

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

**JUSTIN WALLWAY,
dba JDW ENTERPRISES, INC. AND
WENDI SUE LELKE-WALLWAY
3871 Piedmont Ave., #39
Oakland, CA 94611**

Employer

**DOCKETS 14-R1D4-2233
through 2244**

DECISION

Statement of the Case

Justin Wallway, dba JDW Enterprises, Inc. and Wendi Sue Lelke-Wallway (Employer)¹ were involved in the demolition of a single family residence and the construction of a new single family residence on the same property. Beginning January 10, 2014, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer David Hornung (Hornung), conducted a complaint inspection at a place of employment maintained by Employer at 419 Hillside Court, Piedmont, California (the site).

On June 17, 2014, the Division cited Employer for nineteen violations of California Code of Regulations, title 8.² Those alleged violations include three violations related to Employer's Injury and Illness Prevention Program (IIPP), one violation related to providing emergency medical services, three violations related to the use of ladders, one violation related to heat illness prevention, two violations related to projections of reinforcing steel, six violations related to asbestos abatement work, and three violations related to lead abatement work.

Employer filed timely appeals of the citations, contesting the existence of the violations for all cited safety orders, and the classifications and the reasonableness of the proposed penalties in Citations 2 through 12. Employer alleged that it was not an "employer" for the purposes of enforcing all the cited

¹ Employment is contested and the designation of "Employer" identifies the Appellant in this matter. The employment issue is addressed below.

² Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

safety orders, and that the regulatory six month statute of limitations period had expired on the date Citations 4 through 8, 11, and 12 were issued.

This matter was heard by Kevin J. Reedy, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California over three days on May 2, 2015, July 8, 2015, and July 15, 2015. Justin Wallway (Wallway), Owner's Representative, represented Employer. Suzanne Marria, Staff Counsel, represented the Division. Employer timely submitted a post-hearing brief.³ The matter was submitted for decision on October 10, 2015.

Issues

1. Should Employer be allowed to augment the record with additional evidence submitted after the hearing record was closed?
2. Did Justin Wallway appear in this matter as the representative of Justin Wallway dba JDW Enterprises, Inc., and as the representative of Wendi Sue Lelke-Wallway?
3. Was Appellant an "employer" for the purpose of enforcing the safety orders?
4. Did Employer violate section 1509, subdivision (a), by failing to establish, implement, and maintain an effective written IIPP?
5. Did Employer violate section 1509, subdivision (c), by failing to post a Code of Safe Practices (CSP) at a conspicuous location at the job site or make it readily available to the Division by supervisory personnel?
6. Did Employer violate section 1509, subdivision (e), by failing to conduct "toolbox" or "tailgate" safety meetings, or equivalent, with its crews at least every 10 working days?
7. Did Employer violate section 1512, subdivision (b), by failing to ensure the availability of a suitable number of appropriately trained persons to render first aid?

³ The ALJ designated 5:00 p.m. on August 10, 2015, as the deadline for the simultaneous exchange via email of post-hearing briefs. Employer submitted a timely post-hearing brief to the Division. The Division's post-hearing brief was not timely submitted to Employer and as such any arguments therein will not be considered.

8. Did Employer violate section 3276, subdivision (e)(11), by failing to ensure that the side rails of a portable ladder extended at least 36 inches above the upper landing?
9. Did Employer violate section 3276, subdivision (e)(15)(E), by failing to ensure that an employee not stand on the top cap of a step ladder?
10. Did Employer violate section 3276, subdivision (e)(16)(C), by failing to ensure that an employee not use a step ladder in the partially closed position?
11. Did Employer violate section 3395, subdivision (f)(3) by failing to provide written procedures for complying with subdivisions (f)(1)(B), (G), (H), and (I) of the heat standard?
12. Did Employer violate section 1712, subdivision (c)(1), by failing to guard exposed ends of rebar⁴ projections with protective covers?
13. Did Employer violate section 1712, subdivision (d), by using protective covers over rebar projections which were not designed to be used as protective covers?
14. Did Employer violate section 341.6, subdivision (a), by failing to apply for and obtain a registration to engage in asbestos-related work prior to the commencement of asbestos abatement work?
15. Did Employer violate section 1532.1, subdivision (p), by failing to notify the Division prior to the commencement of lead abatement work?
16. Did Employer violate section 1529, subdivision (e)(6), by failing to ensure that asbestos abatement work was supervised by a competent person?
17. Did Employer violate section 1529, subdivision (f)(3)(A), by failing to conduct daily monitoring representative of the exposure of each employee assigned to work within a regulated asbestos abatement area?
18. Did Employer violate section 1529, subdivision (k)(9)(A), by failing to initiate an asbestos training program, and by failing to

⁴ A steel bar used for reinforcement in concrete pouring.

ensure that employees hired and directed to perform asbestos removal work participated in the training?

19. Did Employer violate section 1532.1, subdivision (d)(1)(A), by failing to make a pre-job determination whether any employee could be exposed to any materials containing lead above the action level⁵ while demolishing and removing painted wallboard and various wooden structures known to employer to contain lead based paint?
20. Did Employer violate section 1532.1, subdivision (l)(2), by failing to ensure that employees performing lead abatement work were adequately trained, and by failing to provide to the Division all materials relating to the employee information training program and certification?
21. Did Employer violate section 1529, subdivision (d)(5), by failing to ascertain whether the person(s) hired to remove asbestos containing materials (ACM) from the project site was (were) certified for asbestos removal work?
22. Did Employer violate section 1529, subdivision (f)(1)(A), by failing to perform an initial employee exposure assessment immediately before or at the initiation of the asbestos removal work?
23. Were Citations 4 through 8, 11, and 12 issued prior to the expiration of the statutory six month statute of limitations period?
24. Did the Division establish that Citation 1, Items 1 through 8, and Citations 6 through 10, were correctly classified as “general?”
25. Did the Division establish that Citations 4 and 5 were correctly classified as “regulatory?”
26. Did the Division establish rebuttable presumptions that the violations associated with Citations 2, 3, 11, and 12 were serious?
27. Did Employer rebut the presumptions of the serious classifications in Citations 2, 3, 11, and 12 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violations?

⁵ Action level means employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 micrograms per cubic meter of air calculated as an 8-hour time-weighted average (TWA).

28. Did the Division establish that Citations 4 through 12 were properly characterized as “willful?”
29. Were the proposed penalties reasonable?

Findings of Fact:

1. Employer did not establish good cause to allow for the record to be augmented with additional evidence submitted after the hearing record was closed.
2. Justin Wallway is the employer representative for Justin Wallway, dba JDW Enterprises, Inc. and for Wendi Sue Lelke-Wallway, as designated on all citations.
3. Appellant exercised control over the workers at the site, and paid cash wages to those workers.
4. JDW Enterprises, Inc, is a licensed California general building contractor. The Responsible Managing Officer is Justin Douglas Wallway.
5. Employer did not establish, implement, and maintain an effective written IIPP.
6. Employer did not post a CSP at a conspicuous location at the job site.
7. Employer did not conduct “toolbox” or “tailgate” safety meetings, or equivalent, with its crews at least every 10 working days.
8. Employer did not ensure the availability of a suitable number of appropriately trained persons to render first aid.
9. On or about January 10, 2014, Hornung observed an employee of Employer standing on a portable ladder with side rails which extended less than 36 inches above the upper landing.
10. On or about January 10, 2014, Hornung observed an employee of Employer standing on the top cap of a step ladder.

