

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

In the Matter of the Appeal of:

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

Employer

Dockets. 13-R6D3-0655 through 0662

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration of the matter of the appeal of Chevron U.S.A. Inc. on its own motion, renders the following decision after reconsideration.

JURISDICTION

Beginning on August 30, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Richmond, California maintained by Chevron U.S.A. Inc. (Employer). On January 30, 2013 the Division issued eight citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1 alleges a serious violation of section 2395.78 [failure to maintain electrical continuity of metal noncurrent carrying parts of circuit]. Citation 2 alleges a serious violation of section 2473.1(b) [unused opening on metal conduit not effectively closed]. Citation 3 alleges a serious violation of section 2473.2(a) [failure to provide covers on electrical conduit bodies]. Citation 4 alleges a serious violation of section 5162(a) [failure to provide bright color in rear of or next to eyewash station]. Citation 5 alleges a serious violation of section 5189(j)(3) [failure to ensure broken or damaged conduit replaced or repaired in timely manner]. Citation 6 alleges a willful serious violation of section 5189(l) [failure to implement Maintenance of Change procedures in three Instances]. Citation 7 alleges a serious violation of section 6773(b) [failure to maintain fire service main in serviceable condition]. Citation 8 alleges a willful serious violation of section 6845(a) [failure to repair or

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

replace temporary non-welding repairs in compliance with API publication 570].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on January 25, 2015. The Decision granted in part and denied in part Employer's appeal, imposing total penalties of \$2,810 from initial proposed penalties of \$180,500.

The Board ordered reconsideration of the ALJ's Decision on its own motion. Both Employer and the Division filed answers to the Board's order of reconsideration.²

ISSUE

Did the ALJ adequately review the facts of each violation in making his ruling on Citations 1, 2, 3, 4, 6, and 8?

FINDINGS OF FACT

After the Board's independent review and consideration of the entire record, the Board makes the following findings of fact:

1. The electrical conduit described in Citation 1, Instance 1, located in North ISOMAX, had broken from its connector, leaving wiring exposed.
2. A bonding jumper located in the Distillation and Refining (D&R) plant and described in Citation 1, Instance 2, was disconnected from the conduit.
3. Two sections of conduit described in Citation 2, located in the South ISOMAX unit, were damaged.
4. An unused opening on the end of a conduit in the D&R plant lacked a cover and was not plugged.
5. A rigid conduit body in the South ISOMAX Unit at Furnace 305, and described in Citation 3, Instance 1, was missing a cover.

² In their answers to the Board's order of reconsideration, neither party disputed the ALJ's rulings in Citation 5 and Citation 7. The Board finds no reason to disturb the citations, and does not do so in this Decision After Reconsideration.

6. A rigid conduit body in the D&R Unit, located approximately 15 feet above the ground, and described in Citation 3, Instance 2, was missing a cover.
7. The area around and behind the combination eyewash unit (pictured in Exhibit 20A) was not painted a bright color.
8. A maintenance turnaround occurred in South ISOMAX H2 A train beginning on March 1, 2010.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered both the Employer's and the Division's answers to its order of reconsideration.

As a threshold matter, we address the Employer's arguments regarding exposure to the alleged hazards described in all citations. As part of the Division's initial burden of proving the violation of a safety order, it must show employee exposure to the allegedly violative condition. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976 Decision After Reconsideration (Apr. 24, 2003), citing *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).) Direct evidence of employee exposure to a violative condition is not required; circumstantial evidence may be used to demonstrate that employee exposure is more likely than not. (*Benicia Foundry & Iron Works, Inc.*, supra, citing *C.A. Rasmussen, Inc.*, Cal/OSHA App. 96-3953, Decision After Reconsideration (Sep. 26 2001).) Employer contends that the Division has failed to meet this burden and that the ALJ erred in failing to address the issue of employee exposure.

The Division's Associate Safety Engineer, Robert Salgado (Salgado), testified to walking through the Employer's facility approximately 25 times during the course of the inspection. (Hearing Transcript 1, 97.)³ Salgado testified to the plant being in operation, and to seeing employees at work, during these visits.⁴ This operative status, along with the testimony of Salgado and Associate Safety Engineer Michael Doering (Doering) regarding employees working in the units discussed in the citations, are evidence that employees would, more likely than not, be exposed to the hazards created by the alleged violative conditions. (See, *The Home Depot U.S.A., Inc.*, Cal/OSHA App. 99-690, Decision After Reconsideration (Mar. 21, 2002) [Indirect evidence

³ References to the hearing transcript are by day (HT1 through HT9) and page.

⁴ Division witness Michael Doering, an Associate Safety Engineer in the process safety management (PSM) unit, also conducted an inspection of the plant. His testimony is largely relevant to citations 4, 6, and 8.

demonstrating that employee exposure is more likely than not may be used.]) From this testimony and evidence, the Board is able to find that there was, or would likely have been, employee exposure to the hazards created by the alleged violative conditions at issue at the time of the inspection.

Citation 1

Citation 1 alleges a violation of section 2395.78:

Regardless of the voltage of the electrical system, the electrical continuity of metal noncurrent-carrying parts of equipment, raceways, and other enclosures in any hazardous location as defined in Article 59 of these Orders shall be assured by any of the methods specified for services that are approved for the wiring method used. (Title 24, Part 3, Section 250-78.)

The citation contains the following alleged violative description:

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

1. An electrical conduit and connection fitting installed under the first deck of Jet Stripper C-732, located in North ISOMAX adjacent to turbine pump 737, were completely separated from the conduit junction body. As of September 20, 2012, the vertically mounted rigid metal conduit (RMC) an exposed wiring remained unrepaired.
2. A bonding jumper was completely detached from a fixed grounding lug that was securely threaded to the connector on the end of a Liquid-Tight Flexible Metal Conduit (LFMC.) As of September 27, 2012, the loose bonding wire remained disconnected from the electric conduit serving controller #FV415 and associated equipment operating within D&R, Plant 37.
3. Two sections of flexible metallic conduit (FMC) at ground level in front of tubes #33 and #66 on the fourth deck of South ISOMAX, F-350, A-Cell/A -Train, sustained physical damage that left the interlocked helical coiling strips separated and stretched to the point where their bonding and grounding capabilities were significantly impaired. As of October 19, 2012, the damaged conduit and exposed wiring remained unrepaired.

The Standards Board regulation incorporates a section of the State Building Standards Code.⁵ Employer argues that the ALJ was correct in finding that “there is no section 250-78” and therefore, the citation should be vacated. The ALJ and Employer were correct in noting that the current California Building Code does not include a section 250-78. (Decision, 6; Employer Response to Order of Reconsideration, 17.) The cited safety regulation was last amended in 1986, and section 250-78 is not incorporated into the most recent version of the state Building Code. The ALJ and Employer, however, were incorrect in asserting that the citation should be vacated because the cited regulation no longer exists in the current version of the Building Code. Where the legislature (or in this case, the Standards Board) has declined to take action to incorporate an amended version of regulations that are incorporated by reference in a statute or regulation, the superseded version of the regulation must continue to be followed. (See, *Heyen v. Safeway Inc.* (2013) 216 Cal. App. 4th 795, 827.) Following the above rule of statutory construction, the Board will interpret and apply the safety order— including the relevant provision of the now historical building code—to the evidence in the record.

The superseded building code regulation, Title 24, Part 3, Section 250-78, reads as follows:

250-78. Bonding in Hazardous (Classified) Locations. Regardless of the voltage of the electrical system, the electrical continuity of noncurrent-carrying metal parts of equipment, raceways, and other enclosures in any hazardous (classified) location as defined in Article 500 shall be assured by any of the methods specified for services in Section 250-72(b) through (e) that are approved for the wiring method used.

In turn, this leads to the superseded section 250-72(b) through (e):

250-72. Method of Bonding Service Equipment. Electrical continuity at service equipment shall be assured by one of the methods specified in (a) through (e) below.

(a) Grounded Service Conductor. Bonded equipment to the grounded service conductor in a manner provided in Section 250-113.

