

BEFORE THE  
STATE OF CALIFORNIA  
OCCUPATIONAL SAFETY AND HEALTH  
APPEALS BOARD

In the Matter of the Appeal  
of:

**JAIME DE SANTIAGO ALVAREZ**  
**DBA J. DE S FARM LABOR**  
1631 Madison Street  
Delano, CA 93215

Employer

DOCKETS 12-R6D5-3809  
and 3810

**DECISION**

**Background and Jurisdictional Information**

Jaime De Santiago Alvarez, dba J. Des S Farm Labor (Employer) provides labor to harvest crops at various work sites. On July 19, 2012, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer, Donald Cyrus Jackson (Jackson) conducted an accident inspection at a work site maintained by Employer at Elmo and Hermosa Road, Delano, California (work site). On October 19, 2012, the Division cited Employer for the following alleged violation of the occupational safety and health standards and orders found in Title 8, California Code of Regulations<sup>1</sup>:

<b><u>Cit/Item</u></b>	<b><u>Section</u></b>	<b><u>Classification</u></b>	<b><u>Penalty</u></b>
1-1	3457(c)(2)(D) [Toilet not easily accessible for employee use]	General	\$225
2-1	3457(c)(1)(A) [Drinking water not easily accessible for employee use]	Serious	\$4,050

Employer filed a timely appeal contesting the existence of the alleged violations and asserted that the proposed penalty was unreasonable for Citation 1, Item 1 and Citation 2, Item 1.

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<sup>1</sup> Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

This matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on November 5, 2013. Jaime de Santiago Alvarez, Employer's owner, represented Employer. Michael Nelmda, District Manager, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on November 5, 2013. ALJ Hill-Williams extended the submission date to January 2, 2014.

### **Law and Motion**

ALJ Hill-Williams granted the Division's unopposed motion to amend Citation 2.1, which was issued as "3457(c) **(2)** (A)" due to a clerical error, rather than the correct citation of "3457(c) **(1)** (A)"<sup>2</sup>.

### **Docket # 12-R6D5-3809**

Citation 1.1, General, 3457(c) (2) (D)

### **Summary of Evidence**

#### **Testimony of Donald Cyrus Jackson**

At the hearing, Jackson, an Associate Safety Engineer and Compliance Officer testified that he has been employed by the Division for the past twenty-four years. Previous to his employment with the Division, he was employed by the Federal Occupational Health and Safety Agency for one and a half years and for the Los Angeles County Fire Department from 1975 to 1987. Jackson started with the LA County Fire Department as a fire fighter and was subsequently promoted to a fire fighter paramedic.

As an associate safety engineer and compliance officer with the Division, Jackson has conducted thousands of inspections and hundreds of inspections in the agricultural industry. On July 19, 2012, Jackson conducted an inspection at the work site, which was a "program planned inspection" (PPI). This inspection was not in response to a complaint or an accident at the work site. PPI requires a neutral selection criterion. The Employer's work site was designated as an agriculture inspection on July 19, 2012. Jackson arrived at Employer's work site and presented his credentials and was given permission to conduct the inspection.

During Jackson's inspection he observed employees working and walking from their assigned work location to the toilets. The work site was a grape vineyard with rows of grapes on grape vines. The path taken by the employees through the grape vines was the most direct route to the toilet facilities. He made a determination that the distance between the employees work location

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<sup>2</sup> The alleged violation (AVD) as set forth in Citation 2, Item 1, "Potable water...placed in locations readily accessible..." cited by the Division on October 19, 2012 is correct.

and the toilets exceeded the maximum time permitted by the safety standard. The standard required that the toilet be located within a five minute or a quarter mile walk between the toilet and the work location.

Jackson followed and timed the path that the employees were walking from the work area to the toilet and measured the time that was the greatest distance from the toilet with his wrist watch. Jackson determined that it took 10 to 12 minutes to reach the toilet, which was a violation of section 3457(c) (2) (D).