11. On or about January 10, 2014, Hornung observed an employee of Employer standing on a step ladder in the partially closed position.
12. Employer did not have written procedures for complying with subdivisions (f)(1)(B), (G), (H), and (I) of the heat standard.
13. Employer did not guard exposed ends of rebar projections with protective covers.
14. Employer used protective covers over rebar projections which were not designed to be used as protective covers.
15. The area at the site which required asbestos removal covered more than 100 square feet, which contained material with asbestos content greater than one percent by weight.
16. Employer did not apply for and obtain a registration prior to the commencement of asbestos abatement work.
17. The area at the site which required lead abatement covered more than 100 square feet, which contained material with lead content at or above a level of 1.0 mg/cm².
18. Employer did not notify the Division prior to the commencement of lead abatement work.
19. Employer did not ensure that asbestos abatement work was supervised by a competent person.
20. Employer did not conduct daily monitoring representative of the exposure of each employee assigned to work within a regulated asbestos abatement area.
21. Employer did not initiate an asbestos training program, and did not ensure that employees hired and directed to perform asbestos removal work participate in such training.
22. Employer did not make a pre-job determination whether any employee could be exposed to any materials containing lead above the action level while demolishing and removing painted wallboard and various wooden structures known to employer to contain lead based paint.

23. Employer did not ensure that employees performing lead abatement work were adequately trained, and did not provide to the Division any materials relating to an employee information training program and certification.
24. Employer did not ascertain whether the person or persons hired to remove ACM from the project site were certified for asbestos removal work.
25. Employer did not ensure that an initial employee exposure assessment was performed immediately before or at the initiation of the asbestos removal work.
26. Asbestos abatement operations were being conducted on December 18, 2013, and possibly later. Lead abatement operations were being conducted on or after December 18, 2013. Citations 4 through 8, 11, and 12 were issued on June 17, 2014, one day prior to the expiration of the regulatory six month statute of limitations period.
27. The proposed penalties, as amended, are reasonable.

Analysis:

1. Should Employer be allowed to augment the record with additional evidence submitted after the hearing record was closed?

Labor Code section 6617, in relevant part, provides the following:

The petition for reconsideration may be based upon one or more of the following grounds and no other:

...

(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.

...

In *Dutchman Plastering, Inc.*, Cal/OSHA App. 90-594, Decision After Reconsideration (Feb. 8, 1991), Appellant requested in its Petition for Reconsideration that the Appeals Board take additional direct evidence concerning the employer/employee question. However, it failed to demonstrate that it could not with reasonable diligence have discovered and produced any

such evidence at the hearing. As such, the Appeals Board denied Appellant's request, citing Labor Code section 6617, subdivision (d).

Subsequent to the hearing, in response to the Division's untimely transmission of its post-hearing brief to Appellant, Appellant submitted to the ALJ via email⁶ additional documents it wished to be admitted into the record.⁷ The checks⁸ and the receipt referred to in those emails reflect dates ranging from December 11, 2013, through December 31, 2014. In response to the submission of these documents the Division, on September 17, 2015, submitted in writing to the Appeals Board "Division's Objection to Employer's Evidence Submitted by Emails 8/20/15 and 9/10/15."⁹

The submission of documents by Employer after the record closed, although submitted by email, shall be addressed as a motion to admit additional evidence into the record. The Division's document received on September 17, 2015, will be addressed as opposition to such a motion. In Employer's email dated August 10, 2015, referring to the Division's untimely post-hearing brief, Wallway asserts and/or questions the following: "It is either all in or everything past the deadline is out?" It appears that Wallway submitted these documents in response to the late filing of the Division's post-hearing brief. As already indicated above, the Division's post-hearing brief was not timely submitted, and as such any arguments contained therein will not be considered. Employer failed to provide good cause why it should be allowed to augment the record with additional evidence. According to the dates associated with the proffered documents, Employer could have, with the exercise of reasonable diligence, provided them to the Division in the course of regular discovery.

Employer's request to augment the record with further documentation must be rejected since it has not demonstrated any reasonable basis for not having presented this documentation at the hearing. (Labor Code section 6617, subdivision (d), *supra*, and *Dutchman Plastering, supra*. As such, Employer,

⁶ Three emails from Justin Wallway dated August 10, September 10, and September 15, 2015.

⁷ Section 355, "Proper Method of Service," subdivision (d), in relevant part, provides the following: "Unless otherwise required, service may be made by personal delivery or by depositing the document in a post office, mailbox or mail chute, or other like facility regularly maintained by the United States Postal Service, sealed, properly addressed, with first-class postage prepaid, by deposit with a carrier guaranteeing overnight delivery, or by facsimile ("FAX") machine, ..."

⁸ The email dated August 10, 2015, contains references to 58 checks, with electronic links which could not be opened on the ALJ's email or word processing software.

⁹ The caption of this document appears to contain a typographical error as the email to which it refers is actually dated August 10, 2015, and not August 20, 2015, which is consistent with the date, August 10, 2015, referenced within the document.

lacking good cause, will not be allowed to augment the record with additional evidence submitted after the hearing record was closed.

2. Did Justin Wallway appear in this matter as the representative of Justin Wallway dba JDW Enterprises, Inc., and as the representative of Wendi Sue Lelke-Wallway?

Section 347, “Definitions,” subdivision (x), provides the following: ““Representative” means a person authorized by a party or intervenor to represent that party or intervenor in a proceeding.”

At the commencement of the hearing, the Division asked for clarification whether Mr. Wallway was representing his wife, Wendi Sue Lelke-Wallway. Justin Wallway responded that he did not know whether he had the legal background to make that decision without consulting legal counsel. Justin Wallway signed each appeal form on the line reserved for “Signature of Employer or Employer’s Representative.” Justin Wallway submitted appeal forms identifying himself as “Owner’s Representative” on each of those appeal forms.

It is not in dispute that Wendi Sue Lelke-Wallway is the owner of the property where the alleged violations occurred. The citations attached to each of those appeal forms identify the “Company Name” as “Justin Wallway, dba JDW Enterprises, Inc. and Wendi Sue Lelke-Wallway.” On those same appeal forms Justin Wallway did not indicate that he was only representing “Justin Wallway dba Wallway Enterprises” or that he was only representing “Wendi Sue Lelke-Wallway.”

The Division argued that Wendi Sue Lelke-Wallway received separate service of the subject citations, and that if she was not represented by Justin Wallway, she would not have timely appealed the citations, and that her lack of appearance at the hearing would constitute a failure to appear. The Division asked the ALJ to make a finding of default against Wendi Sue Lelke-Wallway. As indicated above, Wallway identified himself as “Owner’s Representative” on each of the appeal forms. Wallway has represented both himself and his wife since the inception of the appeals, and as such, the Division’s request to find Wendi Sue Lelke-Wallway in default, was denied. It is found that Justin Wallway, pursuant to section 347, subdivision (x), represents both individuals named on each citation, Justin Wallway, dba JDW Enterprises, Inc. *and* Wendi Sue Lelke-Wallway.

