STATEMENT OF THE CASE:

Inglewood Carwash, LLC (Employer) operates as a carwash facility. Beginning on November 10, 2015, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Christian Nguyen, conducted an inspection following a fatal accident at a place of employment maintained by Employer at 320 North La Brea Avenue, Inglewood, California (the Site). On February 18, 2016, the Division issued a citation to Employer alleging three violations of California Code of Regulations, title 8, for failing to establish a written Injury and Illness Prevention Program; failing to establish a written hazard communication program; and, failing to report a workplace fatality to the Division.

Employer filed a timely appeal contesting the existence of the alleged violations.

This matter came regularly for hearing before Howard I. Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on January 18, 2016. Dr. Soheil Hekmat, owner, represented Employer. Victor Copelan, District Manager, represented the Division. The matter was submitted for decision at the close of the hearing.

ISSUES:

1. Did Employer fail to establish a written Injury and Illness Prevention Program?
2. Did Employer fail to establish a written hazard communication program?
3. Did Employer fail to report a workplace fatality to the Division?

FINDINGS OF FACT:

1. On November 8, 2015, Employer’s employee Demetrio Pool died while working at the site.
2. Employer did not report the fatality to the Division.
3. Employer did not establish a written Injury and Illness Prevention Program.

1 Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
2 At the beginning of the hearing, Employer made a motion to expand its appeal to also challenge the reasonableness of the proposed penalties for Citation 1, items 1 through 3. After hearing argument, the undersigned found no good cause and denied Employer’s motion.
3 This finding of fact was stipulated to by the parties at the hearing.
ANALYSIS:

1. Did Employer fail to establish a written Injury and Illness Prevention Program?

Section 3203, subdivision (a) states in relevant part: “Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program).”

Citation 1, item 1 alleged:

Prior to and during the course of the investigation, including but not limited to November 10, 2015, the employer did not establish, implement and maintain a written injury and illness prevention program for its employees in accordance with the subsection.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (Howard J. White, Inc., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (Nolte Sheet Metal, Inc., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (Leslie G. v. Perry & Associates (1996) 43 Cal.App.4th 472, 483, review denied.)

At hearing, Employer did not dispute that it was an employer required to establish an Injury and Illness Prevention Program (IIPP). Thus, section 3203, subdivision (a) is applicable to Employer. Associate Safety Engineer Christian Nguyen (Nguyen) credibly testified that during a visit to the site on February 10, 2016, he requested Employer’s IIPP but did not receive one among the materials that Employer provided to him. At the hearing, Employer had the opportunity to offer evidence that it had established an IIPP, but failed to do so. (See Kaiser Steel Corporation, Cal/OSHA App 75,-1135, Decision After Reconsideration (June 21, 1982) [the Appeals Board may consider an employer’s failure to explain or deny adverse evidence or facts]; see Evid. Code, § 413; see also Shehtanian v. Kenny (1958) 156 Cal.App.2d 576 [failure to offer any evidence on a certain issue, though production of such evidence was clearly within the defendant's power, raised an inference that the evidence, if produced, would have been adverse].) Weighing Nguyen’s uncontroverted testimony against Employer’s complete lack of evidence that it had established an IIPP, the undersigned concludes that Employer failed to establish an IIPP as required under section 3203, subdivision (a).

Thus, for the foregoing reasons, the Division established a violation of section 3203, subdivision (a) by a preponderance of the evidence, and the citation is affirmed.

2. Did Employer fail to establish a written hazard communication program?

Section 5160 (Scope and Application) of Article 109 (Hazardous Substances and Processes) of Group 16 (Control of Hazardous Substances) of Subchapter 7 (General Industry Safety Orders) of California Code of Regulations, title 8 states: “This Article establishes minimum standards for the use, handling, and storage of hazardous substances in all places of employment.”
Section 5194 (Hazard Communication), subdivision (e)(1) (Written Hazard Communication Program) states in relevant part: “Employers shall develop, implement, and maintain at the workplace a written hazard communication program for their employees....”

Section 5194, subdivision (b), states:

(1) This section requires...all employers to provide information to their employees about the hazardous chemicals to which they may be exposed, by means of a hazard communication program, labels and other forms of warning, safety data sheets, and information and training.

(2) This section applies to any hazardous chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a reasonably foreseeable emergency resulting from workplace operations.

Section 5194, subdivision (c) defines “hazardous chemical” as “any chemical which is classified as a physical hazard or a health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, a hazard not otherwise classified, or is included in the List of Hazardous Substances prepared by the Director pursuant to Labor Code section 6382.”

