2020 Cal/OSHA Most Common Citations – All Industries

#	T8CCR	Description	Tot Viol	Ser Viol	% Ser
1	3203	X Injury Illness	1458	199	13.6
2	3395	X Heat Illness Prevention	1287	189	14.7
3	1509	X Code of Safe Practices	757	41	5.4
4	342	Reporting Fat/Cat	471	15	3.2
5	**3314**	**v Energy Control LOTO**	**444**	**178**	**40.1**
6	5144	X Respiratory Protection	373	30	8.0
7	5194	X Hazard Communication	345	11	3.2
8	**5162**	**Emergency Eye Wash/Shower**	**264**	**120**	**45.5**
9	6151	Portable Fire Extinguisher	264	1	0.4
10	**5204**	**X Crystalline Silica General Industry**	**259**	**111**	**42.9**
11	461	Permits to Operate Air Tanks	246	1	0.4
12	**3276**	**Portable Ladders**	**233**	**65**	**27.9**
13	**3650**	**Industr. Trucks General**	**210**	**85**	**40.5**
14	1512	Emergency Medical Construction	201	4	2.0
15	**3328**	**Machinery & Equipment**	**177**	**70**	**39.5**
16	3668	Powered Ind. Truck Operating	176	25	14.2
17	2340.16	Workspace about Elec. Equipment	172	2	1.2
18	**5199**	**X Aerosol Transmissible Diseases**	**133**	**75**	**56.4**
19	341	Construction Permits	129	10	7.8
20	**1670**	**Personal Fall Arrest Systems**	**117**	**77**	**65.8**
21	4650	Compressed Gas Storage, Handling, Use	115	18	15.7
22	**4002**	**Guarding Moving Parts of Mach. or Equip.**	**109**	**77**	**70.6**
23	2500.8	Flexible Cords Uses Not Permitted	107	0	0.0
24	3380	PPE	93	9	9.7
25	3664	Ind. Trucks Operating Rules	91	6	6.6

X Written Program(s)/SOP(s) Required

NOTE: The 2021 data has not been sanitized yet, but since 2004 the top ten most common **has not significantly** changed in position.

2020 Cal/OSHA Most Common Citations – All Industries

Industry	Site Insp	Accident	Complaint	Progr Insp	Tot Alleged Viol	# Serious	%
Agriculture	533	183	79	31	747	199	27
Mineral Extr	78	10	3	56	129	25	19
Construction	1,304	435	227	191	2,908	655	23
Manufacturing	742	289	135	233	2,977	856	29
Trans/Pub. Util	285	114	82	55	514	136	26
Wholesale Trade	162	91	39	14	390	85	22
Retail Trade	272	85	115	6	395	79	20
Finan./Real Est	22	5	11	2	46	9	20
Services	1,194	518	356	77	2,442	440	18
Pub. Admin.	120	77	33	0	82	34	41
Totals	**4,712**	**1,807**	**1,080**	**730**	**10,630**	**2,518**	**24**

NOTE: The public sector has the largest percent of serious citations:. Reasons;

a) most do not aggressively challenge the evidence to support the citations;

b) think the Informal Conference is a part of the Appeals Board process and therefore do not file timely formal Appeals;

c) schedule and participate in the Informal Conference before the appeal has been accepted by the Board;

d) do not ask for a completed copy of the case file when they do go to the Informal Conference

CAL/OSHA CITATIONS FOCUS ON: "WHO HAS DIRECTION & CONTROL"

Government Code sec. 12926(t):

"Supervisor" means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action . . . . ERGO, they are targeted for interviews because:

Supervisors represent Management…hence,

1. When they talk – information is known as imputed knowledge
2. What they say – information is known as "statements against interest"

Remember the 5th. Amendment???

OTHER "CONTROLLING LABOR CODES" HAVING plus/minus IMPACTS ON INSPECTIONS AND OUTCOMES

Section 6406 No person shall do any of the following:

(a) Remove, displace, damage, destroy or carry off any safety device, safeguard, notice, or warning, furnished for use in any employment or place of employment.

(b) Interfere in any way with the use thereof by any other person.

(c) Interfere with the use of any method or process adopted for the protection of any employee, including himself, in such employment, or place of employment.

(d) Fail or neglect to do every other thing reasonably necessary to protect the life, safety, and health of employees.

CONSIDER ***when on-boarding New Hires, Reference these Codes rather than "Generic Company Policy" – It will have greater impact on "ensuring compliance by employees to house rules"***

other "CONTROLLING LABOR CODES"

HAVING plus/minus IMPACTS ON INSPECTIONS AND OUTCOMES

(EMPLOYER/EMPLOYEE DUTIES)

Section 6407

"Universal Citation"

Every employer **and** every employee shall comply with occupational safety and health standards, with Section 25910 of the Health and Safety Code, and with all rules, regulations, and orders pursuant to this division **which are applicable to his/her own actions and conduct.**
(Amended by Stats. 1977, Ch. 62.)

CONSIDER when on-boarding New Hires,

Reference this Code rather than "Company Policy"

and remind employees of the "Independent Employee Act of Misconduct"

See Cal/OSHA Appeals Board Decision After Reconsideration Affirmative Defense

other "CONTROLLING LABOR CODES"

HAVING plus/minus IMPACTS ON INSPECTIONS AND OUTCOMES

(CAL/OSHA/EMPLOYER RELATIONS)

§ 6314(d) In the course of any investigation or inspection of an employer or place of employment by an authorized representative of the division, a representative of the employer and a representative authorized by his or her employees **shall** have an opportunity to accompany him or her on the tour of inspection. ***Any employee or employer, or their authorized representatives, shall have the right to discuss safety and health violations or safety and health problems with the inspector privately during the course of an investigation or inspection.***

NOTE THAT WHEN PARSING THE SENTENCE: it suggests that **either** the **employer or the employee initiates** the conversation (interview) request…the CSHO is not supposed to "arm twist"/"leverage" their position to impose interview compliance…

Consider retraining at least first line supervisors to their Labor Code rights.

Cal/OSHA P&P C-42. Be a manager go to jail

https://www.dir.ca.gov/DOSHPol/P&PC-42.htm#:~:text=The%20Corporate%20Criminal%20Liability%20Act%20requires%20that%20any%20corporation%20or,actual%20knowledge%20of%20the%20danger.

This hyperlink will help to ID what CSHO's look for in support of their allegations that a "manager" has been misbehaving.

In general - Chain of Command

A MANAGER with authority over budget allocations and policy, i.e., rules/procedures/discipline. This person meets the Cal/OSHA criteria to be identified as a Person Responsible under the Injury and Illness Prevention Program (IIPP).