3. Was Appellant an “employer” for the purpose of enforcing each of the cited safety orders?

Status as "employees" and "independent contractors" is distinguishable based on the right of control. (*McDonald's Van Ness*, Cal/OSHA App. 00-1621, Decision After Reconsideration (Sep. 26, 2001).) The right of control is the most important factor in determining whether an employment or independent contractor relationship exists in a given circumstance, although several secondary indicia may also be considered. (*Borello & Sons, Inc. v. Dept. of Industrial Relations* (1989) 48 Cal.3d 356; *Shiho Seki dba Magical Adventure Balloon Rides*, Cal/OSHA App. 11-0477, Denial of Petition for Reconsideration (Aug. 31, 2011).)

Labor Code section 2750.5¹⁰ establishes the presumption that an unlicensed person performing work for which a contractor's license is required is an employee.

The work being performed involved the demolition of a single family residence and the construction of a new single family residence. Hornung opened the investigation at the site on January 10, 2014. At that site Hornung observed Wallway and 10 workers. Hornung spoke with Wallway, who told him that he was working on behalf of his wife, the owner of the property. Hornung created notes during his visit to the site that day (Exhibit 7). Wallway, when

¹⁰ Labor Code section 2750.5 provides the following: There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code shall hold a valid contractors' license as a condition of having independent contractor status.

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5.

asked for a list of sub-contractors, provided Hornung with the name of Action Hauling. Some of the demolition was done by Action Hauling. Wallway provided no other names of sub-contractors performing work at the site. Wallway told Hornung that Ramiro Magana (Magana) helps coordinate the workers and brings the workers to the site. Wallway told Hornung that at the end of the week, he figures out who needs to be paid what, and then he pays them. Exhibit 7 also contains the names of nine workers at the site that day although some of those workers, according to Hornung, may have recorded incorrect last names.

Hornung also spoke with Magana at the site on January 10, 2014. Magana told him that he helps coordinate the workers for Wallway, and that he had 10 employees at the work site, two of which he picked up at Home Depot that day. The employees were day laborers, and that they were “cash pay,” meaning that they were paid cash for their labor. Magana said that he knew some of the workers, and that he had been on the job for about one and a half weeks.

Hornung also spoke with a worker, named Alfredo Ayola (Ayola), who told him that he was paid \$150 for a day’s work. After Ayola made that statement, Wallway told him to not talk to Hornung about pay.

Hornung spoke with Helder Pinto (Pinto) and another worker named “Eder” over the telephone. Pinto and Eder were paid \$500 for each container of demolition debris they took off site, and also \$500 per day for the use of the excavator and bobcat. The Division presented evidence that demolition work of the type performed by Pinto and Eder requires a C-21 contractor’s license (Exhibit 24). Neither Pinto nor Eder had a contractor’s license.

Hornung testified that state licensing was required to perform the asbestos removal specific to this job site. Wallway presented no evidence that he, himself, was licensed to perform asbestos removal work. In a letter sent by Hornung to Wallway on January 13, 2014, Hornung asked Wallway the following: “Who performed the asbestos abatement?” Wallway responded as follows: “Owner and paint contractor – I did not verify whether or not the paint contractor was certified, but they seemed to know what they were doing. None of the contractors referred by JWS seemed interested due to the small size of the job.” Wallway also responded that he had no contact information for “employees/employers” that performed the asbestos work, that they were only there for a couple of days, and that he paid cash to the workers who performed the asbestos removal work. (Exhibit 11). Wallway did not testify at the hearing, and failed to provide the requested contact information to the Division. As

such, a negative inference¹¹ can be drawn that the paint contractor was not licensed to perform asbestos removal work.

Ramiro Paredes (Paredes) testified that Wallway asked him to build his house ("the project"). Paredes is a licensed contractor, operating under the business name of North Pacific Builders (North Pacific). Paredes indicated that there was no written bid for the project. North Pacific was tasked with the foundation and framing aspects of the project. When asked if North Pacific had a written contract for the project, he responded, "I believe so, maybe." Paredes also indicated that the amount of the written contract was approximately \$60,000, and that he also had an additional verbal agreement with Wallway, also for approximately \$60,000. The verbal agreement was a time and material agreement. It appears from the testimony that these were two distinct contracts, but no other significant details of either contract were presented at hearing. Paredes maintained a crew of five or six workers at the times North Pacific was working at the site.

Paredes testified that he maintained a crew of five or six when he was at the site. On the day of the inspection there were 10 workers at the site. As such, if the testimony of Paredes were to be accepted as true, at least four of the workers on site on the day of the inspection would not have been North Pacific employees. Wallway put on no evidence that would have established that any of the workers specified on the list created by Hornung during his on-site inspection were North Pacific employees (Exhibit 7). Here, Hornung's testimony is credited as being the most reliable. Paredes was at the site one and one half hours each day. When Paredes was not at the site Magana was in charge. Paredes provided his own tools and specialized equipment at the site; Wallway provided none. In May of 2015, in a telephone conversation with Hornung and staff counsel Suzanne Marria, Paredes was asked to provide payroll records of the employees working at the site. Paredes testified that he possibly agreed to provide those records to the Division, but that he does not remember, and that he did not provide those payroll records to the Division.

Magana is currently employed by North Pacific. Magana testified that he recalled speaking with Hornung at the site on January 10, 2014, and that Hornung asked questions about the employees at the site that day. Magana testified that he told the truth to Hornung regarding those employees at the site during that conversation. Magana testified that he worked for Wallway as an

¹¹ Evidence Code section 413 provides the following: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

employee of North Pacific, and that he was unaware of other workers at the site who were working for Wallway. Magana used the business credit card from Wallway's company, JDW Enterprises, Inc., to purchase asbestos and lead abatement equipment at Home Depot (Exhibit 5). Hornung provided testimony that Magana is an authorized purchaser on that credit account.

Hornung testified that Wallway paid for the JWS Environmental asbestos report with a check drawn on the business entity, JDW Enterprises, Inc. (Exhibit 18). Wallway, using the name of his business JDW Enterprises, Inc., hired Environmental Lead Detect, Inc. to perform a survey for lead at the site (Exhibit 19).

Evidence that Wallway controlled the worksite is abundant. He controlled the work tasks performed, paid laborers in cash at the end of each week, told at least one worker not to talk to Hornung about pay. Wallway put on no evidence that would have established that any of the workers specified on the list created by Hornung during his on-site inspection were North Pacific employees. As such, a preponderance of the evidence demonstrates that the workers at the site on January 10, 2014, were employees of Wallway. The exercise of control by Wallway at the site gave rise to the status of "employer" (*Borello & Sons*, supra).

Wallway provided special equipment for use by an unlicensed person performing the asbestos removal with Wallway. That person, under Labor Code section 2750.5, is presumed to be an employee. Wallway provided no evidence to refute that presumption. Pinto and Eder were also performing work for which a contractor's license was required. As such, Pinto and Eder were also employees of Wallway.

The totality of the circumstances here shows that Wallway maintained a place of employment. The Division, by a preponderance of the evidence, established that Wallway was the employer of all workers at the site.

4. Did Employer violate section 1509, subdivision (a), by failing to establish, implement, and maintain an effective written IIPP?

Section 1509, subdivision (a), under "Injury and Illness Prevention Program," provides the following:

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

Section 3203, subdivision (a), provides, *inter alia*, that the Program shall be in writing.