⁵ The purpose of references to the Building Code is explained in section 3202 of the safety orders, which states as follows: NOTE: Identification of Building Regulations. The basic building regulations for employments and places of employment contained in Title 24, State Buildings Standards Code, California Administrative Code are part of these safety orders. Pursuant to Health and Safety Code Section 18943(c), such building regulations are identified in these safety orders by the addition of a reference to the appropriate section of the State Building Standards Code (Title 24), which is added to the end of the safety order section: (Title 24, Part X, Section XXXX.)

- (b) Threaded Couplings. Threaded couplings and threaded bosses on enclosures with joints shall be made up wrenchtight where rigid metal conduit and intermediate metal conduit are involved.
- (c) Threadless Couplings and Connectors. Threadless couplings and connectors made up tight for rigid metal conduit, intermediate metal conduit and electrical metallic tubing. Standard locknuts or bushings shall not be used for the bonding required by this section.
- (d) Bonding Jumpers. Bonding jumpers meeting the other requirements of this article shall be used around concentric or eccentric knockouts that are punched or otherwise formed so as to impair the electrical connection to ground.
- (e) Other Devices. Other approved devices, such as bonding-type locknuts and bushings.

The Division has the burden of proving a violation of the cited safety order by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) As the ALJ stated in his Decision, in order to prove a violation, the Division need only demonstrate that one of the three Instances charged by the citation is violative of the safety order. (*Petersen Builders, Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration, (Jan. 24, 1992), fn. 4.)

The Division's witness, Associate Safety Engineer Robert Salgado (Salgado), testified to his observations during the course of his inspection related to Citation 1, Instance 1. He first explained that the refinery is a hazardous location as defined by the safety orders, and process refining plants are generally categorized as Class I and Class II locations. As part of his investigation, Salgado was provided with a map of the Employer's refinery that designated various areas of the plant at different hazard levels, including Class I, Divisions 1 and 2 in many areas, based upon the activities and chemicals in use.⁶ (HT1, 84-86; Ex. 8.) Salgado explained that because of the amount of

⁶ Section 2540.1 subdivisions (a) and (b) read as follows: (a) Applicability. This Article covers the requirements for electric equipment and wiring for all voltages in locations that are classified depending on the properties of the flammable vapors, liquids or gases, or combustible dusts or fibers which may be present therein and the likelihood that a flammable or combustible concentration or quantity is present. Hazardous (classified) locations may be found in occupancies such as, but not limited to, the following: Aircraft hangers, gasoline dispensing and service stations, bulk storage plants for gasoline or other volatile flammable liquids, paint-finishing process plants, health care facilities, agricultural or other facilities where excessive combustible dusts may be present, marinas, boat yards, and petroleum and chemical processing plants. Each room, section or area shall be considered individually in determining its classification.

(b) Classifications.

(1) Class I locations. Class I locations are those in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitable mixtures. Class I locations include the following:

vapor present in some areas, even using a camera or other electronic device may ignite a spark. (HT1, 86.)

Salgado testified that Instance 1 involved a vertically mounted rigid conduit⁷ that he viewed on September 20, 2012. According to Salgado, “the end of it would be a connector into a box with a circuit in it, those three wires. The conduit broke from its connector completely, was severed, and slid down somehow exposing the wiring.” (HT1, 106; Ex. 5.) Salgado explained that the conduit piece should have been screwed in, but the location where it would screw in had completely broken off. (HT1, 107.)

In his testimony, Salgado described the location of the conduit. He had been informed by an employee of Employer⁸ that this circuitry was for Jet

(A) Class I, Division 1. A Class I, Division 1 location is a location:

1. In which ignitable concentrations of flammable gases or vapors may exist under normal operating conditions; or
2. In which ignitable concentrations of such gases or vapors may exist frequently because of repair or maintenance operations or because of leakage; or
3. In which breakdown or faulty operation of equipment or processes might release ignitable concentrations of flammable gases or vapors, and might also cause simultaneous failure of electric equipment.

[...]

(B) Class I, Division 2. A Class I, Division 2 location is a location:

1. In which volatile flammable liquids or flammable gases are handled, processed, or used, but in which the hazardous liquids, vapors, or gases will normally be confined within closed containers or closed systems from which they can escape only in the event of accidental rupture or breakdown of such containers or systems, or as a result of abnormal operation of equipment; or
2. in which ignitable concentrations of gases or vapors are normally prevented by positive mechanical ventilation, and which might become hazardous through failure or abnormal operations of the ventilating equipment; or
3. that is adjacent to a Class I, Division 1 location, and to which ignitable concentrations of gases or vapors might occasionally be communicated unless such communication is prevented by adequate positive-pressure ventilation from a source of clean air, and effective safeguards against ventilation failure are provided.

[...]

⁷ Section 2300 of the Electrical Safety Orders in its definition of “Conduit” states simply, “See Raceway”. The definition of a “Raceway” reads as follows: An enclosed channel of metal or nonmetallic materials designed expressly for holding wires, cables, or busbars, with additional functions as permitted in these orders. Raceways include, but are not limited to rigid metal conduit, rigid nonmetallic conduit, intermediate metal conduit, liquid-tight flexible conduit, flexible metallic tubing, flexible metal conduit, electrical nonmetallic tubing, electrical metallic tubing, underfloor raceways, cellular concrete floor raceways, cellular metal floor raceways, surface raceways, wireways, and busways.

⁸ Salgado testified that during his inspections he was generally accompanied by several employees of Employer— usually a head operator for the unit he was inspecting on that day, a health and safety department representative, and sometimes other refinery staff, such as representatives from Employer’s in-house fire department. (HT1, 95, 97.) Salgado was able to identify Meaghan Horton (Horton), one of Employer’s safety representatives, as having been present on his September 20 walkthrough, and testified that she was the main coordinator of his inspections every time he visited the plant. (HT2, 190.)

Stripper Number 1, or a location where after certain processing has been accomplished the product is refined into jet fuel. According to Salgado's testimony, this conduit was energized. (HT1, 107, 109, also see Ex. 5.) Salgado discussed the conduit with Daniel Canter (Canter), a head operator with Employer, who noted that it was a broken conduit and agreed it was a possible ignition source. Canter, according to Salgado, gave the repair "priority 1" meaning that it needed to be repaired "right away." (HT2, 199).⁹

Instance 2 is a detached bonding jumper¹⁰ in the Distillation and Refining (D&R) unit. Salgado testified regarding a photo he took of the area where the bonding jumper had detached—the connector has a small lug, or a piece of metal with a screw on it. (Ex. 6; HT1, 113-114.) The wire was control wiring, according to Salgado, serving the pneumatic actuator at the flow controller, called FB415, in Employer's Plant 37. (HT1, 116-117.)¹¹

Salgado also testified regarding Instance 3: "Instance 3 was two sections of conduit in the ISOMAX, south ISOMAX unit. They were damaged. They were damaged to the point where the interlocked helical coiling strips of that

⁹ Employer objects to Salgado's testimony regarding conversations with Chevron employees as inadmissible hearsay. The Board is not bound by the formal rules of evidence; see section 376.2, which states in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded." (See also, Labor Code section 6612.) Furthermore, the Board finds that the head operators and safety officials designated to accompany the inspector on his inspection were designated representatives of management. Salgado's un rebutted testimony is that the Division requested a management official from the "senior supervisory level" to accompany inspectors on their walkthroughs; generally a head operator, who functioned in a supervisory capacity over distinct units in the plant, was procured to accompany the inspectors. (HT2, 207-08.) Pursuant to Evidence Code section 1222: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court's discretion, as to the order of proof, subject to the admission of such evidence." Also see Evidence Code section 1220: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

¹⁰ As defined by section 2300 of the Electrical Safety Orders, a bonding jumper is: A reliable conductor to assure the required electrical conductivity between metal parts required to be electrically connected.

¹¹ Salgado testified that he took the photo during his inspection on September 27, 2012, where he was accompanied by head operator Paul Peterson (Peterson) and operator Clara Ballard. (HT2, 201.)

conduit separated from each other and they were damaged upon first visual look at them.” (HT1, 117; Ex. 7.)¹²

The ALJ correctly found in his Decision, and the Board concurs, that section 2395.78 applies to “any hazardous location” as defined in Article 59 of the safety orders. (Decision, 5; see footnote 6.) Salgado’s testimony, which relied on a diagram of the refinery provided by the Employer, establishes that the locations of the various electrical systems discussed in Citation 1 were “hazardous locations” as defined by the referenced safety order. Furthermore, based on all of the credible testimony and photographic evidence entered into the record, the Board is able to conclude that the detached, damaged, and broken components of Employer’s electrical system constitute a violation of section 2395.78.