A SUPERVISOR without budgetary authority who oversees work and enforces policy, i.e., rules/procedures/discipline. In the absence of the Manager, if this person has budgetary authority, they would meet Cal/OSHA's criteria to be identified as a Person Responsible under the IIPP.

A rank-and-file *WORKER without* budgetary or policy authority. This WORKER could *not* be identified as a Person Responsible for the IIPP *per* Cal/OSHA. General Worker NOT in the Chain of Command, and without budgetary or policy authority. ALL EMPLOYEES are expected to anticipate and mitigate hazards and risks (within the scope of their education, training and experience) to themselves and for anyone who is not following proper procedures or who enters the work area, and to report perceived safety problems to the *supervisor*. Any staff, can make recommendations to supervisors and/or managers for consideration and potential adoption.

Laws

CA Labor Code 6423. Except where another penalty is specifically provided, every employer, and every officer, management official, or supervisor having direction, management, control, or custody of any employment, place of employment, or other employee, who does any of the following shall be guilty of a misdemeanor: (a) Knowingly or negligently violates any standard, order, or special order, or any provision of this division, or of any part thereof in, . . . (d) Directly or indirectly, knowingly induces another to do any of the above. . . Any violation of this section is punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding five thousand dollars ($5,000), or by both.

CA Labor Code 6425. Any employee having direction, management, control, or custody of any employment, place of employment, or other employee, who willfully violates any occupational safety or health standard, order, or special order, or Section of 25910 of the H&S code, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $70,000, imprisonment for not more than one year, or by both. Nothing in this section shall prohibit a prosecution under Section 192 PC.

CA 387 Penal Code. Any corporation, limited liability company, or person who is a MANAGER with respect to a product, facility, equipment, process, place of employment, or business practice, is guilty of a public offense punishable by imprisonment and/or fine up to 16 months in State prison and/or $1,000,000 if defendant is a corporation or limited liability company if the MANAGER has management authority in or as a business entity and significant responsibility for any aspect of a business that includes actual authority for the safety of a product or business practice – has "**actual knowledge**" of a "**serious concealed danger**" that creates a substantial probability of death, great bodily harm, or serious exposure and DOES NOT WARN affected employees of the serious concealed danger.

Assumptions for Discussion

The instructor and students were to assume that employer written policies and procedures stemmed from regulatory requirements and/or published prudent practices for the type of work being done. Therefore, a violation of the employer's policies or procedures should be assumed to be a violation of regulatory requirements. Finally, it was assumed that any advice or recommendations made by line managers simply followed and re-stated the employer's written policies and protocols in the Injury Illness Prevention Program (IIPP), Hazard Communication Program (HCP), Chemical Hygiene Plan, Bloodborne Pathogens, or any other Health and Safety subject specific code requiring a written program.

Process

In general, when working within the scope of your employment and under the State Workers' Compensation Program, it is very unlikely that any personal liability would attach even when including conduct where there may be some negligence. However, the legal theory underlying the "Be a Manager – Go to Jail" law applies to anyone who has authority to give orders and/or has other direction and control to advance an activity. General workers who knowingly choose not to follow directions are not personally liable for injury they cause themselves but are subject to disciplinary procedures. Employers need to implement disciplinary procedures to preserve and assert any future defense based on an "independent employee act of misconduct."

Senate Bill 606 Egregious Citations & Subpoenas

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB606

On September 27, Governor Newsom signed Senate Bill 606, significantly expanding the California Division of Occupational Safety and Health's (Cal/OSHA) enforcement authority. SB 606 increases potential exposure for employers with multiple worksites in the state, requires Cal/OSHA to issue "egregious violations" in certain circumstances, increases the potential monetary fines associated with citations, and expands Cal/OSHA's authority to issue subpoenas and seek injunctions and temporary restraining orders**. The law becomes effective January 1, 2022**, so employers should use the remaining months of 2021 to identify and close any compliance gaps to reduce the risk of receiving an enterprise-wide violation or an egregious violation.

Enterprise-Wide Violations

For employers with multiple worksites, **SB 606 creates a rebuttable presumption that a violation is "enterprise-wide"** when **either of the following** factors is met:

1. A written policy or procedure violates a Cal/OSHA safety standard, rule, order, or regulation; **or**
2. Evidence of a "pattern or practice" of the same violation committed by that employer at more than one of the employer's worksites.

If the **employer fails to rebut the presumption that a violation is "enterprise-wide,"** then the division may issue an enterprise-wide citation requiring enterprise-wide abatement.

"Egregious" Violations

SB 606 also directs Cal/OSHA to issue an **"egregious violation"** if **one or more** of the following is true:

1. The employer, intentionally, through conscious, voluntary action or inaction, made no reasonable effort to eliminate the known violation.
2. The violations resulted in worker fatalities, a worksite catastrophe, or a large number of injuries or illnesses. For purposes of this paragraph, "catastrophe" means the inpatient hospitalization, regardless of duration, of three or more employees resulting from an injury, illness, or exposure caused by a workplace hazard or condition.
3. The violations resulted in persistently high rates of worker injuries or illnesses.
4. The employer has an extensive history of prior violations of this part.
5. The employer has intentionally disregarded their health and safety responsibilities.
6. The employer's conduct, taken as a whole, amounts to clear bad faith in the performance of their duties under this part.
7. The employer has committed a large number of violations so as to undermine significantly the effectiveness of any safety and health program that may be in place.

The conduct underlying a violation determined to be egregious must have **occurred within the five years preceding an egregious violation citation**. Once a violation is determined to be egregious, **that determination remains in effect for five years**. After that five-year period has elapsed, additional evidence is required to support any subsequent egregious violation.

If Cal/OSHA "believes that an employer has willfully and egregiously violated" a safety standard, then Cal/OSHA "*shall issue* a citation to that employer for each egregious violation." Critically, "each instance" that an employee is exposed to the violation alleged to be an egregious violation **"shall be considered a separate violation for purposes of the issuance of fines and penalties."** This means that if an employee is exposed to the same cited hazard each day at work, the employer could be cited with multiple violations, which could significantly increase the associated fines.

Subpoenas, Injunctions, and Temporary Restraining Orders

SB 606 authorizes Cal/OSHA to issue a subpoena if the employer fails to "promptly provide" requested information during an inspection, and may enforce the subpoena if the employer "fails to provide the requested information within a reasonable time." (*These time limits are not defined).*

The bill also expands Cal/OSHA's authority **to seek injunctions and temporary restraining orders.** Specifically, if Cal/OSHA has "grounds to issue a citation" under section 6317, then Cal/OSHA may seek an **injunction in superior court restraining the use or operation of equipment until the cited condition is corrected.** Upon filing an affidavit showing that Cal/OSHA has grounds to issue a citation under section 6317, the court may issue a temporary restraining order.