In the citation, the Division alleges the following:

At the time of the Cal/OSHA inspection, the employer did not establish, implement, and maintain an effective Injury & Illness Prevention Program (IIPP) in accordance with section 3203 of the General Industry Safety orders. The employer did not have any written safety programs.

Section 3203 provides that the IIPP shall be in writing. Hornung provided unrefuted testimony that Employer had no written safety programs. In its response to the Division's request for a copy of its IIPP, Employer indicated that it had none (Exhibit 11). As such, the Division has met its burden of proof, and thus, the violation is established.

5. Did Employer violate section 1509, subdivision (c), by failing to post a Code of Safe Practices (CSP) at a conspicuous location at the job site or make it readily available to the Division by supervisory personnel?

Section 1509, subdivision (c) under "Injury and Illness Prevention Program," provides the following:

The Code of Safe Practices shall be posted at a conspicuous location at each job site office or be provided to each supervisory employee who shall have it readily available.

In the citation, the Division alleges the following:

At the time of the Cal/OSHA inspection, the employer did not post a code of safe practices or have a copy readily available.

Hornung provided unrefuted testimony that Employer had no CSP. In its response to the Division's request for a copy of its CSP, Employer indicated that it had none (Exhibit 11). Without a CSP, employer could neither post it nor make it readily available. At the hearing, Employer stipulated that it did not post a CSP. As such, the Division has met its burden of proof, and thus, the violation is established.

6. Did Employer violate section 1509, subdivision (e), by failing to conduct "toolbox" or "tailgate" safety meetings,

or equivalent, with its crews at least every 10 working days?

Section 1509, subdivision (e), under “Injury and Illness Prevention Program,” provides the following:

Supervisory employees shall conduct "toolbox" or "tailgate" safety meetings, or equivalent, with their crews at least every 10 working days to emphasize safety.

In the citation, the Division alleges the following:

At the time of the Cal/OSHA inspection, the employer did not conduct “toolbox” or “tailgate” safety meetings, or equivalent with their crews at least every 10 working days.

Hornung provided unrefuted testimony that Employer had no records of safety training provided to employees at the job site. Hornung testified that Wallway told him during a telephone conversation that he was unaware of the training provided to the employees. In its response to an inquiry regarding training records of safety training provided to employees, Employer indicated that there were none (Exhibit 11).¹² As such, the Division has met its burden of proof, and thus, the violation is established.

7. Did Employer violate section 1512, subdivision (b), by failing to ensure the availability of a suitable number of appropriately trained persons to render first aid?

Section 1512, subdivision (b), under “Emergency Medical Services,” provides the following:

Appropriately Trained Person. Each employer shall ensure the availability of a suitable number of appropriately trained persons to render first aid. Where more than one employer is involved in a single construction project on a given construction site, the employers may form a pool of appropriately trained persons. However, such pool shall be large enough to service the combined work forces of such employers.

¹² Admissions by a party are not made inadmissible by the hearsay rule. (Evidence Code section 1222.)

In the citation, the Division alleges the following:

At the time of the Cal/OSHA inspection, the employer did not ensure the availability of a suitable number of appropriately trained persons to render first aid.

Wallway provided unrefuted testimony that Employer had no records of safety training provided to employees at the job site. Hornung testified that Wallway told him during a telephone conversation that he was unaware of the training provided to the employees. In that same conversation Wallway told Hornung that he, himself, had not recently had first aid training. In its response to an inquiry regarding records of safety training provided to employees, Employer indicated that it had none (Exhibit 11). Since no records specific to first aid training existed a negative inference can be drawn that Employer did not have appropriately trained persons available to render first aid at the work site. (Evidence Code section 413). As such, the Division has met its burden of proof, and thus, the violation is established.

8. Did Employer violate section 3276, subdivision (e)(11), by failing to ensure that the side rails of a portable ladder extended at least 36 inches above the upper landing?

Section 3276, subdivision (e)(11), under “Portable Ladders,” provides the following:

Access to Landings. When portable ladders are used for access to an upper landing surface, the side rails shall extend not less than 36 inches above the upper landing surface to which the ladder is used to gain access; or when such an extension is not possible, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grab-rail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

In the citation, the Division alleges the following:

On or about January 10, 2014, an employee of the employer was using a portable ladder to access an upper landing surface. The side rails of the ladder did not extend 36 inches above the upper landing surface to which the ladder is used to gain access.

Hornung provided unrefuted testimony that he saw an employee using a portable ladder with side rails not extending 36 inches above the upper landing surface. Hornung took a photo of the ladder and the employee, who was located on the upper landing (Exhibit 9, item D). It is clearly discernable in the photo that the side rails of the ladder did not extend more than a few inches above the upper landing surface. As such, the Division has met its burden of proof, and thus, the violation is established.

9. Did Employer violate section 3276, subdivision (e)(15)(E), by failing to ensure that an employee not stand on the top cap of a step ladder?

Section 3276, subdivision (e)(15)(E), under “Portable Ladders,” provides the following:

Employees shall not sit, kneel, step or stand on the pail shelf, topcap or the step below the topcap of a step ladder.

In the citation, the Division alleges the following:

On or about January 10, 2014, an employee of the employer was standing on the topcap of a step ladder.

Hornung provided unrefuted testimony that he saw an employee standing on the topcap of a ladder. Hornung captured this observation on video (Exhibit 8). As such, the Division has met its burden of proof, and thus, the violation is established.

10. Did Employer violate section 3276, subdivision (e)(16)(C), by failing to ensure that an employee not use a step ladder in the partially closed position?

Section 3276, subdivision (e)(16)(C), under “Portable Ladders,” provides the following:

Step ladders shall not be used as single ladders or in the partially closed position.

In the citation, the Division alleges the following:

On or about January 10, 2014, an employee of the employer was using a step ladder in the partially closed position.

Hornung provided unrefuted testimony that while performing his inspection, he saw two employees using a step ladder in the closed position. Hornung took a photo of an employee using the step ladder in the closed position (Exhibit 9, item F). As such, the Division has met its burden of proof, and thus, the violation is established.

11. Did Employer violate section 3395, subdivision (f)(3) by failing to provide written procedures for complying with subdivisions (f)(1)(B), (G), (H), and (I) of the heat standard?

Section 3395, subdivision (f)(3), under “Heat Illness Prevention,” at the time of the issuance of the citation, provided the following:

The employer’s procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I) shall be in writing and shall be made available to employees and representatives of the Division upon request.

In the citation, the Division alleges the following:

At the time of the Cal/OSHA inspection, the employer did not have a written Heat Illness Prevention Program that included the employer’s procedures for complying with each requirement of Title 8 CCR Section 3395 subsections (f)(1)(B), (G), (H) and (I). The employer did not have any written safety programs.

Hornung provided unrefuted testimony that Employer had no Heat Illness Prevention Program (HIPPP). In its response to the Division’s request for a copy of its HIPPP, Employer indicated that it had none (Exhibit 11). As such, the Division has met its burden of proof, and thus, the violation is established.

12. Did Employer violate section 1712, subdivision (c)(1), by failing to guard exposed ends of rebar projections with protective covers?

