

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

In the Matter of the Appeal of:

**NOLTE SHEET METAL, INC.
1560 N. Marks
Fresno, CA 93722**

Employer

**DOCKETS 14-R6D7-2777
through 2783**

DECISION

Statement of the Case

NOLTE SHEET METAL, INC. (Employer) is a heating, ventilation and air conditioning sheet metal fabrication shop, which has offices in Fresno, California. Beginning on June 11, 2014, the Division of Occupational Safety and Health (Division) through Ray Davala (Davala), Associate Safety Engineer, conducted an inspection at 1560 North Marks, Fresno, California. On August 13, 2014, the Division cited Employer for eleven general and six serious alleged violations of California Code of Regulations, title 8.¹

The alleged violations concern failure to have an Injury and Illness Prevention Program (IIPP), failure to provide a copy of heat illness prevention procedures (HIPP) to DOSH upon request, failure to provide training on the risk of heat illness to employees and to provide similar training to supervisors, failure to develop, implement and maintain a hazardous communication program or provide a copy to DOSH upon request, failure to guard and keep clear the shop's electrical panel, other electrical violations, failure to guard the shear belt and pulley drive, press brake, metal shear, and band saw, failure to provide training to all forklift operators; and, failure to secure the compressed gas cylinders.

Employer filed a timely appeal of the citations which contested whether the safety order was violated and whether the proposed penalty was reasonable for Citation 1, Items 1 through 11, whether the classification was correct and whether the proposed penalty was reasonable for Citation 2, Item 1 through Citation 6, Item 1, and whether the safety order was violated, whether the classification was correct and whether the proposed penalty was reasonable for Citation 7, Item 1. Employer also raised a number of affirmative defenses.

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 12, 2015 at 2550 Mariposa Street, Room 1027, Fresno, California. The Division was represented by Shelly Gregory, Esq., Staff Counsel for the Division of Occupational Safety and Health. Employer was

¹ Unless otherwise specified, all references are to sections of the California Code of Regulations, title 8.

represented by Howard A. Sagaser, Esq., Sagaser, Watkins & Wieland, PC. The parties submitted post-hearing briefs, the last of which was filed on June 5, 2015 and the matter was submitted for decision at that time.² The ALJ extended the submission date to December 31, 2015, on her own motion.

Issues

- A. Did the Division obtain consent for its inspection of Employer's premises?
- B. Did Employer violate section 1509, subdivision (a) by failing to have a written Injury and Illness Prevention Program (IIPP) at the time of the inspection?
- C. Did Employer violate section 2340.12, subdivision (a) by failing to guard openings in the shop electrical panel?
- D. Did Employer violate section 2340.16, subdivision (a) by failing to keep the working space in front of the shop electrical panel clear?
- E. Did Employer violate section 2511.10, subdivision (a) by failing to provide strain relief on a cord supplying power to the break in fabrication shop?
- F. Did Employer violate section 3668, subdivision (a)(2) by failing to ensure each operator of the forklifts successfully completed the required training?
- G. Did Employer violate section 3395, subdivision (f)(1) by failing to provide training on risk of heat illness to employees?
- H. Did Employer violate section 3395, subdivision (f)(2) by failing to provide training on risk of heat illness to supervisors?
- I. Did Employer violate section 3395, subdivision (f)(3) by failing to provide a copy of HIPP to DOSH upon request?
- J. Did Employer violate section 5194, subdivision (e) by failing to develop, implement and maintain a hazardous communication program?
- K. Were the proposed penalties in Citation 1 reasonable?
- L. Were the hazards in Citation 1, Items 8 and 9 duplicative of the hazards in Citation 1, Items 10 and subject to the same abatement?
- M. Did Employer violate section 4650, subdivision (e) by failing to secure the compressed gas cylinders in violation of section 4650, subdivision (e)?
- N. Did Division establish a rebuttable presumption that the violations in Citation 3, 4, 5, 6 and 7, are properly classified as serious violations?

² During the time the matter was pending for post-hearing briefs, the Division moved to withdraw Citation 1, Items 5 and 6, and Citation 2, Item 1 upon its re-evaluation in light of new evidence adduced at the hearing and issue an Information Memorandum to Employer. The motion is granted pursuant to section 364.1, subdivisions (a) and (c) and this amendment is made part of the Summary Table.

- O. Did Employer rebut the presumption of the serious classification in Citations 3 through 7 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violations?
- P. Were the proposed penalties in Citations 3, 4, 5, 6, and 7 reasonable?
- Q. Were the hazards in Citations 3, 4, 5, and 6 duplicative guarding hazards and subject to the same abatement?

Findings of Fact

1. The Division obtained consent for its inspection of Nolte Sheet Employer's premises from John Nolte, son of the Employer.
2. Ernie Nolte did not notify the Division at the time of the inspection that John Nolte did not have authority to consent on Employer's behalf.
3. Employer did not provide a copy of its IIPP to DOSH during the inspection, the informal meeting or in response to discovery requests.
4. Employer did not guard openings in the shop electrical panel.
5. Employer did not keep the working space in front of the shop electrical panel clear.
6. Employer did not provide strain relief on a cord supplying power to the break in the fabrication shop.
7. Employer did not ensure John Nolte, the foreman and an operator of a forklift successfully completed the required training.
8. Employer did not provide training on Heat Illness Prevention to employees.
9. Employer did not provide training on risk of heat illness to supervisors.
10. Employer did not provide a copy of its HIPP to DOSH upon request.
11. Employer did not develop, implement and maintain a hazardous communication program or provide a copy to DOSH upon request.
12. Employer did not guard the moving parts of the shear belt and pulley drive.
13. Employer did not guard the press brake at its point of operation.
14. Employer did not guard the metal shear to prevent the hands of the operator from entering the zone traveled by the knives of the shears while they are in motion.
15. Employer did not ensure that the band saw fully enclosed the wheel.
16. Employer did not secure the compressed gas cylinders.

Analysis

A. Did the Division obtain consent for its inspection of Employer's premises?

On May 11, 2015, Employer filed a motion to strike all evidence obtained from the inspection because the Division failed to obtain consent for the inspection from a person who had authority to grant it.³ It claims that John

³ Employer filed a motion to suppress evidence and throughout the hearing sought to exclude evidence based on the fact that the investigation file was stolen from the District Manager's car. It

Nolte, the 43 year old son of the owner, Ernie Nolte, did not have authority to grant permission to inspect the premises on June 11, 2014.

Labor Code section 6307 confers jurisdiction on the Division over "every employment and place of employment in this state" to "adequately . . . enforce and administer all laws and lawful standards." Pursuant to Labor Code section 6314, subdivision (a) provided that Division inspectors, "upon presenting appropriate credentials to the employer, have free access to any place of employment to investigate and inspect during regular working hours . . . [unless] permission to investigate or inspect the place of employment is refused. . . ." The Division must obtain a court inspection warrant only when permission to inspect is "refused." (*Caves Construction*, Cal OSHA App. 90-498 Decision After Reconsideration (May 8, 1991).)