Jackson calculated the penalty for the violation as provided in the penalty worksheet (See Exhibit 4). He calculated the severity as medium with an assessment of \$1,000 based upon the number of employees in the radius of the violation location. The extent was assessed as medium by the number of employees at the location. The likelihood was also assessed as medium, although there have been significant illnesses from Jackson's previous inspections due to lack of timely access to the toilet; however, there were not any heat related illnesses on the day of the inspection. Jackson gave 50 percent abatement credit (See figure #2 on Exhibit 4). Adjustment factors were assessed as follows: 15 percent good faith credit because Jackson believed Employer's intentions were admirable because he did provide bathrooms; Employer was given 30 percent size credit based upon 24 employees at the work site; and Employer was given 10 percent history credit because Employer had not had any prior violations with the Division. The total adjustment factor was 55 percent resulting in a proposed penalty of \$225.

### **Testimony of Jaime De Santiago Alvarez**

Jaime De Santiago Alvarez (Alvarez) disputed Jackson's calculation of 10 to 12 minutes for the employees to walk to the toilet from their work location. He testified that the path Jackson took to the toilet could be accomplished in five minutes, which is a path Alvarez has traveled several times.

### **Findings and Reasons for Decision**

**The evidence established that the toilet facility was located more than five minutes from where employees were working at the work site in violation of section 3457(c)(2)(D).**

**The Division established a general violation**

**The penalty assessed is reasonable.**

Employer was cited under section 3457(c) (2) (D), which provides in pertinent part:

Field Sanitation

Toilet and hand washing facilities.

The facilities shall be located within a one-quarter (1/4) mile walk or within five (5) minutes, whichever is shorter.

In Appeals Board proceedings, the Division has the burden of proving by a preponderance of the evidence each factual element of each violation alleged. (*Cambro Manufacturing Co.*, Cal/OSHA App. 84-923 et.al., DAR (Dec. 31, 1986), p. 4.) This includes the burden of proving a violation, including the applicability of the safety order. (See, e.g., *Travenol Laboratories, Hyland Division*, Cal/OSHA App. 76-1073, DAR (Oct. 16, 1980), at pp. 2-3; and *Howard J. White*, Cal/OSHA App. 78-741, DAR (June 16, 1983).)

The Division has the burden of proving Employer did not provide facilities within one-quarter (1/4) mile walk or within five minutes, whichever is shorter. The Division must also show that Employer's employees were exposed to the hazard of not having toilet facilities within a five minute walking distance.

At the planned inspection of Employer's work site on July 19, 2012, Jackson, the Division's associate safety engineer credibly testified that he observed employees walking to the facilities, which took 10 to 12 minutes to reach from the employees' work location. The path taken by the employees was the most direct route to the toilet facilities. The standard required that the toilet facilities be located no less than five minutes or no more than a quarter mile from the employees' work location. Jackson's time measurement of 10 to 12 minutes for employees to reach the toilet facilities far exceeds the five minute time limit and is sufficient to show a violation of section 3457(c)(2)(D).

Under section 334(b), a general violation is a violation which is not of a serious nature, but has a relationship to occupational safety and health of employees. The Division presented evidence that showed Employer's toilet facilities were 10 to 12 minutes from the employees' work location. The Employer did not submit any time calculations to refute the Division's 10 to 12 minute time calculations. Thus the Division has provided sufficient evidence to establish a violation of section 3457(c)(2)(D). Employer's appeal asserted that the safety order was not violated and the penalty was unreasonable, and thus by implication raised the issue of whether the classification was proper. (*Anderson, Clayton & Company, Oilseed Processing Division*, Cal/ OSHA App. 79-131, DAR (July 30, 1984) and Board Reg. §361.3(a) (5).

The Division must calculate proposed penalties in accordance with its regulations and present proof sufficient to support its calculations on likelihood, etc. (*Gal Concrete Construction Co.*, Cal/OSHA App. 89-317/318, DAR (Sept. 27, 1990).) The Division must properly rate the employer's safety

program and its experience to justify a penalty. (*Monterey Abalone*, Cal/OSHA App. 75-786, DAR (March 15, 1977).)

