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The $4 Billion Lead Debate Controversy

Safety professionals and employer representatives continue to question the assumptions underlying Cal/OSHA's proposed revisions to its lead standards. At the October meeting of the Standards Board, they pressed the agency to justify the dramatic revisions proposed for both the lead permissible exposure limit and action level. And they again protested what they assert was a dramatic underestimation of the costs of implementing the changes.

The Division of Occupational Safety and Health pushed back on some of the comments, and a labor member of the Board explained why she thinks the increasing complexity in Cal/OSHA regulations is not necessarily bad.

Eric Berg: "This proposal is based on science."

The continuing controversy comes after the Division wrote and the Board published a long-delayed lead proposal earlier this year. It would decrease the permissible exposure limit from 50 micrograms per cubic meter of air to 10 and the action level from 30 μg/m3 to 2. The proposal is based on recommendations made by the California Department of Public Health, which notes that adverse health effects from lead can occur at much lower exposure levels than the current regulations recognize, and the current regulations are decades old.

The proposal covers Construction Safety Orders §1532.1 and General Industry Safety Orders §§ 5155 and 5198 and also contains detailed provisions on blood lead testing, medical monitoring, hygiene and training. These provisions are required for construction when performing so-called "trigger tasks."

The proposal was published in March and has seen two rounds of mostly minor revisions. The Board aims to adopt the revisions by next February. Stakeholders are urging the Board to take their concerns seriously and want DOSH to address them before a final vote.

'Triggers So Many Things'

The proposal reduces the PEL by 80% and the AL by 93%. Bruce Wick, director of risk management for Housing Contractors of California, calls on DOSH to provide the Board with "the information as to why we need a reduction of 93%" in the action level. "The reduction triggers so many things on the employer level that I believe weren't contemplated or understood by those pursuing this regulation," he says.

Wick again questions the cost estimates in the Standard Regulatory Impact Assessment required of regulatory proposals of at least $50 million in economic impact. The SRIA "said it would cost construction $80 million a year. We're in the range of $4 billion a year in what we believe it would actually cost us to implement this – forty times more."

Eddie Marquez, safety resource coordinator for Union Roofing Contractors Association, based in Orange, calls for the Board to "strike a delicate balance" between worker protections and "how this is going to land on the back of the small business that's just trying to survive day by day."

Bruce Wick: "The reduction triggers so many things."

Eddie Marquez: "This is going to land on the back of the small business that's just trying to survive."

Lead Debate *continued on page 13900*

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It is 8,244 days since our last lost-time accident.

Petition Seeks Construction Hoist Tweak

A Cal/OSHA requirement on construction personnel hoists is hopelessly outdated, so says a large provider of scaffolding services and hoisting equipment. It contends the requirement is hindering its ability to serve clients.

BrandSafway

BrandSafway, based in Atlanta, Georgia, petitioned the Standards Board to revise Construction Safety Orders §1604.21 to match the latest version of the American National Standards Institute (ANSI) standard.

Tanya Charlesworth, PE, director of product management and a member of the ANSI A10.4 committee, which covers safety requirements for personnel hoists, says the current requirement no longer applies.

Section 1604.21 states that the hoist's rated capacity determines the inside net platform area of a hoist and shall be no greater than "that given" in an accompanying chart labeled "Relationship of the Hoist Rated Capacity to Inside Net Platform Area."

For instance, if the rated load of a hoist is 2,000 pounds, the inside net platform area shall be no greater than 24.2 square feet. At 10,000 pounds, the platform area must be at least 88 square feet.

The table "no longer applies if the hoist car is equipped with an overload detection device and the rated load to inside net platform area is 82 [pounds per square foot] or higher," Charlesworth says. "This provision is clearly outlined in ANSI A10.4-2016."

She notes that the California requirement is based on the 1973 version of the ANSI standard, "which poses a challenge for BrandSafway." The company has a large hoist fleet equipped with overload devices "that cannot be extended due to this restriction. This limitation hinders our ability to efficiently utilize our equipment and provide optimal services to our clients."

The company wants the Board to adopt the requirements of the current ANSI standard. "The updated code aligns with current safety standards, providing a higher level of protection for workers and equipment," Charlesworth states.

Another Cal/OSHA Gondola Variance

The Cal/OSHA Standards Board has granted a variance to Calistoga's Sterling Vineyards to install a high-tech gondola system that surpasses outdated Title 8 requirements. The Board has granted similar variances to several other employers in recent years.

Sterling, owned by Treasury Wine Estates Americas Co., is installing a 2,816-foot detachable grip gondola tramway at the Calistoga vineyard. It will include 13 eight-passenger cabins on the line at any time, with a total capacity of 104 passengers.

The current Cal/OSHA regulation, Passenger Tramway Safety Orders §3162, requires a conductor on cabins that carry at least six passengers. It also requires that evacuation equipment be stored inside the cabin in gondolas with a capacity of at least seven.

The variance supplants both requirements. Without a conductor, the lift has a communication system featuring loudspeakers on each tower, allowing staff to communicate with passengers in each gondola. The cabins also have signage with contact information in case of an emergency.

The system also has two emergency backup sys- ☞

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☞ tems in case of power outages and a diesel engine that can be mechanically coupled to the drive system to provide power to unload passengers. "Both options could be activated before initiating a rope evacuation," the Board says in granting the variance. "Rope evacuations are infrequent and a last-resort effort to evacuate passengers from a lift that cannot be operated under normal operations."

Sterling is required to document, implement, and maintain an evacuation and rescue plan according to the PTSO §3156 and the national consensus standard, American National Standards Institute B77.1-1982.

Why Publication of the Granite Construction Valley Fever Case is Important

The California Court of Appeal recently granted a motion by attorneys representing Granite Construction that an opinion recently issued by the Third Appellate District be certified for publication.

The Finch, Thornton, Baird law firm based in San Diego filed the request for publication. The firm represents the McCarthy Building and coordinated the move with the Donnell, Melgoza & Scates firm, which represents Granite.

It is a significant development. It also continues the quest of the lead attorney in the Granite case, Manuel Melgoza, to push back against recent Cal/OSHA Appeals Board precedent that he asserts waters down the burden of proof required of the Division of Occupational Safety and Health to cite hazardous conditions on worksites.

