the Janitor Safety Training sign-in sheet dated July 31, 2012 did not include the training provider. (Exhibit 9.)

The employer argues that the time to issue a citation runs from the date of the violation and the deficiencies in the training records occurred more than six months prior to the issuance of the citation. The safety training and documentation of the training occurred on April 13, 2012 and July 31, 2012. The errors occurred on the date that the documents were created. Employer maintained the training documents for over one year, as required, from April and July 2012 to April and July 2013, respectively, satisfying the one year retention requirement.

Since alleged violations on April 13, 2012 and July 31, 2012 had occurred more than six months prior to issuance of the citation on January 30, 2014 and were not shown to be continuing violations, the Division failed to establish that the citation of a violation of Section 3203(b)(2) was issued within the six month statute of limitations. Employer's appeal is granted on this issue.

D. Employer failed to have a consulting physician approve first aid materials.

The Division cited employer for a violation of Section 3400(c), which provides:

> There shall be adequate first-aid materials, approved by the consulting physician, readily available for employees on every job. Such materials shall be kept in a sanitary and usable condition. A frequent inspection shall be made of all first-aid materials, which shall be replenished as necessary.

Citation 1, Item 3 alleges:

> At and prior to the time of inspection, Cybernet Entertainment, LLC did not have a consulting physician approve their on-site first aid materials.
>
> This violation was observed on 9/16/13.

The safety order requires that there shall be adequate first-aid materials approved by the consulting physician. Neville requested evidence that a consulting physician approved the first aid materials; employer provided two pages in response. (HT May 20, 2014, pp 65-67.) Exhibit 5 contains the two documents, a letter re: "Subject: Approved First Aid Supplies for General Industry Use" from Jay J. D'Lugin, MD, MS, dated January 4, 2013 and a memo re: "Subject: Approved First Aid Supplies for General Industry Use" also dated January 4, 2013. Both documents were addressed "To Whom It May Concern". The documents provided by employer show that Dr. D'Lugin approved the generic first aid kits and found that they meet or exceeded applicable industry standards, but also stated:

> **If there are special hazards in the workplace**, such as toxic chemicals, processes involving high heat, corrosive and caustic substances, or high voltage electricity, then **the supplies must be supplemented to meet those needs**. [Emphasis added.]

The consulting physician did not examine the workplace or determine the special hazards present. Neville testified that the special hazards of routine and repeated exposure to blood and OPIM, which are hazards specific to adult

film industry,[13] were not addressed by the memos issued by employer's consulting physician. (HT May 20, 2014, pp 61-62.)

The employer asserts that it was in compliance with the safety order because there were first aid carts throughout the building with many supplies in a sanitary and usable condition. (Exhibit C.) It argues that the Division did not articulate whether any supplies were missing from the kits or what specific deficiencies existed. The fact that the employer had acceptable first aid supplies for General Industry does not relieve it of the duty to supplement those items with supplies which deal with the special hazards which exist in this workplace, namely exposure to blood-borne pathogens and OPIM during the filming at Cybernet. The employer failed to refute evidence that the generic letter and memo do not satisfy the requirement to have "adequate first-aid materials, approved by the consulting physician". Its' physician failed to examine the special hazards to determine what supplies were needed prior to approving the generic first aid materials.

Based on the evidence presented, the Division established a violation of Section 3400(c).

This citation was classified as a "general" violation, which is defined as a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety or health of employees. (Section 334(b).) Employer did not offer any evidence to refute Neville's testimony regarding the hazard caused by the violation or the relationship to employee health. In this situation, a general violation is established. (*ARB, Inc.,* Cal/OSHA App. 01-2119, Decision After Reconsideration (Sep. 11, 2003).) The violation was properly classified as general.

Neville testified that the penalty calculation was based on the fact that the gravity-based penalty for a general violation with low severity, medium extent and medium likelihood is $1,000. (Section 336(b).) The only applicable penalty adjustment factor which applied was history, which was rated "good" and given a 10% credit. The gravity based penalty was reduced by $100 to $900 when the 10% history credit was applied. The abatement credit of 50% is allowable, resulting in a proposed penalty of $450. Accordingly, the proposed $450 penalty is found to be appropriate.

E. Employer failed to establish, implement and maintain an effective Injury and Illness Prevention Program regarding

[13] Cybernet, the Employer, shoots, produces and posts on their website, recorded content of BDSM films of various genres, depicting performances that involve some kind of sex act. (HT July 9, 2014, pp 15-16.) Employer also has other business interests involving a live camming product, an events menu and a bar, which were not relevant to this appeal.

exposure to electrical hazards and sexually transmitted illnesses.

The Division cited employer for a violation of Section 3203(a).[14] Citation 1, Item 7 alleges:

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[14] The Division cited employer for a violation of Section 3203(a), which provides:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> (1) Identify the person or persons with authority and responsibility for implementing the Program.
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
> (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.
> EXCEPTION: Employers having fewer than 10 employees shall be permitted to communicate to and instruct employees orally in general safe work practices with specific instructions with respect to hazards unique to the employees' job assignments as compliance with subsection (a)(3).
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.
> (A) When the Program is first established;
> EXCEPTION: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.
> (5) Include a procedure to investigate occupational injury or occupational illness.
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:
> (A) When observed or discovered; and,
> (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
> (7) Provide training and instruction:
> (A) When the program is first established;

> At and prior to the time of inspection, Cybernet Entertainment, LLC failed to write, establish, implement and/or maintain an effective Injury and Illness Prevention Program (IIPP) which met the requirements of this standard for its employee exposed to workplace hazards including, but not limited to, electrical hazards and sexually transmitted illnesses in the course of producing adult videos.

The Division may establish a violation if an Injury and Illness Prevention Program ("IIPP") can be shown to not have been effectively implemented and maintained on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Keith Phillips Painting*, Cal/OSHA App. 92-777, Decision After Reconsideration (Jan. 17, 1995).)

Neville requested the Employer to provide its Injury and Illness Prevention Program on August 28, 2013. The documents were required to be provided by September 12, 2013. When no response was received, a second request was issued, requiring documents by October 4, 2013. (Exhibit 11, document request sheet dated August 28, 2013 and Exhibit 10, document request sheet dated September 9, 2013.) On August 28, 2013, Neville was provided Cybernet's IIPP dated July 9, 2013. (Exhibit 16-20.) Employer was cited for violating Section 3203(a) with respect to two hazards: 1) failure to identify and correct electrical hazards and 2) failure to prevent exposure to sexually transmitted diseases.

1. Failure to identify, evaluate and correct electrical hazards.

EXCEPTION: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
(B) To all new employees;
(C) To all employees given new job assignments for which training has not previously been received;
(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

An employer's IIPP is not effective if the Employer claims to have no knowledge of a hazard because although it observed the hazard, it does not identify, evaluate, or correct it. (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002), citing *Greene and Hemly, Inc.*, Cal/App. 76-435, Decision After Reconsideration (Apr. 7, 1978).) A violation of Section 3203(a) may be based on exposure to electrical hazards which are ongoing for a significant period of time, as opposed to *de minimus*. (*Los Angeles County DPW*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

Division alleges that the Employer's IIPP was not effective although it provided for monthly periodic inspections, required workplace hazards to be identified and evaluated, and required the hazards to be corrected when observed or discovered. (Exhibit 16-20, pp 6-7.) As discussed in connection with Citation 1, Item 1 above, employer used flexible cords in place of permanent wiring on the fourth floor of the building, which was documented during the Division's inspection.[15] Employer's witnesses testified that flexible cords were used extensively for lighting the sets and powering computers for post-production work on an ongoing basis.

Neville testified that the use of flexible cords through the transoms on the fourth floor is the type of hazard that would have been caught, if a proper inspection had been done. (HT Sept. 3, 2014, p 81-83.) The evidence established that the electrical hazard was known to the employer, but Designator D, who inspected the fourth floor, did not correct the hazard he observed. The flexible cords were running up the wall and through the transoms, in plain view. (Exhibits 3, 4, 6, 7, and 8.) It is found that Employer installed the flexible cords in place of permanent wiring and the hazard was not identified, evaluated and corrected prior to the issuance of the citations.

Division established a violation of Section 3203(a).

2. Failure to implement and maintain an effective written IIPP to address the hazards of sexually transmitted illnesses in the course of producing adult videos.

Section 3203(a)(1) provides that the IIPP must identify the person with authority and responsibility for implementing the IIPP. The IIPP identifies the "Company Facilities Representative" but fails to state who that person is.

[15] Employer maintained that it was not subject to the safety order because of the San Francisco National Guard Armory and Arsenal is listed in the National Registry, but this defense was withdrawn by Designator D during the sixth day of the hearing. (See footnote 12, *supra*.)

Section 3203(a)(2) requires that the IIPP ensure that employees comply with safe and healthy work practices. There were no work practices which promoted safe and healthy actions to protect employees from exposure to BBP. The Bloodborne Pathogen Exposure Control Plan (ECP)[16] contains detailed information which states "assist[s] our company in implementing and ensuring compliance with the Cal OSHA standard for bloodborne pathogens, thereby protecting our employees and contractors." This plan lists "all job classifications at our establishment in which all employees and contractors have occupational exposure [to BBP]" and tasks which result in occupational exposure, such as vaginal and anal sexual intercourse. (*Id.* at pp 18-21.) The work practices which would promote such actions are not in the plan.

