

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

*In the Matter of the Appeal of:*

**HERMAN WEISSKER INC.**  
1645 Brown Avenue  
Riverside, CA 92509

Employer

**DOCKETS 13-R3D1-3279**

**DECISION**

**STATEMENT OF THE CASE**

On June 10, 2013, as Associate Safety Engineer Andrew Kong, employed by the Division of Occupational Safety and Health (the Division) began an inspection at a work site location maintained by Herman Weissker Inc., (Employer) at Rimhurst and Trabuco, in Lake Forest, California (work site). On September 24, 2013, the Division cited Employer for failure to conduct testing in a vault identified as V5144270 located at the site, and for failing to confirm that all of the electric conductors were properly identified prior to allowing its employees to begin disassembling the conductors, which caused a serious injury to one of its employees.

The Employer filed an appeal contesting all grounds and several affirmative defenses as indicated in Employer's Appeal filed with the Occupational Safety and Health Appeals Board (See Exhibit 1).

The matter came on regularly for hearing before Clara Hill-Williams, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on March 11, 2014<sup>1</sup>. Employer was represented by Attorney Ronald Medeiros. Staff Counsel Melissa Peters represented the Division. The parties presented oral and documentary evidence which is listed in the certification of the record<sup>2</sup>.

<sup>1</sup> ALJ Hill-Williams determined that abatement was no longer at issue based upon the parties' representation that the work site conditions were abated on the day of the accident (June 10, 2013) and removed the matter from "Expedited Proceedings".

<sup>2</sup> Exhibits received and testifying witnesses are listed in Appendix A. The Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

The ALJ extended the submission date to March 1, 2015.

### **ISSUES**

1. Does the safety order, Section 2943(f)(3) apply to this Employer?
2. Did Employer violate Section 2943(f)(3), by failing to conduct testing in a vault<sup>3</sup> and confirm that all electric conductors had been de-energized prior to allowing its employees to perform work in the vault?
3. Were the cables in the vault at Employer's work site properly identified by electrical means, or by spiking<sup>4</sup> prior to allowing its employees to perform work in the vault?
4. Did the Division properly classify the alleged violation as "Serious Accident Related"?

### **FINDINGS OF FACT**

1. Employer is a licensed contractor specializing in high voltage insulation, subcontracted to perform insulation and cable removal services for Southern California Edison (SCE) at the work site.
2. SCE is a public utilities company that provides electrical energy to customers in Southern California and is under the jurisdiction of the California Public Utilities Commission (PUC).
3. The vault and the electrical equipment within the vault were owned by SCE.
4. Employer's removal of high voltage cable was subject to safety order, Section 2943(f), subsection (3).
5. Patrick Collins (Collins), a journeyman lineman was employed by Employer as a foreman to supervise workers in the removal of electrical conductors from an underground electrical vault at the work site on June 10, 2013.

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<sup>3</sup> A large room or chamber used for storage, especially underground. *www.Dictionary.com*

<sup>4</sup> Andrew Kong testified that "spiking" is the use of a spike safety tool to ensure the power source is de-energized.

6. As foreman, Collins was responsible for ensuring that all items in the vault were de-energized before allowing employees to perform their assigned tasks.
7. Collins was required to obtain approval or clearance from an SCE dispatcher to confirm which circuits in the vault were to be de-energized.
8. Carl Burgess (Burgess) was a journeyman lineman working as an extra worker on a six person crew of experienced journeymen linemen, all of whom were assigned to work inside a vault on June 10, 2013 to perform a “shoofly”<sup>5</sup>.
9. Burgess attended an early morning tailgate meeting<sup>6</sup> before going to the work site on June 10, 2013. Burgess was added to the crew to work inside the vault but did not attend a “pre-field”<sup>7</sup> at the work site later that morning with the rest of the crew to identify the cables inside of the vault before he began working in the vault.
10. On June 10, 2013, after lunch, Burgess entered the vault for the first time to begin disconnecting the high voltage cables. Assuming the cables had been de-energized and cold tested<sup>8</sup> when Collins said “it was good to go”, Burgess began disconnecting a “600 volt dead break elbow” cable, which caused an arc flash that resulted in Burgess sustaining serious burn injuries.
11. The penalty proposed for the alleged citation was calculated in accordance with the policies and procedures of the Division.

## **ANALYSIS**

### **1. The cited safety order, Section 2943(f)(3), applies to Employer, the utility subcontractor.**

The first issue is whether section 2943(f) (3) applies to work “performed by electric utilities” and whether this subcontractor is an “electric utility.”