Impact on ALL Employers

These substantive amendments greatly increase the enforcement authority of Cal/OSHA. Employers with multiple worksites in the state will typically have one set of written procedures that are used at all worksites, such as written Injury Illness and Prevention Programs, Hazard Communication Programs, and Heat Illness Prevention Programs. A deficiency in these written programs now provides a basis for issuing an "enterprise-wide" citation and potentially requiring "enterprise-wide" abatement.

In addition, Cal/OSHA's new authority to issue egregious violations **is broad and not clearly defined.** Cal/OSHA need only establish one of the seven bases for finding an employer's conduct "egregious." Many of the bases contain undefined terms, **such as "large number"** of injuries or illness, **"large number"** of **violations "that undermine significantly** the effectiveness of any safety and health program," **"extensive history"** of prior violations, or **"persistently high" injury rates**. Furthermore, the bill states that Cal/OSHA **"shall"** issue an egregious violation if the criteria are established, meaning that Cal/OSHA is required to issue that citation. The use of the word "shall" in the bill could limit the ability of an employer to pursue a reclassification of these violations through settlement.

Employers should carefully review written programs to ensure compliance with all applicable requirements, including ensuring that required trainings are scheduled and a system is in place to document that those trainings occur. Reviewing these policies and procedures could reduce the likelihood of receiving an enterprise-wide violation or an egregious violation.

Assembly Bill 654 Covid Reporting

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB654

Last year, the California Legislature enacted AB 685, which codified COVID-19 exposure notification/reporting requirements to employees, subcontractors, employee representatives and government entities, and made other major legislative changes. **On October 5, 2021, California AB 654 became effective**. This law somewhat limits COVID-19 outbreak reporting and other required notifications for certain employers, and updates several provisions of AB 685. **Key takeaways include the following:**

- The new law provides clarity as to when to give COVID-19 exposure notifications to a bargaining representative and narrows the group that should receive this notice.
- The **outbreak reporting timeline is now one business day or 48 hours, whichever is later.** Previously, the law stated that employers had to notify the local public health agency within 48 hours of determining its facility was experiencing a COVID-19 outbreak. In addition, under the new law's revisions, an employer does not need to provide notice on weekends and holidays.
- The prior law exempted certain employers from reporting outbreaks to the local public health agency. The **amended law adds adult day health centers, community clinics, community care facilities and child daycare facilities as additional entities exempt from reporting**. Employers should be diligent about reporting outbreaks if they are not exempt.
- The **definition of "worksite" has been clarified** for the purposes of exposure notifications. The new definition **specifically excludes telework**. In addition, in a multi-worksite environment, the employer need only notify employees who were at the same worksite as the qualified individual.
- The law simplifies who must be provided with notification of COVID-19-related benefits. Previously, employees who *may have been exposed* had to be notified of COVID-19-related benefits, which may have resulted in some guesswork as to whether the person was exposed. **Now, notification is required to all employees who *were on the premises at the same worksite as the qualifying individual within the infectious period***, which is an arguably simpler method.
- The law changes who must be notified of cleaning and disinfection plans. Previously, *all employees* and the employers of subcontracted employees had to be notified of disinfection and safety plans. Now, employers are required to notify those employees, employers of subcontracted employees, and exclusive employee representatives who ***were on the premises at the same worksite as the qualifying individual within the infectious period*** of the cleaning and disinfection plans the employer is implementing. The updated requirement is somewhat less burdensome and more targeted.

OSHA History Channel – Enterprise wide OSHA History

https://www.osha.gov/pls/imis/establishment.html

OSHA Fatality/Catastrophe Channel – supports "Realistic Possibilities" definitions

https://www.osha.gov/pls/imis/accidentsearch.html

Excerpts from the Cal/OSHA Info Publication
https://www.dir.ca.gov/dosh/dosh_publications/osha_userguide.pdf

- **Closing Conference…. Listen to what they say, but watch what they do….Begin Poker Playing**
- **Informal conference** – Following **receipt of a citation or notice**, an employer **may request an informal conference** with the Cal/OSHA district manager. The conference **may be conducted within 10 working days** of citation issuance or any time prior to the scheduled date of an appeal hearing if a formal appeal is filed with and accepted by the Appeals Board. At the informal conference, the employer may discuss requests for extension of abatement dates, evidence that indicates that no violation exists, proposed penalty amounts, violation classifications, or any other matter relating to the health and safety investigation.

- **Occupational Safety & Health Appeals Board** - Upon **receipt of a citation**, the employer **may appeal to the Occupational Safety and Health Appeals Board** in reference to the existence or nature of the violation, proposed penalty, or abatement requirement. **Any appeal must be initiated within 15 working days of receipt** of the citation by a phone call (www.dir.ca.gov/oshab/contact_ us.html) to the appeals board office or via the website (www.dir.ca.gov/oshab/oshab.html) through the OASIS online appeal system. The Appeals Board website also includes forms and instructions for completing the online appeal initiation process. **If an employer fails to notify the Appeals Board of their appeal within the 15-working-day limit and submit appeals paperwork as required, and if no notice is filed by an employee or employee representative within that time, then the citation becomes a final order not subject to review by any court or other agency, including Cal/OSHA**, regardless of the date of a scheduled informal conference with the district office…….Appeals Board reconsideration decisions may be appealed to Superior Court.

Controlling Cal/OSHA Policy and Procedures

C-1B1	Documenting the Existence of a Violation	7/22/19
C-1B2	Documenting the Classification of a Violation	7/22/19
C-1B3	Documenting the Penalty Adjustment Factors of a Violation	5/24/17
C-20	Informal Conference (Cal/OSHA 20)	8/5/11
C-23	Appeals and Hearings	10/10/00
C-2	Citation, Notification of Penalty and Verification of Abatement (Cal/OSHA 2, 2X, 160, 161 and 161A)	6/2/08
C-3	Special Order (Cal/OSHA 3 and 3X)	2/29/12

C-4	Notice (Cal/OSHA 4 and 4X)	2/1/95
C-5	Information Memorandum (Cal/OSHA 5 and 5X)	2/1/95
C-6	Order to Take Special Action (Cal/OSHA 6 and 6X)	6/21/12

B. DOCUMENTING THE SAFETY ORDER VIOLATED

1. Title 8 Safety Order Group
   Compliance personnel shall specify which group of safety orders are applicable to the type of workplace inspected. If more than one group of safety orders may be applicable, compliance personnel shall consult with the District Manager to determine which group of orders should be cited.
2. Title 8 Safety Order Section Number
   Compliance personnel shall make certain that the violation to be cited correctly corresponds to the Title 8 section and subsection number which is applicable to the violation. A correctly cited section may include as many as four subsections.
3. **Particularity Requirement**
   Compliance personnel shall ensure that each citation item describes with particularity the nature of the cited violation by incorporating the following information into the description of the violation:
   a. A reference to the specific section and subsection of the California Code of Regulations, the California Labor Code, or, in rare instances, the California Health & Safety Code, alleged to have been violated; and
   b. A description of the equipment, process, condition or other attribute of the employer's workplace which represents a violation of the cited standard.