The base penalty of a general violation is determined by evaluating severity, which is based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. Jackson calculated the severity as medium with an assessment of a base penalty of \$1,000. However section 336(b) indicates the base penalty for medium severity is \$1,500. Nevertheless \$1,000 shall be assessed as a result of Jackson's lower assessment (See C-10 Penalty Worksheet, Exhibit #4), pursuant to the Board's authority to modify a penalty (See *Stockton Tri Industries*, Cal/OSHA App. 02-R5D1-4946 (March 27, 2006).)

The base penalty for a general violation is then subject to an adjustment for "extent", which Jackson rated as medium for the 24 employees exposed to the toilet conditions. "Likelihood" is the probability that injury, illness or disease will occur as a result of the violation and is based on the number of employees exposed to the hazard created by the violation and the extent to which the violation has in the past resulted in injury, illness or disease to employees. Jackson rated likelihood as moderate, which does not require any adjustment.

The base penalty is then afforded adjustments for size of the business, history, and the good faith of the employer, which is based upon the quality and extent of the safety program the employer has in effect and operating, awareness of the regulations and willingness to comply with regulations and the history of previous violations. Employer was given 30 percent size credit for the 24 employees, 10 percent history credit and 15 percent good faith credit. The total adjustment factor was 55 percent. Jackson applied a total adjustment of 55 percent subtracted from the base penalty.

Finally, the adjusted base penalty is reduced by 50 percent abatement credit for general violations (and serious violations as discussed under Citation 2) are reduced by 50 percent on the presumption that the employer will correct the violations by the abatement date indicated at the issuance of the citation. With the abatement credit, the resulting proposed penalty is \$225, which was correctly proposed by Jackson.

**Docket # 12-R6D5-3810**

Citation 2.1, Serious, 3457(c) (1) (A)

**Summary of Evidence**

**Testimony of Donald Cyrus Jackson**

At the July 19, 2012 inspection Jackson observed drinking water that Employer provided along the road side by the shade structure. The location of

the water was not readily accessible because it was too far for the employees to obtain water when necessary. Jackson observed employees working in direct sunlight. He took a temperature measurement at the work site. The temperature measured 102 degrees in the sun and 96 degrees in the shade structure provided by Employer.<sup>3</sup> Based upon his observations, Jackson believed the water could have been placed closer to the employees' work location. Jackson learned that employees had their own water bottles that were refilled with the water provided by Employer, however, he cited Employer because the safety standard requires that an employer provide the water and single-use disposable cups for employees.

At the hearing Jackson identified photo Exhibit #3, which he took at the July 19, 2012 inspection. Jackson described the dirt depicted in photo Exhibit #3 as "soft sandy dirt", which takes longer to walk on. He observed the employee that was the greatest distance from the water and timed the most direct path to the water location to be four minutes.

Jackson testified that when he worked as a paramedic, he was trained to be a first responder for medical emergencies. He was trained to examine an ill person and how to respond to injuries. Jackson has received training in heat related illnesses. During his employment with LA County Fire Department Jackson received training for six months at LA County Hospital and at Daniel Freeman Hospital in Inglewood, California. While employed with LA County Fire Department he became familiar with the signs and symptoms of heart and heat illnesses, which include flushed face, high pulse rate, and being unaware or disillusioned of the immediate surroundings. He testified that extreme heat temperatures can lead to a person fainting or cause death. Jackson testified that he can also recognize symptoms of dehydration caused by lack of water in extreme heat situations, which can disrupt the kidney functions, result in bladder problems, respiratory problems, cardiac arrest and stroke symptoms that can permanently affect a person's organs.

Jackson recited section 3457(c)(1)(A) safety order, which requires that water be accessible to employees during work hours and at all times. Jackson believed Employer violated the safety standard because the drinking water was not close to the employees working in the grape field. Jackson considered the distance to access the water, the soft and sandy condition of the soil and the high heat temperatures as determining factors for the violation.

Jackson classified the violation as serious because there was a lack of accessible water for the employees within a four minute time period and the high heat and soil conditions created a realistic possibility of a serious illness based upon his experience and training as a fire fighter and associate safety

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<sup>3</sup> Jackson testified that he used a "Kestrel 3200", which is a device that measures the temperature, wind direction and moisture. The temperature measured was a direct reading from the Kestrel device, which is calibrated on a yearly basis and was properly calibrated at the time it was used to measure the temperature at the inspection.

engineer. Jackson determined that the water was too far away and could have been placed closer to the employees. Upon classifying the violation as serious, Jackson issued a “Notice of Intent to issue a serious violation” to the Employer (See Exhibit 2)<sup>4</sup> and subsequently cited Employer for not having potable water available.