The Division's inspector is entitled to rely on consent when an employee tells the inspector that he is a "supervisor" and evidence demonstrated that the employee was left at the place of employment to transact the employer's business and the employee consented to the inspection. (*Sacramento Radiator Division of Central Distributing Co.*, Cal OSHA App. 86-712 Decision After Reconsideration (Oct. 5, 1987). Inspectors may reasonably rely on "apparent" authority for consent by a third party, even if there is no actual authority. (*Rudolph and Sletten, Inc.*, Cal OSHA App. 01-478 Decision After Reconsideration (March 30, 2004). An agent's authority to make an admission need not be express; it may be implied. (*Caves Construction, supra*; Cal. Evidence Code section 1222.)

In *Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985), the Board held:

[An] inspection by the Division is not invalid if made with the consent of an individual who the safety engineer reasonably and in good faith believes has authority to consent to the inspection. (*People v. Parker* (1975) 45 Cal. App. 3d 24, 31.) Here in both instances the individuals addressed by the safety engineer represented themselves to be, and were in fact, person in charge of Employer's operations at the respective sites. Being so informed there was no need for the safety engineers to question the extent of the authority of these individuals and to seek out the Employer-owner of the project for its approval to inspect.

Authority to speak for an employer is implied where a foreman or other supervisor is responsible for safety issues. (*Metal Clad Insulation Corp.*, Cal/OSHA App. 83-812, Decision After Reconsideration (Sept. 11, 1987)).

alleged that because the complete file was missing, it was not provided with the names of the other individuals from other state agencies on the Task Force who were present during the inspection. This claim is rejected. Exhibit A, the Investigative File provided to the Employer on January 13, 2015, contained the Form 1B, which states the names of the Task Force members and their affiliations. Employer's request for sanctions is denied because, based on the facts in the record, there was no denial of due process or spoliation of evidence shown.

Davala testified that on June 11, 2014, when members of the Labor Enforcement Task Force approached John Nolte, who was working in the shop, he identified himself as the “foreman” and the person in charge, and gave Davala permission to inspect the premises. He documented the consent to entry of premises in the Cal/OSHA Form 1-A.⁴

Kevin Sage (Sage) was present during the inspection. He has worked for Employer for fifteen years as an installer and testified that John Nolte directs his work in the shop.

John Nolte testified that he works in Employer’s shop and is an employee. He admitted that when he is in the field installing the sheet metal fabricated at Employer’s shop, he is a “foreman”. On the day of the inspection, he was asked by the members of the Task Force whether they could look around the shop. He testified that he replied “I guess” but does not recall any other details. John Nolte responded to the I-B-Y letter on behalf of Employer, and identified his title as “foreman”. (Exhibit 3.) On November 14, 2014, John Nolte and Natalie Emerzian attended the informal conference with Hami and Davala as Employer’s representatives and did not raise an issue regarding lack of consent to inspect Employer’s premises.

Ernie Nolte, Employer’s owner testified that he appeared at the shop while the inspection was ongoing, and made no effort to speak with Davala during the inspection. He did not object to John Nolte acting on behalf of the employer, raise an issue that John Nolte was acting without authority, or object to the inspection. He testified that two of his children are employed by Employer; he and his brother Edmund are owners of the family business; John Nolte, his son serves as a “working foreman”; and, Natalie Emerzian, his daughter, serves as the Controller/Bookkeeper.

Preponderance of the evidence establishes that the Division’ inspection was lawful. Employer did not object to the inspection and John Nolte had apparent authority to consent to the inspection.

⁴ The investigative file was stolen from District Manager of Division’s Fresno District office Jan Hami’s (Hami) car. Employer filed a motion to suppress evidence based on the fact that some of the documents in the Division’s file are no longer available. Hami testified credibly that the case file was stolen from her car in October, 2014, over two months after the citations were issued in July 2014, but before the informal conference with John Nolte and Natalie Emerzian. Pursuant to a request by the Administrative Law Judge at the hearing, Division provided a police report showing that the break-in was reported on October 16, 2014. The Division’s file was partially reconstituted by printing out the information from Division’s computer records. The reconstituted file was provided to Employer on January 13, 2015. (Exhibit A.) Although Davala’s original investigative notes concerning the evidentiary basis for issuing the citations are no longer available, the information from those notes were typed into the forms on the Division’s computer and provided to Employer, together with copies of photographs taken during the inspection before the citations were issued. Employer’s request is denied because 1) it failed to identify the harm caused by the loss of some of the documents in the file, 2) it had an opportunity to cross-examine Davala at the hearing, and 3) it failed to identify any prejudice caused by the loss of the file.

B. Did Employer violate section 1509, subdivision (a) by failing to have a written Injury and Illness Prevention Program (IIPP) at the time of the inspection?

The Division cited Employer for a violation of section 1509, subdivision (a), which provides:

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.⁵

Citation 1, Item 1 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of the inspection the employer had two employees working in the shop. A copy of the employer's Injury and Illness Prevention Program (IIPP) was verbally requested during the inspection and also on a document request sheet (Cal/OSHA 1-A-Y), with a post mark date of June 14, 2014. The employer has not provided a copy of the IIPP by the June 14, 2014 date.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

Section 1509, subdivision (a) requires an employer to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP). Davala testified that he requested a copy of the IIPP orally and in writing and was not provided a copy by June 14, 2014. During the investigation, John Nolte told Davala that he was not aware of any requirement to have an IIPP and Kevin Sage told Davala that he had never seen a written IIPP.

Natalie Emerzian, Ernie Nolte's daughter, testified that she is in charge of handling payroll, billing, accounts receivable and compliance duties, but was on maternity leave on the day of the inspection. She attended the informal conference but did not provide a copy of the IIPP to the Division at that time. She testified that Employer had an IIPP on the date of the inspection on June 11, 2014, and sought to introduce an IIPP as Exhibit B.

⁵ Section 3203, subdivision (a) provides: "Effective July 1, 1991, every employer shall establish, implement and maintain and effective Injury and Illness Prevention Program....."

The Division objected to the admission of Exhibit B because it was not provided to the Division prior to the hearing.⁶ Emerzian's testimony that there was an IIPP at the time of the inspection was not credible. She was not present at the inspection, the employees told Davila that had never seen an IIPP, the IIPP was not produced to the Division during the informal conference, and was it was not produced in discovery.