The Division classified Citation 1 as serious. Under Labor Code section 6432 subdivision (a), a rebuttable presumption of a serious violation exists when the Division establishes that there is “a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.”¹³ The Board has interpreted the phrase “realistic possibility” to mean a prediction that is within the bounds of human reason, and not pure speculation. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Salgado testified to the risks associated with the hazards described in the three Instances. Salgado testified that there was the potential for fire if the plant’s atmospheric conditions were right—for example, if there was a concentration of flammable gases or vapors in a work area, and a spark from the damaged electrical system were to occur due to static electricity. (HT1, 131.) He also explained that if there’s a missing bond between the metal parts in the electrical system, a difference potential can be created, resulting in sparks that can touch off a fire. (HT3, 414.)

Discussing the hazards of Instance 3, Salgado noted that the electrical wiring itself is “crucial and critical” to the processes that are ongoing at Employer’s worksite. Salgado explained, “If you have operators at the control center monitoring equipment 24/7, they’re monitoring inner locks, alarms, sensors, detectors, temperature gauges, pressure gauges, and they’re looking

¹² Salgado also testified that this inspection occurred on October 19, 2012, and that he was accompanied by management representative Horton. (HT2, 201-202.)

¹³ Serious physical harm is also defined in the Labor Code, at section 6432(e): [...]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.” (Labor Code section 6432 subdivision (e).)

for all of the signals that are being reported back and they're going through this wire here. If that wire is damaged and there's a failure of that connection [...] They're not going to be able to operate that or they're not going to be able to get signals. And it could be a critical alarm signal that's not reporting back. So the concern was the electrical wiring for the process.” (HT1, 132.)

On cross-examination, Salgado conceded that he did not know if the wiring for these electrical components alone were grounded. However, he found the damaged electrical components to constitute a hazard, given the nature of the working environment where heat and flammable materials are present. Despite a system being properly grounded, if bonding is not continuous, a fire hazard is still present. (HT3, 469.) He also identified the possibility of arcing or sparking due to failure of a damaged electrical component, or contact between metal parts in the refinery environment as risks to employees. (HT3, 412-13.) According to Salgado, lack of appropriate bonding between metal parts creates a difference potential that may allow for creation of a spark. (HT3, 414.) The Division was able to demonstrate that there exists a realistic possibility of serious injury or death created by the actual hazard of electrocution, electrical sparking, or fire, due to the violation of the regulation. Employer failed to rebut the presumption of a serious hazard. An employer may rebut the presumption through a showing that it did not know, or could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer presented no witnesses or testimony to aid in its rebuttal case, and its cross-examination of the Division’s witness did not overcome the Division’s initial showing.¹⁴ (Labor Code 6432(c).) The Board overturns the finding of the ALJ and reinstates the penalty of \$6,750 proposed by the Division.

¹⁴ The Labor Code at section 6432(c) specifically provides a means by which an employer may rebut the presumption that a violation is not serious. The section reads as follows: (c) 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. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Citation 2

Citation 2 alleges a serious violation of section 2473.1 subdivision (b), Conductors Entering Boxes, Cabinets or Fittings:
[...]

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

The alleged violative description reads as follows:

On or before October 27, 2012 the Employer failed to effectively plug an unused opening on the end of a Rigid Metal Conduit (RMC) fitting installed within a hazardous location at D&R, Plant 37, feed to temperature controller #38TI091B, C590, tray #1.

Salgado testified that he observed an unused opening on the end of a rigid metal conduit. The opening was not properly closed or covered. Salgado testified that, rather than provide an appropriate cover, the open conduit had been repaired with tape. (Ex. 11.) The wires in the rigid metal conduit fed a temperature controller that was in operation on the day of inspection. (HT1, 144, 156; Ex. 11.) Salgado testified that he was able to establish that the temperature gauge was powered and operable in part because the temperature gauge was showing a reading. He also knew the temperature controller was in operation at the time of the inspection both from the noise and heat being generated around him, and because it was confirmed by the head operator of the unit. (HT2, 210; HT1, 144.)

Salgado testified that the lack of a proper covering for the rigid metal conduit created a risk of corrosion and physical damage to the electrical wires within the wires contiguous to this unused opening, both from moisture as well as exposure to the elements.

Salgado explained that there were two safety hazards created by potential water build-up in the open conduit. The first was corrosion damaging the wiring that was contiguous to the conduit. (HT2, 209.) Salgado testified that if any of the circuits were damaged and the equipment malfunctioned, it could create mechanical issues that result in the creation of an arc or spark. (HT3, 412.) He also noted that the opening was standing vertically, allowing any rain, chemical spill or other matter to enter the hole and fill the conduit up, which could potentially cause the circuit to fault. (HT2, 217.) The second issue was the ability for hot gasses to travel out the unclosed end, in the event of an explosion in one of the enclosures where there is switching and arcing of contactors. (HT2, 209-210.)

The evidence supports a finding that the metal opening in the conduit was not properly closed, constituting a violation of section 2473.1 subdivision (b).

The Division classified the citation as serious, but the Division has not shown a realistic possibility of death or serious physical harm from the actual hazard created by the failure to properly cover the unused opening in this metal conduit. The Division does not dispute that the opening does not house any wires, but is an unused opening that is connected to a conduit system. The ALJ found, and the Board agrees, that the metal fitting which may power the temperature controller does not necessarily appear to be directly connected to the improperly open rigid metal conduit. (Ex. 11.) The Division failed to provide enough credible evidence to meet its burden to demonstrate that there is a realistic possibility that water build-up or vapors entering this unused opening where no wires were present would result in damage to the electrified wiring system. The Board affirms the ALJ's re-classification of the citation to general and imposition of a \$750 penalty for the violation.

Citation 3

Citation 3 alleges a serious violation related to electrical installations at Employer's facility. Specifically, it cites to section 2473.2 subdivision (a) Covers and Canopies:

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

The alleged violative description includes two Instances:

On or before August 30, 2012, the Employer failed to provide covers on electrical conduit bodies installed in hazardous locations throughout the refining plant. The following instances were not corrected as of the dates indicated below.

1. As of 09/19/12, the Employer failed to replace a missing cover on a rigid conduit body installed in a hazardous location containing natural/methane gas on the fourth floor deck of South ISOMAX, Furnace 305, C-CELL.

2. As of 9/27/12, the Employer failed to replace a missing cover on a rigid conduit body installed in a hazardous location at the Distillation and Refining unit, located 15 feet above the ground next to furnace #F-447.

Salgado testified regarding Instance 1, a missing cover on a rigid conduit body located on the fourth deck of the South ISOMAX Unit at Furnace 305.¹⁵ Salgado observed a conduit body with a cable and the cover missing. He believed the wiring was instrumentation-type wiring that would have been some part of the process, although he could not determine if it was for monitoring the temperature, a sensor, alarm, pressure gauge, or an inner lock.¹⁶

Salgado described Instance 2, an alleged failure to replace a missing cover. He examined this rigid conduit body that was missing a cover on September 27, 2012, at a location approximately 15 feet above the ground floor. (HT2, 225.)¹⁷ Although it was an elevated location, Salgado testified that he had seen employees accessing these upper deck areas, and that he was also aware that the areas were subject to monthly inspections. (HT2, 227.) He had seen “wiring hanging out of one side of one conduit body, which would mean a cover would be missing. And then over to the right it has a conduit with some wiring exposed and the cover missing.” (HT2, 225; Ex 15.)¹⁸ Salgado stated it looked like instrumentation wiring and wiring for a circuit, perhaps motorized equipment or lighting.

The testimony and evidence supports the ALJ’s finding that the conduits described in Items 1 and 2 were without covers. A violation of the safety order is found.