Citation 1, item 2, alleged:

Prior to and during the course of the investigation, including but not limited to November 10, 2015, the employer did not develop, implement and maintain at the workplace a written hazard communication program for its affected employees as required by the subsections.

Here, the Division offered insufficient evidence to prove that section 5194, subdivision (e) applied to Employer or that Employer violated the safety order. Nguyen testified that Employer provided him with a list of chemicals used by employees at the site (Exhibit 6). However, Nguyen failed to identify which, if any, fell within the definition of a “hazardous substance” as that term is used in the regulation. Thus, although Nguyen credibly testified that Employer did not keep Material Safety Data Sheets (MSDS) for the materials identified in Exhibit 6, the Division failed to offer any evidence that any of the materials on the list required Employer to keep MSDS’s as part of a written hazard communication program. The undersigned declines to speculate that employees were exposed to “hazardous substances” in the absence of convincing evidence from the Division.

Thus, for the foregoing reasons, the Division failed to establish a violation of section 5194, subdivision (e), by a preponderance of the evidence. Consequently, the citation is vacated.

3. Did Employer fail to report a workplace fatality to the Division?

Section 342, subdivision (a) (Reporting Work-Connected Fatalities and Serious Injuries) provides in relevant part:

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4 The list is found at section 339.
Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Citation 1, item 3 alleged:

The employer did not immediately report a fatal injury of an employee that occurred on or about November 8, 2015 to the Division as required.

Section 342, subdivision (a) requires employers to report serious injuries, illnesses and fatalities that occur in the workplace, regardless of whether another person or entity also has a duty to report and does make a report to the Division. The Appeals Board has previously held that “there is no indication in the Legislative history, the language to [Labor Code] section 6409.1(b), or the penalty setting provisions of the Act that reasonable reliance on another’s report fulfills the reporting requirement [of section 342, subdivision (a)], or has any relevance to setting a penalty.” (Allied Sales and Distribution, Inc., Cal/OSHA App. 11-0480, Decision After Reconsideration (November 29, 2012).) In Allied Sales and Distribution, Inc., supra, the fire chief in charge of the response to the workplace incident informed the employer that he would be making a report to the Division, thus there was no reason for the employer also to report it. There, the Appeals Board held that employers and first responders have separate duties to report under section 342 and the Labor Code, and observed that it would undermine the purpose of the reporting requirement to excuse the employer’s failure, even if the Employer’s report would have been duplicative.

At the hearing, the parties stipulated that a fatality occurred at the site on November 8, 2015. District Manager Victor Copelan testified that the Division received notification from the Inglewood Police Department (Exhibit 3) but did not receive any notification from Employer prior to opening the investigation.

Dr. Soheil Hekmat, Employer’s owner, testified that one of the responding police officers told him that he did not need to call the Division. Although the officer’s statement was hearsay, it was corroborated by the Inglewood Police Department’s report concerning the incident. (Exhibit 4, p. 6.) Dr. Hekmat admitted that he was familiar with the reporting requirement found in section 342, subdivision (a). As noted above, employers and first responders have duplicative reporting requirements. Consistent with the holding in Allied Sales and Distribution, Inc., Cal/OSHA App. 11-0480, supra, although the local police department made a report to the Division, that does not relieve Employer of its responsibility also to make a report. Dr. Hekmat testified that the incident occurred around 1:00 p.m. He also testified that the paramedics were at the site for approximately one hour, and police were there for approximately five to six hours. This left Employer with approximately two to three hours after they left during which time Dr. Hekmat or one of his employees (who he testified were able to communicate in English) could have called the Division to inform it of the fatality. Instead, Dr. Hekmat testified that after leaving the scene he went to visit one of his patients in the hospital. Dr. Hekmat knew about the reporting requirement, had time and opportunity to report the incident to the Division, but chose not to do so. In summary, the Division established by overwhelming evidence that Employer violated section 342, subdivision (a) by failing to report a fatality to the Division.
Thus, for the foregoing reasons, Citation 1, item 1 shall be affirmed and a penalty of $5,000 shall be assessed against Employer for violating section 342, subdivision (a).5

CONCLUSIONS:

The Division met its burden of establishing that Employer violated section 3203, subdivision (a). The Division did not meet its burden of establishing that Employer violated section 5194, subdivision (e). The Division met its burden of establishing that Employer violated section 342, subdivision (a).