The Division maintained that the IIPP was not effective because the sections of the IIPP which concerned protection from STIs did not apply to the performers.[17] The evidence establishes that performers routinely and repeatedly engaged in unprotected sexual activity without any barrier protections as part of their jobs. Murphy identified more than 37 performers who were exposed to blood or OPIM during shoots that occurred on or after July 31, 2013. (HT Sept. 3, 2014 69:18.) They were exposed to bloodborne illnesses, including human immunodeficiency virus (HIV), Hepatitis B (HBV) and Hepatitis C (HCV) and STIs such as gonorrhea, chlamydia, herpes, and trichomoniasis during the performance of their job duties.

The "Performer Work Practice Controls" did not include effective communication about safe and healthy work practices (Exhibit 24). Employer provides "written information on the potential risks associated with engaging in the type of work being proposed" to the potential performers. After reading and signing off on the information provided, the performer can make an "'informed decision' as to whether or not they wish to pursue the offer extended to them." (*Id.* at 22.) A list of job duties were described an the email sent to Designator N on June 4, 2013, which informed her of the acts she would be required to perform. It failed to discuss these hazards, which would be likely to expose her to BBP and no safe work practices were mentioned.

[16] The ECP is found in Exhibit 16-20, IIPP, Section A2, pp 16 – 31 and Exhibit 12. There appear to be no significant differences between the two versions.

[17] Employer implemented an Injury and Illness Prevention Program ("IIPP"), dated July 9, 2013 (Exhibit 16-20) which states on page 4: "The goal and our policy are aimed at preventing any employee or visitor from being subjected to any unusual health or safety risks (hazards). We shall establish positive and realistic policies, based on past experience and research, to prevent unreasonable health and safety risks (hazards)." IIPP pages 6-8 states requirements for Responsibility (of managers and supervisors), Employee Responsibility, Hazard Identification, Hazard Correction, Accident Investigation, Training and Instruction, Communication, Compliance, and Documentation. These procedures have not been implemented for performers.

As discussed in more detail in connection with Citation 2, performers are exposed to blood and OPIM in the course of their duties and no barriers are used. It is undisputed that Cybernet did not provide prophylactic hepatitis B vaccinations to performers. Nor was a post-exposure evaluation or follow-up provided to performers. The employer is aware of the hazards and maintains a policy of not covering the performers with the same protection as the individuals it considers to be "employees". (HT Sept. 5, 2014 p. 42.)

The requirement to communicate the IIPP to the performers was not followed. (Section 3203(a)(3).) Designator N was not provided a copy of the IIPP. Frequently, Cybernet failed to send communicate with the performer or his or her agent about existence of the IIPP, provided them a copy of the IIPP, or explained the hazards involved in exposure to STIs. The IIPP did not have any provisions which encourage employees to inform the employer of hazards without fear of reprisal. There was no evidence of meetings, training programs, posting, written communications, anonymous notification by employees about hazards or any other means of communication with the performers. Designator N testified that the Employer did not communicate with her prior to filming "Public Disgrace" about hazards associated with exposure to BBP, other than requiring her to be "tested", as discussed in more detail below.

Section 3203(a)(4) requires that employers identify and correct work place hazards. The employer's Bloodborne Pathogen Exposure Control Plan, pages 16 to 31 in the IIPP, discusses engineering controls to be used when employees are exposed to blood and OPIM. These include the requirement to use of biohazard waste containers, to complete the sharps injury log when any object penetrates the skin, and to complete an exposure incident report when an exposure incident occurs.

When Designator N's molar cut Designator V's penis, causing it to bleed on the floor, there was no evaluation, no biohazard waste containers were used for disposal of the materials used to clean up the blood and no logs or post exposure incident report were completed with respect to the hazard of exposure to blood.[18] Designator LL, Editor/Production Assistant in "Public Disgrace" testified to the manner in which the blood in this incident was cleaned up. While she testified that she followed Cybernet's procedures when cleaning up the blood, this was not credible. She could not recall any details regarding what method she used to clean up the blood on the set, and could not recall what chemicals or cleaning agents she used. (HT Sept. 5. 2014, pp 50, 71,-77, 85-87.)

[18] Exhibit 14, Cal/OSHA Form 301 Injury and Illness Incident Reports for 2013 contains an incident report which documents the complaint that a guest audience member slapped Designator N's left breast, which caused bruising and swelling. No incident reports were included regarding the exposure incident involving Designator N and Z on July 31, 2013 or the exposure to OPIM of Designator O on August 1, 2013.

Section 3203(a)(5) requires that employers investigate occupational injuries or illnesses. Because performers were not classified as "employees", exposure to blood and OPIM was not considered to be an occupational injury or illness. Even when Designator V experienced injury during the "Public Disgrace" shoot, there was no investigation done. Designator LL described the amount of blood she wiped up as "dime sized", which is inconsistent with her prior testimony that she provided Designator V with gauze to stop the bleeding.[19] If an investigation had been done, there would be evidence of the amount of blood involved and specific information about what steps were taken to clean it up. Instead, that portion of the shoot was destroyed, so that there is no record of what occurred.[20] There was no investigation and the evidence of the amount of blood on the set was destroyed.

Section 3203(a)(6) requires that employers develop methods for timely correcting unsafe or unhealthy conditions. The performers were not considered to be employees, and the employer's methodology was to place responsibility on the employee to accept the risk of exposure to STIs.

Section 3203(a)(7) requires that employers train and instruct employees and supervisors on procedures for identifying and evaluating work place hazards in their Injury and Illness Prevention Programs. The IIPP provides for safety training for "employees" and proper cleaning materials and substances for cleaning the sets; this training is not provided to performers. For example, in "Public Disgrace", Designator N did not receive any training prior to the filming.

Employer's IIPP was not effective with respect to the hazard of sexually transmitted illnesses to which the performers were exposed, resulting in a second violation of Section 3203(a).

The violation was properly classified as general. In order to establish a general violation, the Division need only show that the safety order was

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[19] *Big Valley Dental Center*, Cal/OSHA App. 94-0288, DAR (Jul. 14, 1999) found a violation of Section 5193(d)(4)(C)(2.a) is established if regulated waste, which includes one dime size piece of waste soaked with blood or OPIM is not properly disposed of in closable waste containers, labeled biohazard, citing *American Dental Association v. Martin* (7th Cir. 1993) 984 F.2d 823.

[20] The raw footage of the July 31, 2014 "Public Disgrace" shoot was destroyed approximately six months after July 31, 2013. (HT Sept 5, 2014, p 85.) Cybernet's Editor and Production Assistant, Designator LL, audited the raw footage of the July 31, 2014 "Public Disgrace" shoot fifteen times to determine whether the injury to Designator V's breast actually occurred on camera and the amount of blood on the set resulting from the injury to Designator V's penis. (HT Sept 5, 2014, p 282-285, 306-307.) She testified that all footage of this exposure incident was deleted from the server and from all of Cybernet's computers. (HT Sept 5, 2014, p 305, 308-309.) No copy of the raw footage was in existence, including the copy placed on the Employer's server so that she could review it.

violated, the violation does not satisfy the definition of "serious" and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, DDAR (Jun. 25, 2009), citing *A. Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998); (*Santa Fe Mechanical Company, Inc.*, Cal/OSHA App. 94-2087, Decision After Reconsideration (Jun. 9, 1999). An IIPP, by definition, impacts employee safety and health. Employer did not argue otherwise. The violation was correctly classified as general.

The proposed penalty is presumptively reasonable and will not be reduced absent evidence by the Employer that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.,* Cal/OSHA App. 02-4946, Decision After Reconsideration (May 27, 2006).) Employer did not dispute the truth of Neville's testimony regarding the factors he used to calculate the penalty. A review of the penalty calculation worksheet (Exhibit 2) indicates that the proposed penalty was calculated consistently with the regulations. (Section 336(b).) The gravity-based penalty for a general violation with medium severity, high extent and high likelihood is $1,500. A 10% history penalty adjustment factor was applied, thereby reducing the gravity based penalty by $150 to $1,350. The abatement credit of 50% is allowable, resulting in a proposed penalty of $675.

A civil penalty of $ 675 is found reasonable and is assessed.

F. Employer failed to develop an effective exposure control plan re: hazards of bloodborne pathogens involved in production activities associated with adult content videos.

Citation 2 alleges a violation of Section 5193(c)(1) for failure to develop and implement procedures or schedule for methods of compliance with an effective exposure control plan re: hazards of bloodborne pathogens, including engineering controls and work practices and hepatitis B vaccination and post-exposure evaluation and follow-up and recordkeeping.

The Division cited employer for a violation of Section 5193(c)(1), which provides:

> (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).
(4)
(5)
(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;
(7)
(8)

Citation 2, Item 1 alleges:

> At and prior to the time of inspection, Cybernet Entertainment, LLC had not established and implemented an effective exposure control plan to protect employees who had reasonable anticipated contact with bold or Other Potentially Infectious Materials (OPIM) for the hazards of bloodborne pathogens. Cybernet Entertainment, LLC had not developed and implemented procedures or schedule for:
> (c) methods of compliance, including engineering controls and work practices:
> (f) hepatitis B vaccination and post-exposure evaluation and follow-up; and
> (h) recordkeeping.
>
> This violation was observed on 8/28/2013.