The Division classified Citation 3 as serious. As discussed above, to establish a rebuttable presumption that a serious violation exists, the Division must demonstrate a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. (*Orange County Sanitation District*, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).) Salgado testified that the violative conditions were found in

¹⁵ Salgado testified that the unit was in operation on the day of his inspection, September 19, 2012 and that he was aware of its operation in part because of the heat being generated. (HT2, 224; Ex. 14.) He recalled Horton being present during the inspection. (HT2, 203.)

¹⁶ According to Salgado’s un rebutted testimony, the process Salgado observed was natural gas in the production of hydrogen operating at a pressure of 340 pounds-per-square-inch (PSI), and at a temperature of 900 degrees Fahrenheit. It is highly volatile and flammable. (HT1, 121.)

¹⁷ Salgado testified that head operator Peterson had accompanied him on his inspection that day. (HT2, 204.)

¹⁸ Salgado incorrectly wrote “Citation 2” on this photograph during the course of his inspection, now marked as Exhibit 15, before it was admitted into evidence. (HT3, 346.)

Class 1, Division 2 locations, as defined by section 2540.1., making the work area more hazardous than the usual workplace due to the presence of various process fuels, including flammable natural gas, and high temperatures. He testified that the actual hazard created by the failure to provide the required covers was moisture reaching the wiring and causing damage. This could lead to failure of the wiring as well as the components served by the wiring. (HT2, 228.) The Board credits Salgado's testimony on this point. Employer failed to rebut the presumption of a serious violation. In so finding, the Board reinstates the \$6,750 penalty.

Citation 4

Citation 4 concerns an eyewash station at Employer's worksite, and is classified as serious by the Division. The regulation cited is section 5162 subdivision (a), which reads as follows:

(a) Plumbed or self-contained eyewash or eye/facewash equipment which meets the requirements of sections 5, 7, or 9 of ANSI Z358.1-1981, Emergency Eyewash and Shower Equipment, incorporated herein by this reference, shall be provided at all work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption. Water hoses, sink faucets, or showers are not acceptable eyewash facilities. Personal eyewash units or drench hoses which meet the requirements of section 6 or 8 of ANSI Z358.1-1981, hereby incorporated by reference, may support plumbed or self-contained units but shall not be used in lieu of them.

The alleged violative description is as follows:

As of September 26, 2012, an eyewash/shower station located near V2606 in SRU, where exposure to corrosive or severely irritating liquids is possible, had been painted dark green, the same color as surrounding beams, making it difficult for an injured worker with corrosive or irritating material is [sic] in his/her eyes to access the eyewash.

Exhibit 21 is the superseded ANSI standard referenced in the safety order. At 9.4.2, ANSI Z358.1 states:

Each combination unit location shall be identified with a highly visible sign. The area around or behind the combination unit, or both, shall be painted a bright color and shall be well lighted.

The Division's witness, Associate Safety Engineer Michael Doering (Doering), testified to observing an eyewash station in the refinery, and presented photographs taken of the location. The area around and behind the eyewash station was painted a dark green color, the same color as surrounding poles in the large area that is filled with various kinds of equipment and piping used in Employer's process. (Ex. 20A.) The Division argues that the combination eyewash and shower station was "camouflaged" by its dark color that matched the surrounding area around and behind it. (HT4, 635.) Doering explained that there was an area behind the pole that the eyewash station sign was mounted on, that it would be "easy to label or color or paint a different color so that it can be seen." (HT5, 887-888.) Because the area around or behind the eyewash station was not painted a bright and distinct color, it did not clearly stand out from its surroundings, and a violation of the standard is found.

The Division alleges that the violation is serious. In support of the classification, Doering testified that a chemical used in this area of the worksite, sodium bisulfite, is used in various chemical processes to extract other chemicals, and creates a corrosive and severely irritating acid in contact with water. (HT4, 628-629.) Doering did not know exactly how the chemical was used in this area of Employer's plant. He testified that "There is a history of leaks in that area, not necessarily with sodium bisulfite, but sodium bisulfite was stated to be present in pipes in that area." (HT5, 922.) Another eye irritant, hydrogen sulfite, was also in the area. (HT6, 1040-41.) Doering described past experience with employees being injured through eye contact with a corrosive chemical. According to Doering, "If it is difficult to see exactly where the eyewash is, it will take you more time to get there. The more time that it takes to get there, the more potential damage there is to the eyes." (HT4, 633, 635.) The Hazardous Substance Fact Sheet for one chemical used in this area of the refinery establishes that the chemical can severely burn skin and eyes. (Ex. 22.)

The Division has demonstrated that there is a realistic possibility that serious physical harm could result from the actual hazard created by the violation. (Labor Code section 6432). As discussed above, realistic possibility has been interpreted by the Board to mean that the occurrence is within the bounds of reason, and not purely speculative. (*International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015), citing *Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) There is a realistic possibility that serious physical harm may result from the actual hazard of an employee being unable to locate the eyewash station in a timely manner, due to the failure to have the area around the eyewash brightly painted.

In rebuttal, Employer posits that the chemical is available on the market for household use. Whether or not a chemical is also available as a household product is irrelevant, as the Board has found in prior Decisions. (See, *Big Lots*, Denial of Petition for Reconsideration, 11-1929 (Mar. 25, 2013).) To rebut the presumption of a serious violation, an employer may demonstrate that it “did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.”¹⁹ (Labor Code section 6432 subdivision (c).) Employer has failed to rebut to presumption. We find that there is a realistic possibility of an employee suffering a serious eye injury due to the actual hazard of an employee being unable to quickly locate the eyewash station. In so finding, we reclassify the citation as serious and reinstitute the penalty of \$6,750.

Citation 6

Citation 6 alleges a willful serious violation of section 5189 subdivision (l), Process Safety Management of Acutely Hazardous Materials, with an accompanying proposed penalty of \$70,000.²⁰ The ALJ reclassified the citation to general.²¹

The safety order, section 5189 subdivision (l), states:

[...]

(l) Management Of Change.

¹⁹ Labor Code section 6432 subdivision (c) reads in full as follows:

(c) 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. The employer may accomplish this by demonstrating both of the following:

(1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

²⁰ Process Safety Management is defined by section 5189 as: The application of management programs, which are not limited to engineering guidelines, when dealing with the risks associated with handling or working near acutely hazardous materials, flammables, or explosives.

²¹ The Division does not dispute the reclassification to general, but argues that the citation should be upheld as willful general. Employer argues that the Board should vacate all citations at issue.

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

[...]

The alleged violative description includes three Instances:

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

1. As of September 12, 2012, MOC (Management of Change) number 16210, an injection fitting seal of a leak in a 3 inch block valve controlling flow at the east natural gas split at furnace F-305C on the 4th deck in South Isomax was in place 13 months beyond its MOC expiration date. The necessary time period for the change was not implemented.
2. As of September 27, 2012, MOC number 18408, a globe valve injection fitting on the 1S/C to 2 S/C on a 400 degree hydrocarbon line in the D&R 4 Crude plant was 2 years and 7 months beyond its MOC expiration date. The necessary time period for the change was not implemented.
3. As of September 27, 2012, MOC number 21513, an injection fitting for valve packing on a motor operated valve controlling the flow of 600 psi flammable product at the base of V-4030A in the D&R PenHex area had been in place since January, 2010. It was not replaced, as recommended in the MOC, at the next opportunity. In the technical basis for the change, the maximum time period before replacement was stated to be 5 years. But it was not replaced at the turnaround in January 2011 and was given until December 31, 2017, a period of 8 years. Neither the maximum time period, nor the instruction to replace “at the next opportunity,” was implemented.

The Division does not contend that there is a violation related to the Employer's Management of Change (MOC) procedures as documented, but instead likens the violation to an Illness and Injury Prevention Program (IIPP) violation, where the Board has stated that while an employer may have an adequate plan or program in writing, failure to implement the written plan constitutes a violation of the safety order. (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) Here, the Division contends that Employer's MOC program as designed is adequate, but Employer has failed to engage in timely and appropriate repairs as required by its own MOC program, and by the regulation.