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<sup>5</sup> Shoofly is the act of removing the electrical cables inside an old vault and replacing the cables in a new vault.

<sup>6</sup> A tailgate meeting is an informal safety meeting, which is generally conducted at the job site prior to the commencement of a job or work shift. *www.safeopedia.com*

<sup>7</sup> Pre-field is a meeting at the work site where the members of the crew view the vault to identify cables to be worked on.

<sup>8</sup> Cold test is a test to confirm that the cables have been de-energized.

Section 2943(a) clarifies that the entire regulation, section 2943, applies to all electrical installations on or in proximity to underground high-voltage cables, conductors or equipment and to the operations necessary to raise or lower cables, conductors or equipment to such underground locations.

Working on de-energized cables, conductors or equipment is governed by the safety order found in Article 36 (§§ 2940-2945) of the high voltage electrical safety orders (Subchapter 5, Group 2, § 2700 to § 2983.) A "high-voltage system" is defined in section 2700 as "associated electrical conductors and equipment operating at or intended to operate at a sustained voltage of more than 600 volts between conductors."

Section 2706(a) "high voltage cable refers to "installations of conductors, equipment and associated enclosures. Section 2706(a) further defines the applicability of "high-voltage" safety orders as follows:

"(a) These high-voltage electrical safety orders, apply to all electrical installations and electrical equipment operating or intended to operate on systems of more than 600 volts between conductors and to all work performed directly on or in proximity to such electrical installations, equipment or systems in all places of employment in the State of California as defined in Labor Code Section 6303."

The Division specifically alleged:

"On or before June 10, 2013, Employer failed to conduct testing in a vault identified as V5144270 located at Rimhurst and Trabuco in the city of Lake Forest to confirm all conductors electric energy may be supplied to [sic] have been de-energized and properly identified prior to allowing its employees to do any work.

Two employees inside the vault were injured on June 10, 2013, while attempting to disassemble a 600 Ampere dead break elbow when an arc flash occurred resulting in flash burns ranging from second to third degree covering up to 28% of the body on one of the injured employees."

Employer was a subcontractor for SCE, a public utilities company that owned the vault and the electrical equipment inside the vault, which was under the jurisdiction of the PUC. In the instant case, Employer was hired to perform insulation and cable removal services for SCE, which included the removal of

high voltage cable. <sup>9</sup>Patrick Collins (Collins), a journeyman lineman was employed by Employer as a foreman to supervise workers in the removal of electrical conductors from an underground electrical vault at the work site on June 10, 2013.

The Employer's removal of the high voltage cables at the accident location on June 10, 2013, as defined in Section 2706(a) was electrical work subject to the high voltage safety requirements of Section 2943(f)(3). Employer was contracted to remove cables from the vault and install cables in another location. Thus, under the plain meaning rule, the cited section 2943(f) is a rule that applies to electrical work. The Division testified that the dead break elbow cable which was to be removed was 600 volts. Employer did not dispute the testimony. Since this was electrical work, the High Voltage Safety orders apply. Employer's act of removing the cables was subject to Section 2943(f)(3).

## **2. Whether the Employer failed to de-energize electrical equipment located in an underground vault.**

The Division cited Employer for a violation of subsection 2943(f) subsection (3) which provides for:

Working on De-Energized Cables, Conductors or Equipment. (3) Where more than one cable exists in an excavation, the cable to be worked on shall be identified by electrical means or spiking unless its identity is obvious.

The elements of subsection (f)(3) are: (1) multiple cables located in an excavation; (2) cables are de-energized; (3) cables to be worked on are identified by electrical means or spiking unless its identity is obvious; and (4) employee exposure to the hazard.

The first element of Section 2943(f) is established because there were multiple cables inside the vault. Employer was contracted to remove 600 volt dead break elbow cables, which are high voltage cables according to testimony of the Division's inspector Andrew Kong (Kong). High voltage cables can cause an arc flash and result in serious burn injuries.

Section 2943(b) applies to "Manholes, Vaults, or Similar Structures". Herein, the work took place in a vault, defined as a large room or chamber used for storage, especially underground. (See Footnote 3, *supra*) An

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excavation is defined as the process of excavating; a cavity formed by cutting, digging or scooping.<sup>10</sup> So long as the opening in the earth is below a surface, it is an excavation. The hazard associated with an excavation is similar to the hazard of a vault because there is limited egress from the location, so hazards in confined spaces are often more dangerous. Therefore, the SCE vault was an excavation, subject to Section 2943(f).