C. ESTABLISHING AND DOCUMENTING EMPLOYEE EXPOSURE

1. Employee Exposure at a Multi-Employer Worksite
   Before adoption of 8 CCR Sections 336.10, only the employer whose employees were actually exposed to the violative condition could be cited or a violative condition. Beginning in January of 2000, Labor Code Section 6400 and 8 CCR Section 336.10 now permit the Division to cite, in specified circumstances, an employer who is responsible for a violative condition, e.g., a creating, controlling and/or contracting employer, regardless of which employer's employees are exposed to the violative condition. See P&P C-1C.
   NOTE: The term "employee" means every person who is required or directed by any employer to engage in any employment, or to go to work, or be at any time in any place of employment (Labor Code Section 6304.1), including any state prisoner engaged in correctional industry, as defined by the California Department of Corrections (Labor Code Section 6304.2).

2. Establishing Employee Exposure

a. Observed Employee Exposure -- Uncommon Situation
   Employee exposure can be established if compliance personnel directly observe or witness exposure of the employee(s) to a hazard which is a violation of a Title 8 Safety Order.

b. Unobserved Employee Exposure -- More Common Situation
   Employee exposure can also be established if compliance personnel obtain witness statements or other admissible evidence which indicates that employees were exposed to a hazard which is a violation of a Title 8 Safety Order.
   NOTE: If a citation is based on unobserved exposure, the citation shall be issued no later than six months after the occurrence of the violation.
   EXCEPTION: When the employer's concealment of a violative condition by failure to comply with a Title 8 reporting requirement results in the Division's inability to discover the violation within the six-month period, the deadline to issue a citation or notice may be extended to six months from the date the

Division discovers the violation. However, upon discovery of such a violation, the Division has only six months in which to issue the citation or notice.

c. Zone of Danger

(1) To establish a violation, compliance personnel shall document that the employee(s) came within the "zone of danger" associated with the violative condition, i.e., in such proximity to the hazard that there is a reasonable basis to conclude that employee exposure to the violative condition has occurred.

(2) Employees can come within the zone of danger of the hazard while:

i. Performing work-related duties;

ii. Pursuing personal activities during work hours; or

iii. Employing normal means of ingress and egress to their work stations.

3. Documenting Employee Exposure

Compliance personnel shall document employee exposure for every violation by obtaining one or more of the following types of evidence

a. An oral or written statement from the immediate supervisor of the exposed employee(s), which may include an admission that a violation has occurred;

NOTE: Compliance personnel should attempt to obtain a signed written statement whenever possible.

b. An oral or written statement from exposed employee(s);

NOTE: Compliance personnel should attempt to obtain a signed written statement whenever possible.

c. Photographs of the place of employment demonstrating the violative conditions, machinery or equipment

d. Any relevant documents, e.g., autopsy reports, job duty description for exposed employees, and the employer's personnel and safety policy guidelines; or

e. A written statement by compliance personnel setting forth an eyewitness account of employee exposure.

4. Employee Exposure Not Needed for a Regulatory Violation

Evidence of employee exposure is not required to establish a regulatory violation.

§1598. Traffic Control for Public Streets and Highways. **SERIOUS**

(a) Where a hazard exists (1) to employees (2) because of traffic or haulage conditions (3) at work sites that encroach upon (4) public streets or highways (5), a system of traffic controls (6) in conformance with the "California Manual on Uniform Traffic Control Devices for Streets and Highways, September 26, 2006," which is herein incorporated by reference (7) and referred to as the "Manual", published by the State Department of Transportation, shall be required (8) so as to abate the hazard (9).

Note: Additional means of traffic control, such as continuous patrol, detours, barricades, or other techniques for the safety of employees may be employed.

Elemental Analysis

Elmnt	Description	Evidence	Type	Strength
1	Where a hazard exists	ID & name hazard		
2	To employees	ID name/title of worker		
3	Because of traffic or haulage conditions	Describe traffic/speed		
4	Work sites that encroach	Describe project/activity		
5	Public streets or highways	ID		
6	System of traffic controls	ID		
7	IAW CMUTCD	Ref. Appropriate Section	No?	Vague/ Ambiguous
8	…Shall be required	Imposed duty – yes/no		
9	To abate the hazard	Reason for duty		

§3203. Injury and Illness Prevention Program. **SERIOUS**

(a) Effective July 1, 1991 (1), every employer (2) shall establish, implement and maintain (3) an effective Injury and Illness Prevention Program (Program) (4). The Program shall be in writing (5) and, shall, at a minimum:
(4) Include procedures (6) for identifying and evaluating work place hazards (7) including scheduled periodic inspections to identify unsafe conditions and work practices (8). Inspections shall be made to identify and evaluate hazards (9).
(A) When the Program is first established; (10)
EXCEPTION: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard (11) ; and
(C) Whenever the employer is made aware of a new or previously unrecognized hazard(12).

Elemental Analysis

Elmnt	Description	Evidence	Type	Strength
1	Effective July 1, 1991	Date of Insp		
2	Every employer	ID		
3	Establish, implement and maintain	Historical Docs		
4	Effective IIPP	Definitions?		
5	Shall be in writing	Doc		
6	Include procedures	Specific to activities		
7	for identifying and evaluating work place hazards	Historical Docs		
8	including scheduled periodic inspections to identify unsafe conditions and work practices	Specific to activities		
9	Inspections shall be made to identify and evaluate hazards	Specific to Subject/object		
10	(A) When the Program is first established;			
11	(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard	ID specific subject/object/hazard		
12	(C) Whenever the employer is made aware of a new or previously unrecognized hazard	Proof of knowledge		

Cal Labor Code Section 6306
(a) "Safe," "safety," and "health" as applied to an employment or a place of employment mean such freedom from danger to the life, safety, or health of employees as the nature of the employment reasonably permits.