Section 1712, subdivision (c)(1), under “Reinforcing Steel and Other Similar Projections,” provides the following:

(c) Protection from Reinforcing Steel and Other Similar Projections.

(1) Employees working at grade or at the same surface as exposed protruding reinforcing steel or other similar projections, shall be protected against the hazard of impalement by guarding all

exposed ends that extend up to 6 feet above grade or other work surface, with protective covers, or troughs.

In the citation, the Division alleges the following:

On or about January 10, 2014, the employer did not ensure that reinforcing steel or other similar projections were protected against the hazard of impalement. There was unprotected rebar at the site.

Hornung provided unrefuted testimony that he, while in the company of Wallway, observed four instances of unguarded protruding reinforcing steel at the job site, which exposed employees to hazards of impalement. Hornung's observation of the unguarded rebar protrusions at the site, and his conclusion that those protrusions created impalement hazards, are found to be credible. As such, the Division has met its burden of proof, and thus, the violation is established.

13. Did Employer violate section 1712, subdivision (d), by using protective covers over rebar projections which were not designed to be used as protective covers?

Section 1712, subdivision (d), under "Reinforcing Steel and Other Similar Projections," provides the following:

- (d) Protective Covers, Specifications, Testing and Approval.
 - (1) Protective covers shall be made of wood, plastic, or other materials of equal or greater strength.
 - (2) Protective covers shall have a minimum 4-inch by 4-inch square surface area, or if round, a minimum diameter of 4 1/2 inches.
 - (3) Manufactured protective covers shall meet the following requirements:
 - (A) Manufactured protective covers shall be approved as provided for in Section 1505 and be legibly marked with the manufacturer's name or logo.
 - (B) Manufactured protective covers made before October 1, 2000 shall, at the minimum, be capable of withstanding the impact of a 250-pound weight dropped from a height of 10 feet without penetration failure of the cover.
 - (C) Manufactured protective covers made on or after October 1, 2000 shall meet the testing requirements of Section 344.90.
 - (4) Job-built protective covers shall meet the following requirements:

(A) Job-built protective covers shall be designed as specified by an engineer currently registered in the State of California. A copy of the engineering drawing(s) depicting the job-built protective covers shall be kept at the worksite and made available to the Division upon request.

Exception: Job-built troughs as depicted in Appendix Plate C-25 may be used as a substitute for engineered or manufactured protective covers when employees are working at heights not greater than 6 feet above grade or other working surface.

(B) Job-built wood protective covers and troughs shall be constructed of at least "Standard Grade" Douglas Fir, as graded by either the Western Lumber Grading Rules 98, handbook, effective March 1, 1998, published by the Western Wood Products Association, or the Standard No. 17 Grading Rules for West Coast Lumber, handbook, effective September 1, 1991 and revised January 1, 2000, published by the West Coast Lumber Inspection Bureau, which are hereby incorporated by reference.

(C) Job-built protective covers, except for troughs as depicted in Appendix Plate C-25, shall, at the minimum, be capable of withstanding the impact of a 250-pound weight dropped from a height of 10 feet without penetration failure of the cover.

Note: The drop test requirement in subsection (d)(4)(C) applies to protective covers used to prevent employee impalement where the employee is exposed to fall heights of up to 7 1/2 feet.

(D) Drop test specifications for job-built protective covers listed in subsection (d)(4)(C) shall be modified where fall heights greater than 7 1/2 feet are anticipated, to ensure that the protective cover can withstand increased impact loading.

In the citation, the Division alleges the following:

On or about January 10, 2014, the employer used protective covers over reinforcing steel or other similar projections that were not designed or to be used as protective covers. Instance 1: The employer used a water bottle, spray painted orange, to protect a piece of rebar. Instance 2: the employer used a Sunny Delight bottle, spray painted orange, to protect a piece of rebar.

Hornung provided unrefuted testimony that two rebar protrusions at the site were improperly covered. One rebar protrusion was covered with a plastic water bottle painted orange. Another rebar protrusion was covered with a plastic "Sunny D" bottle, also painted orange. Hornung testified that neither of

the two bottles would satisfy the requirements of the regulation. Neither bottle had a minimum diameter of four and one-half inches as required by subdivision (d)(2) of section 1712. Hornung opined that neither bottle would pass the “drop test” provision, as explained in Section 1712, subdivision (d)(4)(C), meaning that neither bottle would withstand the impact of a 250-pound weight dropped from a height of 10 feet without penetration failure of the cover. Employer exposed its employees to the hazard of impalement. As such, the Division has met its burden of proof, and thus, the violation is established.

14. Did Employer violate section 341.6, subdivision (a), by failing to apply for and obtain a registration to engage in asbestos-related work prior to the commencement of asbestos abatement work?

Section 341.6, subdivision (a), under “Registration Requirements,” provides the following:

An employer who will be engaging in asbestos-related work, as defined, in subsection (b), involving 100 square feet or more of surface area of asbestos-containing material, computed in accordance with subsection (e) of this section, shall apply for and obtain a registration from the division prior to the commencement of any such work.

The registration shall be valid for one year after issuance by the division.

In the citation, the Division alleges the following:

On or after October 27, 2013, the employer planned to engage in asbestos-related work at 419 Hillside Courts, Piedmont, California, involving 100 square feet or more of surface area of asbestos-containing material, based on the report from JWS Environmental. The employer did not apply for and obtain a registration from the division prior to the commencement of such work.

Hornung provided unrefuted testimony that the area where the asbestos removal was to be performed, according to the JWS Environmental Asbestos Report, covered an area greater than 100 square feet, and that the material which was removed contained asbestos in an amount greater than one percent by weight (Exhibit 18). Hornung testified that neither Wallway, nor anyone else, obtained the necessary registration prior to the commencement of the asbestos

removal work at the site. As such, the Division has met its burden of proof, and thus, the violation is established.

15. Did Employer violate section 1532.1, subdivision (p), by failing to notify the Division prior to the commencement of lead abatement work?

Section 1532.1, subdivision (p), under “Lead,” provides the following:

Lead-Work Pre-Job Notification. The employer shall provide written notification to the nearest Division District Office in the manner prescribed by subsections (p)(1) through (p)(4) when work is planned that includes any of the tasks listed in subsection (d)(2).¹³

¹³ Section 1532.1, subdivisions (p)(1) through (p)(4), provides the following:

(1) The employer shall ensure that the information required by subsection (p)(2) is received by the nearest Division District Office at least 24 hours prior to the commencement of the work by any of the following means: (A) Letter; (B) Facsimile; (C) Electronic mail; or (D) Telephone call, followed by written notification sent or mailed within 24 hours of placing the call.

EXCEPTION: When an employer intends to initiate unforeseen lead-work on an urgent basis within 24 hours, the notification requirement may be met by giving telephone notice to the Division at any time prior to commencement of the work, followed by written notification sent or mailed within 24 hours of telephoning the Division.

(2) The written notification provided by the employer shall contain the following: (A) The name, address and phone number of the employer; (B) The address of the job (or common name of the site with closest streets or roadways identified); (C) The precise physical location of the lead related work at the job site; (D) The projected starting date; (E) The expected completion date or approximate duration of the work in days; (F) The approximate number of workers planned to do the lead-related work; (G) The type of structure(s) in which or on which the work is to be performed; (H) The amount of lead containing material to be disturbed in square feet or linear feet; (I) A description of the type of lead-related work to be performed and work practices that will be utilized; (J) The name of the supervisor who will be responsible for the lead-related work; and (K) The amount of lead in the disturbed materials (percent by weight, parts per million or milligrams per square centimeter) if known.