The second element of Section 2943(f) (3) requires that the cables are de-energized. On the afternoon of June 10, 2013, Burgess entered the vault for the first time to begin disconnecting the power cables, assuming the cables were de-energized and cold tested<sup>11</sup> to determine if the cables were de-energized or by spiking with the use of a spike safety tool to ensure the power source was de-energized.

Employer's post hearing brief asserted section 2943(f)(3) does not apply to work performed on energized cables because subsection (f) of the safety order addresses "Working on **De-energized** Cables, Conductors or Equipment". However, working on "de-energized" cables is an element of the safety order. Working on the cables is only allowed if these steps to de-energize the cables are taken. Since Burgess actually worked on energized cables, the evidence is susceptible to the inference that the de-energizing methods required by the safety order were not adequately performed.

In conclusion, Employer failed to ensure that the cables to be removed in the vault were de-energized

The third element of Section 2943(f)(3) requires that the cables are identified by electrical means or spiking unless its identity is obvious. The facts indicate Burgess, Employer's employee, relied on the foreman's (Collins) confirmation that the cables he was assigned to work on were de-energized. According to SCE's policies, Collins was required to obtain approval or clearance from an SCE dispatcher to confirm which circuits in the vault were to be de-energized. There was not any evidence submitted at the Hearing showing Collins obtained clearance before allowing the workers to proceed with the shoofly work inside the vault on June 10, 2013.<sup>12</sup> At the Hearing, Burgess testified that during the early morning June 10, 2013 tailgate meeting with the rest of the crew members, they were given the tasks for the day before going to the work site. Burgess further testified that when he arrived at the work site on the morning of June 10, 2013, he did not attend a "pre-field" meeting with

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<sup>10</sup> *www.Merriam-Webster.com*: Dictionary and Thesaurus

<sup>11</sup> Cold test is a test to confirm that the cables have been de-energized.

<sup>12</sup> See testimony of Julie Olin, SCE Claims Representative.

the rest of the crew, where Collins, the foreman usually went over the cables to be worked on inside of the vault. After lunch on June 10, 2013, without any prior identification of the cables, Burgess entered the vault for the first time to begin disconnecting the high voltage cables.

Employer further contends section 2943(f)(3) was not violated because the existence of the various cables in the vault was “obvious” to Employer’s experienced electrical workers and did not need to be “identified by electrical means or spiking.” Employer’s position does not consider the purpose of the safety order, which is to identify cables that are de-energized and the cables that are not de-energized. Here, without evidence of any electrical means or spiking to identify whether the cables were energized or de-energized and Collins failing to accurately confirm that the cables were de-energized, Burgess wrongly assumed the cable he attempted to disconnect was de-energized and cold tested. The Employer did not submit any evidence that the cables de-energized state was obvious or identified by other employees working on the crew. Nor did Employer refute the Division’s position, with evidence that the cables were identified as de-energized by electrical means or obvious to the other crew members working in the vault. Here, Employer was duty-bound to ensure the cables were identified and de-energized before allowing the workers to work with the cables inside the vault, in order to remove the hazard of an electrical injury to exposed workers.

In conclusion, the cables were not properly identified by electrical means, or by spiking before Employer allowed its employees to work inside the vault.

Finally, the fourth element requires employee exposure. The employee must be exposed to the possible hazard of improperly de-energized cables in the vault. Burgess was exposed to a hazard of being burned by an arc flash emanating from improperly de-energized cables. He actually encountered the hazard addressed by the safety order, thereby establishing employee exposure to the hazard of not de-energizing the cables to be worked on inside the vault.

All elements of Section 2943(f) are present: The work site vault contained multiple high voltage cables; the removal of the cables required de-energized cables which were the responsibility of Collins, Employer’s foreman; the cables inside the vault required identification of the de-energized cables before the removal of the cables; and there was exposure of serious injuries to employee Burgess working inside the vault if the cables were not de-energized or identified.

Therefore, Safety Order, Section 2943(f)(3) applies to Employer as a utility subcontractor. All four elements of this safety order are applicable

because the work took place inside an underground vault, which is considered an excavation; the procedures to ensure the cables to be worked on were de-energized were not followed; nor were procedures followed to identify the de-energized cables inside the vault; and Burgess was exposed to a serious injury because these procedures were not followed by Employer.

**3. Did the Division prove, by a preponderance of evidence that Employer's violation of section 2943(f), subdivision (3) resulted in a realistic possibility that death or serious physical harm could occur from the hazard created by the violation?**

The issue in this matter is whether there is sufficient evidence to support the "serious" classification as cited by the Division's Associate Safety Engineer, Andrew Kong (Kong). In determining whether the Division presented sufficient evidence to prove the "serious" classification of the violation, the legal standard is expressed in Labor Code section 6432, subdivision (a) which states:

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

....