As we reported on September 29th, [click here] the Appeals Court overruled the Board and Placer County Superior Court and vacated citations issued to Granite. Granite was cited for alleged violations related to Valley Fever exposure at a solar energy project in Monterey County. The vacated citations were under General Industry Safety Orders §5144(a)(1) for failing to require employees to wear respirators when engineering controls for dust control were not feasible; and Construction Safety Orders §1509(a) for failing to implement adequate measures to limit exposure to the spores that carry the disease.

The appeals court did uphold one of the issued citations, under GISO §5144(e)(1), for effectively requiring employees to wear respirators but failing to have them fit tested.

No employees became ill, and no *Coccidioides* spores were found at the California Solar Flats project.

The opinion was originally unpublished. Granite's legal team filed successfully to have the opinion certified for publication. It means similarly situated cases can cite the opinion as binding precedent to the Appeals Board, Melgoza tells *Cal-OSHA Reporter*. This week, the Third District denied a motion by the Appeals Board to rescind the publication.

Six employers were cited for alleged Valley Fever exposure; one case, McCarthy Building Cos., is still under appeal.

Grounds for Publication

There are eight grounds for officially publishing an opinion, for instance, if a case establishes a new rule of law or applies an existing rule of law to a significantly different set of facts.

Manuel Melgoza: Board precedent is whittling away Cal/OSHA's burden of proof.

In this case, the publication is based on four grounds. "These regulations [the ones vacated by the Court of Appeal] had not previously been discussed in the context of protection against potential exposure to harmful dust contaminated with Valley Fever spores," writes counsel Chad Wishchuk. "As such, the opinion provides a new interpretation, clarification, criticism, and construction of these regulations."

The Division's "zone of danger" argument also merited a precedential designation, Wishchuk argued. The court rejected this interpretation of the regulations as an alternative to the harmful exposure standard. DOSH argued that employees on the project were in the Valley Fever zone of danger because the fungus is endemic to Monterey County. "To date, the Division has yet to decide which of these two standards … is the appropriate one in cases involving alleged violations of section 5144(a)(1). The court thus applies an existing rule to a new set of facts," according to Wishchuk.

He says the opinion also qualifies because it is of continuing public interest. "When a public entity does not follow its own rules in a consistent or appropriate manner, employers and their employees are left without important guidance."

The last grounds for publication was that the court rejected DOSH's assertion that Granite had forfeited its challenge to the sufficiency of the administrative evidence by providing a "one-sided account" of the facts in its appeal briefing. "The court rejected this argument and in so doing established a new rule of law which merits publication."

A Question of Presumption

To Melgoza, the former presiding administrative law judge for the Appeals Board, the issues here transcend just the Granite Construction case. "Over the years, I have seen Board precedent whittle away at Cal/OSHA's requirement to prove employees were exposed to a violative condition, to the point where presumptions now suffice," he tells *COR*. The Board defines "exposure" as "reliable proof that employees are endangered by an existing hazardous condition or circumstances." Melgoza notes that a violation may not be based on speculation, assumptions, or conjecture that employees will be exposed ☞

to the hazard that the safety order is designed to abate, but rather upon definite evidence of a past or existing danger.

He adds that alongside this trend, another "precedent" has developed that employers' actions to protect against a hazard are "ineffective" without criteria to determine how to evaluate effectiveness. "The Board in 1991 reasoned that the safety order mandates employers to take corrective action, and since that employer took corrective action, the fact that it was not fully successful did not merit finding a violation.

"In more recent DARs, seemingly no matter what measures employers take to protect against exposure to a regulated hazard, all it takes is for a Cal/OSHA agent's opinion that the measures taken were not 'effective' to establish a violation. Sometimes, it is enough if one person becomes ill or injured without a direct connection to the employment. In some cases, it is enough to opine that someone 'could have been exposed.'

"This is one of those cases," Melgoza says. "The Board essentially held that anyone who happened to be anywhere (miles apart) on the CalFlats sprawling worksite was in the 'zone of danger,' despite the lack of evidence that anyone actually encountered the hazardous substance or even became ill when Granite worked there."

By the Board's standard, and without regulatory language telling employers what measures constitute compliance, it becomes impossible for employers to develop compliance strategies that avoid future citations. How much is enough?"

He adds that employers' efforts to comply with one mandate could expose employees to other, more dangerous hazards. "At CalFlats there were at least two other hazards that were likely if there was a 100% mandatory respirator use policy – loss of visibility by people working around heavy earth-moving equipment while wearing respirators, and heat illness or heat stress from having to labor while wearing sweaty, dirty dust masks. There was virtually no shade at CalFlats."

Melgoza observes that if a hazard is not susceptible to being prevented by an existing regulation, the Division has options other than citing an employer. It can issue Special Orders tailored to employers at job sites like CalFlats. Or it can propose regulations designed to protect against particular hazards. "These approaches give employers the information they need to implement concrete safety and health measures. The Division did neither, and the Board's decision endorsed such inaction."

He concludes, "The approach the Board took in the Granite case leaves employers in limbo, and their employees at risk, with no incentive for the Division to improve the regulations to ensure future compliance. Such an approach defeats, rather than promotes the goal of workplace safety. It discourages employers who take more than the minimum required steps to prevent exposure to a hazard, which is what Granite did in this case."

Cal-OSHA Reporter requested comment from Cal/OSHA, and as we went to press, we were waiting for a response.

Lead Debate

continued from page 13897

Steve Johnson, safety director for Marquez' counterpart organization in Northern California, Associated Roofing Contractors of the Bay Area Counties, says the proposal, at least as far as construction goes, "hasn't proven a need." The "unrealistically lowered" PEL and AL will require employers to assume employee exposure above the PEL and conduct exposure assessments for lead work "that is not defined in the regulation."

Steve Johnson: Lead proposal "hasn't proven a need."

"These regulations strengthen the underground economy, weaken employers' ability to hire and maintain a trained and skilled workforce, put a burden on Cal/OSHA enforcement with a complicated regulation, and subjects employees to unnecessary blood lead level testing and intrudes on their personal lives," Johnson asserts.

Helen Cleary, director of the Phylmar Regulatory Roundtable OSH Forum, says organization members who are industrial hygienists are "concerned about the necessity and the impact of the requirements." She adds, "To be clear, we're not disputing the health risk associated with the exposure, the need to update the rule, or the goal to reduce the blood lead levels of employees. We're trying to understand how Cal/OSHA derived these workplace requirements."

Helen Cleary: "We're trying to understand how Cal/OSHA derived these workplace requirements."