An IIPP was not provided to the Division when requested by Davala at the inspection on June 11, 2014, nor in response to the document request by June 14, 2014, in response to the discovery request dated March 26, 2015, or in response to the e-mail request by counsel, dated April 28, 2015. John Nolte and Kevin Sage told Davala that they had never seen a copy of the IIPP, there was no evidence that they received any training or that they had any procedures for identifying hazards in the workplace. The preponderance of the evidence established that there was no IIPP at the time of the inspection.

C. Did Employer violate section 2340.12, subdivision (a) by failing to guard openings in the shop electrical panel?

The Division cited Employer for a violation of section 2340.12, subdivision (a), which provides:

Mechanical Execution of Work

(a) Unused openings in boxes, raceways, auxiliary gutters, cabinets, equipment cases, or housings shall be effectively closed to afford protection substantially equivalent to the wall of the equipment.

⁶ Employer sought to introduce Exhibit B, an undated five page document titled "Injury and Illness Prevent Program" which was not produced to the Division until the day of the hearing. In response to Employer's motion to suppress evidence, Division filed the Declaration of Shelley A. Gregory, dated June 5, 2015, which included Exhibit B, Division's Request for Documents, dated March 26, 2015 and Exhibit C, email messages between Howard Sagaser and Shelley Gregory requesting copies of Employer's IIPP on April 28, 2015. Division's Request for Documents included a request for "each and every writing, photograph or other thing which you proposed to offer in evidence." The receipt of the IIPP for the first time at the hearing prejudiced the Division's preparation for hearing. Objections to Employer's Exhibits B and C were sustained, based on the totality of circumstances and the surprise, which was evident at the hearing. (*Central Chevrolet, Cal/OSHA App. 05-2615, Decision After Reconsideration (Sept. 12, 2008).*)

Board Rule, section 372.7 provides:

- (a) The Administrative Law Judge or the Appeals Board may impose sanctions on a party who fails to respond to an authorized request for discovery or makes an evasive or incomplete response to discovery where such action results in surprise to the requesting party at the hearing.
- (b) Such sanctions may include:
 - (1) An order prohibiting the introduction of designated matters into evidence by the abusing party; and/or
 - (2) An order establishing designated facts, claims, or defenses against the abusing party in accordance with the claim of a party adversely affected.
 - (3) Any other order as the Administrative Law Judge or the Appeals Board may deem appropriate under the circumstances.

Citation 1, Item 2 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of the inspection the employer had two employees working in the shop. At the time of the inspection the employer failed to have guarded the openings in the shop electrical panel.

The Division must establish that an electrical panel is not closed, or has an unused opening to establish a violation of Section 2340.12, subdivision (a). Davala testified that he observed an electrical panel with missing knockout covers in the shop where two employees were working.⁷ Exhibit 4 is a photograph taken during the inspection showing the electrical panel in the work area of the shop which is used to power the equipment. Davila pointed into the unused opening with a red pen in Exhibit 4. This opening is a round hole where the box is missing a knockout cover on the right hand side of the box. The Employer did not refute this evidence. The violation of section 2340.12, subdivision (a) is established.

D. Did Employer violate section 2340.16, subdivision (a) by failing to keep the working space in front of the shop electrical panel clear?

The Division cited Employer for a violation of section 2340.16, subdivision (c) of the Electrical Safety Orders, which provides:

(c) Clear Spaces. Working space required by this section shall not be used for storage. When normally enclosed live parts are exposed for inspection or servicing, the working space, if in a passageway or general open space, shall be suitably guarded.

Citation 1, Item 3 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of the inspection moving dollies, compressed gas cylinders and a shop vac were stored in area directly in front of the shop electrical panel.

In order to establish that Section 2340.16, subdivision (c) is violated, the Division must establish that the working space in front of the electrical panel is used for storage. Davala testified that he observed that the working space in front of the shop electrical panel was not clear and the moving dollies, two compressed gas cylinders and a shop vac were stored in front of the panel. Exhibit 5 is a photograph taken during the inspection showing the moving dollies, compressed gas cylinders and a shop vac in front of the electrical panel. As stated above, the

⁷ The "electrical panel" is a steel box that holds multiple circuit breakers wired to circuits that distribute power throughout the shop.

electrical panel is used to power the equipment in the shop, and contains enclosed live parts, which must be accessible for inspection or servicing. The Employer did not refute this evidence. The violation of section 2340.16, subdivision (c) is established.

E. Did Employer violate section 2511.10, subdivision (a) by failing to provide strain relief on a cord supplying power to the brake in the fabrication shop?

The Division cited Employer for a violation of section 2500.10, subdivision (a) of the Electrical Safety Orders, which provides:

- (a) Flexible cords and cables shall be connected to devices and fittings so that strain relief is provided which will prevent pull from being directly transmitted to joints or terminal screws.

Citation 1, Item 4 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of the inspection the cord supplying power to the brake did not have strain relief and was damaged from the pull transmitted to the plug.

Section 2500.10, subdivision (a) is violated where the cord supplying power to the press brake did not have strain relief and was damaged from the pull transmitted to the plug. Davala testified that during the inspection, he observed the cord supplying power to the press brake did not have strain relief, and the insulation was separated from the cord where it connects to the plug. Exhibit 6 is a photograph taken during the inspection showing the cord supplying power to the brake press did not have strain relief. The photo depicts a cord which was damaged at the end point of the plug, or screw terminal⁸ due to the pull. An inference can be drawn that the cord is a "flexible cord" based on the fact that Exhibit 6 shows that the cord is bent down from the plug and appears to be flexible. The use of the press brake with the damaged cord was confirmed by Ernie Nolte, who testified that he has been using the press brake for decades, when working in the shop. The violation of section 2500.10, subdivision (a) is established.

F. Did Employer violate section 3668, subdivision (a)(2) by failing to ensure each operator of the forklifts successfully completed the required training?

⁸ A "screw terminal" is a type of electrical connector where a wire is held by the tightening of a screw. (See, https://en.wikipedia.org/wiki/Screw_terminal, accessed Jan. 14, 2016.)

The Division cited Employer for a violation of General Industry Safety Orders, section 3668, subdivision (a)(2), which provides:

Prior to permitting an employee to operate a powered industrial truck (except for training purposes), the employer shall ensure that each operator has successfully completed the training required by this section, except as permitted in subdivision (e).⁹

Citation 1, Item 7 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of Division's inspection employees operating the forklift had not successfully completed the fork lift operators training required by this standard.

Davala testified that during the inspection, he observed John Nolte driving the forklift around the shop and noted that he was not wearing a seat belt. He asked John Nolte whether he had a certification to operate the forklift and John Nolte admitted that he had no certification or training.¹⁰ Exhibit 8 is a photograph taken during the inspection showing John Nolte driving the forklift.¹¹ He did not testify that he was certified or received training in operating a forklift. Employer did not claim that any of the exceptions applied. The violation of section 3668, subdivision (a)(2) is established.