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

Here, the "practice" or "method of operation . . . adopted or in use" in the work place was allowing employees to enter the vault to remove cables assuming they were de-energized and cold tested or that spiking with the use of a spike safety tool was conducted to ensure the power source was de-energized.

The elements of a serious violation are: (1) rebuttable presumption, (2) a violation exists in a place of employment, (3) a demonstration of realistic possibility of death or serious injury and (4) employee exposure to actual hazard.

The element of a rebuttable presumption refers to the “reasonable possibility” language, which had been in use by the Appeals Board. There is a presumption that the Legislature has approved the Board’s definition. (See, *Moore v. California State Board of Accountancy* (1992) 2 Cal. 4<sup>th</sup> 999, 1017, 9 Cal. Rptr. 2d 358, 831 P. 2d 798). Here, Employer stipulated that there was a serious injury.

The second element, “a violation exists in a place of employment” is established by the evidence showing Employer was hired as a subcontractor of SCE which owned the vault where the violation occurred.

The third element, a demonstration of “realistic possibility” of death or serious injury is not defined in the Labor Code or safety orders, but has previously been addressed by the Appeals Board. In *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001), the Appeals Board determined that it was unnecessary for the Division to prove actual splashing of caustic chemicals but only a realistic possibility that splashing of chemicals occurred. The Appeals Board explained: “[c]onjecture as to what would happen if an accident occurred is sufficient to sustain (a violation)... if such a prediction is clearly within the bounds of human reason, not pure speculation.” Here, the Employer stipulated that a serious injury occurred at Employer’s work site. When considering the legislative history of the revised Labor Code section 6432, subdivision (a), there is little question that a lower standard of proof was intended when revising the statute from “substantial probability” to “realistic possibility” when this statute was revised effective January 1, 2011.<sup>13</sup>

Serious physical harm as used in section 6432, subdivision (e) is defined as “any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following: (1) Inpatient hospitalization for purposes other than medical observation.

Burgess, a journeyman lineman working as an extra worker on a six person crew of experienced journeymen linemen, was assigned to work inside a

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<sup>13</sup> “Critics also point to other interpretations of the current Appeals Board that make it exceedingly difficult to prove 'serious violation' cases. For example, the Appeals Board has also applied a strict interpretation of the requirements that there be a 'substantial probability' that serious physical harm occur -- at least a 50 percent chance. In fact, in a recent article the Chief of DOSH characterized this interpretation by stating, "that is impractical, unrealistic and calculated to make it almost impossible for us to meet our burden.” (Ass. Com. On Labor Standards, on Assembly. Bill No. 2774 as amended April 14, 2010, May 5, 2010 date of hearing, (reg. sess. 2009-2010).)

vault on June 10, 2013. Upon making contact with the energized cable to begin performing a “shoofly” (removing high voltage electrical cables from an old vault and replacing the cable in a new vault), an arc flash occurred causing Burgess to sustain severe burn injuries.

Burgess testified that he was hospitalized for three weeks for burns he received as a result of the arc flash that occurred in the vault on June 13, 2013. At the Hearing, Captain Michael Schroeder (Schroeder) from the Orange County Fire Authority testified that he interviewed Burgess as part of his investigation in responding to the June 10, 2013 arc flash at the work site. Schroeder confirmed that he observed that Burgess was severely burned. Employer and the Division stipulated that Burgess was severely burned as a result of the June 10, 2013 arc flash. Consequently, there is sufficient evidence in the record to conclude Burgess was severely burned as a result of the arc flash, which caused him to be hospitalized for three weeks.

Kong testified that exposure to a high-voltage in excess of 600 volts or an arc flash resulting from a high voltage current can result in *death or serious burns* (See Labor Code section 6432, *supra*). The assessment is based upon Kong’s training and experience with prior accident investigations. Kong testified that he classified the violation as serious based upon the type of injury sustained by Burgess when he contacted an energized cable. At the Hearing, the parties further stipulated that Burgess suffered serious injuries. The actual occurrence of Burgess’ injury satisfies the standard of “realistic possibility” because the injury sustained by Burgess was “within the bounds of human reason, not pure speculation” (see *Janco Corporation, supra*), which establishes a serious classification.