She notes that the modeling the recommendation is based on was performed more than ten years ago, "and assumptions were made about workplace data because 40-year data for workers in the lead industry wasn't available. We're concerned that the assumptions and the data used resulted in an overly conservative recommendation and a proposal that will apply to workers that aren't chronically exposed."

Cleary opines, "Cal/OSHA should take the time to get this right for the safety professionals and industrial hygienists who are committed to protecting workers."

One industrial hygienist, Dan Napier, principal of DNA Industrial Hygiene, contends the current standards don't need major modifications, "but maybe a little tweaking." He asserts that the current standard "provides effective protection in my compliant clients." Napier says some clients include employers performing abrasive blasting on gasoline storage tanks coated with "very high lead-based paint." He says the employ-

ees did not have one test above 10 micrograms per deciliter of blood complying with the current standard.

Dan Napier: "We need to have a model that relies on good science."

Napier criticizes the proposal as based on "calculations, not on actual physical data. We need to have a model that relies on good science and looks at not only association, but causation." The standards don't "need to be rewritten and made into this extremely complex and very large standard."

Mike Donlon, a safety consultant and former DOSH official, compared workplace safety to a "ground war." He explains, "Victory is achieved by influencing employers and employees that safe work practices are in their best interests. Please help me prevent harm to employees by adopting regulations that are clear, make sense, can be imitated, and most importantly, prevent injuries."

Another former DOSH and Fed-OSHA official, Chris Lee, questions whether DOSH has made a "cogent necessity case for the proposed revision," and calls the SRIA "deeply flawed," grossly underestimating the costs to employers.

Nola Kennedy: "We need to work better at making regulations that are understandable, implementable and enforceable."

The Board's occupational health representative, Nola Kennedy, agreed with some of the criticism. "People are saying these [regulations] are hard to understand. And I do think we need to work better at making regulations that are understandable, implementable and enforceable." She adds that the lead proposal "does require a lot of back and forth movement within the document to figure things out. Very few people except people who are being paid to do that have time or are interested in doing it."

As for DOSH's rulemaking process (the Division crafts health standards and the Board writes safety standards and votes on all standards), Kennedy comments, "The Board has been calling for the Division to have a more engaging advisory committee process in the development of standards."

'The Hazards are Very Complex'

DOSH Deputy Chief for Health Eric Berg declined to go into the science underpinning the proposal, saying that discussion will come at a future meeting. "This proposal is necessary to protect workers from lead poisoning," he states. "The current regulation does not do this, and this proposal is based on science."

He also pushed back on one employer's estimate that implementing the new rules could cost many thousands of dollars. "Cal/OSHA strongly disagrees that the proposal will cost $24,000 per employee," Berg says. "The costs were calculated with the assistance of several experts who consulted with many in the industry. It will cost much less than that."

Laura Stock: "Complexity in and of itself is not necessarily bad."

Board occupational safety representative Laura Stock came to the defense of DOSH and the proposal. "In my experience, the Division has been quite careful and very diligent in reviewing the science and reviewing the evidence," she says. "Perhaps the problem is that it's not as transparent or is not as visible." She calls on DOSH to share its deliberations publicly.

And while she agrees that standards must be understandable to be enforceable, "we should remember that complexity is because the hazards are very complex, and because they are trying to cover incredibly diverse industries. Complexity in and of itself in not necessarily bad. Sometimes it is essential in order to make a regulation that is as effective as possible."

The hazards facing California workplace are "evolving," from lead to silicosis to indoor heat to workplace violence, Stock says. "What it points to is sufficient education, and support and resources for employers, and for workers to know what is required and how to comply."

Boots-on-the-ground safety professionals tell *Cal-OSHA Reporter* that increasingly complex regulations keep them in the office writing more and more programs and not in the field where they can have the most impact on safety.

Workplace Fatality Update

There are six new workplace fatalities in California, four of them from falls.

In San Francisco, the owner of Tritec Construction suffered a fall of about 14 feet from a scaffold and died a day later of severe head trauma.

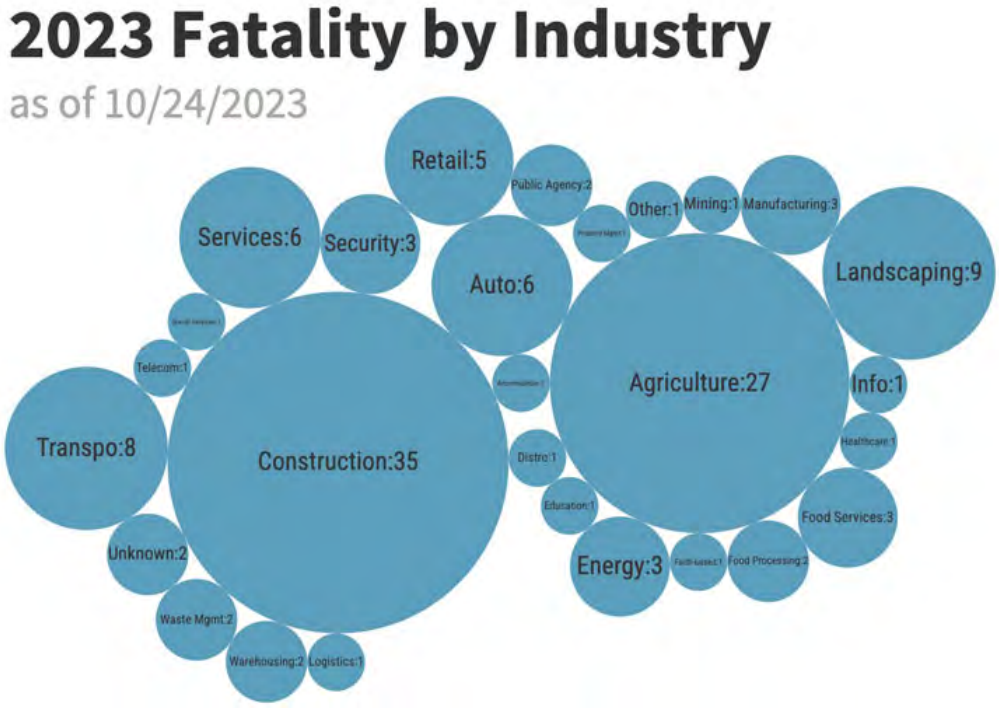
In Fontana, an employee of Royal Roof Corp. was working on the roof of a warehouse when he fell about 40 feet through a skylight.