Jackson testified that the severity of the violation was moderate, assessing a penalty of \$18,000. He calculated extent as medium because there were 24 employees present at the work site, with approximately 12 employees exposed to the hazard. Likelihood was determined to be medium due to the high heat temperatures of 102 degrees in direct sunlight and 96 degrees in the shade at the time of the inspection. The total adjustment factor was 55 percent (See good faith, size, and history credits discussion for Citation 1, Item 1, *supra*) with a 50 percent abatement credit, resulting in a proposed penalty of \$4,050.

### **Testimony of Javier Jabiner Cadena**

Javier Jabiner Cadena (Cadena) was called to testify by the Division. He is the Deputy Labor Commissioner, responsible for ensuring compliance with California labor laws. Cadena was a participant in the PPI on July 19, 2012. He testified that his responsibilities in the PPI included ensuring that employees are given breaks, lunch breaks, workers compensation benefits, employees are on the payroll and that employees are actually employed by the Employer. Cadena also assisted Jackson in interpreting interviews with Spanish speaking employees at the work site.

Cadena confirmed that Jackson made time measurements to calculate the distance employees walked from the work location to the toilet facilities (See Citation 1.1 Summary of Evidence *supra*) and the time measurement of water accessible to the employees. Cadena testified that he saw Jackson take the most direct route to the toilet facilities and the water location.

### **Testimony of Oscar Amancio**

Oscar Amancio (Amancio) testified regarding employees’ access to water at work sites during high temperature weather conditions. Amancio is employed by the Division as an Associate Safety Engineer and is assigned to the Division’s Labor Enforcement Task Force. Amancio has been an associate safety engineer for over four years. Before employment with the Division, Amancio worked for the State Compensation Insurance Fund (SCIF), Employers Direct, and Royal Sun Alliance as a loss control representative. Amancio received training in heat illness throughout his career. He learned that access to water prevents heat illnesses and allows employees to drink

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<sup>4</sup> The Division is required to give an employer notice of its intent to cite a serious violation of a health and safety standard.

more water throughout the day. The closer the water is located to the employees, the more likely employees will drink water.

During his heat illness training he learned the types of illnesses that can develop from heat exposure: heat strokes, heat exhaustion, as well as permanent injury such as heart illnesses and strokes. During his employment he observed renal failure, fainting and fatalities from employees' lack of water during extreme heat conditions.

Amancio testified that he was also present with Jackson and Cadena at the July 19, 2012 inspection. Amancio has inspected grape vineyards on prior occasions and this work site is consistent with grape vineyards he has previously inspected. He observed Jackson walk the path of the employees to the water location, the high heat temperatures and the soft and sandy soil conditions. He also observed the full growth of the grape vines. Amancio testified that these conditions could impede the employees' access to water and created a realistic possibility of serious harm to the employees at the work site.

### **Testimony of Jaime De Santiago Alvarez**

Jaime De Santiago Alvarez (Alvarez) testified that Employer had a fixed location for water and shade and a truck that moved around the work site to provide water to the employees. On the day of the July 19, 2012 inspection, Employer's foreman, Moises Lepe (Lepe) did not have an opportunity to drive the water unit around the work site because he was attending to a female employee who had become ill at the job site. Alvarez testified that he arrived at the work site at 11:30 a.m. on the day of the inspection and was also attending to Arguello (the ill female employee, *supra*) during the PPI inspection. On cross-examination Alvarez acknowledged that he was three miles away from the work site when Jackson first arrived at the work site to begin the inspection. Alvarez became aware of Jackson when his foreman called and told him Jackson was at the work site.

According to Alvarez's measurements, the temperature on the day of the inspection was 98 degrees. Alvarez acknowledged that he took his measurements with his cell phone, which does not have a temperature gauge to measure the temperature. Alvarez testified that the company that owned the work site does not allow Employer's employees to work if temperatures exceed 100 degrees or more.