The fourth element is that there is exposure to an actual hazard. Here the actual hazard was exposure to high voltage cables that were not de-energized. The violation was Employer’s failure to identify whether 600 volt cables were de-energized before allowing Burgess to work on the cables. Collins, as Employer’s foreman failed to identify the de-energized cables in the vault at the “pre-field” meeting and failed to obtain clearance from an SCE dispatcher before allowing Burgess to work on the cables. Thus, Employer’s actions created a hazard that Burgess could be seriously injured.

Thus, the “serious” classification of the citation is established.

**(4) Did the Division establish a nexus between the violation of the safety order and the serious injury sustained by the employee to sustain an accident-related characterization of the violation?**

"To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury." (*Pierce Enterprises*, Cal/OSHA App. 00-1951, Decision After Reconsideration (Mar. 20, 2002) citing to *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001). In order for the penalty reduction limitations of Labor Code §6319(d) to apply to the civil penalty as proposed, the Division must prove that a serious violation caused a serious injury. (*Southwest Engineering, Inc.*, Cal/OSHA App. 91-1366, Decision After Reconsideration (July 6, 1993).)

The Board requires a showing of a "causal nexus between the violation and the serious injury" to sustain the classification of accident-related. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) citing *Obayashi Corp.*, Cal/OSHA App. 98-3674, Decision After Reconsideration (Jun. 5, 2001).) In other words, "where, as here, the evidence establishes that a serious violation caused a serious injury, the violation is properly characterized as "accident-related." (*Duke Pacific, Inc.*, Cal/OSHA App. 06-5175, Decision After Reconsideration (Mar. 14, 2012), citing *K.V. Mart Company dba Valu Plus Food Warehouse*, Cal/OSHA App. 01-638, Decision After Reconsideration (Nov. 1, 2002).)

Kong classified the violation as accident related because employer's failure to identify de-energized cables before allowing the employee to work inside the vault resulted in the serious injury Burgess sustained on June 10, 2013. Because Collins failed to identify high voltage de-energized cables from energized cables before permitting employees to work inside the vault, an arc flash occurred when Burgess began working on the cables, which created a hazard from which a serious injury resulted. Since the serious violation caused serious injury, the penalty may not be reduced by any of the adjustment factors except for size. Based upon the Division's "C-10 Penalty Worksheet" (See Exhibit 15) calculations, Employer is a large employer with over 100 employees. Thus, an adjustment for size was not given.

At the Hearing the parties stipulated that the penalties were calculated according to the Division's policies and procedures. The proposed penalty of \$22,500 is assessed (see Exhibit 15 – Penalty Worksheet).

### **CONCLUSION**

The Division established a serious, accident related violation as a result of Employer's failure to identify the cables to determine whether the cables were energized or de-energized before allowing its employees to work on the cables inside the vault on June 10, 2013.

**ORDER**

It is hereby ordered that the citation is established as indicated above and as 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.

**IT IS SO ORDERED.**

Dated: March 19, 2015

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**Clara Hill Williams**  
Administrative Law Judge

CHW: ao

## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**HERMAN WEISSKER INC.**  
**Docket 13-R3D1-3279**

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

IMIS No. 315534222

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A V F C I R T M E D	V A I T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D1-3279	1	1	2943(f)(3)	S	Proposed penalty is assessed	X		\$22,500	\$22,500	<b>\$22,500</b>
<b>Sub-Total</b>								\$22,500	\$22,500	<b>\$22,500</b>

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$22,500**

NOTE: Please do not mail payments to the Appeals Board.  
All penalty payments must be made to:

Accounting Office (OSH)  
Department of Industrial Relations  
P.O. Box 420603  
San Francisco, CA 94142

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

Please call (415) 703-4291 if you have any questions.

ALJ: CHW/ao  
POS: 03/19/2015

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD**

**Herman Weissker Inc.  
Dockets 13-R3D1-3279**

**Date of Hearing:** March 11, 2014

**Division's Exhibits**

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional documents	X
2	OCFIRS Orange County	X
3	Doc Request Response SCE Inv. Report	X
4	Photo – Elbow vault in vault	X
5	Photo - Vault #2	X
6	Photo Wrench #1	X
7	Photo – Incident location	X
8	Photo – Cables on ground	X
9	Photo close-up of cables on ground	X
10	IBY letter	X
11	Work Place Accident Interview Questionnaire	X
12	Burgess Interview Questionnaire	X
13	Docs rec'd from ER in Prep to Doc Request	X
14	Docs rec'd from SCE – Response to Doc Req.	X

15 C-10

X

**Employer's Exhibits**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
A	Photo Entire T-Body System	X
B	Photo Top of Vault	X

**Witnesses Testifying at Hearing**

**CERTIFICATION OF RECORDING**

*I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.*

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