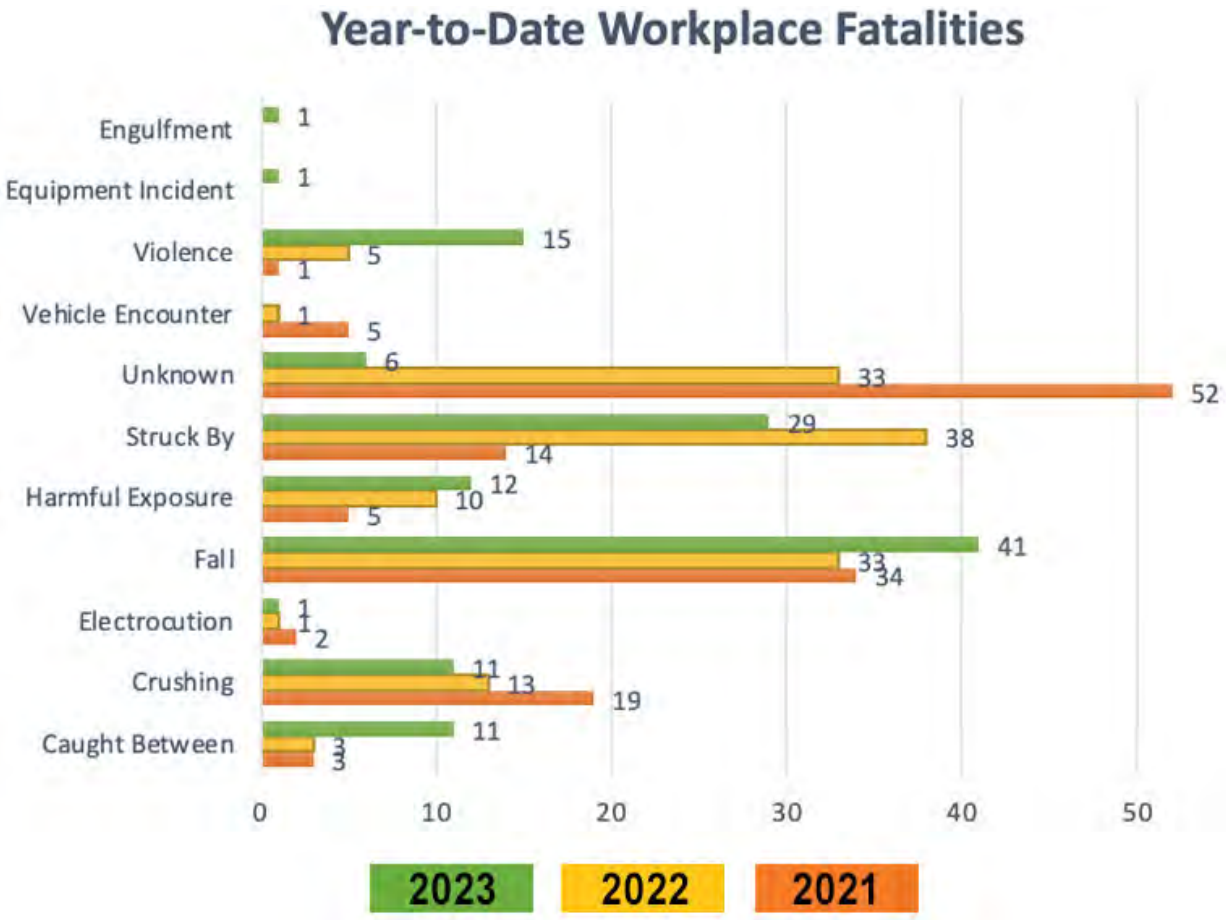
In Montebello, an employee of another construction company, Jose Montanya, was working on the roof of a residence when he fell more than 10 feet. He was pronounced dead at the scene.

In Irvine, an employee of California Greenhouse House Plant Nursery fell while climbing a flight of stairs to an office on September 19th. The employee died on October 4th.

In Compton, an employee of Express Tire Shop was working on a vehicle when it fell off the lift and landed on and killed him.

In Chualar, an employee of Pro Ag Harvesting was driving a tractor with two trailers down a grade when it overturned. The employee died at the scene.





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SUMMARIES OF RECENT CAL/OSH APPEALS BOARD DECISIONS

Cal-OSHA Reporter is pleased to provide, for our valued subscribers, graphs indicating cited employers' experience modification rating (X-Mods) over the designated years.

HEAT ILLNESS PREVENTION PROGRAM (HIPP) –

Title 8, California Code of Regulations, §§3395(h) and (i) – The Appeals Board agreed with the ALJ's finding that Employer's HIPP did not have all necessary elements related to the provision of water, access to shade, emergency response and acclimatization. Further, Employer failed to provide its employees all required training regarding the contents of the HIPP.

FLOOR OPENING – SECURED AND PROPERLY MARKED

Title 8, California Code of Regulations, §1632(b)(3) – The Appeals Board agreed with the ALJ's finding that Employer failed to ensure the cover over the opening was marked as required by the safety order.

MULTI-EMPLOYER WORKSITES – CONTROLLING EMPLOYER, DUE DILIGENCE

Title 8, California Code of Regulations, §336.10 – Employer failed to establish the due diligence defense. The Appeals Board affirmed the decision of the ALJ.

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LENNAR CORPORATION
49 *COR* 40-8733 [¶23,264R]

***Digest** of COSHAB's Decision After Reconsideration dated September 26, 2023, Inspection No. 1340561.*

Ed Lowry, Chair.

Judith S. Freyman, Board Member.

Marvin P. Kropke, Board Member.

X-MOD GRAPH FROM COMPLINE

Background. Lennar Corporation (Employer) is a general contractor that develops residential properties. The Department of Industrial Relations, Division of Occupational Safety and Health (Division) conducted an inspection of a residential construction project located at 1058 Foster Square Lane, Foster City, CA, in response to a report of an injury that occurred at the job site on August 7, 2018.