Division must prove 1) employer failed to establish an effective written bloodborne pathogen exposure control plan (ECP) to protect employees who

had reasonable anticipated contact with blood or Other Potentially Infectious Materials (OPIM), 2) exposure to the hazards of bloodborne pathogens (BBP), and 3) failure to implement ECP including procedures or schedule for methods of compliance, hepatitis B vaccination, evaluation and follow-up, or recordkeeping.

Neville requested the exposure control plan (ECP) and the employer provided a copy during the inspection on August 28, 2013. (Exhibit 12, Blood Borne Exposure Control Plan.)

All jobs which involved reasonably anticipated contact with blood or Other Potentially Infectious Materials (OPIM) are required to have an ECP, including the performers and staff which were exposed to BBP by their proximity to the sexual activities on the set. The ECP includes engineering controls and work practices, hepatitis B vaccination, and post-exposure prophylactic treatment which complied with Section 5193. However, these provisions applied only to the production crew, janitorial staff and laundry staff, who were not performers, and who were considered to be "employees" by Cybernet. The performers, who were more directly exposed to blood and OPIM because their duties involved acts which put their bodies in direct contact with these substances, were not provided the required protection, as discussed below. They directly experienced multiple exposure incidents during each shoot.

1. Employer failed to develop and implement procedures or schedule for methods of compliance, including engineering controls and work practices, as required.

The Employer is required to have 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. The safety order requires employers to offer a post-exposure prophylactic treatment shortly after exposure to hepatitis B, because it is highly effective in preventing replication of the virus. (*Behavioral Health Services, Inc.*, Cal/OSHA App. 01-3397, Decision After Reconsideration (Apr. 14, 2006).) The issue here is whether Cybernet developed and implemented procedures for the performers. Critical portions of the ECP did not cover the performers who were deemed "independent contractors", e.g., they were not given training, hepatitis B vaccination, post-exposure prophylactic treatment, or a copy of the ECP. (Designators E and N, *supra*.)

Evidence of employee exposure is required for each alleged violation. "Exposure" has been defined as "reliable proof that employees are endangered by an existing hazardous condition or circumstances." *United Airlines,* Cal/OSHA App. 00-2844, Decision After Reconsideration (Apr. 30, 2009) citing

Santa Fe Aggregates, Inc., Cal/OSHA App. 00-388, Decision After Reconsideration (Nov. 13, 2001). "There must be some evidence that employees came within the zone of danger while performing work related duties, pursuing personal activities during work, or employing normal means of ingress and egress to their work stations." (*C.A. Rasmussen, Inc.,* Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26, 2001); *Santa Fe Aggregates, Inc., supra.*

The ECP acknowledges that performers, by virtue of the job duties involved in shooting the BDSM films described above, reasonably anticipate contact with blood or OPIM. This contact is an "occupational exposure", defined in Section 5193(b) as:

> Reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood of other potentially infectious materials ("OPIM") that may result from the performance of an employee's duties.

The performer's skin, eyes, vagina, anus and other mucous membranes are directly in contact with blood or OPIM. In the "Public Disgrace" segment filmed on July 31, 2013 in a bar in San Francisco, Cybernet did not provide the performers with training, a hepatitis B vaccination, post-exposure prophylactic treatment, a followup evaluation, or a copy of the ECP. At the time of the exposure, the testing procedures did not require screening for the HBV and HCV. (Exhibit 26, DVD, Film No. 31517.)

Designator N testified that she was exposed to blood-borne pathogens, including HBV and HCV while performing vigorous unprotected sex with Designator V. At some point, Designator N's wisdom tooth "nicked" Designator V's penis. (HT July 10, 2014 p 50 – 53.) Designator LL testified that the scene was halted; time was taken to clean up the set, and to obtain gauze to soak up and stop the flow of blood. (HT Sept 5, 2014 p 73-77.) During the lengthy break, there were discussions between Cybernet's Performer & Guest Director, Designator H, and performers Designator N and Designator O about whether to continue the scene without a condom. (*Id.* p. 63.) After a lengthy break, the performers and crew resumed the shoot. By resuming the filming, an additional "occupational exposure" to blood occurred, in addition to exposure to OPIM during unprotected oral and anal sex, for both Designator N and Designator V, who now had an open cut and was more susceptible to STIs. (Exhibit 26.)

The ECP should have applied the following work practices to the performers: 1) effective communication and training on the hazards to employees, 2) a Hepatitis B Vaccination, 3) a post exposure evaluation, 4) a follow-up evaluation and 5) provide a copy of the ECP to performers. (Designator N, HT July 10, 2014 pp 36-38; Designator E Sept. 5, 2014 pp 298-

301.) These work practices should have been followed for Designators N, O and V.[21] The performers were excluded from the engineering controls which applied to the crew, even though they were more directly and consistently exposed to blood-borne pathogens. The performers should have been covered by the sections of the ECP involving barrier protection.

Cybernet's workplace safety specialist, Designator D, admitted that serious health hazards could result from exposure to blood and OPIM. He also acknowledged that janitors are required to use barrier protections such as gloves whenever cleaning up blood to avoid contracting various STIs, including HIV, HBV and HCV. (HT July 10, 2014, p. 184, 188.)

Cybernet acknowledged that occupational exposure to bloodborne illness was a hazard and nothing in the documents or information provided to the performers instructed them on prevention of the exposure. The director explained to the potential performer the potential risks and allowed the person to make an informed decision whether to proceed.[22] There is nothing in the documents allegedly provided to the performers regarding how to prevent exposures to BBP. (*Id.* p 302.) Employer placed the onus on the performers to assume the risks or decline the job. Cybernet's ECP defines "work practice controls" as "controls that reduce the likelihood of exposure by altering the manner in which a task is performed." The pre-filming process is described on p. 22 of the ECP:

> Performer Work Practice Controls
>
> A. During the initial contracting process (prior to filming) the work scope is defined by the Company and communicated in writing to the potential performer. During this process potential performers

[21] Another example is illustrated by Designator O who was exposed to BBP while filming a "TS Seduction" shoot on August 1, 2013 for the employer. (Exhibit 34, DVD, Film No. 32867.) He got ejaculate in his eye during one scene, which he wiped off with a Kleenex. (HT Sept 4, 2014, p. 278-281, 285.) There was no post-exposure report completed after that incident was observed by Designator I and he was not offered a medical evaluation.

[22] On the day of the shoot, the performer is provided various documents, including the "limits check list", "condom limitation addendum" and "model release, consent and waiver agreement". (Exhibits 16-6, 16-8, and 16-18.) The Condom Limitation Addendum for Shoot No. 31517 allowed each performer to choose one of the following options: 1) Condom Shoot, 2) Optional Condom Shoot (I wish to discuss this with my scene partner(s), prior to the shoot beginning), and 3) No Condom Shoot. (Exhibits 18-A and 18-B.) This form is filled out in private, not in front of other performers or directors. (HT Sept. 5, 2014 pp 281-282.) In the case of "Public Disgrace", Designator V selected "No Condom Shoot" whereas Designator N selected "Optional Condom Shoot", indicating she wished to discuss this with her scene partner(s), prior to the shoot beginning. Based on the test results Designator V showed her, namely, a green "√" showing he was cleared to work in the adult film industry, she agreed to a "no condom shoot".

are provided written information on the potential risks associated with engaging in the type of work being proposed, performers acknowledge and agree that they have read the document and understand potential risks involved in performing. After reading and signing off on the written information provided, the performer has the knowledge to make the 'informed decision' as to whether or not they wish to pursue the offer extended to them.

B. Prior to arriving at set, performers comply with Performer Risk Reduction Requirements and recommendations as stated in Attachment #1.[23]
C. After arriving on set but before performing, performers comply with inspection as stated in Attachment #2.

Employer argues that "the exposure control plan was not required to eliminate all hazards but instead to minimize the hazards." (Cybernet Post Hearing Brief, p 19:26-27.) Employer fails to show how communication to potential performers of the hazards so they can decide "whether or not they wish to pursue the offer" minimizes the known hazards.

The safety order requires employer to promulgate safe and healthy work practices and does not permit delegation to the employees. An employer cannot comply with its obligation to establish controls by shifting responsibility to its employees to review information and make their own decisions regarding their safety. (*Ferro Union, Inc.,* Cal/OSHA App. 96-1445, Decision After Reconsideration (Sep. 13, 2000).) Section 5193(c)(1) does not permit the employer to place the onus on the performer to reject the job offer, as that work practice does nothing to prevent the exposure. Requiring the employee to sign a consent and waiver form is not a work practice control which satisfies the safety order. Division established by a preponderance of the evidence that performers were excluded from coverage by the relevant sections of the ECP, they were not provided with a copy of the ECP, and they were not given a prophylactic Hepatitis B Vaccination, a post exposure evaluation, or a follow-up evaluation. Division proved a violation of Section 5193(c)(1).