To assist in meeting its obligation under the MOC regulation, Employer has created a database for managing what are termed "MOCs"—various repairs and maintenance events.²² A mechanical engineer with Employer, Ron Post (Post), testified regarding the functions of the MOC database. The Employer's MOC database tracks open MOCs from beginning to closure. According to Post, when a MOC is opened, various groups of employees within Employer's facility, including engineering, process engineering, operations, metallurgy, and the like, are solicited for input on the MOC. A final consensus is then determined at an in-person meeting, and approvals gathered for a work order to be issued with the requisite instructions as to how to proceed in the needed work. (HT7, 1197.)

Citation 6 and Citation 8 both concern MOCs related to leak seals. The process safety management safety order cited by the Division in Citation 6 requires establishment and implementation of written procedures to manage changes to process chemicals, technology, equipment and facilities. (Section 5189.) The MOC documents demonstrate that leaks had occurred in valves at Employer's refinery. Nonetheless, Employer argues that the Division has not demonstrated employee exposure, as it has not introduced readings or measurements of the volatile organic compound (VOC) leaks that are at issue in these MOCs. Employer theorizes that the leaks were so small as to make them only an air pollution concern, rather than a worker health and safety issue.

Generally, the Division need not show actual exposure to the hazards of process chemicals, technology, and equipment that the safety order is designed to guard against, but only "that it is 'reasonably predictable by operational necessity or otherwise (including inadvertence) that employees have been, are, or will be in the zone of danger.' [Citations]... The zone of danger is that area surrounding the violative condition that presents the danger to employees that

²² Exhibit 36 contains pages from the Employer's MOC database (see, for example, Bates-stamped page DOSH-314332370-001840, as well as the Employer's corresponding work order, Bates stamped -001841, and the Division's chart for the MOC, Bates stamped -001839.) (HT4, 650.)

the standard is intended to prevent. [Citations].” (*Benicia Foundry and Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) As discussed earlier in this Decision After Reconsideration, the testimony of the Division’s witnesses establish that employees work in the units where these temporary repairs are located. That there has not yet been an accident, injury, or exposure to a dangerous process fluid is not dispositive.

The Division’s witness, Doering, testified that temporary repairs were given expiration dates by Employer because the efficacy of a temporary repair will wane over time, and leaks resume. He noted that the repaired leaks in some areas were of flammable natural gas. (HT4, 669.) In other areas of the workplace, pipes contained hazardous chemicals such as benzene, which has a workplace exposure allowable limit of one part per million. (HT4, 671-22.) While the Division did not take measurements of levels of chemicals in the air in areas surrounding allegedly violative temporary leak seals and leaks, Doering testified to reading one tagged clamp that had been measured as leaking natural gas at 896 parts per million, a rate that he considered significant to worker safety and health. (HT4, 743-45.) The Board credits Doering’s testimony as it relates to the issue of employee exposure. Vapors emitted by these leaks contain chemicals known to be carcinogens, or that are flammable; it is not unreasonable to presume that while very small vapor leaks may not pose a serious health hazard, these vapor leaks have potential to become large and more serious vapor leaks, or actual fluid leaks. The Division has met its initial burden of demonstrating exposure to an allegedly violative condition.

Both the Division and the Employer presented testimony and evidence related to the three Instances cited by the Division. Employer’s witness, Post, testified on Instance 1, also labeled MOC 16210. The Instance involved a repair to a block valve, which is used to open or close flow through sections of piping. (HT4, 656; HT7, 1241.) Post testified that the valve was leaking low levels of vapor and was repaired with an injection of a packing material to seal the leak. The MOC had an issue date of August 8, 2006 and a listed “expiration date” of August 8, 2011. Post also testified that the expiration date field on the form is generally a date that is past the implementation of the work or any expected actions the Employer anticipates taking. (HT7, 1243.) According to Post’s testimony, the word “temporary” in the database printout refers not to the repair but is a type of MOC. By categorizing the MOC as “temporary”, the MOC was tagged for tracking in the future; by keeping the MOC open, Employer is able to use the MOC database to “force” a future review of the condition of the valve. (HT7, 1243-1244, 1211.) Post testified that in the first quarter of 2010, a maintenance shutdown occurred in the South ISOMAX unit, and it would be routine for 50 to 300 valves to be repaired during a

turnaround.²³ A large work order from the turnaround included the valve.²⁴ (HT7, 1256.)

The Division disputes this description of the “temporary” categorization of MOCs. According to the Division’s witness, Doering, the replacement in Instance 1 was not a permanent replacement, but was a temporary repair with a known expiration date. (HT5, 961, 964.) Here, to stop a natural gas leak in the valve, Employer injected the valve with sealant. (HT4, 656-57, Ex. 35.) Doering explained that there is a time period during which the Employer’s own experts consider a repair to be acceptable, or safe; the repair materials last only so long before wearing away, causing the leak to resume. (HT4, 659, 669; HT5, 999.) The materials also wear down from opening and closing the valve, pressure, and expansion and contraction due to temperature changes in the valve. (HT5, 999-1000.) The repair has a limited life determined by Employer’s staff of engineers and experts, and in this case, the expiration date of the leak seal repair was entered as August 8, 2011 in Employer’s database. (HT4, 655; Ex. 36, Bates number -001840.) Because a temporary repair can only be considered a stopgap, a “permanent” repair should be made by the expiration date. However, Doering testified that at the time of his inspection, this temporary repair was still in place. He calculated this as 13 months past the expiration date. (HT4, 661.)²⁵

The Board does not find the Employer’s explanation as to why Instance 1 was listed as “temporary” to be persuasive. This justification for labeling certain repairs as temporary is contrary to the information contained in Employer’s own database, which states that “The 3” valve can not [sic] be repaired on the run. Will need a shutdown to repair the valve[.]” On the Employer’s leak seal checklist, comments from a Chevron Inspector again state, “[V]alve should be repaired or replaced at the next maintenance opportunity.” Further down the form, a Chevron Engineer writes in the comments box, “For a temporary fix, shoot valve with sealant to try and stop leak or place a clamp on the valve. Valve will need to...” (Ex. 36.) The consensus among Employer’s MOC staff in 2006 appeared to be that this repair was a makeshift fix, and a more permanent repair would need to be made when a turnaround opportunity allowed. Nor does the database reflect

²³ The terms “shutdown” and “turnaround” are used interchangeably by the parties.

²⁴ Post cites Employer’s Exhibit C, pages Bates stamped -0000671 through -0000675 in his testimony, as the basis for his testimony that MOC 16210 was repaired at the turnaround. Exhibit C Bates stamped document -0000663 is a “health and safety evaluation extension” for the MOC, with comments dated September 13, 2012, or the day after Doering’s inspection. The leak seal repair is described as “in good condition”. The leak seal was not removed until after issuance of the citation, on March 7, 2013, according to Employer’s exhibit. (Ex. C, Bates number -0000668.)

²⁵ Doering testified regarding the hazard associated with allowing the temporary repair to stay in place past its expiration point. He asserted that over time the repair material wears away, and the leak will reappear. In the case of this injection fitting which sealed a leak in a block valve that controls the flow of natural gas, the leak would be flammable. (HT4, 667, 669.)

any repair made at the turnaround in the first quarter of 2010; from the MOC record and Doering's inspection, the evidence preponderates to a finding that the temporary repair was not addressed at that time. Permitting the leak seal injection in Instance 1 to remain in place past the Employer's own listed expiration date of August 8, 2011 constituted a violation of the Employer's MOC procedures, and is therefore a violation of section 5189 subdivision (l).

Instance 2, MOC 18408, concerned a valve leak seal in the 4 crude plant, and was issued on April 23, 2008. (HT7, 1260-61.) According to Post's testimony, the MOC was classified as temporary for tracking purposes. (HT7, 1260-61.) He testified that the leak was a globe valve that "did not close 100 percent"; the globe valve was on one end of the system, and process material was leaking by the valve within the contained system, rather than into the environment outside of the system. (HT7, 1268.) The repair involved injecting sealant within the globe valve to complete the seal, and was completed on May 23, 2008. (HT7, 1273.)

Doering testified regarding Instance 2, which he observed on September 27, 2012. (HT4, 683.) The temporary repair to the globe valve was given an expiration date of February 1, 2010 in Employer's internal database, but the temporary repair was still in place during his inspection. (Ex. 36, Bates number -001843; Ex 34.) A turnaround for the unit had occurred on October 7, 2011. (Ex. 37.) On cross-examination, Doering admitted that he had never seen the document titled "PSI Review Checklist," which stated that the globe valve had been replaced in kind during the 3rd quarter pit stop in 2009. (HT6, 1118; Ex. E, Bates number -0000716.)