(3) The employer shall notify the Division, and provide the current information, if changes are made to the starting date, the surface area to be disturbed, or the type of lead-related work performed or work practices to be utilized, before or upon adoption of that change.

(4) An employer conducting ongoing, lead-related operations and maintenance work on stationary steel structures need only notify the Division once for each structure if the duration of the operations and maintenance work is less than one year. If the duration of the work is more than one year, the employer shall submit to the Division at least once per year a supplemental written notification updating all of the information required by subsection (p)(2) for each structure.

Section 1532.1, subdivision (d)(2), provides the following:

(2) Protection of employees during assessment of exposure.

(A) With respect to the lead related tasks listed in subsection (d)(2)(A), where lead is present, until the employer performs an employee exposure assessment as required in subsection (d) and documents that the employee performing any of the listed tasks is not exposed above the PEL, the employer shall treat the employee as if the employee were exposed above the PEL, and not in excess of ten (10) times the PEL, and shall implement employee protective measures prescribed in subsection (d)(2)(E). The tasks covered by this requirement are:

Relevant exceptions to section 1532.1, subdivision (p), are the following:

1. Where lead containing coatings or paint are present: manual demolition of structures (e.g., dry wall), manual scraping, manual sanding, heat gun applications, and power tool cleaning with dust collection systems;

2. Spray painting with lead paint

(B) In addition, with regard to tasks not listed in subsection (d)(2)(A), where the employer has any reasons to believe that an employee performing the task may be exposed to lead in excess of the PEL, until the employer performs an employee exposure assessment as required by subsection (d) and documents that the employee's lead exposure is not above the PEL the employer shall treat the employee as if the employee were exposed above the PEL and shall implement employee protective measures as prescribed in subsection (d)(2)(E).

(C) With respect to the tasks listed in this subsection (d)(2)(C), where lead is present, until the employer performs an employee exposure assessment as required in subsection (d), and documents that the employee performing any of the listed tasks is not exposed in excess of 500 µg/m³, the employer shall treat the employee as if the employee were exposed to lead in excess of 500 µg/m³ and shall implement employee protective measures as prescribed in subsection (d)(2)(E). Where the employer does establish that the employee is exposed to levels of lead below 500 µg/m³, the employer may provide the exposed employee with the appropriate respirator prescribed for such use at such lower exposures, in accordance with Table 1 of this section. The tasks covered by this requirement are:

1. Using lead containing mortar; lead burning

2. Where lead containing coatings or paint are present: rivet busting; power tool cleaning without dust collection systems; cleanup activities where dry expendable abrasives are used; and abrasive blasting enclosure movement and removal.

(D) With respect to the tasks listed in this subsection (d)(2)(D) of this section, where lead is present, until the employer performs an employee exposure assessment as required in subsection (d) and documents that the employee performing any of the listed tasks is not exposed to lead in excess of 2,500 µg/m³ (50 x PEL), the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500 µg/m³ and shall implement employee protective measures as prescribed in subsection (d)(2)(E). Where the employer does establish that the employee is exposed to levels of lead below 2,500 µg/m³, the employer may provide the exposed employee with the appropriate respirator prescribed for use at such lower exposures, in accordance with Table I of this section. Interim protection as described in this subsection is required where lead containing coatings or paint are present on structures when performing:

1. Abrasive blasting,

2. Welding,

3. Cutting, and

4. Torch burning.

(E) Until the employer performs an employee exposure assessment as required under subsection (d) and determines actual employee exposure, the employer shall provide to employees performing the tasks described in subsections (d)(2)(A), (d)(2)(B), (d)(2)(C) and (d)(2)(D) with interim protection as follows:

1. Appropriate respiratory protection in accordance with subsection (f).

2. Appropriate personal protective clothing and equipment in accordance with subsection (g).

3. Change areas in accordance with subsection (i)(2).

4. Hand washing facilities in accordance with subsection (i)(5).

5. Biological monitoring in accordance with subsection (j)(1)(A), to consist of blood sampling and analysis for lead and zinc protoporphyrin levels, and

6. Training as required under subsection (l)(1)(A) regarding section 5194, Hazard Communication; training as required under subsection (l)(2)(C), regarding use of respirators; and training in accordance with section 1510, Safety Instruction for Employees.

EXCEPTION NO. 1: The employer is not required to notify the Division if: A. The amount of lead-containing materials to be disturbed is less than 100 square or 100 linear feet; or

EXCEPTION NO. 2: The employer is not required to notify the Division if the percentage of lead in the material disturbed is less than 0.5%, 5,000 parts per million (weight by weight), or 1.0 mg/cm².

In the citation, the Division alleges the following:

The employer planned lead abatement work to be performed on or about December 19th at 419 Hillside Court, Piedmont, CA, including manual demolition of painted wallboard structures and cutting of painted wood structures, and failed to notify the nearest District Office of the Division prior to commencing such work.

Hornung provided unrefuted testimony that the area where the lead abatement was to be performed, according to the Environmental Lead Detect, Inc. Lead Report, covered an area greater than 100 square feet, which contained material with lead content at or above a level of 1.0 mg/cm² (Exhibit 19). Employer, therefore, is not excepted from the notification requirement of the standard because (1) the amount of lead-containing materials to be disturbed was greater than 100 square feet, and (2) the lead in the material which was disturbed was more than 1.0 mg/cm². (Exception Numbers 1 and 2, *supra*). Hornung testified that Wallway, nor anyone else, provided written notification to the Division prior to the commencement of the lead abatement work at the site, in any manner prescribed by subsections (p)(1) through (p)(4), when work was planned that included manual demolition of a structure, which is one of the tasks listed in subsection (d)(2). As such, the Division has met its burden of proof, and thus, the violation is established.

16. Did Employer violate section 1529, subdivision (e)(6), by failing to ensure that asbestos abatement work was supervised by a competent person?

Section 1529, subdivision (e)(6), under "Asbestos," provides the following:

Competent Persons. The employer shall ensure that all asbestos work performed within regulated areas is supervised by a competent person, as defined in subsection (b) of this section. The duties of the competent person are set out in subsection (o) of this section.

In the citation, the Division alleges the following:

The employer engaged in Class I and Class II asbestos-related work at 419 Hillside Court, Piedmont, CA on or about December 18, 2013, but failed to ensure that all asbestos work performed within the regulated area was supervised by a competent person, as required.¹⁴

Hornung provided unrefuted testimony that Class I and Class II asbestos-related¹⁵ work was performed at the site, and that Employer failed to ensure that work performed within the regulated area¹⁶ was supervised by a competent person.¹⁷

Hornung testified that Employer performed Class I asbestos work as the task included the removal of “surfacing material.”¹⁸ Hornung testified that, according to the first page of the JWS Environmental Asbestos Report (Exhibit 18), the texture on the walls in the kitchen and bedroom contained greater than one percent ACM. As such, the surfacing material, textured walls in this

¹⁴ The parties stipulated at the hearing the date shown on the citation, due to a typographical error, was incorrectly listed as “December 18, 2014,” and that the correct date should be “December 18, 2013.” Good cause having been established, the citation is so amended.