2. The Performers Availability Screening Services (PASS) System

Does Cybernet's exposure control plan which requires pre-employment testing, satisfy the requirements of Section 5193(c)(1)? That section requires the employer to establish, implement and maintain an effective Exposure

[23] Exhibit 16-20, IIPP, Attachment #1, Work Practice Controls – Performer Risk Reduction Prior to Arriving at Set, pp 32-33.

Control Plan designed to eliminate or minimize employee exposure. The IIPP acknowledged that performers were anticipated to be repeatedly exposed to blood and OPIM during the shoot.[24]

The testing protocol used by Cybernet requires the performer to complete the requisite testing referred to in Performer Work Practice Controls subsection B and to sign off on knowledge of the risks involved in the shoot. Performers are required to obtain a blood test for HIV, hepatitis A, B & C, (HIV, HBV, and HCV), urine test for gonorrhea, syphilis, chlamydia, trichomoniasis and a skin test for tuberculosis. New performers must be retested every 28 days for HIV, gonorrhea and chlamydia and retested every six months for syphilis.[25] A performer could be exposed to an STI, either before the shoot or during the shoot, and could be highly infectious and unknowingly transmit the infection to others.

Performers Availability Screening Services (PASS) maintains a data base which contains the confidential test results. (Exhibit S and T; HT Sept. 5, 2014 pp 274-281.)[26] The performers pay to obtain test results showing their status. The results of these tests are recorded as a green "√" if the performer is cleared to work and a red "x" if he or she is not. Performers ask to see their partner's PASS system printout to verify the person was tested.

Employer defends the workplace practices in which performers are exposed to BBP during the shoots, by "utilize[ing] the PASS system to ensure that all performers were maintaining the proper testing protocols" and prohibiting "performers [from] participat[ing] in a scene if the performer had not tested negative for HIV and other STIs." [27] (Appellant's Post Hearing Brief, p. 19-20.)

The Division provided evidence of the inadequacy of the test protocol. Paul Papanek, M.D., M.P.H., the Division's medical expert, is a public health

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[24] Employer's "shooting rules" acknowledge that exposure to blood is anticipated: "Scat, bleeding, needles and vomiting are not permitted. If someone is grazed inadvertently and the bleeding is minimal, that's ok." (Exhibit 6-14, p. 3)

[25] The testing period was changed from every 30 days to every 14 days on August 19, 2013. (Exhibit 48) The testing requirements do not apply to films involving "condom only" shoots. Boy/boy genre films require all performers to wear condoms. Genres involving women, transsexuals or males are "condom optional" and require the performers to wear condoms or other barrier protection only if one of the performers selects a "condom shoot". (See Exhibit 18-A and 18-B, Condom Limitation Addendum for Designators N and O.) "They are allowed to do that [vaginal and anal penetration by multiple male performers] with their penis as long as [all] performers have consented to that". (HT Sept 5, 2014, p. 81-82.)

[26] Prior to August 19, 2013, PASS (formerly Adult Production Health & Safety Services, or "APHSS") did not require testing for HBV, HCV or trichomoniasis. (Exhibit 48)

[27] There is no specific mention in the IIPP of the PASS/APHSS system.

medical officer with the Division.[28] (Exhibit 44) He testified that post-exposure medical evaluations are critical to assess the risk of transmission and to prescribe prophylactic treatment. (HT Sept. 3, 2014 pp 95-96.) In his opinion, testing performers before an exposure incident is not effective in preventing transmission of HIV[29], HBV[30] and HCV[31]; condoms or other barriers must be used during shoots to prevent infection. (HT Sept. 3, 2014 pp 90-94.) The risk of transmission is greater if the exposure is prolonged. Unprotected sex which is fast and forceful increases the likelihood of a tear of mucus membranes, which increases the likelihood of transmitting the infection. (HT Sept. 3, 2014 pp 110-112.) If there is an exposure, a prophylactic treatment, such as taking an antiretroviral medication, will decrease the likelihood of infection, if started within 24 hours of the exposure and continued for at least 30 days. (*Id.* pp 95-100.)

Cybernet's medical expert, Sean J. Darcy, M.D. is one of four physicians on the PASS medical advisory board, which established the adult film industry testing protocols and regularly consults with PASS. He received training in sexually transmitted infections during his OB/GYN and family medical rotation in medical school and 90 percent of his post-residency career has been in work regarding the adult film industry testing protocols. Dr. Darcy testified that 50 percent of his income is derived from ordering tests from Talent Testing Services for performers in the adult film industry. (HT Sept. 5, 2014 pp 95-96, 200.)[32] He diagnoses and prescribes treatment or refers patients who test positive for HIV, HBV and HCV, syphilis, gonorrhea, chlamydia and

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[28] Dr. Papanek was established as an expert based on his specialized knowledge, skill, experience and training. (Cal. Evidence Code 720). He is board certified in occupational medicine, served as the Chief of the Department of Occupational Medicine for Kaiser Permanente for fifteen years and worked for the L.A. County Health Department as a Public Health Epidemiologist. His opinion regarding the effectiveness of condoms or other barriers in preventing transmission of BBP and the reasons why a post-exposure medical evaluation is required immediately after an exposure to BBP is reasonable and trustworthy. *Sargon Enterprises, Inc. v. University of Southern California, et al.* (2012) 55 Cal.4th 747.)

[29] HIV is a virus that causes infections, that is characterized by destruction of the immune system and then other secondary problems result from the loss of immune competence, such as fevers, weight-loss, inability to fight off infections and disabling side effects of the medications used to treat HIV, such as nausea, headaches, skin rashes. (HT Sept. 3, 2014 pp 97-100.)

[30] HBV is a virus which infects the liver, causes jaundice, abdominal pain, nausea, flu-like symptoms, and permanent liver damage, to cirrhosis, and ultimately liver cancer and death. If the Hepatitis B vaccine is administered promptly after exposure, it is less likely that the virus will take hold. (HT Sept. 3, 2014 pp 103-105; pp 106.)

[31] Like HBV, HCV is a virus that causes a chronic infection of the liver, which destroys the livers function, causes abdominal pain, nausea, flu-like symptoms, and leads to cirrhosis, liver cancer and death. (HT Sept. 3, 2014 pp 100-101; pp. 107.)

[32] Dr. Darcy's testimony regarding the validity of the PASS system involves an apparent conflict of interest, as his opinion may have been influenced by his financial relationship with PASS/APHSS. His credibility was diminished by his failure to explain how the existing scientific research which he relied on supported his conclusions, when in fact, these research papers were inapposite. (Exhibits 49, 50 and 51.)

trichomoniasis. Dr. Darcy disputed Dr. Papanek's testimony and opined that a greater hazard is created by use of condoms because condoms create "condom rash" or ulcerations that are not only uncomfortable but also create a greater risk of injury. (Cybernet Post Hearing Brief, p 24.) In Dr. Darcy's opinion, a person who is infected with HIV and is tested every ten days, has a one in ten thousand chance of transmitting HIV to another individual. (HT Sept. 5, 2014 pp 121-123.) He based his opinion on three medical studies, including a diagram referred to as the "*Fauci* study", Exhibit 50. (*Id.* pp 122-125, 205 - 207.) However, he provided no research which supported his analysis that condoms create a greater hazard or his conclusion that frequency of testing would reduce the risk of transmission of HIV.

Jeffrey D. Klausner, M.D. M.P.H. was called to rebut Dr. Darcy's analysis and interpretation of the "*Fauci* study".[33] Dr. Klausner's HIV experience includes clinical treatment of patients with HIV currently as attending physician at UCLA and an outpatient clinic, in San Francisco as attending physician at SF General Hospital, as well as in New York in the 1990s during his residency.[34] Dr. Klausner diagnosed and treated patients with HBV, implemented prevention and control strategies for San Francisco and conducted research in hepatitis B prevention. He currently diagnoses and treats patients for HCV at UCLA. From November 2011 to June 2012, he served as Acting Medical Director of St. James Infirmary, a community based clinic in San Francisco that provides services to adult film workers. There, he diagnosed and treated patients with STDs and ordered tests required by the adult film industry.

Dr. Klausner developed and published recommendations about testing in the film industry in 2009. In his opinion, the testing panels done in the adult film industry in August 2013 were deficient because they did not test at other exposed anatomic sites such as the throat and rectum, nor did they test for human papilloma virus or herpes simplex virus, type I and II. (HT Sept. 5, 2014 pp 217-219.) Dr. Klausner testified credibly that Dr. Darcy's opinion regarding

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[33] Employer's motion to exclude the testimony of Dr. Klausner as a rebuttal expert was denied. A party may call a rebuttal expert witness which was not previously disclosed. (Sections 376.1(b) and 376.2.) The Board does not look to the Code of Civil Procedure as a source of new discovery rules. (*See, FedEx Ground*, Cal/OSHA App. 13-1220, Decision After Reconsideration (Sep. 17, 2014), citing *Central Chevrolet,* Cal/OSHA App. 05-2615, Decision After Reconsideration and Order of Remand (Sep. 12, 2008).) The right to present testimony by experts does not include the right to present testimony free from rebuttal by differing expert views. *People v Carpenter* (1997) 15 Cal. 4th 312.