(b) "Safety device" and "safeguard" shall be given a broad interpretation so as to include any practicable method of mitigating or preventing a specific danger, including the danger of exposure to potentially injurious levels of ionizing radiation or potentially injurious quantities of radioactive materials.

California Labor Code Section 6317
If, upon inspection or investigation, the division believes that an employer has violated Section 25910 of the Health and Safety Code or any standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part, it shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the alleged violation. The period specified for abatement shall not commence running until the date the citation or notice is received by certified mail and the certified mail receipt is signed, or if not signed, the date the return is made to the post office. If the division officially and directly delivers the citation or notice to the employer, the period specified for abatement shall commence running on the date of the delivery.

The division may impose a civil penalty against an employer as specified in Chapter 4 (commencing with Section 6423) of this part. A notice in lieu of a citation may not be issued if the number of first instance violations found in the inspection (other than serious, willful, or repeated violations) is 10 or more violations. No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed since occurrence of the violation.

Some Potential Grounds for Appeal – Checklist

	Appeal Argument	Rebuttal/Counter Argument (Support Evidence)	Strength
1	The Div. does not have jurisdiction over the subject place of employment		
2	The inspection(s) was invalid		
3	The Citation does not give notice of the violation and/or is otherwise defective		
4	The safety order cited is vague and/or ambiguous		
5	The citation was not issued timely		
6	An **exception** to the safety orders exempts compliance		
7	The citation does not allege a violation of that safety order which most appropriately pertains to the alleged violation		
8	Independent employee action		
9	It is impossible to comply with the safety order		
10	The citation was issued to the wrong employer and/or a non-existing employer		
11	No employee of Appellant was exposed to the alleged violation		
12	The citation does not correctly identify a location at which employees of Appellant were working		
13	Appellant had no actual knowledge, nor, with the exercise of reasonable diligence, could have known, of the existence of the alleged violation		
14	Appellant acted as a reasonably prudent employer, having no reason to anticipate the existence of any hazard		
15	Appellant acted with due diligence to comply with all regulatory requirements		
16	Appellant contends it had a reasonable expectation of privacy to be free of governmental inspections at its private place of employment, which place of employment was the subject of the inspection of the Div. in this matter; that the inspection which did occur was illegal and in violation of **Appellant's Fourth Amendment rights as no designated person of Appellant authorized the inspection conducted by the Div.** of said place of employment; that **no inspection**		

	warrant was obtained to conduct said inspection, nor did the inspection occur pursuant to some other exception to the warrant requirement of Labor Code 6314(b)		

"Appellant reserves the right to plead and present any and all available defenses up to and including the date of any hearing to be conducted in this matter".

Reporting Accidents/Serious Injuries/Illnesses and Investigations
http://www.dir.ca.gov/DOSHPol/P&PC-36.HTM

DIVISION OF OCCUPATIONAL SAFETY AND HEALTH.
POLICY AND PROCEDURES MANUAL
ACCIDENT REPORT P&P C-36

AUTHORITY: California Labor Code Sec. 6302, 6313, 6315.3, 6317, 6409, 6409.1, 6409.5, Health and Safety Code Sec. 105200 and Title 8, California Code of Regulations, Section 330(h) and 342.

See below excerpt

"C. INVESTIGATION OF AN ACCIDENT REPORT

1. Mandatory

All accident events resulting in a fatality, serious injury or illness, pesticide poisoning, serious exposure, or "catastrophe" shall be investigated by the District Office. Labor Code Section 6313(a).

EXCEPTION: An investigation shall not be conducted if the District Manager determines that one of the following conditions exists: (a) information contained in the Cal/OSHA 36(S) cannot be substantiated; (b) no employer-employee relationship exists; (c) the Regional Manager and the Legal Unit agrees with the District Manager that jurisdiction does not exist over the accident event; **or (d) the fatality, injury, illness or exposure was not work-related, e.g., a heart attack, stroke or other medical events not related to working conditions."**

Non-Admissions Clause

"BEWARE OF GREEKS BEARING GIFTS"

At some time during the negotiations, Cal/OSHA might offer the exchange listed below as an incentive in accepting an offer typically when they either remove or downgrade a citation especially for a "lack of evidence".

If you opt and agree…..

There will be the following non-admissions clause:
"Although the Appellant does not admit that violations or wrongdoing occurred, the final orders resulting from this Agreement shall be fully enforceable under, and may be used for all purposes of administration and enforcement of, the California Occupational Safety and Health Act and in proceedings before the Appeals Board, but the Order will not be used in any other proceeding between the parties or involving any other person, whether said proceedings be legal, equitable, or administrative in nature. The parties stipulate that Appellant has entered into this agreement in order to avoid protracted litigation and costs associated thereto, and that no findings or conclusions have been made by any trier-of-fact regarding the citations and proposed penalties at issue herein."

This is what you lose the ability to do…

Employer's cost recovery
An employer may petition the appeals board to recover its costs for an appeal, up to $5,000 per citation, if: (1) the employer's appeal is upheld or DOSH withdraws the citation, and (2) issuance of the citation was the result of arbitrary or capricious action or conduct by DOSH. An employer has the burden of proof.
A petition for costs must be filed not more than 60 days after the filing of a final decision granting an appeal for the order granting DOSH's motion to withdraw.
The appeals board will review the petition for costs and may: (1) summarily dismiss it if insufficient grounds or facts are alleged or (2) set the proceeding for hearing. If a hearing is held, the board may deny the petition or order that costs be awarded.

"It's not what you believe, it's what you can prove!"

https://www.dir.ca.gov/title8/397.html

§397. Petition for Costs Procedures.

(a) Any **employer who appeals a citation resulting from an inspection or investigation** conducted on or after January 1, 1980, issued by the Division for violation of an occupational safety and health standard, rule, order, or regulation established pursuant to Chapter 6 (commencing with Section 140) of Division 1 of the Labor Code **may file a petition for costs together with a memorandum of items of cost with the Appeals Board to claim reasonable costs, not to exceed five thousand dollars ($5,000) in the aggregate per citation if either the employer prevails in the appeal or the citation is withdrawn, and the employer alleges that the issuance of the citation was the result of arbitrary or capricious action or conduct by the Division**. The burden of proof shall be on the employer to establish by a preponderance of the evidence that the issuance of the citation was the result of arbitrary or capricious action or conduct by the Division.