G. Did Employer violate section 3395, subdivision (f)(1) by failing to provide training on risk of heat illness to employees?

The Division cited Employer for a violation of section 3395, subdivision (f)(1), which provides:

⁹ Section 3668, subdivision (e) provides:

Avoidance of duplicative training. If an operator has previously received training in a topic specified in subsection (c) of this section, and such training is appropriate to the truck and working conditions encountered, additional training in that topic is not required if the operator has been evaluated and found competent to operate the truck safely.

¹⁰ The statement made at the time of the inspection by John Nolte to Davala is admissible as a party admission, an exception to the hearsay rule. (Cal. Evidence Code section 1222(a).) Statements by John Nolte, the foreman, are imputed to Employer. (*Sassan Geosciences, Inc.*, Cal/OSHA App. 05-2260, Denial of Petition for Reconsideration (Apr. 20, 2007), citing, *Macco Contractors, Inc.*, Cal/OSHA App. 84-1106, DAR (Aug. 20, 1986).) An admission at a hearing is an adequate basis upon which to rest a finding of fact. (*C & S Battery & Lead*, Cal/OSHA App. 77-0001, Decision After Reconsideration (Oct. 18, 1977).)

¹¹ John Nolte's testimony that he was asked to get on the forklift and pose for the photograph by Davala is not found to be credible.

Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness.

Citation 1, Item 8 alleges as follows:

On June 11, 2014, the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of Division's inspection the employer had not provided training to employees prior to work that should reasonably be anticipated to result in exposure the risk of heat illness.

To sustain a violation, the Division has the burden of establishing that 1) Employer maintained an outdoor place of employment, 2) Employer should reasonably have anticipated that Sage and John Nolte were exposed to the risk of heat illness, and 3) Employer failed to provide effective training in one or more of the topics which are enumerated in the rule, such as the importance of acclimatization, the symptoms or signs of heat illness, procedures for contacting emergency medical services, prior to Sage and John Nolte beginning work.

Section 3395 does not define the term "an outdoor place of employment." In *AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration 08-135 (June 12, 2013) the Appeals Board found that the interior of a bus is not an outdoor place of employment. It based its' holding on the Oxford English Dictionary, which defines "outdoors" as a location that is "out of doors; in the open air." The Appeals Board noted in *AC Transit* that "the Standards Board declared that the regulation was limited to 'outdoor work,' and stated that the *intended effect* of the regulation is to protect employees who are 'performing such (outdoor) work from the increased risk of heat illness that can result from working without the environmental protections indoor working environments can provide.'"¹²

Whether the patio portion of the shop was "an outdoor place of employment" depends on whether the employees are subject to working without the environmental protections indoor working environments can provide. Davala testified that the patio is adjacent to the back of the building and covered by roofing material. Ernie Nolte admitted that the patio area has a 22 foot awning and is open on the sides. Employer's work involves the fabrication of heating, ventilation and air conditioning ducts and installing them for use in commercial and residential buildings, which involves outdoor work. Employer exposed its'

¹² There is nothing in the scope and application language of Section 3395 that requires that the outdoors ambient temperature be at any particular level before an employer must comply with the standard. Nor is there a requirement that the duration of exposure to heat be over a specified period of time before employer must comply with the standard. (*Kenneth L. Poole, Inc.*, Cal/OSHA App. 90-278, Decision After Reconsideration (April 18, 1991).)

employees to the hazard that section 3395 was designed to protect, as Sage was working in the patio area during the inspection. Given that the patio does not have walls on three sides, and does not provide the protections of an indoor working environment, such as air conditioning, it is found to be “an outdoor place of employment”.

Davala testified that during the inspection, he asked John Nolte about heat illness training and did not receive a response. As discussed below, the Heat Illness Prevention Plan was requested, but not received prior to the day of the hearing. No documentation of training on heat illness was provided to the Division. Employer failed to offer any evidence that it implemented training in any of the topics required by the safety order. The violation of section 3395, subdivision (f)(1) is established.

H. Did Employer violate section 3395, subdivision (f)(2) by failing to provide training on risk of heat illness to supervisory employees?

The Division cited Employer for a violation of section 3395, subdivision (f)(2), which provides:

Supervisor Training. Prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness effective training on the following topics shall be provided to the supervisor:

- (A) The information required to be provided by section (f)(1).
- (B) The procedures the supervisor is to follow to implement the applicable provisions in this section.
- (C) []¹³
- (D) How to monitor weather reports and how to respond to hot weather advisories.

Citation 1, Item 9 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company’s fabrication shop located at 1560 North Marks in Fresno, CA. At the time of Division’s inspection the employer had not provided required training to supervisors prior to work that should reasonably be anticipated to result in exposure he risk of heat illness.

Davala testified that during the inspection, he asked John Nolte about heat illness training and did not receive a response. John Nolte testified that he had not received heat illness training, although he was “in charge” and works as “the foreman” in the field. The violation of section 3395, subdivision (f)(2) is established.

¹³ Citation 1, Item 9 appears to have a typographic error, namely, subdivision (B) is repeated two times and (C) is omitted.

I. Did Employer violate section 3395, subdivision (f)(3) by failing to provide a copy of its heat illness prevention procedures (HIPP) to DOSH upon request?

The Division cited Employer for a violation of section 3395, subdivision (f)(3), which provides:

The employer's procedures for complying with each requirement of this standard required by subdivisions (f)(1)(B), (G), (H) and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

Citation 1, Item 10 alleges as follows:

A copy of the employer's written heat illness prevention procedures, was verbally required during the inspection and also on a document request sheet (Cal/OSHA 1AY), with a post mark date of June 14, 2014. The employer has not provided a copy of his written heat illness prevention procedures by the June 14, 2014 date.

To establish a violation of section 3395, subdivision (f)(3), the Division must prove by a preponderance of the evidence that 1) Employer maintained an outdoor place of employment; and either 2) Employer failed to establish a compliant written Heat Illness Prevention Program (HIPP), or 3) Employer failed to make its HIPP available to its employees and to the Division upon request.

As discussed above, Employer maintained an outdoor place of employment.

With respect to prongs 2 and 3, Employer failed to provide a HIPP to the Division until the day of the hearing. Exhibit C, Heat Illness Prevention Program, dated April 1, 2015 was offered, but not admitted, because, like the IIPP discussed above, it was not provided to the Division, as stated above in footnote 6. Davila requested the HIPP orally at the inspection on June 11, 2014, and in a written document request. On March 26, 2015, Division's attorneys sent a formal written discovery request which was not responded to. (Declaration of Shelley A. Gregory, Exhibit B.) Again, on April 28, 2015, Employer was sent an email requesting the HIPP be provided prior to the hearing, but the document was not produced. (Declaration of Shelley A. Gregory, Exhibit B.) Employer did not dispute that HIPP was not provided to the Division upon request during the inspection, in discovery or prior to the hearing. The violation of section 3395, subdivision (f)(3) is established.