[34] Dr. Klausner is a Professor of Medicine at UCLA, and prior to that was Branch Chief of Centers for Disease Control for HIV and TB in South Africa. From 1998 to 2010, he served as Deputy Health Officer for San Francisco, Director of STD Prevention and Control Services of San Francisco, Medical Director of San Francisco STD Clinic and Associate Professor of Medicine and Infectious Diseases at UCSF. He is board certified in internal medicine and in infectious diseases. He is the senior editor and author of the textbook "Current Management and Diagnosis of Sexually Transmitted Diseases." (HT Sept. 5, 2014 pp 210-213.)

the reliability of the HIV Aptima test used by the PASS system ignored the well-known research which establish that a false negative test result can occur between five days to seven days and up to sixty days after exposure to HIV.[35] During this period, HIV is not detectible but the individual is highly infectious. Between 20 to 50 percent of all new infections are caused by people in this highly infectious period. (HT Sept. 5, 2014 pp 219-221.) Because a newly infected individual is particularly infectious, they could transmit HIV during this period, even though they test negative for HIV.

Dr. Klausner disagreed with Dr. Darcy's opinion regarding Exhibit 50, the *Fauci* study. Dr. Klausner explained that the graph shows the opposite of what Dr. Darcy claimed regarding the increase in HIV viral RNA after infection. During the three to six-week period after the initial infection, an infected person has the highest titers of viral load, and is associated with high infectivity. (HT Sept. 5, 2014 pp 227-230.) Once in a person's bloodstream, the virus multiplies rapidly and can be retransmitted almost immediately to another sexual partner. During the early onset of the virus, the test results are more likely to show a false negative, leading one to mistakenly believe that they are not positive for HIV. He testified that Dr. Darcy's analysis is not supported by the *Fauci* study and fails to take into account the well-established conclusion that the viral load is highest during this early period, when a "false" negative test result is more likely.

Dr. Klausner concluded that transmission of HIV, HBV and HCV can be prevented through the use of condoms. He testified that the studies comparing risk of transmission with a condom and without, demonstrate a 20 fold difference in the risk of HIV transmission. (HT Sept. 5, 2014 pp 234-235.) Relying solely on the test results of the PASS system is not effective to prevent transmission.[36] He testified that a comprehensive plan, which includes condoms or other barriers, training for workers, pre-exposure prophylaxis, HIV antibody testing and specific post exposure plans are necessary. Neither the testing requirements in the IIPP nor the PASS testing system eliminate or minimize a performer's exposure to blood or OPIM. These opinions are credible and consistent with the safety order at issue. No steps were taken by the employer to eliminate or minimize the exposure incidents by any engineering controls.

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[35] According to Dr. Klausner, the FDA package insert of the Aptima Assay, the current test used, states that the average window period for HIV to be detected is ten to fifteen days from exposure. Following a recent exposure to HIV-1, it may take several months for the antibody response to reach detectable levels, during which time, testing for antibodies to HIV-1, including the use of rapid antibody tests will not be indicative of true infection status. HIV is more readily transferrable during this window than in later stages.

[36] The Adult Protection Health & Safety Service testing system has been recently held to be ineffective in preventing sexually transmitted infections (STIs) in *Vivid Entertainment LLC v Fielding*, ___ F 3d ___, (slip op at 30-31) (9th Cir. Dec. 15, 2014).

3. Employer failed to provide a hepatitis B vaccination, post-exposure evaluation and follow-up examination.

The safety order requires the Employer to include in the ECP a pre-exposure hepatitis B vaccination, post-exposure evaluation and follow-up examination when the job is reasonably anticipated to involve contact with blood or OPIM. Division Senior Safety Engineer Eugene S. Murphy subpoenaed all records concerning the employer's exposure control plan, including documents regarding the employees' hepatitis B vaccination status and the hepatitis B declination form and no records were provided. (HT Sept. 3, 2014, pp 24-25, 33.)

There are no records regarding hepatitis B vaccination status or declination of a hepatitis B vaccination forms for the performers. Exhibit 16-19, the employer's declination of a hepatitis B vaccination form, was not used or shown to Designators N and O and they were not offered hepatitis B vaccinations after the exposure incident, nor were they asked to sign a hepatitis B declination form prior to the shoot. (HT July 10, 2014, pp 38; HT July 15, 2014, pp 127.)[37] Employer did not provide post-exposure medical evaluations nor follow-ups to Designators N and O after the exposure incident. (*Id.* at p 23; *Id.* p 153.)

Division established a violation of Section 5193(c)(1).

4. Employer Failed to Prove Free Speech Rights, Due Process Rights Were Violated or the Regulation was void for vagueness.

Section 5193(c)(1) is a content-neutral regulation tailored to serve a significant governmental interest in preventing the transmission of BBP. (*Vivid Entertainment LLC v Fielding* (9th Cir. Dec. 15, 2014.)___ F 3d ___, (slip op at 30-31.) It applies to dental offices, hospitals, labs, plasma clinics, and any job in which contact with blood or OPIM is reasonably anticipated. Cybernet's claim that the freedom of speech provisions in the federal and state constitution require that the adult entertainment industry be allowed to depict sexual activity without barrier protection is rejected.[38] Cybernet bears the burden of making a colorable claim that its First Amendment rights have been

[37] Designator A testified that the employer offers a full set of hepatitis B vaccinations to all "employees", from the directors to the set cleaner, but the performers are not considered to be employees. (HT July 10, 2014, pp 17-18.) None of the "performers" were required to provide any evidence of a hepatitis B vaccination, or provided a hepatitis B vaccination, or given a declination of a hepatitis B vaccination form. (*Id.* pp 17-19, 21-22.)

[38] The Appeals Board has authority to determine the validity of a regulation in light of constitutional standards. (*Novo-Rados Enterprises,* Cal/OSHA App. 75-1171 et.al., DAR (May 29, 1981), citing *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 669, fn.18.)

infringed. It was allowed ample time to present evidence that Section 5193(c)(1) is content-based, or cramps the ability of performers to communicate their message. It failed to meet its burden.

Assuming without deciding that employer established that barrier free sex is protected speech, because Section 5193(c)(1) is a facially neutral regulation, it receives intermediate scrutiny.[39] Section 5193(c)(1) is designed to achieve the substantial governmental interest of reducing the rate of STIs, and has a *de minimis* effect on expression. It mandates use of engineering controls, work practices and post-exposure evaluations to prevent the transmission of BBP. The Exposure Control Plan may provide for post-production editing, simulation and camera angles which can be used to protect performers from exposure to blood or OPIM. Cybernet acknowledges that it is able to make films in which barriers are required, as it admittedly does when shooting boy/boy films for which condoms are required under Cybernet rules. Section 5193(c)(1) contains only a reasonable restriction on speech and many alternative channels of expression are available.

Employer failed to establish its burden of proving that Section 5193 violates due process. Section 5193(c)(1) is sufficiently clear to give fair notice to an employer of what is required by the regulation. The bloodborne pathogen standards were promulgated by the Standards Board on February 5, 1997 and became operative on July 30, 1999. By its terms, Section 5193 applies to all workplaces, except for the construction industry.

Cybernet also failed to establish that Section 5193 is void for vagueness. It points out that the adult film industry was not mentioned in the regulatory history. The safety order applies to industries, such as research laboratories, dental and medical industries, which were specifically mentioned in the regulatory history, as well as the retail industry and adult film industry, which were not. (*Big Valley Dental Center*, Cal/OSHA App. 94-0288, Decision After Reconsideration (Jul. 4, 1999).) The detailed discussion of engineering controls used in the medical industry does not affect the application of Section 5193 to the adult film industry.

5. Employer Failed to Prove That The Abatement Requirements Are Not Feasible

The employer has the burden of proving that the abatement requirements are not feasible, after the Division establishes a violation of a performance standard. (*BHC Fremont Hospital, Inc.,* Cal/OSHA App. 13-0204,

[39] In *Vivid Entertainment LLC v Fielding*, ___ F 3d ___, (slip op at 30-31) (9th Cir. Dec. 15, 2014), the Ninth Circuit upheld Measure B based on an "intermediate scrutiny" standard. Measure B requires producers of adult films to obtain a public health permit before shooting in Los Angeles County and requires performers to use condoms during any acts of vaginal or anal sexual intercourse. The Ninth Circuit held that the First Amendment challenge was unlikely to succeed on merits.

Decision After Reconsideration (May 30, 2014); *Campbell Soup Company,* Cal/OSHA App. 77-0701, Decision After Reconsideration (May 5, 1980).) The testing system is insufficient to satisfy the requirements of Section 5193 (c)(1) because an employer may not substitute its own safety measures for those created by the Standard's Board. *(B&B Roof Preparation, Inc.*, Cal/OSHA App. 12-2946, Decision After Reconsideration (Oct. 6, 2014).) A variance could have been sought under Labor Code Section 143 if the employer believed that its testing rules or the PASS system would provide equal or superior safety than adherence to a safety order which imposes a greater hazard. (Labor Code Sections 142.3 through 142.4; *B&B Roof Preparation, Inc.*, *supra*; *Hyatt Die Casting Co., Inc.*, Cal/OSHA App. 93-1530, Decision After Reconsideration (Oct. 1, 1997); *Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985), citing *Hooker Industries, Inc.*, Cal/OSHA App. 77-525, Decision After Reconsideration (Feb. 24, 1982); and see *Paradise Post*, Cal/OSHA App. 85-1769, Decision After Reconsideration (Oct. 16, 1987).) No variance was sought by the Employer and the Employer failed to prove abatement requirements are not feasible.