ARBITRARY AND CAPRICIOUS

Absence of a rational connection between the facts found and the choice made. Natural Resources. v. U.S., 966 F.2d 1292, 97, (9th Cir.'92). A clear error of judgment; an action not based upon consideration of relevant factors and so is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law or if it was taken without observance of procedure required by law. 5 USC. 706(2)(A) (1988).

What is a standard of review?

A standard of review is the level of deference that a federal court affords to a lower court ruling or an agency determination when reviewing a case on appeal. Courts reviewing an administrative action will consider whether the agency's action was arbitrary or capricious, an abuse of discretion, or contrary to law. In applying a standard a review, the reviewing court may either uphold, alter, or overturn the action under review.

The **arbitrary-or-capricious test** is a legal standard of review used by judges to assess the actions of administrative agencies. It was originally defined in a provision of the 1946 Administrative Procedure Act (APA), which instructs courts reviewing agency actions to invalidate any that they find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The test is most frequently employed to assess the factual basis of an agency's rulemaking, especially informal rulemakings.

1. **What makes an agency decision "arbitrary and capricious?"**

An agency acts arbitrarily and capriciously when it:

(1) denies a litigant due process and prejudices its substantial rights;

(2) wholly adopts the record from another case involving different parties, fails to make findings of fact, and bases its decision on its findings made in the other case; or

(3) improperly bases its decision on non-statutory criteria.

In addition, an agency abuses its discretion or its decision is arbitrary if the agency:

(1) failed to consider a factor that the legislature directs it to consider;

(2) considers an irrelevant factor; or

(3) weighs only relevant factors that the legislature directs it to consider but still reaches a completely unreasonable result."

An agency's decision is also arbitrary if it is made without regard for the facts, relies on fact findings that are not supported by any evidence, or lacks a rational connection between the facts and the decision. CPS Energy v. Pub. Util. Comm'n, 537 S.W.3d 157 (Tex. App.--Austin 2017, pet. filed).

Note to all:

First DAR 79-1039 [1980] the Cal/OSHA Appeals Board ruled that this section was unconstitutionally vague.
Section 1511[B] stated "No worker shall be required or knowingly permitted to work in an unsafe place, unless for the purpose of making it safe, and then only after proper precautions have been taken to protect him while doing such work". In the case of Dept. of Transportation,
Then

BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: NORTH FORK SPRINGS CONSTRUCTION P.O. Box 300 Oak View, CA 93022 Employer	Docket Nos. 02-R4D1-199 through 202 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) issues the following decision after reconsideration, pursuant to the authority vested in it by the California Labor Code. The Board took reconsideration of this matter on its own motion.

JURISDICTION

Beginning June 25, 2001, a representative of the Division of Occupational Safety and Heath (Division) investigated an accident at a place of employment located at 560 South Stanford Avenue, Los Angeles, California, maintained by North Fork Springs Construction (Employer). The Division issued Employer a number of citations for violations of occupational safety and health standards contained in Title 8, California Code of Regulations, which Employer timely appealed. A hearing was held before an Administrative Law Judge (ALJ) of the Board on May 16, 2003 and the ALJ rendered her decision on June 5, 2003 granting all of Employer's appeals. On July 2, 2003, the Board ordered reconsideration of the ALJ's decision on its own motion. The

Division submitted an answer in response to the order of reconsideration on August 1, 2003.

FINDINGS AND REASONS
FOR
DECISION AFTER RECONSIDERATION

The Board has fully reviewed the record in this case, including the testimony at the hearing and the documentary evidence admitted, the arguments of counsel, the decision of the ALJ, and the arguments and authorities presented in the answer to order of reconsideration. In light of all of the foregoing, we find that the ALJ's decision was proper and was based on substantial evidence in the record as a whole. Therefore, we adopt the attached ALJ's decision in its entirety and incorporate it into our decision by this reference.

DECISION AFTER RECONSIDERATION

The decision of the ALJ dated June 5, 2003 is reinstated and affirmed.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 31, 2007

BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: **NORTH FORK SPRINGS CONSTRUCTION** P.O. Box 300 Oak View, CA 93022 Employer	DOCKETS 02-R4D1-199 through 202 **DECISION**

Background and Jurisdictional Information

Employer is a construction contractor and construction sub-contractor. Between June 25, 2001 and December 5, 2001, the Division of Occupational Safety and Health through Associate Cal/OSHA Engineer Shlomo Goldberg conducted an accident inspection at a place of employment maintained by Employer at 560 South Stanford Avenue, Los Angeles, California (the site). On December 6, 2001, the Division cited Employer for the following alleged violations of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1]:

Type	Section	Cit/Item	Penalty
Serious	1511(a) [unsafe work place]	2	$4,725
Serious	1626(e) [stair railings]	3	$4,725
Serious	2405.4(b) [ungrounded electrical system]	4	$3,150
General	1509(a) [IIPP]	1-1	$175
General	1509(c) [Code of Safe Practices]	1-2	$175
General	1509(e) [safety meetings]	1-3	$175
General	1513(c) [holes in stairways]	1-4	$260
General	1629(a)(4) [number of stairways]	1-5	$175

Employer filed timely appeals contesting the existence of the alleged violations, their classifications, the abatement requirements, and the reasonableness of all proposed penalties.

This matter came on regularly for hearing before Dale A. Raymond, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at West Covina, California on May 16, 2003. Employer was represented by Randall Hromadik, Employer Representative. The Division was represented by Shlomo Goldberg, Associate Cal/OSHA Engineer. Oral and documentary evidence was presented by the parties and the matter was submitted on May 16, 2003.

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

Law and Motion

At the hearing, Employer moved, over objection, to dismiss Citation 2 based upon lack of sufficient evidence for the Division to sustain its burden of proof. The motion was taken under submission and is disposed of in this Decision.

Employer made a hearsay objection to all statements made to Goldberg except for the Accident Reports admitted as Exhibits 7 and 8.

Docket 02-R4D1-200

Citation 2, Serious, § 1511(a)

Summary of Evidence

The Division cited Employer for knowingly permitting an employee to work in an unsafe place.

Associate Cal/OSHA Engineer Shlomo Goldberg (Goldberg) testified that he began an inspection at the site on June 25, 2001. On June 13, 2001, the Fire Department reported an accident that occurred earlier that day. (Exhibits 7 and 8) The reports stated that Supervisor Randy Hromadik (Hromadik) suffered head trauma and a right foot injury and was admitted to the hospital. During his inspection, Goldberg spoke to Mortiz Halpern (Halpern), who was the construction superintendent of the general contractor, Fassberg Construction (Fassberg). Halpern told Goldberg that he saw Randy Hromadik step on a piece of plywood that was not secured to a joist. The plywood gave way and Hromadik fell about 10 feet to the basement below. Goldberg requested additional information from Employer, but never received it. Based upon the above, Goldberg issued Citation 2 for a serious violation of § 1511(a).