On November 14, 2018, the Division issued two citations to Employer alleging violations of California Code of Regulations, Title 8. Employer timely appealed the citations, and administrative proceedings were held. Citation 1, Item 1, asserted a Regulatory violation of §341.4, alleging a failure to post a copy of the project permit. Citation 1, Item 2, asserted a General violation of §3395(i), alleging that Employer failed to provide its employees all required training. Citation 1, Item 3 asserted a General violation of §3395(h), alleging that Employer failed to provide its employees all required training regarding the contents of Employer's HIPP. Citation 2, Item 1, issued under the mutl-employer worksite regulation, alleged a Serious, Accident-Related violation of §1632(b)(3), which requires that covers over openings be able to withstand 400 pounds or twice the weight of the employees, and that they be secured in place and marked. Employer contested the existence of the violation and the reasonableness of the penalties in Citation 1, Items 2 and 3 and Citation 2, Item 1. Only the reasonableness of the penalty was appealed for Citation 1, Item 1. Employer also asserted affirmative defenses.

An ALJ issued a Decision on May 4, 2022, which affirmed Citation 1, Items 1, 2, and 3 as well as Citation 2, Item 1. The ALJ also affirmed the Serious Accident-Related classification of Citation 2. In doing so, the ALJ held that Employer was the controlling Employer, not the correcting employer. The ALJ also held that Employer failed to establish the due diligence defense to Citation 2.

Employer filed a timely Petition for Reconsideration (Petition). The Petition challenged the ALJ's affirmance of Citation 1, Items 2 and 3. Further, Employer challenged Citation 2, but not regarding the Serious, Accident-Related classification. Employer asserted that it established the due diligence defense to Citation 2.

Findings and Reasons for Decision After Reconsideration.

Did Employer's HIPP contain all the elements required by the safety order regarding emergency response and acclimatization?

The Division's Associate Safety Engineer, determined that Employer had employees that intermittently worked outdoors. The parties agreed that Employer's management personnel inspected the worksite regularly and frequently. Employer was required to comply with the heat illness prevention standard (HIPP) set forth in §3395, because it had employees who worked outdoors and were exposed to outdoor conditions. The evidence confirmed that Employer had a HIPP applicable to its employees.

The Division cited Employer for violation of §3395(i), stating the HIPP did not contain all required procedures related to water and shade, emergency response and acclimatization. The Division had the burden to demonstrate that defects in Employer's written HIPP amounted to a failure to establish, implement, or maintain an effective program. (*Hill Crane Service, Inc.*, Cal/OSHA App. 1135350, Decision After Reconsideration (Sept. 24, 2021).)

The ALJ found that Employer's HIPP contained all necessary provisions related to water and shade, but found that the HIPP failed to contain all required emergency response and acclimatization procedures. Employer argued in its Petition that the ALJ erred in her findings.

Emergency Response Procedures:

Sections 3395(i)(3) and (f)(3) read in conjunction, require that an Employer's HIPP contain a procedure for "contacting emergency medical services, and if necessary, transporting employees to a place where an emergency medical provider can reach them." The ALJ found

NOTE: According to the Appeals Board, ALJ decisions are not citable precedent on appeal, i.e., they cannot be quoted when one is appealing a citation. There is nothing in the California Code of Regulations about this: it is by Board precedent. "(U)nreviewed administrative law judge decisions are not binding on the Appeals Board." (*Pacific Ready Mix*, Decision After Reconsideration of 4-23-82, and *Western Plastering, Inc.*, Decision After Reconsideration, 12-28-93.) Decisions After Reconsideration (DARs) are precedential and may be quoted in an appeal.

Employer's HIPP deficient because it did not contain such a provision. The Appeals Board found the ALJ's analysis to be correct, there was no such provision in the HIPP regarding transportation of employees. The Division need only show a single missing element in the HIPP to establish a violation.

Acclimatization Procedures:

Sections 3395(i)(4) and (g)(1), read in conjunction require that an Employer's HIPP contain procedures for closely observing employees during a "heat wave" (defined as any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and a least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days). The ALJ found that Employer's HIPP was deficient because Employer's acclimatization procedures do not address "heat waves," as defined. The Appeals Board agreed. Since no such provision was in the HIPP, there was a violation.

Tbe Division established and the ALJ's Decision correctly found, that Employer's HIPP was deficient and therefore Citation 1, Item 2, was affirmed.

Did Employer provide its employees with all required heat illness prevention training on the procedures for emergency response and acclimatization?

Section 3395(h) requires that Employer provide effective training on a list of topics. The Division argued and the ALJ's Decision found, that because Employer's HIPP did not contain all the elements specified in §3395(i), it did not, and could not, provide training on those elements, as required by subdivision (h). The Appeals Board agreed. Section 3395(h)(1)(H), requires employees to be trained on "the employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where an emergency medical service provider can reach them." The Appeals Board held, that because Employer had no such procedures in its HIPP, it follows that Employer did not provide training on the procedure.

The ALJ noted "Employer presented no evidence that refuted the Division's assertions. No testimony or documentary evidence established that Employer's heat illness prevention training did, in fact, contain the topics that are missing from its HIPP. Citation 1, Item 3, was therefore affirmed.

Was the floor opening at Employer's worksite secured to prevent accidental displacement and properly marked?

Citation 2 alleged a violation of §1632(b)(3), which requires that temporary openings be protected as follows:

Covers shall be capable of safely supporting the greater of 400 pounds or twice the weight of the employees, equipment and materials that may be imposed on any one square foot area of the cover at any time. Covers shall be secured in place to prevent accidental removal or displacement, and shall bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: "Opening-Do Not Remove." Markings of chalk or keel shall not be used.

In Citation 2, the Division alleged:

Prior to and during the course of the inspection, including, but not limited to, August 7, 2018, Lennar Corporation dba Lennar Homes of California, who is the controlling and correcting employer, failed to ensure that covers were secured in place to prevent accidental removal or displacement, and bear a pressure sensitized, painted, or stenciled sign with legible letters not less than one inch high, stating: Opening-Do Not Remove. As a result, an employee of RJP Framing suffered serious injuries when he fell approximately 12 feet through a floor opening after lifting an unsecured and unmarked plywood cover.

The Division has the burden of proving a violation by a preponderance of evidence (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) As part of its burden, the Division also bears the burden of proving employee exposure to the violative condition. (*Ibid.*)

Citation 2 arose from an accident on August 7, 2018, at Building 13 when an employee of subcontractor RJP Framing, fell through a floor opening on the second floor. Prior to the accident, the opening had been covered by a piece of plywood that was slightly larger than the opening. The accident occurred when the employee, while in the process of cleaning debris on the second floor, entered the compartment containing the opening by stepping through the framing uprights, lifted the piece of plywood, and fell to the first floor, suffering serious physical harm.