6. The violation was properly classified as "serious".

To sustain a serious violation of (Labor Code § 6432(a)(2), the Division was required to establish the serious classification by showing 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 by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things: The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods operations, or processes that have been adopted or are in use."

"Serious physical harm" includes impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job. (Labor Code Section 6302(h). (See, *e.g. Abatti Farms/Produce*, Cal/OSHA App. 81-0256, Decision After Reconsideration (Oct. 4, 1985); *Chooljian Brothers Packing Co. Inc.*, CAL/OSHA 95-2549, DAR (Jun. 15, 2000).) As discussed above, HIV, HBV and HCV can all lead to serious injury and death.

Realistic possibility" is not defined in the safety orders. However, the Appeals Board has interpreted the phrase "realistic possibility" to mean a prediction "clearly within the bounds of human reason, not pure speculation." (*B & B Roof Preparation, Inc.*, Cal/OSHA App. 12-2946, Decision After Reconsideration (Oct. 6, 2014) citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), which quotes *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (Apr. 30, 1980).) The Board found in *Janco, supra*, that there was a realistic possibility of eye injury from the hazard in question, (splash in the eyes), although such an injury was unlikely and the possibility was remote. (*Id.*)

Dr. Papanek and Mr. Murphy testified that serious harm actually occurred in the adult film industry and the risk of transmission is greater when the duration of vigorous nature of sexual activity leads to tears in the mucous membranes.[40] Examples in the adult film industry include the male performer who transmitted HIV to three female performers in 2004, in spite of the fact that he tested negative (HT Sept. 3, 2014 pp 33-34 (Murphy) and pp 124-125 (Papanek); the performer who tested positive for syphilis, but was able to perform and have sex with other performers. (HT Sept. 5, 2014 pp 168-170 (Darcy).) One performer can transmit an STI to another performer who does not yet realize that their last test results reflect a false positive.

Employer contests the "serious" classification and argues that an "exposure incident" on the set cannot be assumed, absent evidence of injury to an employee or performer. Employer bears the burden of rebutting the presumption that a "serious violation" exists, once the Division demonstrates that there is a realistic possibility that death or serious physical harm.

Employer's argument is rejected, because there is no requirement to establish an actual injury occurred. (See *Janco, supra*.) Given that it is undisputed that performers' mucus membranes contacted OPIM and blood during the sex acts, the performers had occupational exposure to HIV, HBV and HCV. Division established that there is a "realistic possibility" that the health effects of these viruses can lead to serious illness and ultimately death. Therefore, the classification of serious was correct.

7. Penalty

The violation was rated serious and was determined to have a "high" rating for severity, a "high" rating for extent and a "high" rating for likelihood. The initial base penalty of $18,000 was increased by 25% for extent and by 25% for likelihood (18,000 plus $4,500 plus $4,500). The gravity-based penalty of $27,000 was reduced to $25,000, the highest civil penalty allowed. (Section 336 (c).) No abatement credit was allowable and no penalty adjustment factors were given. The employer presented no contrary argument. Thus, the Division correctly computed the proposed penalty as $25,000, which is assessed as reasonable.

[40] 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. (*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. (*R. Wright & Associates, Inc.,* Cal/OSHA App. 95-3649, DAR (Nov. 29, 1999).)

G. Employer failed to observe Universal Precautions during production activities associated with adult content videos.

The Division cited employer for a violation of Section 5193(d)(1) which provides:

> 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.

Citation 3, Item 1 alleges:

> On or before 8/9/13, employees of Cybernet Entertainment, LLC who had reasonably anticipated contact with blood or Other Potentially Infectious Materials (OPIM) were exposed to the hazards of bloodborne pathogens. Cybernet Entertainment, LLC did not observe Universal Precautions which exposed employees to blood and Other Potentially Infectious Materials during production activities associated with adult content videos.

The Division is required to establish that 1) the Employer's employees reasonably anticipated contact with blood or OPIM, and 2) Employer failed to observe "universal precautions". "Universal precautions", the phrase used in Section 5193, is an infection control standard whereby one assumes that all blood or OPIM contains BBP and takes actions to prevent transmission of infectious disease. This is done by using engineering controls, work practice controls, barrier protection, such as gloves, condoms, dental dams, masks and other measures to limit exposure.

As described above, the performers came into contact with blood or OPIM during shoots. Crew members, including the director, videographer, lighting staff, production assistants who are participating in the shoot also can reasonably anticipate that they will come into contact with blood or OPIM during the performance of their duties. Custodians who handle the contaminated waste in the trash containing items with blood and OPIM must also observe universal precautions. The first prong, reasonably anticipated exposure to blood or OPIM by employees was established.

"Universal precautions" assumes that all blood or OPIM contains BBP. The employer argues that no "actual exposure" to blood or OPIM occurred unless the Division established that one of the performers contracted HIV, HBV or HCV on the set. It is not necessary to establish that the performers who

engaged in sexual acts were infectious at the time of the exposure incidents or that they actually contracted HIV, HBV or HCV on set. The testing methods used by Cybernet do not always guarantee that disease will be detected, particularly right after a person has become infected. Failure to use a condom during sex exposes the performer to the risk of contracting or spreading HIV, HBV or HCV. A performer who has an STI can infect another performer on the set, while the testing results will not be positive until weeks or months after the fact. The performers can contract an STI when exposed to blood and OPIM from another performer who does not yet realize that their last test results reflect a false positive. Cybernet failed to implement universal precautions irrespective of whether a performer can be proven to have contracted or transmitted an STI on the set.

The Division has established a violation of Section 5193(d)(1).

Penalty

As in Citation 2, Item 1, the violation was rated serious and was determined to have a "high" rating for severity, a "high" rating for extent and a "high" rating for likelihood. The initial base penalty of $18,000 was increased by 25% for extent and by 25% for likelihood (18,000 plus $4,500 plus $4,500). The gravity-based penalty of $27,000 was reduced to $25,000, the highest civil penalty allowed. (Section 336 (c).) Employer argues that because Citations 2, 3 and 4 all involve exposure to sexually transmitted illnesses via BBP during filming, and condoms are required to abate the violations of all three sections, the penalties should be reduced pursuant to Section 336(k). (See pages 34-35.)

H. Employer failed to use engineering controls or work practice controls during filming of adult content videos to prevent hazardous exposure to OPIM.

The Division cited employer for a violation of Section 5193(d)(2) which provides:

> Engineering and Work Practice Controls - General Requirements.
>
> (A) Engineering and work practice controls shall be used to eliminate or minimize employee exposure.
>
> (B) Engineering controls shall be examined and maintained or replaced on a regular schedule to ensure their effectiveness.
>
> (C) Work practice controls shall be evaluated and updated on a regular schedule to ensure their effectiveness.
>
> (D) All procedures involving blood or OPIM shall be performed in such a manner as to minimize

> splashing, spraying, spattering, and generation of droplets of these substances.

Citation 4, Item 1 alleges:

> On or before 8/9/13, employees of Cybernet Entertainment, LLC who had reasonably anticipated contact with blood or Other Potentially Infectious Materials (OPIM) were exposed to the hazards of bloodborne pathogens. Cybernet Entertainment, LLC did not require the use of engineering controls and work practice controls during production activities associated with adult content videos to eliminate and/or minimize employee exposure to blood and Other Potentially Infectious Materials.

To establish a violation of Section 5193(d)(2), the Division must establish that 1) employees had reasonably anticipated contact with blood or OPIM, 2) employees were exposed to the hazards of BBP, and 3) the employer did not require the use of engineering controls and work practice controls during production activities. Once this is established, the Division must produce reliable, credible evidence that engineering or operational controls exist that may be incorporated in Employer's site to eliminate or reduce exposure to blood or OPIM. (*Delco-Remy Division of General Motors Corporation*, Cal/OSHA App. 75-110, Decision After Reconsideration (Dec. 1, 1977); *Campbell Soup Company*, Cal/OSHA App. 77-701, Decision After Reconsideration (May 5, 1980).)

The evidence establishes that the performers were not given any engineering controls which would enable them to avoid contact with BBP to protect them from exposure to BBP or to exposing others to BBP. On the day of the shoot, a form titled "Limits Check List for Public Disgrace" was given to Designator N to fill out.[41] (Exhibit 23.) This form was created by Cybernet and requires each performer to check boxes regarding their limits. It instructs them: "Please check all items you **do not agree** to do during your shoot". [Emphasis in original]

To the extent that the limits specified on this form were work practices which would assist the employee in eliminating or minimizing exposure to BBP, the limits were not followed. Although Designator N did not agree to anal

[41] A specific "limits check list" is created for each film series. (Exhibit O and P.) Designator N's preferences are not accurately described in Cybernet's Post hearing brief, e.g., she did not check the "No" box for "enema", but did say no "animal role play – bark like dog, etc." She also said no to waterboarding, described as "Water Play – dunking, dripping on head, spraying on face, throwing on body." Designator N objected to "feet" due to "recent injury", but checked none of the other categories of corporal punishment listed on the form.

fisting, this in fact appears to have occurred during the filming. In addition, the Limits Check List form gives written approval to Cybernet to subject the performers to all of the other actions listed which were not checked off, including "electricity – safe and on adjustable scale", "corporal punishment on face, breasts," etc. (Exhibit 23.) There are no positive statements which indicate what the performer will do or in what sequence. Such "engineering controls" and "work practice controls" do not eliminate and/or minimize employee exposure to BBP.