The Board credits the Employer's testimony and evidence in Instance 2, and does not uphold the violation in this Instance. Post reviewed the valve addressed by MOC 18408 and testified that the photos in the Division's Exhibit 32 were not of MOC 18408's valves. Rather, the valves described were not globe valves, but twin seal valves, which were rare in that unit, and were not the valves described in MOC 18408. (HT7, 1280, 1286; Ex. 32.) The Division did not rebut this testimony, and the Board finds Post's testimony to outweigh that of the Division's. It appears that the Employer replaced the globe valve in kind during the 2009 pit stop, and the Division, in Instance 2, in the course of its inspection, inadvertently mistook this valve for another valve located in the unit.

Instance 3, MOC 21513, is a packing leak on a valve in the PenHex unit that was also classified as temporary by Employer. (HT7, 1295; Ex. 36.) Post testified that the Employer planned to install an injection fitting on the side of the valve and refresh the packing by using that injection fitting. (HT7, 1301.) Post testified that the MOC was issued January 27, 2010, and its expiration date was December 31, 2017. (HT7, 1297.) The work was completed on July 21, 2010. (HT7, 1301.) The MOC was left open for tracking and maintenance.

(HT7, 1302.) Although there was a turnaround of the PenHex plant in 2011, it was not a maintenance turnaround.²⁶ Employer nonetheless attempted to accomplish the maintenance work for the MOC during that turnaround. (HT7, 1303.) Post disagreed that the PenHex unit was in a maintenance shutdown status in September, 2012, the time of Division's inspection. (HT7, 1303.)

The Division's witness, Doering, testified regarding this injection of a valve where the injection fitting was still in place. Doering explained that the documents from Employer state that a piece of equipment can only remain on the shutdown list for five years before being repaired, but the valve was given a MOC life of eight years, an internal inconsistency. (HT4, 706-08; Ex. 36, Bates Number -001846, -001847.) Doering testified that at the time of his inspection on September 27, 2012, the unit where the valve was located appeared to be in a shutdown status, meaning that the valve was accessible for repair. (HT4, 711.)

The Division has not met its burden of proof in Instance 3. Employer's policy prohibits allowing certain MOCs to remain on the shutdown list for over five years before being repaired. The Division argues the equipment had not been repaired by the inspection date in 2012. However, Employer was able to demonstrate through exhibits and rebuttal testimony that MOC 21513 had been provided with temporary maintenance in 2010 and was scheduled for further repair at the next scheduled maintenance turnaround, which had not yet occurred in the PenHex unit at the time of the Division's inspection. Employer's actions did not yet constitute a violation of its MOC policy, as a maintenance turnaround had not occurred in the unit. We credit the Employer's testimony on the issue of the PenHex unit's turnaround, given Employer's greater expertise and familiarity with turnaround scheduling, and the Division's failure to introduce rebuttal testimony on this issue.

The Division has demonstrated a violation of section 5189 subdivision (1) by a preponderance of the evidence. The Division argues that the citation should be reclassified as willful general. The "willful" standard is defined by regulation at section 334 subdivision (e):

[...] a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware

²⁶ Doering testified regarding Exhibit 37, a turnaround list he recalled having been produced by a management official at Chevron. The creator of this turnaround list was not called to testify. This list only characterizes turnarounds as "major" and "minor" and does not specify which turnarounds involved maintenance activities. Post, a Chevron management official, testified that there are turnarounds that are not maintenance related, and that process material was not drained from the pipe or equipment during the 2011 PenHex turnaround, meaning that maintenance work could not be performed at that time. The Division did not rebut this testimony, and it is credited.

that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

The Court of Appeal has interpreted this language as creating two distinct tests by which the Division may establish willfulness: "(1) an employer intentionally violated a safety law or (2) an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it." (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.*, (2000) 80 Cal.App.4th 1023, 1034-1035, citing, *National Cement Co.*, Cal/OSHA 91-310, Decision After Reconsideration (Mar. 10, 1993); see also, *Tutor-Saliba-Perini*, Cal/OSHA App. 94-2279, Decision After Reconsideration (Aug. 20, 2001).)

The first test for willfulness requires "the Division to prove by a preponderance of the evidence that the employer committed a voluntary and volitional, as opposed to inadvertent, act, or, in other words, that the act itself was the desired consequence of the actor's intent, and that the employer was conscious that its act violated a safety order." (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.*, (2000) 80 Cal.App.4th 1023, 1037.) Based upon the testimony and evidence presented, the Board is able to conclude that Employer's failure to implement its written procedures was knowing and intentional.

Employer had information readily available in its computer database showing when the temporary repair in Instance 1 expired, but declined to replace deficient parts prior to the expiration of the temporary repairs. Expiration dates of repairs are not secret in Employer's MOC procedures. Multiple layers of management have knowledge that temporary repairs require permanent repair or replacement by certain dates; indeed, multiple meetings are called, documents are signed, and checklists are completed in the MOC process in order for temporary repairs to begin. Employer cannot claim ignorance of the expiration dates of these temporary repairs. Based on this knowledge, we hold that the first alternative test for a willful violation has been met.

The Division sustained its burden of showing the violation to be willful general. The penalty is recalculated as \$11,250.

Citation 8

Citation 8 alleges a willful serious violation of section 6845 subdivision (a): Piping, Fittings, and Valves, with a \$70,000 proposed penalty. The safety order reads as follows:

(a) The design, fabrication, and assembly of piping systems installed prior to July 26, 2006, shall comply with General Industry Safety Orders and ASME B31.3- 1990, Chemical Plant

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

The alleged violative description includes nine Instances, and states the following:

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

1. MOC number 20968, a clamp covering two flanges and a valve at the outlet of furnace F-340 in South ISOMAX, conveying hot (>600 deg F) natural gas. As of September 12, 2012, this was in place 2 years and 6 months past its last turnaround.
2. MOC number 18856, a valve packing injection fitting for a valve conveying natural gas to furnace F305 in South ISOMAX. As of September 18, 2012, this had been in place 30 months past its last turnaround.
3. MOC number 16210, an injection fitting in a block valve for the F 305 east split in South ISOMAX, conveying hot (>600 deg F) natural gas. As of September 12, and 18, 2012 [sic]. It had been in place for 6 years and was 30 months beyond the last turnaround.
4. MOC number 17395, a clamp covering the mating surface edge of two flanges for a feed gas orifice for furnace F 305 in South ISOMAX, conveying natural gas. As of September 12, 2012, it was still in place more than 5 years and 30 months past the last turnaround.
5. MOC number 19758, a clamp enclosing an elbow at Stanchion A6 overhead in the TKN plant of North Isomax, conveying nitrogen at up to 200 psi. As of September 20, 2012 [sic]. [sic] was still in place 2 years and 7 months past the past turnaround. [WITHDRAWN]
6. MOC number 21514, an injection fitting in a valve on a 6 inch line conveying flammable liquid/vapor at the base of V-4030A in D&R PenHex. As of September 27, 2012, was still present 11 months beyond the last turnaround maintenance opportunity.
7. MOC number 21434, a valve packing injection fitting at 40 MOV inlet block valve for drier V4030A in D&R, PenHex, conveying hydrogen. As of September 27, 2012, this was still present 11 months beyond the last turnaround maintenance opportunity.

8. MOC number 18408, a globe valve injection fitting at on the [sic] 1 S/C to S/C on the D-3-8312 line in D&R unit, 4 Crude plant, conveying hydrocarbon at 400 deg F, 300 psi. As of September 27, 2012, this fitting was in place 4 years, 5 months and was still present 11 months past the most recent turnaround.

9. MOC number 15197, consisting of 3 injection fittings, two for packing and one for a flange, on LT 92 top block valve to V4090, conveying C1 to C5 hydrocarbons and and [sic] chlorine. As of September 27, 2012, these three injection fittings were still present, 7 years later, and 1 year and 8 months past the most recent turnaround.