Alvarez also measured the distance employees walked to get the water. He stated that the time measured by Jackson is not correct. It does not take longer than 5 minutes to walk from the employees' work location to access the water. Alvarez further stated that the vine is only 7 feet long with 78 furrows<sup>5</sup> for each row. Alvarez testified that he has worked in the grape fields for the past 32 years and he knows how long it takes to walk a vine seven feet long

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<sup>5</sup> "furrow": a trench in the earth made by a plow. – Merriam-Webster Dictionary

with 78 furrows to the water location. He explained that the shade and water were together at a fixed location. There was also a truck that moved around the work site to provide water to employees.

Alvarez further testified that the penalties proposed by the Division were excessive.

### **Rebuttal Testimony of Donald Cyrus Jackson**

Jackson testified as a rebuttal witness for the Division, to rebut Alvarez's testimony that he was attending to employee Ruby Arguello (Arguello) when he arrived at the work site and that his foreman, Lepe, could not drive the water unit around because he was attending to Arguello. Jackson testified that when he arrived at the work site he observed a female employee (Arguello) lying in a shaded area complaining of a stomach ache as a result of medication she had taken, which was not related to work conditions or the inspection. Jackson further testified that when he arrived at the work site and during the inspection he never saw Lepe or Alvarez attending to Arguello.

### **Findings and Reasons for Decision**

**The evidence established that the drinking water was not accessible to the employees at the work site.**

**The evidence established that the lack of accessibility of water was a serious violation.**

**The proposed penalty was properly calculated and is assessed.**

The Division alleged that Employer violated section 3457 (c)(1)(A) which provides:

Potable water shall be provided during working hours and placed in locations readily accessible to all employees. Access to such drinking water shall be permitted at all times.

The Division specifically alleged that at the time of the inspection an observation was made of a drinking water unit located in the grape orchard that was too far away for employees working in the orchard to readily access, exposing employees to a serious injury/illness.

Jackson credibly testified that he observed that the drinking water at the work site was along the roadside by the shade structure, but was not readily accessible. Jackson determined that it took four minutes to walk to the water location; the temperature at the time of the inspection was 102 degrees in the sun and 96 degrees in the shade. Jackson testified that it took longer to walk

to the water location because of the soft sandy dirt. Cadena, the Deputy Labor Commissioner and Amancio, a Division associate safety engineer also present at the work site confirmed that the distance from the employees to the water location was four minutes.

Presently there is not an Appeals Board Decision After Reconsideration that applies the phrase “readily accessible” as it appears in section 3457(c)(1)(A). Section 3457(b) does not define “readily accessible” in section 3457(c)(1)(A). In attempting to determine the Standards Board’s intended meaning of a work or phrase in a standard, related safety orders may be considered (*NPS Energy Services, Inc.* Cal/OSHA App. 83-600, Decision After Reconsideration (Oct. 13, 1987).) When there is not a definition of a term given in the safety orders, the Board has applied the meaning attributed to the term in common usage or common law in the absence of evidence of a contrary meaning.

It can be inferred that section 3457(c)(1)(A) requires potable water be within or in close proximity to an employee’s immediate work area. The Board has previously held reasonable inferences can be drawn from evidence introduced at a hearing. (*ARB, Inc.*, Cal/OSHA App. 93-2084, Decision After Reconsideration (Dec. 22, 1997).) In *W.R. Thomason*, Cal/OSHA App. 77-750, Decision After Reconsideration (May 11, 1978), the Board held that an employer had violated a standard – then 1602(d) – which required an employer to have a boat “readily accessible” to employees who were working over water. In that decision, the Appeals Board considered a number of factors to determine whether the boat was “readily accessible” to workers.

In *W.R. Thomason, supra*, not only was the boat approximately 250 feet from where employees were working, but it was also locked and it was 10 to 15 feet above the water. In addition, keys to the boat were only available in the bridge control shack which was locked, and only the foreman had the keys. In *W.R. Thomason* the Board did not determine that the 250 feet from the working area of the employees to the location of the boat necessarily constituted a lack of ready accessibility; however, when the 250 feet distance was considered in combination with the other factors present in the case, a violation of the safety standard was found to exist.