As discussed above, the employees Cybernet hired as performers in their film shoots had contact with blood or OPIM and were exposed to BBP. The employer argues that the "Limits Check List" is an "engineering control" or "work practice control" which ensures that nothing is done to the performer which she did not agree to in writing in advance. Cybernet points out that Designator N provided her with a summary of her list of "limits" including no foot contact, no swallowing, no anal fisting, no tickling, no animal role play, and no enema. (Employer's Post Hearing Brief, p 14:19-22.) No engineering controls and work practice controls were in existence during the production activities in which the exposures occurred. However, Cybernet's evidence is not sufficient to negate the violation.

Division established a violation of Section 5193(d)(2).

I. The hazards addressed in Citation 2, Section 5193(c)(1)(A), Citation 3, Section 5193(d)(1) and in Citation 4, Section 5193(d)(2) are duplicative and subject to the same abatement.

The Division proposed a $25,000 penalty. The Appeals Board may set aside a penalty if 1) the hazards are substantially identical or duplicative of another violation, and 2) abatement of one will serve to abate the other. (*A & C Landscaping, Inc. aka A & C Construction, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010) and cases cited therein; *JSA Engineering, Inc.,* Cal-OSHA App. 00-1367, Decision After Reconsideration (Dec 3, 2002).)

Here, different but interrelated sections of the General Industry Safety Orders concerning engineering and work practice controls were cited. Section 5193(c)(1)(A) requires Employer to implement an effective Exposure Control Plan which is designed to eliminate or minimize employee exposure to blood and OPIM through engineering controls and work practices; Section 5193(d)(1) requires the employer to observe Universal Precautions, so that all body fluids shall be considered potentially infectious materials; Section 5193(d)(2) requires engineering controls and work practices to be used to eliminate or minimize employee exposure during activities associated with production of adult content videos. Citation 2, Citation 3 and Citation 4 are based on the same facts, namely the exposure to blood and OPIM during filming adult videos.

Abatement of the violation in Citation 2 is the same as steps necessary to abate the violations in Citations 3 and 4: effective communication and training of performers on hazards of exposure to sexually transmitted illnesses, pre-exposure prophylaxis, such as a hepatitis B vaccination and HIV antibody testing, use of barriers during the course of producing adult videos, post-exposure evaluation, anti-retroviral therapy, medical follow-up and recordkeeping. The hazards addressed in all three safety orders, 5193(c)(1)(A), 5193(d)(1) and Section 5193(d)(2) involve ensuring that employees are protected from the known hazard of STIs to which they are exposed during the making of adult videos. Both the first and second prongs of *A & C Landscaping* were established because the hazards involved in Citations 2, 3 and 4 are substantially identical or duplicative of the other violation and the abatement of one would abate the other. Therefore, pursuant to Section 336(k), the penalty will not be assessed for Citations 3 and 4.

Decision

It is hereby ordered that the Employer's appeal of Citations 1, Items 1, 3, 7 and Citations 2, 3 and 4 is denied and Employer's appeal of Citations 1, Item 2 is granted as discussed above and set forth in the attached Summary Table.

It is further ordered that the penalty as set forth in the attached Summary Table be assessed, for the reasons stated above.

IT IS SO ORDERED.

DATED: April 10, 2015
MD:sp

_____
MARY DRYOVAGE
Administrative Law Judge

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD
CYBERNET ENTERTAINMENT, LLC, dba KINK.COM
DOCKETS 14-R6D1-0364 through 0367
DATES OF HEARING: May 20, July 9, 10, 15
September 3, 4, and 5, 2014

Division's Exhibits

Exh. No.	**Exhibit Description**	**Admitted/ Rejected**
1	Jurisdictional Documents.	Yes
2	Proposed penalty worksheet.	Yes
3	Photograph of flexible power cords running through transoms on 4th floor.	Yes
4	Photograph of hand holding a voltage tester showing flexible cord was energized.	Yes
5	Letter to whom it may concern from Jay J. D'Lugian, MD, MS, re: approved first aid supplies for general industry use, dated January 4, 2013. (2 pages)	Yes
6	Photograph of hallway showing flexible power cords running through transom on 4th floor.	Yes
7	Photograph of hallway showing flexible power cords running through transoms from one room to the next.	Yes
8	Photograph of room showing flexible power cords coming into room through transom on 4th floor.	Yes
9	List of attendees - EPA/Videographer Production Safety Training, 4/13/2012 and Janitor Safety Training – In Use of Chemical & Procedures, 7/31/2012.	Yes
10	Document request to Cybernet Entertainment LLC, dated 9/19/2013. (2 pages)	Yes
11	Document request to Cybernet Entertainment LLC, dated 8/28/2013. (2 pages)	Yes

12	Cybernet Entertainment LLC Blood-borne Pathogen Exposure Control Plan, p 1 and pp 15-32 (Section A2).	Yes
13	Cal/OSHA Form 300 Log of Work Related Injuries and Illnesses (2009 – 2013) (10 pages) [under seal].	Yes
14	Cal/OSHA Form 301 Injury and Illness Incident Report (3/28/2013 to 8/8/2013) (11 pages) [under seal].	Yes
15	Letter to Cal OSH Appeals Board dated May 19, 2014 confirming Eugene Murphy is current on Division-mandated training.	Yes
16-2	E-mail dated May 7, 2014 from Karen Tynan to DOSH.	Yes
16-3	E-mail dated May 8, 2014 from Karen Tynan to DOSH.	Yes
16-4	Designator A's Business card.	Yes
16-6	Model Release, Consent and Waiver Agreement (Blank Form).	Yes
16-8	Condom Limitation Addendum Shoot No. 31517, dated 7/31/13.	Yes
16-10-A	Shoot Admin for Shoot No. 31517 (Public Disgrace) [under seal].	Yes
16-11-A	Shoot Admin for Shoot No. 32729 (Naked Kombat) [under seal].	Yes
16-12-A	Shoot Admin for Shoot No. 33506 (Bound in Public) [under seal].	Yes
16-13-A	Shoot Admin for Shoot No. 31495 (Public Disgrace) [under seal].	Yes
16-14-A	Webpages titled "Welcome to Kink.com" re: shooting rules. (5 pages)	Yes
16-15	Webpages titled Sex and Submission PA Notes. (4 pages)	Yes
16-16	Designator CC, blog titled "Why We're Fighting the Cal-OSHA Citations, 2/10/2014. (4 pages)	Yes

16-17	Database of date, city & state, and location of Cybernet film shoots, KLFT00138.	Yes
16-18	"Model Health and Safety Questionnaire" for Film No. 31495 dated 6/30/2013.	Yes
16-19	"Hepatitis B Vaccination Declination (Mandatory)", signed by Designator A on 8/27/2013 [under seal].	Yes
16-20	Cybernet Entertainment LLC Injury & Illness Prevention Program, dated July 9, 2013. (37 pages)	Yes
17	Deposition of Designator A, taken May 12, 2014 (vol l) [under seal].	Rejected
18-1	Condom Limitation Addendum Shoot No. 31517, for Designator V, dated 7/31/13 [under seal].	Yes
18-2	Condom Limitation Addendum Shoot No. 31517, for Designator N, dated 7/31/13 [under seal].	Yes
19	Model Release, Consent and Waiver Agreement Shoot Shoot No. 31517, for Designator V, 7/31/13 [under seal].	Yes
20	Model Release, Consent and Waiver Agreement Shoot Shoot No. 31517, for Designator N, 7/31/13 [under seal].	Yes
21	Email from Karen Tynan to DOSH re: changes in the shooting rules, dated July 10, 2014.	Yes
22	Photographs of Designator N, Public Disgrace, taken July 31, 2013 (17 pages) [under seal].	Yes
23	Limits checklist signed by Designator N on June 5, 2013 for Public Disgrace (2pages) [under seal].	Yes
24	Email exchange between Designator GG to Designator N, June 3 - 4, 2013 re: booking details for Public Disgrace (3pages) [under seal].	Yes
25	Deposition of Designator A, taken May 13, 2014 (vol 2) [under seal].	Rejected