¹⁵ “Class I asbestos work” means activities involving the removal of TSI and surfacing ACM and PACM. “Class II asbestos work” means activities involving the removal of ACM which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics (See section 1529, subdivision (b), under “Definitions”).

¹⁶ “Regulated area” means: an area established by the employer to demarcate areas where Class I, II, and III asbestos work is conducted, and any adjoining area where debris and waste from such asbestos work accumulate; and a work area within which airborne concentrations of asbestos, exceed or there is a reasonable possibility they may exceed the permissible exposure limit. Requirements for regulated areas are set out in subsection (e) of this section.

¹⁷ “Competent person” means, in addition to one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them, one who is capable of identifying existing asbestos hazards in the workplace and selecting the appropriate control strategy for asbestos exposure, who has the authority to take prompt corrective measures to eliminate them: in addition, for Class I and Class II work who is specially trained in a training course which meets the criteria of EPA’s Model Accreditation Plan (40 CFR part 763) for supervisor, or its equivalent and, for Class III and Class IV work, who is trained in a manner consistent with EPA requirements for training of local education agency maintenance and custodial staff as set forth at 40 CFR 763.92 (a)(2). Note: For operations involving more than 100 square feet of asbestos containing construction material as defined in subsection (r) of this section the competent person may fulfill the requirement contained in Section 341.9 to specify a certified supervisor for asbestos related work. (See section 1529, subdivision (b), under “Definitions”).

¹⁸ “Surfacing material” means material that is sprayed, troweled-on or otherwise applied to surfaces (such as acoustical plaster on ceilings and fireproofing materials on structural members, or other materials on surfaces for acoustical, fireproofing, and other purposes).

instance, are characterized as “surfacing ACM.”¹⁹ The removal of surfacing ACM falls within the category of Class I asbestos work.

Hornung testified that Employer also performed Class II asbestos work as the task included the removal of floor tiles, roofing materials, and window glazier putty. Hornung testified that, according to the first page of the JWS Environmental Asbestos Report (Exhibit 18), those items all contained greater than one percent ACM. As such, the removal of the floor tiles, the roofing materials, and the window glazier putty all fall within the category of Class II asbestos work.

Wallway presented no evidence that he met the requirements of a “competent person” tasked with performing asbestos removal work. In a letter sent by Hornung to Wallway on January 13, 2014, Hornung asked Wallway the following: “Who performed the asbestos abatement?” Wallway responded as follows: “Owner and paint contractor – I did not verify whether or not the paint contractor was certified, but they seemed to know what they were doing. None of the contractors referred by JWS seemed interested due to the small size of the job.” (Exhibit 11, item 9.)

In the letter of January 13, 2014, Hornung also asked Wallway to provide the contact information for all employees/employers that performed asbestos abatement work. Wallway’s response was as follows: “Don’t know – only there for a couple of days and paid cash.” (Exhibit 11). Wallway did not provide to the Division any contact information for the persons who performed the asbestos abatement work. As the result of not providing this information to the Division, a negative inference can be drawn that the paint contractor was not a “competent person.” As such, the Division has met its burden of proof, and thus, the violation is established.

17. Did Employer violate section 1529, subdivision (f)(3)(A), by failing to conduct daily monitoring representative of the exposure of each employee assigned to work within a regulated asbestos abatement area?

Section 1529, subdivision (f)(3)(A), under “Asbestos,” provides the following:

Class I and II operations. The employer shall conduct daily monitoring that is representative of the exposure of each employee who is assigned to work within a regulated area who is performing Class I or II work, unless the employer pursuant to subsection

¹⁹ “Surfacing ACM” means surfacing material which contains more than 1% asbestos.

(f)(2)(C) of this section, has made a negative exposure assessment for the entire operation.

In the citation, the Division alleges the following:

On or about December 18, 2013, the employer engaged in asbestos-related work. The employer did not conduct daily monitoring that is representative of the exposure of each employee who is assigned to work within a regulated area.

Hornung presented unrefuted testimony that Employer was performing Class I and Class II asbestos work at the site. In a letter sent by Hornung to Wallway on January 13, 2014, Hornung asked Wallway the following: “How was the abatement work performed?” Wallway responded as follows: “Surfaces were kept moist, wore suits with respirators, all exterior windows and doors were sealed with plastic, materials was placed in epa [EPA] certified plastic bags, sealed, labelled and provided to transporter for deposit at Altamont landfill” (Exhibit 11). Wallway did not provide to the Division any information in his response that, in addition to the actions taken above, Employer conducted daily monitoring that was representative of the exposure of each employee who worked within the regulated area. Hornung testified that this job required that Employer perform daily monitoring of airborne quantities of asbestos, or that Employer perform a negative exposure assessment for the entire operation, and that Employer did neither. There was no evidence presented that a Negative Initial Exposure Assessment²⁰ was conducted at the

²⁰“Negative Initial Exposure Assessment” means a demonstration by the employer, which complies with the criteria in subsection (f)(2)(C) of this section, that employee exposure during an operation is expected to be consistently below the PELs. (Section 1529, subdivision (b)). Section 1529, subdivision (f)(2)(C), provides the following: Negative Exposure Assessment: For any one specific asbestos job which will be performed by employees who have been trained in compliance with the standard, the employer may demonstrate that employee exposures will be below the PELs by data which conform to the following criteria;

1. Objective data demonstrating that the product or material containing asbestos minerals or the activity involving such product or material cannot release airborne fibers in concentrations exceeding the TWA and excursion limit under those work conditions having the greatest potential for releasing asbestos; or
2. Where the employer has monitored prior asbestos jobs for the PEL and the excursion limit within 12 months of the current or projected job, the monitoring and analysis were performed in compliance with the asbestos standard in effect; and the data were obtained during work operations conducted under workplace conditions “closely resembling” the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the operations were conducted by employees whose training and experience are no more extensive than that of employees performing the current job, and these data show that under the conditions prevailing and which will prevail in the current workplace there is a high degree of certainty that employee exposures will not exceed the TWA and excursion limit; or

site. The job was not performed by employees who had been trained in compliance with the standard (Section 1529, subdivision (f)(2)(C). (Competent Person and employee training are discussed in “Analysis” sections 16 and 18 herein.) Without such training, Employer may not demonstrate, by considering any of the criteria contained in section 1529, subdivisions (f)(2)(C)(1), (2), and (3), that employee exposure during the asbestos-removal operation was expected to be consistently below the PELs.²¹ As such, a negative inference can be drawn that no such monitoring was conducted at the site. Therefore, the Division, by a preponderance of the evidence, has established the violation.

18. Did Employer violate section 1529, subdivision (k)(9)(A), by failing to initiate an asbestos training program, and by failing to ensure that employees hired and directed to perform asbestos removal work participated in the training?

Section 1529, subdivision (k)(9)(A), under “Asbestos,” provides the following:

The employer shall, at no cost to the employee, institute a training program for all employees who are likely to be exposed in excess of a PEL and for all employees who perform Class I through IV asbestos operations, and shall ensure their participation in the program.