J. Did Employer violate section 5194, subdivision (e) by failing to develop, implement and maintain a hazardous communication program?

The Division cited Employer for a violation of section 5194, subdivision (e), which provides:

- (1) Employers shall develop, implement, and maintain at the workplace a written hazard communication program for their employees which at least describes how the criteria specified in sections 5194(f), (g), and (h) for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following. . . .

Citation 1, Item 11 alleges as follows:

On June 11, 2014 the Division conducted an inspection with Nolte Sheet Metal Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. The employer failed to develop, implement, and maintain at the workplace a written hazard communication program for employees.

Hazardous substances observed during the inspection included denatured alcohol, spray paint, transmission fluid, starting fluid and air tool lubricant.

A copy of the employer's written hazard communication program was verbally requested during the inspection and also on a document request sheet (Cal-OSHA 1-A-Y) with a post mark date of June 14, 2014.

The employer has not provided a copy of the written hazard communication program by the June 14, 2014 date.

To sustain a violation of this standard, the Division has the burden of establishing that Employer failed to have a written Hazard Communication Program. (*Tomlinson Construction, Inc.*, Cal OSHA App. 95-2268 Decision After Reconsideration (February 18, 1998).)

Davala testified that during the inspection, he observed chemicals in the shop that contained hazardous substances, including denatured alcohol, spray paint, transmission fluid, starting fluid and air tool lubricant and other chemicals covered by the hazard communication standard. These substances are depicted in a photo taken during the inspection. (Exhibit 9.) Davila requested the Employer's written Hazard Communication Program and did not receive one. Nor was it provided in response to the Division's discovery request, dated March 26, 2015. At the hearing, Employer did not dispute the existence of the hazardous substances or claim that they had a Hazard Communication Program. The violation of section 5194, subdivision (e) is established.

K. Were the proposed penalties in Citation 1 reasonable?

Penalties proposed in accordance with the penalty setting regulations promulgated by the Director of the Department of Industrial Relations (§§333-336) are presumptively reasonable and will not be reduced absent evidence that the proposed 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).)

Davala testified that he calculated the proposed penalties in accordance with the regulations, as set forth in the Proposed Penalty Worksheet, Exhibit 2. He classified Citation 1, Items 1 through 11 as “general”.¹⁴ Citation 1, Items 1 through 4 and 7 through 11 were characterized as having low severity, extent and likelihood. For each of these items, the base penalty was \$1,000. A gravity-based penalty of \$500 was calculated by subtracting \$250 for both extent and likelihood. The only penalty adjustment factor which applied was size, resulting in a forty percent reduction, which netted an adjusted penalty of \$300.¹⁵ When the fifty percent abatement credit was applied, the proposed penalty for each violation was \$150. The proposed penalty of \$150 is found to be reasonable for Citation 1, Items 1, 2, 3, 4, 7 and 11 and is assessed, as set forth in the Summary Table.

L. Were the hazards in Citation 1, Items 8 and 9 duplicative of the hazards in Citation 1, Item 10 and subject to the same abatement?

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 (December 3, 2002).) Penalties which tend to be duplicative or cumulative, and are not needed to effectuate abatement, are inconsistent with the spirit and intent of the Act. (*A & C Landscaping, Inc.*, *supra*, citing *Strong Ties Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sept. 16, 1978); *Western Pacific Roofing Corp.*, Cal/OSHA App. 96-529, Decision After Reconsideration (Oct. 18, 2000).)

Citation 1, Items 8, 9 and 10 involve different but interrelated sections of the Heat Illness Prevention safety orders in section 3395. The employer’s duty in Items 8 and 9, to train supervisory and non-supervisory employees before they begin work which results in exposure to the risk of heat illness, (subds. (f)(1) and (f)(2)) is required in order to implement subdivision (f)(3). Citation 10 (section 3395, subdivision (f)(3)) requires the employer to establish and implement written

¹⁴ A general violation is defined as “a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.” (§ 334, subd. (b).)

¹⁵ No “good faith” or “history” factors were applicable, under the facts of this case, because of the lack of an IIPP and prior Cal/OSHA history.

heat illness prevention procedures and make them available to employees and representatives of the Division. The hazards addressed in section 3395, subdivisions (f)(1), (2) and (3) all involve the requirement to have and implement a heat illness prevention program. The first prong of *A & C Landscaping, supra*, has been established because the hazards involved in subdivisions (f)(1), (2), and (3) are substantially identical or duplicative of the other two violations. A single abatement, such as implementing and maintaining an effective Heat Illness Prevention Plan, which requires appropriate training, would have eliminated the hazards in all three citations, and satisfies the requirement of the second prong.

It is determined that the violations in Citation 1, Items 8, 9 and 10 are similar, pursuant to section 336, subdivision (k). Pursuant to section 336, subdivision (k), the penalty for Citation 1, Items 8 and 9 will be reduced to \$0 and the penalty for Citation 1, Item 10 of \$150 is reasonable and will be assessed.

M. Did Employer violate section 4650, subdivision (e) by failing to secure the compressed gas cylinders in violation of section 4650, subdivision (e)?

The Division cited Employer for a violation of section 4650, subdivision (e), which provides:

Compressed gas cylinders shall be stored or transported in a manner to prevent them from creating a hazard by tipping, falling or rolling. Liquefied fuel-gas cylinders shall be stored or transported in a position so that the safety relief device is in direct contact with the vapor space in the cylinder at all times.

Citation 7, Item 1 alleges as follows:

On June 11, 2014, the Division conducted an inspection with Nolte Sheet Metal, Inc., at the company's fabrication shop located at 1560 North Marks in Fresno, CA. At the time of the inspection the employer failed to secure the compressed gas cylinders.

To establish a violation of section 4650, subdivision (e), the Division must establish that 1) Employer failed to store compressed gas cylinders in a manner to prevent them from creating a hazard by tipping, falling or rolling and 2) employee exposure to the violative condition. (*California Dairies*, Cal/OSHA App. 07-2080, Denial of Petition for Reconsideration (June 25, 2009), citing *Miller Redwood Company*, Cal/OSHA App. 78-210, Decision After Reconsideration (June 9, 1980).) The compliance officer does not have to observe an employee in the potential area of danger to establish employee exposure; circumstantial evidence is sufficient. (*California Dairies, supra*, citing *C. A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sept. 26, 2001).)

Davala testified that he observed two cylinders in the shop area which were next to the electrical panel. They did not have protection over their valves and were not secured. Exhibit 14, a photograph he took during the inspection, shows

that two 20 pound compressed gas cylinders on the floor in plain view, which were freestanding and not secured. Ernie Nolte was aware of the cylinders. Ernie Nolte did not deny that the cylinders were used to store compressed gas, that his employees were exposed to the hazard, or that both cylinders were not restrained from tipping, falling or rolling. On balance, it appears the Division established its burden of proof of a violation of section 4650, subdivision (e) by a preponderance of the evidence.