26	DVD - Public Disgrace, Shoot No. 31517 [under seal].	Yes
27	DVD – ISAAC – Part 1, Shoot No. 33506 [under seal].	Yes
28	DVD - Shoot No. 32724 [under seal].	Yes
29	Cleaning Data Sheet.	Yes
30	Cleaning Procedures.	Yes
31	Deposition of Designator D taken May 13, 2014 [under seal].	Rejected
32	Deposition of Designator B taken May 27, 2014 [under seal].	Rejected
33	Model Release, Consent and Waiver Agreement Shoot Film No. 32230, for Designator O dated 7/28/13 [under seal].	Yes
34	DVD – Kink Trailer, Shoot No. 32867 [under seal].	Yes
35	State Compensation Insurance Fund, effective August 20, 2012 for Cybernet Entertainment LLC.	Yes
36	Letter from State Compensation Insurance Fund to Cybernet Entertainment LLC, dated November 4, 2013.	Yes
37	Letter from Designator C to Richard McStay, dated December 17, 2013. (6 pages)	Yes
38	Letter from State Compensation Insurance Fund to injured employee, dated January 18, 2014. (4 pages)	Yes
39	State Fund Online claim Detail for various injured employees of Cybernet Entertainment LLC. (5 pages) [under seal]	Yes
40	Deposition of Designator C, taken May 27, 2014. [under seal]	Rejected
41	DVD – Film No. 33507 [under seal]	Yes

42	Email between Tynan and Nguyen re: stipulation, dated Sept. 3, 2014 [under seal].	Yes
43	I-B-Y Letters from Cal OSHA High Hazard Unit to Cybernet, Oct. 16, 2013. (9 pages)	Yes
44	CV for Paul J. Papanek, MD, MPH (Division's Medical Expert Witness).	Yes
45	Email from Dr. Darcy to Gene Murphy re: 3/1000 Known HIV percutaneous exposure, Sept. 5, 2014.	Yes
46	Lee Warner, et al, Condom Effectiveness for Reducing Transmission of Gonorrhea and Chlamydia: the Importance of Assessing Partner Infection Status" American Journal of Epidemiology (2004). (10 pages)	Yes
47	UCLA Fielding School of Public Health, "Adult Film Performers Transmission Behaviors and STI Prevalence" National STD Prevention Conference, June 2014.	Yes
48	"APHSS Announces New Protocol for Performer Testing Starting Monday, August 19", Blog, Aug 15, 2013.	Yes
49	Ronald Grey, Probability of HIV -1 transmission per coital act in monogamous, heterosexual, HIV-1-discordant couples in Rakai, Uganda, The Lancet, Vol. 357, April 14, 2001. (5 pages)	Yes
50	Fauci et al, "Immunopathogenic mechanisms of HIV infection", Diagram showing typical course of HIV infection without intervention Ann Intern Med (1996).	Yes
51	"Table 1, Per Act Related Risk for Acquisition of HIV based on Choice of Partner, Sex Act, and Condom Use".	Yes
52	CV for Jeffrey David Klausner, MD, MPH (Division's Rebuttal Medical Expert Witness). (72 pages)	Yes
53	Deposition of Designator E, taken May 13, 2014 [under seal].	Rejected
54	Email exchange (June 3, 2013 to July 23, 2013) between Designator N and Cybernet, sent to DOSH Legal, W. Nguyen, dated 6/12/14 (9 pages) [under seal].	Yes

55	Email exchange (Oct. 5, 2013 to Oct. 7, 2013) between Cybernet's HR Director and Cybernet's Talent Manager (2 pages) [under seal].	Yes

Employer's Exhibits

Exhibit Letter	**Exhibit Description**	**Admitted**
A	Limits checklist – Public Disgrace (blank form). (4 pages)	Yes
B-1	Original Limits checklist signed by Designator N on July 31, 2013 for Public Disgrace [under seal]. (4 pages)	Yes
C	Photograph of model cart containing first aid items.	Yes
D	Model's Rights (Blank form).	Yes
E	Model Health & Safety Questionnaire (Blank form).	Yes
F	Photo – Electrical Distribution Box aka "Spider Box".	Yes
G-1	Photo of Cables, taken Sept. 5, 2014 – side view.	Yes
G-2	Photo of Cables, taken Sept. 5, 2014 – top view.	Yes
H	Condom Limits Addendum, Allie, Shoot No. 31495.	Yes
I	Condom Limits Addendum, Shoot No. 31495, 6/20/13.	Yes
J	Check register from Accounting Dept. [under seal]	Yes
K	Invoice for Designator N's Booking Fee – Aug. 1, 2013. (1 page) [under seal]	Yes
L	Invoice for Designator V's Booking Fee – Feb. 26, 2014. (1 page) [under seal]	Yes
M	"Device Bondage Participant Interest Questionnaire". (3 pages)	Yes
N	"Twisted Factory - Sadistic Rope Participant Interest Questionnaire". (4 pages)	Yes

O	"Naked Kombat Checklist" and "Divine Bitches Checklist". (5 pages)	Yes
P	"Men on Edge Checklist" (1 page)	Yes
Q	W-9 Request for Taxpayer Identification Number and Certification. (1 page)	Yes
R	CV – Sean Darcy, MD (Cybernet's Medical Expert Witness). (2 pages)	Yes
S	APHSS (Adult Production Health & Safety Services) Kink Talent screen, Dec. 28, 2012 - July 10, 2013 (1 page)	Yes
T	PASS (Performer Availability Screening Services) Kink Talent screen, August 20, 2012. (1 page)	Yes

Witnesses Testifying at Hearing

1. Douglas Neville (Division Associate Safety Engineer)
2. Eugene S. Murphy (Division Senior Safety Engineer)
3. Designator A, (Cybernet's COO)
4. Designator N, (Performer)
5. Designator D, (Manager of Facilities and Building Operations)
6. Designator B, (Cybernet's Director)
7. Designator O, (Performer)
8. Designator C, (Cybernet's HR manager)
9. Paul J. Papanek, MD, MPH (Division's Medical Expert Witness)
10. Designator L, (Cybernet's Director & Producer)
11. Mev (Cybernet's Videographer)
12. Aden (Cybernet's Performer, Director & Producer)
13. Designator H, (Cybernet's Performer & Guest Director)

14. Designator I, (Cybernet's Director)

15. Designator J, (Cybernet's Performer, Director & Producer)

16. Designator LL, (Cybernet's Editor & Production Assistant)

17. Sean Darcy, MD, (Cybernet's Medical Expert Witness)

18. Designator E, (Cybernet's Talent Manager)

19. Jeff Klausner, MD, (Division's Rebuttal Medical Expert Witness)

CERTIFICATION OR RECORDING

I, MARY DRYOVAGE, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the Undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

April 10, 2015

_____ _____

MARY DRYOVAGE DATE

IMIS No. 316446855

Site: 1800 Missioln St., San Francisco, CA 94103-5502
Date of Inspection: 08/28/13 - 01/30/14 Date of Citation: 01/30/14

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	**FINAL PENALTY ASSESSED BY BOARD**
14-R6D1-0364	1	1	2500.8(a)(3)	G	[Running flexible power cords through multiple window transoms on the fourth floor.] ALJ affirmed.	X		$335	$335	**$335**
		2	3203(b)(2)	Reg	[Improperly maintaining records of safety training.] ALJ granted ER's appeal.		X	$450	$0	**$0**
		3	3400(c)	G	[Failure to have a consulting physician to approve first aid materials.] ALJ affirmed.	X		$450	$450	**$450**
		4	5191(f)(2)(D)	Reg	[Failure to provide a declination statement to employees who decline hepatitis B vaccination.] Employer withdrew appeal.	X		$450	$450	**$450**
		5	14300.1(a)(2)	Reg	[Failure to maintain Cal/OSHA Form 301 Injury and Illness Reports.] DOSH reduced proposed penalty and Employer withdrew appeal based on penalty reduction.	X		$450	$225	**$225**
		6	14300.40(a)	Reg	[Failure to provide 2008 Cal/OSHA Form 300 Log to Division.] DOSH withdrew citation.		X	$450	$0	**$0**
		7	3203(a)	G	[Failure to establish, implement and maintain an effective Injury and Illness Prevention Program regarding exposure to electrical hazards and sexually transmitted illnesses.] ALJ affirmed.	X		$675	$675	**$675**
		8	3203(b)(1)	Reg	[Failure to maintain records of required scheduled and periodic inspections for at least one year.] DOSH withdrew and reclassified as notice in lieu of citation.		X	$450	$0	**$0**

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE-HEARING	**FINAL PENALTY ASSESSED BY BOARD**
14-R6D1-0365	2	1	5193(c)(1)	S	[Failure to develop and implement procedures or schedule for methods of compliance with an effective exposure control plan re: hazards of BBP, including engineering controls, work practice controls, hepatitis B vaccination, post-exposure evaluation, follow-up and recordkeeping.] ALJ affirmed, but found same abatement as Citation 2-1.	X		$25,000	$25,000	**$25,000**
14-R6D1-0366	3	1	5193(d)(1)	S	[Failure to observe Universal Precautions, as required.] ALJ affirmed, but found same abatement as Citation 2-1.	X		$25,000	$25,000	**$0**
14-R6D1-0367	4	1	5193(d)(2)	S	[Failure to require the use of engineering controls and work practice controls during production activities associated with adult content videos to minimize employee exposure to blood and OPIM.] ALJ affirmed, but found same abatement as Citation 2-1.	X		$25,000	$25,000	**$0**
					Sub-Total			$78,710	$77,135	**$27,135**
					Total Amount Due*					**$27,135**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: 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

*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: 4/10/15