A violation may be upheld if an uncovered opening exists. Alternatively, where the opening is covered, a violation may be upheld if the cover fails to meet any of the safety order requirements. There was no dispute that the cover could withstand sufficient weight. The ALJ found that the cover had been secured from accidental removal or displacement by the surrounding framing, but found that the cover did not have the writing required by the safety order. The Appeals Board agreed with the ALJ's latter conclusion.

Employer's Petition argued that the word "Cuidado", which translates to English as "be careful", constituted a better alternative to the requirements of the safety order because most of its workers were Spanish-speaking. However, the ALJ found the argument to be unpersuasive and the Appeals Board agreed determining that "Cuidado" neither denotes nor implies the "Opening – Do Not Remove" message required by §1632(b)(3).

The record demonstrated that the employee was exposed to the violative condition. Exposure may be demonstrated by showing "actual exposure" to the zone of danger, or by demonstrating reasonably predictable access to the zone of danger. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) [**Digest** ¶20,494R]; *Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [**Digest** ¶22,634R] (*Dynamic Construction*).) The ALJ properly concluded that the employee was actually exposed to a hazard created by the improperly marked cover when he lifted it and fell through the floor opening. Citation 2 was affirmed.

If the floor opening was not properly secured and/or marked, did Employer establish the due diligence defense as a controlling employer?

The Appeals Board recognizes a due diligence affirmative defense available to controlling employers in California cited under the multi-employer worksite regulation. (*McCarthy Building Companies, Inc,* Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan 11, 2016) (*McCarthy*) [**Digest** ¶22,555R].) The due diligence defense recognizes that the "[t]he general contractor is not normally required to inspect for hazards as frequently or to have the same level of expertise and knowledge of applicable standards as the subcontractor it hired." (*Harris Construction Company*, Cal/OSHA App. 03-3914, Decision After Reconsideration (Feb. 26, 2015) [**Digest** ¶22,450R].)

The evidence presented at the hearing, including stipulations, demonstrated that Employer was familiar with the subcontractor's safety practices and background, conducted regular and frequent inspections, generally enforced compliance with safety and health requirements, had a system of employee education and training, and had a comprehensive IIPP. However, other factors militated against the defense. The evidence demonstrated that the hazard in this case, i.e., the improperly marked cover, was neither latent nor unforeseeable. Further, although Employer generally enforced compliance with safety and health requirements, Employer did not promptly correct this particular hazard upon discovery.

The evidence demonstrated that the opening was created by Conco, the concrete contractor, who initially placed the cover over the opening for several months before the accident. RJP framed around the opening and cover. Employer was aware, or should have been aware, of the opening, the cover and the fact that it was improperly marked, given that it had the blueprints, was present when the opening was created, present when RJP framed around it, and conducted regular inspections. Employer did not direct anyone to properly mark the cover for several months and thus, the ALJ found and the Appeals Board agreed, that the patent nature of the hazard, and the failure to promptly correct the hazard were sufficient to defeat the due diligence defense.

Conclusion.

The Appeals Board concluded that Employer failed to establish the due diligence defense as to the violation of §1632(b).

Decision.

The Appeals Board affirmed the ALJ's Decision.

INJURY AND ILLNESS PREVENTION PROGRAM (IIPP) –

Maintain records - Title 8, California Code of Regulations, §3203(b)(2) - The evidence proffered by the Division, was sufficient to show that Employer failed to maintain documentation of safety and health training for each employee.

IMPLEMENTATION OF IIPP – TITLE 8, CALIFORNIA CODE OF REGULATIONS, §3203(A)(4) –

The evidence proffered by the Division, was sufficient to show that Employer failed to conduct scheduled and periodic inspection of the secondary employer's work site as required by its IIPP.

DUAL EMPLOYER -

The Division proffered evidence that Appellant had the right to control and direct the activities of the employee. It was established that the Appellant was an Employer.

ASSESSMENT OF CIVIL PENALTIES –

Two citations were affirmed. The penalties were modified.

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RANDSTAD NORTH AMERICA, INC. DBA RANDSTAD USA/RANDSTAD US , LP

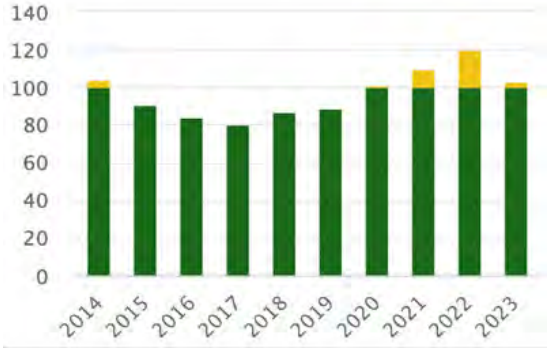
49 COR 40-8735 [23,265]

Digest of COSHAB-ALJ's Decision dated September 19, 2023, Inspection No. 1330829 (Carlsbad, CA)

Mario Grimm, Administrative Law Judge

For Employer: Benjamin D. Briggs, Esq. and Daniel R. Birnbaum, Esq. of Seyfarth Shaw, LLP

For DOSH: Manuel Arambula, Staff Counsel



X-MOD GRAPH FROM COMPLINE

Facts: Randstad North America, Inc. (Employer) provides employee staffing, payroll administration, and human resources administration services. On June 18, 2018, the Division of Occupational Safety and Health (the Division) conducted an investigation following a report of a death of an employee, at Employer's worksite, located at 8451 Calle Barcelona, Carlsbad, California (the site).

On November 20, 2018, the Division issued two citations to Employer, alleging violations of the California Code of Regulations, Title 8. Citation 1, Item 1, classified as Repeat Regulatory, alleged failure to maintain records. Citation 1, Item 2, classified as Repeat General, alleged a failure to implement its Injury and Illness Prevention Program. The citations were issued with a total of $5,000 in proposed penalties.

Employer filed a timely appeal contesting the existence of the alleged violations, the correctness of the classification, and the reasonableness of the proposed penalties. In addition, Employer contended that it was not an employer and raised numerous affirmative defenses.

The matter was submitted on August 22, 2023.

Did the Division cite the correct Randstad entity?

The Division issued the citations in the name "Randstad North America Inc." The citations specify two fictitious business names: "Randstad USA" and Randstad US L.P." The parties did not dispute that Appellant (Employer) is part of a corporate umbrella of various legal entities (collectively, Randstad). Appellant contends that each entity performs separate and distinct business services.