On cross-examination, Goldberg testified that he also spoke to Peter Dasaloff (Dasaloff), an employee of Van Elk Ltd., who said that he saw Hromadik slip, lose his balance, and fall through a hole to the basement below.

Hromadik testified that he was in charge of making the work place safe. Earlier, he nailed plywood on the first floor over a hole above the basement. On the day of the accident, the steel subcontractor (Van Elk Ltd.) removed the plywood but did not replace it. At the end of the day, Hromadik took a piece of plywood to put over the hole. He inadvertently stepped into the hole and fell. As a result, he was hospitalized from about 3:00 p.m. to 5:00 p.m. Hromadik did not take any precautions to ensure that he did not fall through the hole.

Goldberg asserted that Hromadik should have bent down on his knees and slid the plywood over the hole to protect himself from the fall hazard. Since Hromadik was aware of the hole but did not take any measure to protect himself, Goldberg moved, after Hromadik's testimony, to reclassify Citation 2 as willful. As Employer had put classification in issue in its appeal, the motion was granted.

Findings and Reasons for Decision

Section 1511(a) is too vague and ambiguous to be constitutionally enforceable. Citation 2 is dismissed and the penalty is set aside.

The Division has the burden of proving every element of its case, including the applicability of the cited safety orders, by a preponderance of the evidence. (*Howard J. White, Inc.,* Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division cited Employer under § 1511(a) which reads "No worker shall be required or knowingly permitted to work in an unsafe place, unless for the purpose of making it safe and then only after proper precautions have been taken to protect the employee while doing such work."

Former § 1511(b) read "No worker shall be required or knowingly permitted to work in an unsafe place …." In *State of California Department of Transportation,* Cal/OSHA App. 79-1039, Decision After Reconsideration (Oct. 16, 1980), the Appeals Board held that former § 1511(b) was unconstitutionally vague, in violation of due process. It found that the word "unsafe" was vague and the safety order language did not provide an employer with guidance to help it determine what is required to avoid a violation.

Since the language of § 1511(a) is the same as former § 1511(b), it is found that § 1511(a) is unconstitutionally vague. Citation 2 is dismissed and the penalty is set aside.

Dockets 02-R4D1-199, 201 and 202

Citation 3, Serious, § 1626(e)
Citation 4, Serious, § 2405.4(b)

Citation 1, Item 1, General, § 1509(a)
Citation 1, Item 2, General, § 1509(c)
Citation 1, Item 3, General, § 1509(e)
Citation 1, Item 4, General, § 1513(c)
Citation 1, Item 5, General, § 1629(a)(4)

In Citation 1, Employer was cited for failure to establish, implement, and maintain an effective Injury and Illness Prevention Program (IIPP) (Item 1), failure to have a Code of Safe Practices available at the site (Item 2), failure to hold safety meetings at least every 10 days (Item 3), holes in stairway landings (Item 4) and failure to have enough stairways (Item 5). In Citation 3, Employer was cited for lack of stair railings, and in Citation 4, Employer was cited for an ungrounded electrical system.

Goldberg testified that he issued Citation 1, Item 1 for a § 1509(a) violation based upon the unsafe conditions he found on June 25, 2001 (set forth in the other Citations and Items), and upon Employer's failure to provide information he requested. Goldberg specifically pointed to the hole and plywood covering (Citation 2) as an unsafe condition that was evidence that Employer lacked an effective IIPP.

Goldberg interviewed foreman Wilfredo Ponce. (Ponce) Ponce told Goldberg that there was no Code of Safe Practices and that safety meetings were held monthly. Accordingly, Goldberg issued Citation 1, Item 2 for a violation of § 1509(c) and Citation 1, Item 3 for a violation of § 1509(e).

Goldberg observed that the building was a four-story, 39-foot high building with only one stairway, so he issued Citation 1, Item 4 for a violation of § 1513(c). Four of the landings had seven inch gaps in the floor. Goldberg took a photograph of one of the gaps. (Exhibit 3). Therefore, he issued Citation 1, Item 5 for a violation of § 1629(e).

Goldberg testified the stairway had open sides but no railings, as illustrated in photographs he took. (Exhibits 4 and 6). As all employees had to use the one stairway, he issued Citation 3 for a serious violation of § 1626(e).

Goldberg saw one of Employer's employees, a carpenter named Jaime Martinez (Martinez), using a saw on the fourth floor. The saw was plugged into a spider box. Upon testing the box, Goldberg found that it was not grounded. He traced the electric line back to the power pole. There was no grounding ring at the power pole so anyone using the electricity would not be protected. Exhibit 5 is a photograph of the end of the cord and the grounding ring that should have been used. Based upon the above, he issued Citation 4 for a serious violation of § 2405.4(b).

The proposed penalty worksheet (Exhibit 2) was admitted into evidence, but Goldberg did not testify regarding the reason for classification of any of the violations or the basis for his calculation of the penalties.

On cross-examination, Goldberg testified that there were approximately 12 of Employer's employees at the site when he inspected. Besides Martinez, he spoke to foreman Wilfredo Ponce (Ponce) and employee Miguel Cortez (Cortez) at the site.

Hromadik testified that the general contractor fired Employer on the day of his accident, June 13, 2001. Fassberg faxed a letter to Employer's office at about 5:00 p.m. that day. After June 13, 2001, Employer did not have any employees at the site. Jamie Martinez had worked for Employer for a short time, but was not working for Employer during Goldberg's inspection. Wilfredo Ponce was not Employer's foreman, and Hromadik had never heard of him. Hromadik had not heard of Miguel Cortez before the day of the hearing.

Prior to Employer being fired, about 95% of Employer's work was done by subcontractors. When Employer was fired, it told its subcontractors to work directly for the general contractor in order to mitigate damages. The subcontractors were familiar with the job and the general contractor would not have to spend time or money to find substitute workers. The job was a government construction project. Penalties would be levied against Employer if the project were late. Employer might be found liable for the penalties or cost overruns even if it had been fired midstream.

In rebuttal, Goldberg testified that he spoke to Office Manager Mike Skinner and Employer's sole proprietor Earl Arnold over the telephone, but neither said that Cortez, Martinez or Ponce were not their employees.

Citation 4

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the electrical hazard referred to in § 2405.4(b). Citation 4 is dismissed and the penalty is set aside.