The Division argues that Employer has not complied with the API 570 publication referenced in the safety order—specifically, 8.1.4:

8.1.4 Nonwelding Repairs (On-Stream)

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

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

Procedures that include leak sealing fluids (“pumping”) for process piping should be reviewed for acceptance by the inspector or piping engineer. The review should take into consideration the compatibility of the sealant with the leaking material; the pumping pressure on the clamp (especially when repumping); the risk of sealant affecting downstream flow meters, relief valves or machinery; the risk of subsequent leakage at bolt threads causing corrosion or stress corrosion cracking of bolts; and the number of times the seal area is repumped.

Both parties are in agreement that the safety order incorporates American Petroleum Industry Piping Inspection Code (API) 570, but Employer argues that the Division is in error when it applies API 570 to the leak seals at issue in Citation 8. Employer argues that API 570 is applicable to piping systems and defects in pipes rather than the repairs to valves, valve stems, and

packing materials which primarily serve to mitigate small VOC leaks.²⁷ Employer's witness, Post, testified that the MOCs in Citation 8 did not involve what API 570 describes as "locally thinned" sections of pipe, or circumferential defects. (HT7, 1395-96.) He also testified that the repairs made in the Citation 8 MOCs were not mechanical integrity issues of the kind contemplated by API 570. (HT7, 1398.) In contrast, the Division argues that the plain language of API 570 is broad enough to encompass the temporary repairs made by Employer to valves or flanges, regardless of the size of the leaks, and that a VOC leak may become large enough to constitute a serious health and safety concern.

As background, we first look at terms that are defined by the section. "Pipe" is defined by the section simply as:

A pressure-tight cylinder used to convey a fluid or to transmit a fluid pressure and is ordinarily designated "pipe" in applicable material specifications. (Materials designated "tube" or "tubing" in the specifications are treated as pipe when intended for pressure service.)

A "piping system" is defined as follows:

An assembly of interconnected piping that is subject to the same set or sets of design conditions and is used to convey, distribute, mix, separate, discharge, meter, control, or snub fluid flows. Piping system also includes pipe-supporting elements but does not include support structures, such as structural frames and foundations.

When interpreting the language of a regulation, the Board strives to determine and give effect to the intent of the legislative body that authored it—here, the Standards Board and API. We first look to the ordinary and usual meaning, and if the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. (*Borikas v. Alameda Unified School Dist.* (2013) 214 Cal.App.4th 135, 146.) Employer reads the section to only apply to temporary repairs of metal pipe, and not to leak seals that may be categorized as VOC leaks. The Division reads the section to require all temporary repairs to be "removed and appropriate actions taken to restore the original integrity of the

²⁷ Doering testified as to what constitutes a VOC: "generally speaking, a volatile organic compound is one that evaporates readily at room temperature." (HT4, 735.) Some commonly found VOCs in a refining plant would be "Benzene, ethyl benzene, toluene. There are numerous chemical constituents that originally come from crude oil that are what you would call volatile or what certain agencies call volatile organic compounds." (HT4, 735.) In Doering's experience, all of these VOC leaks are not necessarily small, in the range of one part per million. (HT4, 743.) For example, Doering testified that "I saw a tag on a clamp that said – and it's noted here in the tables that it was leaking 896 parts per million[.]" (HT4, 744.)

piping system” during turnarounds, or at other opportunities for repair that may occur earlier than the next scheduled turnaround. The safety order and API section 570 do not define or discuss VOC leaks. Neither the safety order nor the API standard creates an exception for leaks of a certain size.

Generally, the Board will attempt to interpret a regulation by adopting the literal meaning of the language used by the drafters of the regulation, unless a literal interpretation would frustrate the purpose of the regulation, or create absurd results. (*POET, LLC v State Air Resources Board et. al.* (2013) 218 Cal. App. 4th 681, 750.) Here, a literal interpretation is reasonable, and the Board will be guided by the plain meaning of API section 570. The first paragraph of API section 8.1.4 is largely irrelevant to the repairs at issue, as the leak seals described in Citation 8 are not repairs of thinned sections of piping or circumferential linear defects. However, we are able to find that paragraph two of section 8.1.4 requires that temporary leak seals, including repairs that have been made to valves that are part of a piping system, be removed and that appropriate actions be taken to restore the original integrity of the piping system during turnarounds or other appropriate opportunities. The action of removing the temporary leak sealing devices is mandatory rather than permissive, as can be construed by the use of “shall” in this sentence, in opposition to the permissive “should” used in other portions of API 570. (See, *People v. Ledesma* (1997) 16 Cal.4th 90, 94; Labor Code section 15.) The section also requires a piping engineer or inspector to determine repair procedures.

While we read the API language according to its plain meaning, the Board also finds—even assuming that an ambiguity exists in the plain language (which we do not)—that the legislative (or regulatory) history also supports the adoption of the Division’s interpretation of the standard. According to the rules of statutory construction, when an ALJ or the Board finds the language of a statute or regulation to contain patent or latent ambiguities, resort to external sources to determine legislative intent may be appropriate to provide clarity. The Court of Appeal has stated, "In such cases, a court may consider both the legislative history of the statute and the wider historical circumstances of its enactment to ascertain the legislative intent." (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 119-120, citing, *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 724 [disapproved on other grounds].)

From the Initial Statement of Reasons (ISOR) we can ascertain that the Standards Board entirely eliminated section 6846 (Valves) in this rulemaking action, and relocated the requirements that were once in that section to section 6845, now renamed “Piping, Fittings, and Valves”, for two reasons: consistency of formatting, and “because the standards incorporated by reference in Section 6845 are applicable to valves as well.” (ISOR, 19.) The understanding and intention of the Standards Board, according to the document, was that a

separate “valve” safety order was no longer needed (and in fact, one no longer exists) because API 570 and other incorporated standards would apply to valves. Both the plain language and regulatory history support a finding that the API 570 section at issue may be applied to the leak sealing devices at issue in Citation 8. We now turn to the eight Instances.

The Employer and Division each presented documents and testimony related to the eight Instances cited by the Division.

Instance 1 addresses MOC 20968. Doering, the Division’s inspector, explained that this MOC was located in South ISOMAX, specifically the H2 A train. (HT4, 749.) The pipe was hot and contained natural gas. During his inspection Doering observed the temporary repair, a clamp covering two flanges and a valve, still in place although it should have been replaced or removed at the last turnaround, scheduled on March 1, 2010. (HT4, 748; 763-64.) The temporary repair had been in place for 2 years and 6 months past its listed expiration date. (HT4, 746.) Doering’s testimony on this Instance is credited and the Board finds that under section 6845 subdivision (a) and API 570, Employer was required to remove this temporary repair or take other appropriate actions to restore the piping system to its original integrity during the turnaround that occurred on March 1, 2010.

Doering testified regarding Instance 2, MOC 18856. He explained that this was a temporary repair in the form of an injection fitting on a valve that delivered natural gas to a furnace in South ISOMAX. The injection fitting had been in place since August 7, 2008 and South ISOMAX H2 A train had had a major turnaround beginning March 1, 2010. (HT4, 771.) The temporary repair had not been repaired or replaced during that turnaround as required by API 570, and was still in place 30 months after the maintenance turnaround. (HT4, 772.) The Board credits the testimony and finds that Employer failed to meet its obligation under section 6845 subdivision (a) and the incorporated API 570 to restore the piping system to its original integrity during the March, 2010 maintenance turnaround.

Doering also testified on MOC 16210 (Instance 3). This Instance also relates to a temporary injection fitting on a valve that had been in place since August 8th of 2006, and was also in the South ISOMAX H2 A train unit, which had experienced a major turnaround starting March 1, 2010. Despite the turnaround, the injection fitting was still in place at the time of Doering’s inspection, 30 months later. (HT4, 772.) Doering explained the difference between Citation 6 and 8 in this Instance: “There were a few of these that were not only in place beyond the turnaround, but also in place beyond the end date of the MOC given to them by Chevron, and this was one of those.” (HT4, 773.) The Board again credits the Division’s testimony in this Instance. API 570, by its plain language, requires leak sealing devices such as the injection fittings at

issue here to be removed and appropriate action taken to restore the piping system to its original integrity.