The Division has the burden of proving a violation, including the propriety of the cited entity, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016) [**Digest** ¶22,625R]; *Shimmick-Nicholson Construction, A Joint Venture*, Cal/OSHA App. 1021893, Decision After Reconsideration (Jul. 24, 2017) [**Digest** ¶22,731R]**.)**

An employee worked at the job site on June 15, 2018. She worked as a sales associate at a cosmetics store counter, specifically selling L'Oreal cosmetics. She was found later in the day unresponsive in the restroom by a store manager. It was determined by authorities that the employee died of natural causes unrelated to work.

The Division's District Manager visited the worksite on June 18, 2018. The store manager told the District Manager that the employee was employed by Randstad. The Division issued a request for documents and received responses approximately two weeks later. Included in the document response was evidence of workers'

compensation insurance coverage as well as Certificate of Liability Insurance, Addtional Remarks Schedule and a letter dated November 9, 2017, regarding workers' compensation and experience modification factors. The District Manager researched and determined that the Appellant was registered to transact business in California according to the Secretary of State's online database.

The written agreement entered into by the deceased employee identified Randstad Professionals US, LLC (RP LLC) as the entity contracting with her. Additionally, the Talent Assignment/Pay Acknowledgement Form identified the employer as Randstad Professionals US, LLC. The Appellant's contract with L'Oreal identified Randstad Professionals US, LP (RP LP) as the entity contracting with L'Oreal. One itemized wage statement from the deceased employee's file identified the entity paying her wages as Randstad HR Solutions DE, LLC (RHR LLC).

The Division received an IIPP which belonged to "Randstad US," without entity type designation. It stated "Randstad US is a wholly owned subsidiary of Randstad Holding NV...." The organizational chart submitted showed "Randstad U.S." which the ALJ determined to be a fictitious business name. "Randstad Sourceright' appeared on multiple documents, and it was found to be a fictious business name for both RP LLC and RP LP. Additionally, Randstad Sourceright was identified as the legal name of the deceased employee's employer on the Earned Sick Leave and Minimum Wage Notification Form.

The ALJ determined that the evidence established there were four Randstad entities engaged in the business operation related to the deceased employee. Appellant characterized their business as "payrolling services." The ALJ found that RP LLC was the entity that entered into a written agreement with the deceased employee and RP LP was the entity that entered into a written agreement with "L'Oreal". RHR LLC fulfilled the role of issuing required itemized wage statements. The appellant did not introduce evidence supporting its assertion that it did not have any employees. To the contrary, the fact that Appellant introduced that it carried workers' compensation insurance which covered the deceased employee was a determining factor. Therefore, the ALJ found that the Appellant was not improperly cited and in fact Appellant played a direct and indispensable role in the deceased employee's employment.

***Was Appellant an employer (or "dual employer") of* Hazel Reid (deceased employee)?**

Appellant contended that L'Oreal employed the deceased employee and that Appellant merely provided payrolling services on behalf of L'Oreal. The Appeals Board has long held that an employee may, in some instances, have two employers. Four Randstad entities were participating in the deceased's employment, so the ALJ had to determine which actions Appellant was responsible for.

The Division argued that Appellant was liable under an "Alter Ego" theory. Under the "Alter Ego" doctrine a corporation or LLC and its owner(s) will be liable for each other's acts. (*840 The Strand, LLC*, Cal/OSHA App. 13-3353 (Sep. 25, 2014) [Digest ¶22,407R]).)

Unity of Ownership

Appellant held membership interests of 99.9 percent in at least two of the legal entities involved with the deceased's employment: RP LLC and RHR LLC. Further, the remaining interests in RP LLC and RHR LLC were held by Randstad General Partner (US), LLC, of which Appellant was the sole member. Thus, the ALJ determined there was unity of interest and ownership among RP LLC, RHR LLC and Appellant. With respect to RP LP, it was a party to the contract with L'Oreal which contracted with the deceased. RHR LLC issued paychecks to the deceased and the Appellant provided workers' compensation insurance coverage for the deceased. The ALJ found, therefore, that the evidence supported an inference that RP LP had a unity of interest and ownership with the three other entities.

The evidence established that a single business was operated through the utilization of multiple legal entities. Each entity played an indispensable role and each entity's activity made sense only if seen as part of a unified whole. Three entities used "Randstad Sourceright" as a fictitious business name which indicated the entities were intended to be viewed as one business. The ALJ determined that viewing each entity's actions as integral parts of a larger business showed that the larger business had a purposeful, coherent relationship with the deceased. Appellant therefore, satisfied the elements of the Alter Ego doctrine and the ALJ held that Appellant was responsible for the actions of the three other Randstad entities involved with the deceased.

Control

Appellant's written agreement with the deceased addressed a broad array of fundamental employment issues. Appellant instructed the employee regarding workplace safety issues, including that she was to notify Appellant rather than L'Oreal regarding "unsafe" work environment, unless it was a case of immediate risk of harm. Further, the provisions of the contract showed a broad range of control from matters of public policy to matters within freedom of contract, such that the employee was prohibited from working for L'Oreal for a period of six months after the assignment ended. The ALJ determined that the evidence showed Appellant actually exercised control by instructing the employee on how to handle various employment matters and thus, Appellant was an employer for purposes of Title 8.

Did Appellant maintain records as required by section 3203?

Section 3203(b), requires an employer to document the steps taken to implement its IIPP:

Records of the steps taken to implement and maintain the Program shall include:

(1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year; and [...]

(2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

Citation 1, Item 1, alleges:

Prior to and during the course of the inspection, including, but not limited to, on June 18, 2018, the Employer did not record the steps taken to implement and maintain the employer's Injury Illness Prevention Program.

Instance 1: The employer did not maintain records of training provided to employees by secondary employer on tasks required to be performed at the secondary employer's work site.

Instance 3 [sic]: The employer did not maintain records of secondary employer's reviewed IIPP.

In order to prove a violation, the Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*Gateway Pacific Contractors, Inc.*, Cal/OSHA App. 10-1502 (Oct. 4, 2016) [**Digest** ¶22,618R].)