The Division cited Employer under § 2405.4(b) which provides "To protect employees on construction sites, the employer shall use either or both ground-fault circuit interrupters as specified in Subsection (b) of this Section or an assured equipment grounding conductor program as specified in Subsection (d) of this Section.

In order to establish a violation, the Division has the burden of proof to establish that Employer's employees came within the zone of danger while performing work related duties. (*Bethlehem Steel Corp.,* Cal/OSHA App. 76-552, Grant of Petition for Reconsideration and Decision After Reconsideration (May 21, 1981)[2].)

Employer did not dispute that on June 25, 2001, a worker on the fourth floor was using a saw that was not grounded. The testimony was in conflict regarding whether the Martinez was one of Employer's employees that day. The only evidence the Division offered to prove that Martinez was Employer's employee was hearsay. Employer made a hearsay objection to Goldberg's testimony. Under Rule 376.2 hearsay evidence is not sufficient in itself to support a finding when a timely hearsay objection has been made unless it would be admissible over objection in civil actions. Martinez's statements are hearsay which does not fall within any exception.

While statements from Office Manager Mike Skinner (Skinner) or Owner Earl Arnold (Arnold) would not be hearsay, it was not clear that Goldberg specifically asked them to verify that Martinez was their employee. A failure to deny employment status is unpersuasive. This could be due to a number of reasons, including a failure to realize that employee status was in issue.

Accordingly, the Division has not met its burden with regard to Citation 4 to show employee exposure. Citation 4 is dismissed and the penalty is set aside.

Citation 3

[2] An exception exists for multi-employer worksites, but the Division did not allege or attempt to prove that Employer fell within this exception. The multi-employer worksite regulations are found in § 336.10, which permits citation of (a) the employer whose employees were exposed to the hazard; (b) the employer who actually created the hazard; (c) the employer who has the authority to correct unsafe or unhealthy conditions on the worksite; and (d) the employer who had the responsibility for correcting the hazard.

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the fall hazard associated with § 1626(e). Citation 3 is dismissed and the penalty is set aside.

Section 1626(e) provides, "Stairways, until permanently enclosed, shall be guarded on all open sides with stair railings. Open sides of stairway landings, porches, balconies, and similar locations shall be guarded with standard railings."

Employer did not deny that the stairway Goldberg observed and photographed on June 26, 2001 (Exhibits 4 and 6) did not have stair railings. Exposure of Employer's employees to the hazard was in dispute.

Hromadik, as the General Manager, would have personal knowledge of the foreman's identity. Statements by Martinez and Cortez are hearsay to which no exception applies, and are insufficient for a finding. As discussed above, Skinner's and Arnold's silence does not establish employment status. Since Wilfredo Ponce was a foreman, his statements would not be hearsay as they would be authorized admissions[3]. The Division did not call Ponce to testify or present any other evidence, documentary or otherwise, to prove that Ponce or anyone else was Employer's employee on June 25, 2001. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code § 412). Accordingly, Hromadik's denial that any of Employer's employees were present on June 25, 2001 is credited over Goldberg's testimony to the contrary.

Employer had employees at the site on June 13, 2001, one of which was Hromadik. However, this was a building under construction. There was no evidence that the stairway was in existence at that time.

Therefore, the Division failed to meet its burden to prove that any of Employer's employees were exposed to the hazard of a stairway without stair railings as cited in Citation 3. Citation 3 is dismissed and the penalty is set aside.

Citation 1, Items 4 and 5

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the hazards of holes in the landings (Citation 1, Item 4) or too few stairways (Citation 1, Item 5) in violation of §§ 1513(c) and

[3] Evidence Code § 1222(a) provides that evidence of a statement offered against a party is not made inadmissible by the hearsay rule if 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.

1629(a)(4). Citation 1, Items 4 and 5, are dismissed and the penalties are set aside.

In Citation 1, Item 4, the Division cited Employer for a violation of § 1513(c), which provides "Material storage areas and walkways on the construction site shall be maintained reasonably free of dangerous depressions, obstructions, and debris. Citation 1, Item 5 is for a violation of § 1629(a)(4) which provides that a building or structure is more than three stories or 36 feet, a minimum of two stairways must be provided.

Goldberg's unrefuted testimony that, on June 25, 2001, there were at least four stairway landings with 7 inch wide holes, the building at the site was four stories high, 39 feet high and had only one stairway was based upon his personal observation. This testimony, based upon Goldberg's personal observation, is not hearsay and is credited.

As discussed, the Division's evidence does not establish that any of Employer's employees were present on June 25, 2001 or afterwards. There was no evidence regarding the condition of the landings or height of the building on June 13, 2001, when Employer's employees were present. Hence, the Division did not meet its burden to establish employee exposure. Citation 1, Items 4 and 5 are dismissed and the penalties are set aside.

Citation 1, Items 1, 2 and 3

Findings and Reasons for Decision

The Division did not establish that any of Employer's employees were exposed to the hazards cited in Citation 1, Items 1, 2 or 3. Citation 1, Items 1, 2, and 3 are dismissed and the penalties are set aside.

In Citation 1, Item 1, the Division cited Employer under § 1509(a) which requires Employer to establish, implement and maintain an effective IIPP. In Citation 1, Item 2, the Division cited Employer for failure to have a Code of Safe Practices readily available at the site. Citation 1, Item 3 cited Employer under § 1509(e) which requires Employer to hold safety meetings at minimum of every 10 working days.

Goldberg testified that he issued Citation 1, Items 1, 2, and 3 based upon Ponce's statements and Employer's failure to provide him additional information, as requested. Goldberg's testimony that Ponce said he did not have an IIPP or Code of Safe Practices and that safety meetings were held monthly is credited. However, as discussed above, Hromadik's testimony that Ponce was not Employer's foreman is credited over the Division's evidence to the contrary. If Ponce were not Employer's employee, it would explain why Goldberg did not receive any additional information about Employer by making a request to Ponce. As Goldberg was not clear about the contents of the conversations he had with Skinner and Arnold, the statements Skinner or Arnold made or failed to make cannot not carry substantial weight. Goldberg did not produce a Document request sheet, letter, or other written evidence to show the person to whom he made a request for additional information. He did not request Hromadik, who was responsible for safety, to provide any information.

Accordingly, the Division failed to establish violations of §§ 1509(a), 1509(c) or 1509(e) by a preponderance of the evidence. Citation 1, Items 1, 2, and 3 are dismissed and the penalties are set aside.

Decision

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

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

DALE A. RAYMOND
Administrative Law Judge

DAR:mc

Dated: June 5, 2003