N. Did Division establish a rebuttable presumption that the violations in Citation 3, 4, 5, 6 and 7, are properly classified as serious violations?

Labor Code § 6432, subdivision (a) states:

(a) There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm¹⁶ could result from the actual hazard created by the violation. The actual hazard may consist of, among other things: ...

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (August 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) For each of the citations classified as “serious”, the Division must establish that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

Citation 3, Item 1 (section 4070, subdivision (a))¹⁷ involves the guard on the belt and pulley drives of the shear, which vibrates off. Davala observed that the

¹⁶ Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) 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, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

¹⁷ Employer did not contest the existence of the violation of Section 4070, subdivision (a), provides: “All moving parts of belt and pulley drives located 7 feet or less above the floor or working level shall be guarded.” An issue not properly raised on appeal is deemed waived. (Section

belt pulley drive at the end of shear was unguarded, as depicted in Exhibit 10. Davala testified that there is a realistic possibility that serious physical harm could result from improper guarding of the belt and pulley drive. The controls are located in proximity to the drive and the nip point created by the drive could realistically break bones or cause severe damage to the fingers and hands of the operator. Sage told Davala that the shear is used every day and was in plain view in the shop. The shear had been used in the shop for 40 years. (E. Nolte)

Davala's un rebutted opinion as to the realistic possibility of a serious injury caused by an accident involving an improper guarding of the belt and pulley drive on the shear is found credible and is accepted.¹⁸ The realistic possibility of serious physical harm combined with existence of the actual hazard caused by an improperly guarded belt and pulley drive is well within reason, and therefore meets the definition of "serious" set forth in section 6432. The Division established a rebuttable presumption that the violation of section 4070, subdivision (a) was properly classified as a serious.

Citation 4, Item 1 (section 4214, subdivision (a))¹⁹ involves the failure to guard press brakes at the point of operation.²⁰ The brake located on the opposite

361.3 ["Issues on Appeal"]; *Pacific Cast Products, Inc.*, Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (July 19, 2000); *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000); *Closets Unlimited*, Cal/OSHA App. 92-427, Decision After Reconsideration (Nov. 2, 1994); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986); *Lloyd W. Aubry Engineering Co., Inc.*, Cal/OSHA App. 79-251, Decision After Reconsideration (May 28, 1982).) A violation of section 4070, subdivision (a) is found to exist by operation of law.

¹⁸ Davala testified that he was current in his Division-mandated training, and has 30 years of experience conducting accident inspections for the Division. He received a BA at Cal State Fresno in Occupational Health and Safety and worked as an Environmental Engineer for seven years before working for the Division. Davala conducted approximately 100 inspections each year, including 80 to 100 inspections involving machine guarding issues. His opinion was based upon a reasonable evidentiary foundation consisting of his experience and training. Davala is competent to give his opinion per Labor Code section 6432, subdivision (g). (*Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).)

¹⁹ Section 4214, subdivision (a) provides:

Press brakes, mechanically or hydraulically powered, shall be guarded in a manner that will accomplish the following: Restrain the operator(s) from inadvertently reaching into the point of operation, or Inhibit machine operation if the operator's hand or hands are inadvertently within or placed within the point of operation, or Automatically withdraw the operator's hands if they are inadvertently within the point of operation.

Employer did not contest the existence of the violation, hence, a violation of section 4214, subdivision (a) is found to exist by operation of law. (See, footnote 17.)

²⁰ The motion to amend Citation 4, Item 1 to allege a violation of section 4214, subdivision (a) was granted, as the amendment relates back to set of facts originally pled. (Section 386(a)(3).) Initially, Division cited Employer for a violation of section 4184, subdivision (b), which provides:

All machines or parts of machines, used in any industry or type of work not specifically covered in Group 8, which present similar hazards as the machines covered under these

side of the entry way, which Davala observed during the inspection, was not guarded, as depicted in Exhibit 11. Davala testified that he observed the press brakes in plain view in the shop and that there is a realistic possibility that serious physical harm could result from the failure to guard the press brake at the point of operation. The press brake is capable of bending metal and lack of guarding could result in amputations or broken bones, if the fingers and hands of the operator enter the point of operation. Ernie Nolte testified that the press brake has been in use in the shop for 25 years.²¹

As stated above, Davala's opinion was based upon a reasonable evidentiary foundation. (See, footnote 18.) Davala's opinion that a realistic possibility that serious injury could result from the failure to guard the press brake is found credible and is accepted. The Division established a rebuttable presumption that the violation of section 4214, subdivision (a) was properly classified as a serious.

Citation 5, Item 1 (section 4227, subdivision (a))²² involves a failure to guard the sheet metal shear. Davala testified that there is a realistic possibility that serious physical harm could result from the absence of a guard since the sheet metal shear is cutting through metal. If the fingers and hands of the operator enter the point of operation, it could result in amputations or broken bones. Ernie Nolte testified that the press brake has been in use in the shop for 40 years. This equipment was also in plain view in the shop.

As stated above, Davala's opinion was based upon a reasonable evidentiary foundation. (See, footnote 18.) Davala's opinion that there is a realistic possibility that a serious injury could be caused by an accident involving the failure to guard the sheet metal shear is found credible and is accepted. The Division established

point of operation orders, shall be guarded at their point of operation as required by the regulations contained in Group 8.

²¹ Ernie Nolte did not plead or prove that the eight methods of guarding in Section 4214, subdivision (b) are impractical. The Appeals Board "considers exceptions to safety orders as affirmative defenses; the employer advancing the defense must prove in met the conditions or elements of the exception." (*CGK Inc. dba Premier Steel Fabrication*, Cal/OSHA App. 13-0518-0519, Denial of Petition for Reconsideration (Oct. 30, 2015), citing *Guardsmark*, Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011), writ denied Orange County Superior Court, 2015.)

²² Section 4227, subdivision (a), provides:

Mechanical power and foot and hand power metal shears shall be provided with a guard which will prevent the hands of the operator from entering the zone traveled by the knives of the shears while they are in motion. This guard may be a fixed barrier, set not more than 3/8-inch above the table (or in accordance with Figure G-8 and Table G-3 of Section 4186), or a self-adjusting barrier with a limit of 3/8-inch above the table, but that will automatically rise to the thickness of the material.

A violation of section 4227, subdivision (a) is found to exist by operation of law because Employer did not contest the existence of the violation. (See, footnote 17.)

a rebuttable presumption that the violation of section 4227, subdivision (a) was properly classified as a serious.