Instance 4 (MOC 17395), is another alleged violation observed by Doering in the South ISOMAX H2 A train unit. Doering testified that the Employer had placed a temporary ring-shaped clamp around the edge of two flanges that also had an injection fitting. Doering testified that the clamp had been in place since August of 2008. As discussed in Instances 1, 2 and 3, a maintenance turnaround for South ISOMAX H2 A train had occurred beginning on March 1, 2010. The temporary repair was not removed or replaced during that turnaround. (HT4, 774.) The Board finds that the temporary leak sealing device at issue should have been removed during the March 1, 2010 turnaround, and the piping system restored to its original integrity, pursuant to API 570 and the cited safety order. Employer argues that the flanges were replaced and the leak seal removed in November, 2011; while the Board agrees that the leak seal was removed in 2011, we uphold the violation, as Employer failed to take appropriate action during the earlier maintenance turnaround in 2010, as required by the safety order. (HT7, 1348, 1351; Ex. D. Bates number -0000698.)

The Board is not persuaded that the Division demonstrated a violation of section 6845 incorporating API 570 by a preponderance of the evidence in the remaining Instances. However, as mentioned earlier in this Decision After Reconsideration, the Division need only prove one of a series of multiple Instances in order for a citation to be upheld. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration, (Jan. 24, 1992), fn. 4.)

The Division demonstrated a violation of the safety order in Instances 1 through 4. We now turn to the classification of the violation. The Labor Code creates a rebuttable presumption that a serious violation exists where the Division demonstrates “that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.” (Labor Code section 6432.) Doering testified on the realistic possibility of death or serious injury related to the actual hazard of a natural gas leak in Instances 1, 2, and 3 from a temporary repair. He testified that a leak would create the possibility of fire, should it become large enough. (HT4, 769, 772, 774.)²⁸ Employer failed to rebut the presumption of a serious violation. (See, *International Paper Company*, Cal/OSHA App. 14-1189 (May 29, 2015).) The violation is therefore classified as serious.

²⁸ Doering believed that the hazard was also a natural gas leak for Instance 4, but admitted that he was not sure what “feed gas to the refining stream” referenced. We do not credit the speculative testimony regarding the classification of Item 4. (HT4, 775.)

The Division argues that the violation is properly classified as willful. As discussed above, under section 334, the Division may establish a violation as willful by showing through a preponderance of the evidence that: (1) an employer intentionally violated a safety law, or (2) an employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it. (*National Steel and Shipbuilding Co.*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).) Doering testified that the Employer intentionally violated the requirements of section 6845 subdivision (a) by failing to make repairs of temporary leaking sealing devices and valves during turnarounds or at other appropriate opportunities. (See, API section 8.1.4.)

The Division has failed to meet the first test, which may be met through demonstration of a prior violation of the same safety order, or other showing of the employer's knowledge that its actions were violative of the safety regulation at issue. (*Owens-Brockway Plastic Containers*, Cal/OSHA App. 93-1629, Decision After Reconsideration (Sep. 25, 1997).) In this case, Employer and the Division dispute the application and meaning of API 570, and Division has failed to meet its burden to show that Employer knowingly or intentionally violated the standard.

Under the second test, the Division must establish that the employer had actual knowledge of an unsafe or hazardous condition, yet did not attempt to correct it. Here, the Division has proved its case—Employer was aware of the hazardous condition created by aging temporary repairs that had not been replaced at the next turnaround opportunity. (See, *Owens-Brockway Plastic Containers*, Cal/OSHA App. 93-1629, Decision After Reconsideration (Sep. 25, 1997).) Although Employer's MOC database alerted Employer to the impending expiration of these temporary repairs, and Employer's own documents called for repairs to be made at the next turnaround, Employer failed to act. Temporary repairs remained in place, some for well over two years past their recommended replacement date, leaving employees at risk of exposure to leaks of hazardous and flammable substances in the workplace.

The Board finds Citation 8 to be both willful and serious; a \$70,000 penalty is assessed.

Duplicative Penalty Doctrine

A Board-created doctrine allows for the assessment of one penalty, where two or more civil penalties are imposed for violations pertaining to a single hazard and a single means of abatement will eliminate the hazard. (*TL Pavlich Construction, Inc.*, Cal/OSHA App. 11-1303, Decision After Reconsideration (Jun. 16, 2014); *Louisiana-Pacific Corp., Inyokern Plant*, Cal/OSHA App. 78-511 Decision After Reconsideration (Dec. 20, 1984).) The hazards associated with the violations found in Citation 6 and Citation 8 were the same—namely, vapor

leaks of flammable materials that expose employees to the risk of fire in the plant. Similarly, Employer would have abated the hazard of both section 5189(l) and 6845(a) by making timely and appropriate repairs as required by its MOC program. We therefore apply the penalty-reduction doctrine, and vacate the penalty for Citation 6.

Decision

Accordingly, the Board reverses in part and affirms in part the Decision of the ALJ. The Board overturns the finding of the ALJ in Citation 1. The Board finds Citation 1 to be serious and reinstates a penalty of \$6750. The Board affirms the ALJ's finding of a general violation in Citation 2 and the penalty of \$750. The Board affirms the ALJ's finding of a violation in Citation 3, but overturns the ALJ's reclassification of the citation. The Board finds Citation 3 to be serious and reinstates a penalty of \$6750. The Board affirms the ALJ's finding of a violation in Citation 4, but overturns the ALJ's reclassification of the citation. The Board finds a serious violation, with a penalty of \$6750. The Board affirms the ALJ's finding of a general violation in Citation 6, but finds that the ALJ failed to consider the issue of the willful classification. The Board finds the citation to be willful, and calculates the amended penalty as \$11,250. The Board overturns the finding of the ALJ in Citation 8, and reinstates the penalty of \$70,000. Using its discretion, the Board vacates the \$11,250 penalty associated with Citation 6 as duplicative. The Board affirms penalties in the amount of \$91,000.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: OCT 20, 2015

SUMMARY TABLE DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

CHEVRON U.S.A., INC.
Docket No(s). 2013-R6D3-0655 through 0662

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

IMIS No. 310551346

Site: 841 Chevron Way, Richmond, CA 94801
Date of Inspection: 08/30/2012 ~ 09/21/2012

Date of Citation: 0/30/2013

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	FINAL PENALTY ASSESSED BY BOARD
13-R6D3-0655	1	1	2395.78	S	Failure to maintain electrical continuity of metal noncurrent carrying ports of circuit. Appeal granted by ALJ. ALJ's finding overturned by Board.	x		\$6,750	\$0	\$6,750
13-R6D3-0656	2	1	2473.1(b)	S	Unused opening on metal conduit not effectively closed. Re-classified as "General" by ALJ.	x		\$6,750	\$750	\$750
13-R6D3-0657	3	1	2473.2(a)	S	Failure to provide covers on electrical conduit bodies. Re-classified as "General" by ALJ. Re-classified as "Serious" by Board. Penalty re-instated by Board.	x		\$6,750	\$750	\$6,750
13-R6D3-0658	4	1	5162(a)	S	Failure to provide bright color in rear of or next to eyewash station. Re-classified as "General" by ALJ. Re-classified as "Serious" by Board. Penalty re-instated by Board.	x		\$6,750	\$750	\$6,750
13-R6D3-0659	5	1	5189(j)(3)	S	Failure to ensure broken or damaged conduit replaced or repaired in timely manner. Appeal granted by ALJ.		x	\$6,750	\$0	\$0
13-R6D3-0660	6	1	5189(1)	WS	Failure to implement MOC procedures, 3 instances. Re-classified as "General" by ALJ. Re-classified as "Willful" by Board. Penalty vacated as duplicative.	x		\$70,000	\$560	\$0
13-R6D3-0661	7	1	6773(b)	S	Failure to maintain fire service main in serviceable condition. Appeal granted by ALJ.		x	\$6,750	\$0	\$0
13-R6D3-0662	8	1	6845(a)	W	Failure to repair or replace temporary non-welding repairs in compliance with API Publication 570. Appeal granted by ALJ.	x		\$70,000	\$0	\$70,000
Sub-Total								\$180,500	\$2,810	\$91,000

Total Amount Due*

\$91,000

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should 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.

POS: 10/20/2015