First Instance –

Employer is required to keep training records that include the

employee's name, training dates, type of training and training providers. Appellant did not dispute that the employee received training. The Division requested training records and the Appellant produced the Employee Guidebook and the Safety in the Workplace record. Appellant sought to obtain the employee's training records from the Sales and Training Coordinator for L'Oreal, but she implied that such records did not exist stating that the employee did not participate in any formal training but that the employee interacted with the Training Coordinator via email, phone and in person regarding new product training. The ALJ determined that the documents produced did not comply with the safety order requirements as they did not include the employee's name, training dates, types of training and training provider information.

Second Instance -

The second violation instance alleged Appellant "did not maintain records of secondary employer's reviewed IIPP." The ALJ reviewed the IIPP which stated that Appellant will "Perform a documented on-site inspection of the client's working environment, which includes review of the client's IIPP or any other form of safety program." Although, the Appellant admitted that it did not perform on-site inspections, the Division failed to prove the allegation of not maintaining records of secondary employers reviewed IIPP, by a preponderance of the evidence.

The Division proved one of two violation instances alleged in Citation 1, Item 1, and thus, it was sufficient to establish a violation of §3203(b)(2).

Did Appellant effectively implement its IIPP?

Section 3203, subdivision (a)(4), provides, in relevant part:

Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A) When the Program is first established;

[...]

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Citation 1, Item 2, alleges:

Prior to and during the course of the inspection, including, but not limited to, on June 18, 2018, Randstad North America, a temporary labor supplier, failed to implement the steps of the employer's written IIPP.

Instance 1—Primary employer failed to review and ensure that the secondary employer had an effective, written IIPP prior to sending workers to work at the secondary employer's worksite located at 8451 Calle Barcelona, Carlsbad CA 92009 as required by this subsection.

Instance 2—The primary employer failed to conduct scheduled and periodic inspections to identify unsafe conditions and work practices, where their employees may be exposed at the secondary employer's work site as required per primary employer's written IIPP.

First Instance –

The first violation instance alleged that Appellant failed to review and ensure that the secondary employer had an effective, written IIPP prior to sending workers to work at the secondary employer's worksite. The Division did not put forth specific evidence. Contrary to the IIPP, Appellant stated in response to the Division's questions, "that it did not currently conduct onsite inspections at the retail stores". However, the ALJ determined that the evidence did not squarely address the allegation that Appellant failed to review the written IIPP and ensure its effectiveness. Thus, the ALJ held the Division did not prove the first violation instance.

Second Instance –

This instance alleged Appellant "failed to conduct scheduled and periodic inspections…" at the secondary employee's work site as required. Appellant did not argue that it performed inspections pursuant to the IIPP. Thus, the evidence established that it did not perform the inspections and thus, the Division proved the second violation instance.

The Division proved one of the two violation instances alleged in Citation 1, Item 2, thus a violation of section 3203(a)(4) was established.

Was Citation 1, Item 1, properly classified as a Regulatory violation?

The Division classified Citation 1, Item 1, as a Regulatory violation. Section 334(a), defines a Regulatory violation as one other than a violation defined as Serious or General that pertains to permit, posting, recordkeeping and reporting requirements as established by regulation or statute.

The allegation in Citation 1, Item 1, was that Appellant did not keep compliant training records for the deceased employee. Thus, the violation pertained to recordkeeping. Neither party argued that the violation was Serious or General. Accordingly, the ALJ determined that Citation 1, Item 1, was properly classified as a Regulatory violation.

Was Citation 1, Item 2, properly classified as a General violation?

The Division classified Citation 1, Item 2, as a General violation. Section 334, subdivision (b), defines a General violation as a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.

The allegation in Citation 1, Item 2, was that Appellant failed to implement its IIPP procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Appellant stopped performing on-site inspections of its client's working environments and, thus, without inspections, employees were more likely to be injured or suffer increased severity of harm. The ALJ determined the violation had a relationship to safety and health and since no party argued the violation was Serious, the ALJ held that the Citation was properly classified as a General violation.

Were the violations properly classified as Repeat violations?

The Division classified both Citation 1, Items 1 and 2, as Repeat violations. Section 334(b) defines a Repeat violation as one where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon a later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest citation which was affirmed or became final by operation of law.

Both citations premise the Repeat classification based upon prior citations issued to Randstad US L.P. pursuant to Division's inspection number 1157627. The Division contended that Appellant is a successor or alter ego of Randstad US L.P. because the Regional Safety Manager and company representative had a role in the earlier appeal similar to

her role in this appeal. The Division's compliance officer in the earlier case testified that she determined that Randstad US L.P. provided general orientation and training to employees before assigning them to clients. She also testified that in the earlier investigation she saw the name "Randstad Sourceright" in documents and on the Secretary of State's online database of registered businesses. However, there was no documentary evidence that Randstad Sourceright was a name involved in the earlier case. Throughout her testimony the compliance officer did not distinguish among any Randstad entities. On cross-examination, she testified that the earlier case did not involve confusion regarding the correct entity. The ALJ determined that her testimony that "Randstad Sourceright" appeared in the earlier case was not credible.

After review of all the evidence, the ALJ held that there was no indication that Appellant was involved in the earlier case. The nature of the businesses appeared to be different, Randstad US L.P. trained employees and provided general orientation before assigning them to clients, which was not the case for the Randstad business involved with L'Oreal and the deceased employee. The evidence did not establish that Appellant was a successor or alter ego of Randstad US LP. Thus, the Division did not establish the Repeat classifications of Citation 1, Items 1 and 2, because Appellant was not the employer from the earlier case.

Were the proposed penalties calculated in accordance with the penalty-setting regulations?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Decision After Reconsideration (Mar. 10, 2017) [**Digest ¶**22,683], citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006) [**Digest ¶**20,795R].)

The Division submitted its Proposed Penalty Worksheet showing the penalty calculations. The Division's District Manager testified that as a result of the Repeat classification, the proposed penalty was doubled. Appellant did not dispute the calculation of the penalties except to dispute the Repeat classifications of the violations. Since the ALJ determined that the evidence did not support the Repeat classifications, the doubling of the penalties was not supported. The penalty for Citation 1, Item 1, was assessed at $500 and for Citation 1, Item 2, it was assessed at $2,000.

Conclusion.

The evidence supported a finding that Appellant violated §3203(b), the Repeat classification was dismissed and the ALJ reclassified the violation as Regulatory. The penalty was found to be reasonable as modified by the ALJ.

The evidence supported a finding that Appellant violated §3203(a), the Repeat classification was dismissed and the ALJ reclassified the violation as General. The penalty was found to be reasonable as modified by the ALJ.