Citation 6, Item 1 (section 4310, subdivision (a)(2)) involves guarding of band knives and saws. Davala testified that the metal shear, which was used every day, was not guarded, as depicted in Exhibit 12. He observed that the top of the band saw was unguarded, exposing the wheel, and in the absence of a guard. There is a realistic possibility that serious physical harm could result. If a hand is placed inside the guard near the wheel, it could result in amputations or broken bones. Ernie Nolte testified that the guard at the top of the band saw is usually closed, but someone may have been cleaning it.²³ This equipment was also in plain view in the shop.

As stated above, Davala's opinion was based upon a reasonable evidentiary foundation. (See, footnote 18.) Davala's opinion that there is a realistic possibility that a serious injury could be caused by an accident involving the failure to guard the band saw is found credible and is accepted. The Division established a rebuttable presumption that the violation of section 4310, subdivision (a)(2) was properly classified as a serious.

Citation 7, Item 1 cites section 4650, subdivision (e), involves two unsecured cylinders. Davala testified that there is a realistic possibility that serious physical harm could result from the unsecured cylinders, in that the contents are under pressure and if the cylinders fall and valves are broken off, they become dangerous projectiles. The types of injuries which result if an unsecured cylinder falls over, tips or rolls includes broken bones, major contusions, or possibly death.

Davala's unrebutted opinion that there is a realistic possibility that a serious injury or death could be caused by an accident involving an unsecured cylinder is found credible and is accepted. The realistic possibility of serious physical harm combined with existence of the actual hazard caused by unsecured cylinders that fall, tip or role and become dangerous projectiles is well within the definition of "serious" set forth in section 6432. The Division established a rebuttable presumption that the violation of section 4650, subdivision (e), was properly classified as a serious.

O. Did Employer rebut the presumption of the serious classification in Citations 3 through 7 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violations?

²³ Ernie Nolte testified that the guards on the shear (Citation 3) and the band saw (Citation 6) were in place, but were opened because the machine was in the process of being cleaned. Had Employer contested the existence of the violation, this testimony would be relevant.

Once the Division produces enough evidence to create a presumption of a serious violation, the burden of proof shifts to Employer to rebut the presumption. Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

To establish that it could not have known of the violative condition by exercising reasonable diligence, an employer must establish that the violation occurred at time and under circumstances which could not provide the employer with a reasonable opportunity to have detected it. (*Vance Brown, Inc.*, Cal/OSHA App. 00-3318, Decision After Reconsideration (April. 1, 2003).) Reasonable diligence includes the obligation of foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists. (*A. A. Portonova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986).)

Employer knowledge of the violations in Citations 3 through 6 was not contested, in that Ernie Nolte testified that he was aware of the conditions of the shear belt and pulley drive, metal shear, press brake, and band saw and the violations were not contested. The serious classifications were not rebutted.

With respect to Citation 7, Employer argued that there was no explosion hazard presented by the cylinders because the cylinders were empty at the time of the inspection. Davala was asked on cross-examination whether he tested the cylinders to make sure there were pressurized contents inside and although he could not recall specifically, it was his practice to do so. Similarly, he testified that he normally tested a cylinder to determine whether the attachment to a hose made it secure, prior to issuing a citation. Ernie Nolte testified "I could not tell you if it was empty or full", but he believed it was empty. Given that Davala admitted his memory was not clear and his original notes were no longer available, Employer rebutted the presumption of serious violation for Citation 7. The classification of that citation will be reduced to a general.

P. Were the proposed penalties in Citations 3, 4, 5, 6, and 7 reasonable?

As stated above, penalties proposed in accordance with the regulations (§§333-336) are presumptively reasonable and will not be reduced absent evidence that the proposed penalty was miscalculated. (*Stockton Tri Industries, Inc.*, *supra*.)

Davala testified that he calculated the proposed penalties in accordance with the regulations, as set forth in the Proposed Penalty Worksheet, Exhibit 2.

The existence of the violations was not contested with regard to Citations 3 through 7. Evidence about the existence of the alleged violations and the context in which they occurred remains relevant, not for purposes of reviewing whether the violation was proven, but for determining the appropriateness of the penalty resulting from the violation. (*System 99, A Corporation*, Cal/OSHA App. 78-1259, Decision After Reconsideration (Aug. 30, 1982); *Watkins Contracting, Inc.*, Cal/OSHA App. 93-1021 *et al.*, Decision After Reconsideration (Sep. 24, 1997).)

The Division established that Citations 3 through 6 were properly classified as “serious”. For Citations 3 through 6, Davala calculated the proposed penalty by beginning with a base of \$18,000 for severity²⁴ as having low extent and likelihood and applied the maximum credit for size of forty percent.²⁵ The base penalty for a “serious” violation is \$18,000. Davala gave a twenty-five percent reduction (\$4,500) for extent and a twenty-five percent reduction (\$4,500) for likelihood. The gravity based penalty was \$9,000 for each of these citations. The forty percent size adjustment resulted in an adjusted penalty of \$5,400. When the fifty percent abatement credit is calculated, the proposed penalty is \$2,700 for each serious violation.²⁶ Employer did not refute the Division’s calculation.

Citation 7 was reduced to a general citation and the penalty calculation must be revised. The base penalty for a violation classified as “general” is \$1,000. Given a low severity²⁷, extent and likelihood rating, the gravity based penalty is \$500. The adjusted penalty, taking into consideration Employer’s size, is \$300.²⁸ The abatement credit of 50% results in a penalty of \$150, which is reasonable and is assessed.

Q. Were the hazards in Citations 3, 4, 5, and 6 duplicative guarding hazards and subject to the same abatement?

The Appeals Board may set aside a penalty if the hazards are substantially identical or duplicative of another violation, and abatement of one will serve to abate the other. (*A & C Landscaping, Inc. aka A & C Construction, Inc.*, *supra*, as set forth above.) However, without both a single hazard and a single means of abatement, penalty reduction based on duplication is not warranted. (*TL Pavlich Construction, Inc.*, Cal/OSHA App. 11-1303, Decision After Reconsideration (June 16, 2014), citing *A. Teichert & Son Inc. dba Teichert Construction*, Cal/OSHA App. 09-0459, Decision After Reconsideration (Nov. 9, 2012).)

²⁴ Section 335, subdivision (a)(1)(B).

²⁵ Exhibit 2, Proposed Penalty Worksheet.

²⁶ \$18,000 – \$9,000 = \$9,000; 40% of \$9,000 = \$5,400; ½ of \$5,400 = \$2,700.

²⁷ There was no testimony or other evidence on this point. Where there is no evidence in the record of how the Division would have determined the adjustment factors and rating criteria, Employer must be afforded the maximum credits and adjustments provided under the regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After Reconsideration (Jan. 8, 2004).) Therefore the rating for “severity” must be reduced to “low”.