ORDERS:

Employer’s appeal from Citation 1, item 1 is denied. Citation 1, item 1 is affirmed as set forth in the body of this Decision. Employer’s appeal from Citation 1, item 2 is granted, and the associated penalty is vacated. Employer’s appeal from Citation 1, item 3 is denied. Citation 1, item 3 is affirmed as set forth in the body of this Decision. Final penalties in the amount of $5,450 are assessed against Employer for the reasons described herein and as set forth in the attached Summary Table.

Dated: 02/09/2017

Howard I. Chernin
Administrative Law Judge

5 As mentioned above, the only issue before the undersigned was whether Employer violated the cited safety order. However, it bears mentioning that the Division established by a preponderance of the evidence that it correctly calculated the proposed penalty for each of the violations (see Exhibit 2). Furthermore, to the extent that Employer attempted to offer evidence of financial hardship, Employer did not meet its burden. The only evidence regarding Employer’s finances came in the form of a single business credit card statement (Exhibit D). Employer did not meet its burden of demonstrating financial hardship, because it did not show how reduction of the penalty would further the purpose of the Occupational Safety and Health Act. (Maria de Los Angeles Colunga dba Merced Farm Labor, Cal/OSHA App. 08-3093-3098, Decision After Reconsideration (Feb. 26, 2015).) Nor did Employer provide sufficiently detailed financial records to establish that it was entitled to further penalty relief. (Id.) Finally, it bears mentioning that the facts adduced at hearing do not give rise to an inference that a miscarriage of justice will result from imposing the statutory $5,000 fine on Employer for violating section 342, subdivision (a). Although the Appeals Board has yet to elaborate on what would meet the definition of “miscarriage of justice”, Employer offered no evidence to support a conclusion that it would be procedurally or substantively unfair to assess the $5,000 statutory penalty.
APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

Inspection No.: 1110352
Employer: INGLEWOOD CARWASH LLC
Date of hearing(s): January 18, 2017

DIVISION’S EXHIBITS

<table>
<thead>
<tr>
<th>Exhibit Number</th>
<th>Exhibit Description</th>
<th>Status</th>
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<tbody>
<tr>
<td>1</td>
<td>Jurisdictional documents</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>2</td>
<td>Cal/OSHA C-10 Proposed Penalty Worksheet</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>3</td>
<td>Accident Report (OIS) (redacted)</td>
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<tr>
<td>5</td>
<td>Scene photographs (2 pages)</td>
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<tr>
<td>6</td>
<td>List of chemicals</td>
<td>Admitted Into Evidence</td>
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EMPLOYER’S EXHIBITS

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<tr>
<th>Exhibit Letter</th>
<th>Exhibit Description</th>
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<tbody>
<tr>
<td>A</td>
<td>Inglewood Police Department Report 15-10351 (partial, redacted)</td>
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<tr>
<td>B</td>
<td>Receipt re airfare for burial</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>C</td>
<td>Settlement Documents re Case No. ADJ10339085</td>
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<tr>
<td>D</td>
<td>Bank of America business card statement 11/20/16 thru 12/19/16</td>
<td>Admitted Into Evidence</td>
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Witnesses testifying at hearing:

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<tr>
<td>Christian Nguyen</td>
<td>Associate Safety Engineer</td>
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<td>Victor Copelan</td>
<td>District Manager</td>
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<td>Dr. Soheil Hekmat</td>
<td>Owner/Employer</td>
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OSHAB 601
APPENDIX A
Rev. 5/16
Summary of Evidentiary Record and Certification of Recording
APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: 1110352
Employer: INGLEWOOD CARWASH LLC

I, Howard I. Chernin, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

Howard I. Chernin
Administrative Law Judge

02/09/2017

### SUMMARY TABLE

**OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD**

In the Matter of the Appeal of:  
**INGLEWOOD CARWASH LLC**

<table>
<thead>
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<td><strong>C I T A T I O N</strong></td>
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<td><strong>Total Amount Due</strong></td>
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*You may 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.

**PENALTY PAYMENT INFORMATION**

1. Please make your cashier’s check, money order, or company check payable to:  
   **Department of Industrial Relations**
2. Write the **Inspection No.** on your payment
3. Mail payment to:  
   Department of Industrial Relations (Accounting)  
   Cashier Accounting Office  
   P.O. Box 420603  
   San Francisco CA 94142-0603

*Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html*

-DO NOT send payments to the California Occupational Safety and Health Appeals Board-

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**Abbreviation Key:**  
G=General  
R=Regulatory  
Er=Employer  
S=Serious  
W=Willful  
Ee=Employee  
A/R=Accident Related  
RG=Repeat General  
RR=Repeat Regulatory  
RS=Repeat Serious