In *Griffith Company*, Cal/OSHA App.86-1202, Decision After Reconsideration (March 20, 1987), the Board interpreted the requirement to have a Code of Safe Practices “readily available”. The board held that it meant that a copy of the code had to be “under the immediate control of the supervisor in charge, who shall make it readily available to employees.” It was insufficient for an employer to show that a copy of the code was at a remote headquarters office. Thus, the Board has shown in various Decisions After Reconsideration that it is proper to consider a variety of factors presented by the specific circumstances in each case to determine whether an item or object (here potable water) is “readily accessible” to “all employees” and “access... permitted at all times.” [Section 3457(c) (1) (A)]. Employers cannot ignore the

time, distance, and efforts required to reach the location of potable drinking water.

In *Hong Phat Farm*, Cal/OSHA App. 98-1499, Decision After Reconsideration (April 30, 1001), the Board upheld a violation alleging that toilet and hand washing facilities were located further from the agricultural workers than permitted by field sanitation safety order section 3457(c)(2)(D). In a field sanitation case, the Board held that a hand washing facility must be close enough to a toilet facility for employees to wash their hands before returning to work. (*Davey Tree Surgery Company*, Cal/OSHA App. 00-032, Decision After Reconsideration (June 14, 2002).) While neither case dealt specifically with potable drinking water, it can be inferred that drinking water should be close to employees, especially when workers are engaged in physically exerting activities such as pruning and related hand labor operations and the safety order includes the more protective term “placed in locations readily accessible to all employees”.

In this case Jackson viewed “readily accessible” as the location of potable drinking water should be less than five minutes from the workers work location and found Employer to be in violation of section 3457(c)(1)(A), which he classified as a serious violation.

A “serious violation” is deemed to exist in a place of employment if there is a realistic possibility of serious injury. “Realistic possibility” is not defined in the safety orders. However, the Appeals Board has interpreted the phrase, and it did so in the context of unsafe working conditions from splashing of hazardous chemicals into eyes. The Board interpreted “realistic possibility” to mean a prediction “within the bounds of human reason, not pure speculation.” (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), quoting *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980) .) In *Janco, supra*, the Board found that there was a realistic possibility of eye injury from the hazard in question, (splash in the eyes), although such an injury was unlikely and the possibility was remote. (*Id.*) Effective January 1, 2011, the Legislature changed the standard for finding a serious classification from a “substantial probability” of serious physical harm to a “realistic possibility” of serious physical harm.

Jackson has received training in heat related illness from LA County hospital and at Daniel Freeman Hospital and is familiar with the signs and symptoms of heart illnesses and heat illnesses and has been on hundreds of inspections that involved heat illnesses. He testified that extreme heat situations can lead to a realistic possibility of a person fainting or death. Likewise, Amancio has received heat illness training from the Division, SCIF and Royal Sun Alliance and learned the types of illnesses that can develop from heat exposure, which include heart illnesses and strokes. He testified that lack of water during extreme heat conditions can lead to dehydration, which can result in a realistic possibility of renal failure, fainting and fatalities.

The citation classifies section 3457(c)(1)(A) violation as serious; however, Employer did not base its appeal on a claim that the classification was improper. Employer's appeal asserted that the safety order was not violated and the penalty was unreasonable, and thus by implication raised the issue of whether the serious classification was proper. (*Anderson, Clayton & Company, Oilseed Processing Division*, Cal/ OSHA App. 79-131, DAR (July 30, 1984) and Board Reg. §361.3(a)(5).) Jackson and Amancio's opinion evidence regarding the realistic possibility of a serious injury occurring as a consequence of the violation has been credited. Employer did not question or challenge the Division's evidence regarding classification. Thus the serious classification of the violation is appropriate.

Jackson correctly calculated the penalty according to the Division's policies and Title 8 California Code of Regulations as defined supra under the Findings of Fact for Citation 1, Item 1. The proposed penalty is assessed.

### **Decision**

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

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

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**CLARA HILL-WILLIAMS**  
Administrative Law Judge

Dated: January 29, 2014

CHW: ao