²⁸ A reduction of 40% is given if there are ten or fewer employees. 40% of \$500 is \$200. \$500 - \$200 = \$300.

Citations 3, 4, 5, and 6 involve different but interrelated sections of the General Safety Orders which involve guarding: Citation 3, which cites section 4070, subdivision (a), involves guarding moving parts of belt and pulley drives, Citation 4, which cites section 4214, subdivision (a), involves guarding of the point of operation on press brakes, Citation 5, which cites section 4227, subdivision (a), involves guarding of metal shears which have mechanical power or foot or hand power, and Citation 6, which cites section 4310, subdivision (a)(2), involves guarding of band knives and saws. The first prong of *A & C Landscaping, supra*, has been established because the hazards involved are substantially identical or duplicative of the other three violations.

Abatement involves installing guarding on each piece of machinery. This would require a separate abatement to eliminate the hazards in each of those four citations. It is determined that although the violations in Citation 3, 4, 5, and 6 all involve guarding and are similar, the abatement is different for each machine. Therefore, pursuant to section 336, subdivision (k), the penalty for Citations 3, 4, 5, and 6 will remain \$2,700.

Conclusion

Employer's appeal is denied. The Division established the existence of the alleged violations found in Citation 1, Items 1, 2, 3, 4, 7, 8, 9, 10, and 11, and Citations 3 through 7, which are affirmed. Citations 3, 4, 5, and 6 were correctly classified as serious. Employer rebutted the serious classification of Citation 7, which will be changed from a serious to general classification. The penalties assessed for Citation 1, Items 8 and 9 will be reduced pursuant to section 336, subsection (k).

Order

It is hereby ordered that the citations are established as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

DATED: January _____, 2015

MD:

MARY DRYOVAGE
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A

**SUMMARY OF EVIDENTIARY RECORD
NOLTE SHEET METAL, INC.
Dockets 14-R6D7-2777 THROUGH 2783
Date of Hearing: May 12, 2015**

Division's Exhibits

Exh. No.	Exhibit Description	Admitted
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet	Yes
3	1-B-Y form (2 pages)	Yes
4	Photo – Electrical Panel	Yes
5	Photo – Electrical Panel	Yes
6	Photo – no insulation on plug	Yes
7	Photo – grinder spindle nut	Yes
8	Photo – John Nolte sitting on forklift	Yes
9	Photo – Chemicals on site	Yes
10	Photo – the Shear	Yes
11	Photo – the side of break	Yes
12	Photo – unguarded shear	Yes
13	Photo – band saw	Yes
14	Photo – 2 canisters	Yes

Employer's Exhibits

<i>Exhibit Letter</i>	Exhibit Description	Admitted
A	Inspection File IMIS No. 317431674	Yes
B	Injury and Illness Prevention Program [undated and not provided to DOSH in response to discovery request]	No
C	Heat Illness Prevention Program 4/1/2015 [not in effect at time of inspection and not provided to DOSH in response to discovery request]	No
D	OSHA Form 300A for 2014, 2013, 2012, 2011, Form 300 for 3/15/2010 and 11/10/2010, Form 301 for 3/19/2010 and 11/11/2010, Form 300-A for 2010.	Yes

Witnesses Testifying at Hearing

1. Jan Hami, District Manager
2. Ramon Davala, Associate Safety Engineer, Division
3. Kevin Sage, Nolte Sheet Metal employee
4. Natalie Emerzian, Nolte Sheet Metal employee
5. Ernie Nolte, Nolte Sheet Metal foreman
6. John Nolte, Nolte Sheet Metal owner

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
NOLTE SHEET METAL INC
DOCKETS 14-R6D7-2777 through 2783

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

Site: 1560 North Marks, Fresno, CA 93722
Date of Inspection: 06/11/2014

IMIS No. 317431674

Date of Citation: 08/13/2014

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R6D7-2777	1	1	1509(a)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
		2	2340.12(a)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
		3	2340.16(c)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
		4	2500.10(a)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
		5	3577(c)	G	DOSH withdrew citation and issued an information memorandum.		X	\$225	\$0	\$0
		6	3577(e)	G	DOSH withdrew citation and issued an information memorandum.		X	\$150	\$0	\$0
		7	3668(a)(2)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
		8	3395(f)(1)	G	ALJ reduced penalty per 336(k) to Citation 1-10.	X		\$150	\$150	\$0
		9	3395(f)(2)	G	ALJ reduced penalty per 336(k) to Citation 1-10.	X		\$150	\$150	\$0
		10	3395(f)(3)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
		11	5194(e)	G	ALJ affirmed as set forth in Decision.	X		\$150	\$150	\$150
14-R6D7-2778	2	1	3578(g)	S	DOSH withdrew citation and issued an information memorandum.		X	\$2,700	\$0	\$0
14-R6D7-2779	3	1	4070(a)	S	ALJ affirmed as set forth in Decision.	X		\$2,700	\$2,700	\$2,700
14-R6D7-2780	4	1	4184(b)	S	DOSH amended citation to change to Section 4214(a). ALJ affirmed as set forth in Decision.	X		\$2,700	\$2,700	\$2,700
14-R6D7-2781	5	1	4227(a)	S	ALJ affirmed as set forth in Decision.	X		\$2,700	\$2,700	\$2,700
14-R6D7-2782	6	1	4310(a)(2)	S	ALJ affirmed as set forth in Decision.	X		\$2,700	\$2,700	\$2,700
14-R6D7-2783	7	1	4650(e)	S	ALJ reclassified from Serious to General and recalculated penalty.	X		\$2,700	\$2,700	\$150

SUMMARY TABLE DECISION

In the Matter of the Appeal of:
NOLTE SHEET METAL INC
DOCKETS 14-R6D7-2777 through 2783

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

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
Sub-Total								\$17,925	\$14,250	\$12,000
Total Amount Due*										\$12,000

(INCLUDES APPEALED CITATIONS ONLY)

<p>NOTE: Please do not send payments to the Appeals Board. All penalty payments must be made to:</p> <p style="text-align: center;">Accounting Office (OSH) Department of Industrial Relations PO Box 420603 San Francisco, CA 94142 (415) 703-4291, (415) 703-4308 (payment plans)</p>
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*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

ALJ:MD
POS: 1/___/16

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, California 95833.

On January _____, 2015, I served the attached **Decision** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Howard A. Sagaser
Sagaser, Watkins & Wieland, PC
7550 North Palm Avenue, Suite 100
Fresno, CA 93711

DOSH DISTRICT OFFICE
1515 Clay Street, Suite 1303, Box 43
Oakland, CA 94612

DOSH LEGAL UNIT
ATTN: Amy Martin, Chief Counsel
1515 Clay Street, Suite 1901
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct.
Executed on January _____, 2015, at Sacramento, California.

Declarant