In the citation, the Division alleges the following:

The employer failed to institute an asbestos safety training program and failed to ensure that employees hired and directed to perform Class I and Class II asbestos removal work at 419 Hillside Court, Piedmont, CA, participated in the training program.

Section 1529, subdivision (k)(10)(B), under “Asbestos,” provides the following:

The employer shall provide to the Chief and the Director, upon request, all information and training materials relating to the employee information and training program.

3. The results of initial exposure monitoring of the current job made from breathing zone air samples that are representative of the 8-hour TWA and 30-minute short-term exposures of each employee covering operations which are most likely during the performance of the entire asbestos job to result in exposures over the PELs.

²¹ Permissible exposure limits (PELS).

Hornung provided unrefuted testimony that Employer failed to institute such a training program for any employees conducting the asbestos work at the site. Hornung testified that, in a letter sent by Hornung to Wallway on January 13, 2014, he asked of Wallway the following: "Please provide a copy of any record of safety training provided to employees working on the job site." Wallway responded as follows: "None - do not have employees" (Exhibit 11). Hornung testified that Wallway hired unlicensed contractors to do the work, and as such, Wallway had no training records. Employer was also required by section 1529, subdivision (k)(10)(B), to provide the training materials relating to asbestos, and did not. As such, a negative inference can be drawn that Employer failed to institute such a training program for any employees conducting the asbestos work at the site. Therefore, the Division, by a preponderance of the evidence, has established the violation.

19. Did Employer violate section 1532.1, subdivision (d)(1)(A), by failing to make a pre-job determination whether any employee could be exposed to any materials containing lead above the action level while demolishing and removing painted wallboard and various wooden structures known to employer to contain lead based paint?

Section 1532.1, subdivision (d)(1)(A), under "Lead," provides the following:

Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level.

In the citation, the Division alleges the following:

The employer failed to make a pre-job determination whether any employee could be exposed to materials containing lead above the action level while performing work such as manually demolishing and removing painted wallboard and various wooden structures known to the employer to contain lead based paint.

As concluded above, the area where the lead abatement was performed covered an area greater than 100 square feet, which contained material with lead content at or above a level of 1.0 mg/cm². As such, the workplace is covered by the standard.

Hornung testified that, according to Wallway, the same persons who performed the asbestos-related work also performed the lead removal work, and that Wallway failed to provide the name of that paint contractor to the

Division. In an email from Wallway to Hornung, dated January 2, 2014, Wallway indicated that he “personally walked through the project with the EPA [Environmental Protection Agency] certified employee of the paint contractor and pointed out the required scope of the work. I specified that no other than certified employees were to abate the lead.”(Exhibit 6, page 3). Nowhere in that same email does Wallway indicate that steps were taken to ascertain whether any employee would be exposed to lead at or above the action level during the lead abatement process or manual demolition.

Wallway provided no evidence that he, nor anyone else, made the required initial determination to ascertain whether any employee could have been exposed to lead at or above the action level during demolition operations. As indicated above, and given the opportunity, Wallway failed to provide to the Division the name of the paint contractor who performed the lead abatement work. As such, a negative inference can be drawn that Employer failed to conduct that initial determination regarding the possibility of employee lead exposure at the site. (Evidence Code 413). Therefore, the Division, by a preponderance of the evidence, has established the violation.

20. Did Employer violate section 1532.1, subdivision (1)(2), by failing to ensure that employees performing lead abatement work were adequately trained, and by failing to provide to the Division all materials relating to the employee information training program and certification?

Section 1532.1, subdivision (1)(2), under “Lead,” provides the following:

Training program. The employer shall assure that each employee is trained in the following:

- (A) The content of this standard and its appendices;
- (B) The specific nature of the operations which could result in exposure to lead above the action level;
- (C) The purpose, proper selection, fitting, use, and limitations of respirators;
- (D) The purpose and a description of the medical surveillance program, and the medical removal protection program including information concerning the adverse health effects associated with excessive exposure to lead (with particular attention to the adverse reproductive effects on both males and females and hazards to the fetus and additional precautions for employees who are pregnant);
- (E) The engineering controls and work practices associated with the employee's job assignment including training of employees to

follow relevant good work practices described in Appendix B of this section;

(F) The contents of any compliance plan and the location of regulated areas in effect;

(G) Instructions to employees that chelating agents²² should not routinely be used to remove lead from their bodies and should not be used at all except under the direction of a licensed physician; and

(H) The employee's right of access to records under section 3204.

Section 1532.1, subdivision (l)(4)(B), under "Lead," provides the following:

The employer shall provide, upon request, all materials relating to the employee information training program and certification to affected employees, their designated representatives, the Chief and NIOSH.

In the citation, the Division alleges the following:

On or about December 19, 2013, employees of the employer were demolishing structures that had a lead containing coatings or paint present. The employer did not ensure that employees performing this work were adequately trained according to Title 8 CCR Section 1532.1(1)(2). The employer did not provide to Cal/OSHA all materials relating to the employee information training program and certification.

Hornung provided unrefuted testimony that Employer provided no training to employees who may have been exposed to lead above the action level at the site. In a letter sent by Hornung to Wallway on January 13, 2014, Hornung asked of Wallway the following: "Please provide a copy of any record of safety training provided to employees working on the job site." Wallway responded as follows: "None - do not have employees" (Exhibit 11). Employer was required by section 1532.1, subdivision (l)(4)(B), to provide the training materials relating to lead, and did not. Because a request was made for training records and none were produced, a negative inference can be made that there are no training records. And because there are no training records there is no proof that the required training occurred. As such, a negative inference can be drawn that Employer failed to provide training to its employees who may have been exposed to lead above the action level at the site. (Evidence Code 413). Therefore, the Division, by a preponderance of the evidence, has established the violation.

²² Chelating agents are used in the pharmacological treatment of lead poisoning.

21. Did Employer violate section 1529, subdivision (d)(5), by failing to ascertain whether the person(s) hired to remove ACM from the project site was (were) certified for asbestos removal work?

Section 1529, subdivision (d)(5), under “Asbestos,” provides the following:

All general contractors on a construction project which includes work covered by this standard shall be deemed to exercise general supervisory authority over the work covered by this standard, even though the general contractor is not qualified to serve as the asbestos “competent person” as defined by subsection (b) of this section. As supervisor of the entire project, the general contractor shall ascertain whether the asbestos contractor is in compliance with this standard, and shall require such contractor to come into compliance with this standard when necessary.

In the citation, the Division alleges the following:

The employer acted in a general supervisory capacity over a residential demolition and construction project at 419 Hillside Court, Piedmont, CA, known to have asbestos containing materials present and failed to ascertain whether the person(s) hired to remove asbestos containing materials from the project site was certified for asbestos removal work.

Hornung provided testimony that Wallway is a licensed general contractor (Exhibits 16 and 17) and that Wallway acted in the capacity of a general contractor at the site. Wallway and the painter(s) conducted the asbestos-related work at the site. As established above, no “competent person” supervised the asbestos removal work. Wallway, as the general contractor, was responsible to ensure that the work was being done by licensed professionals, and that a “competent person” was present to supervise the work. Wallway, when given the opportunity, did not respond to the Division’s notice that it intended to cite Employer for a violation of the alleged safety order. (Exhibit 14). As such, a negative inference can be drawn that Employer had no exculpatory information or any mitigating factors to offer to the Division prior to issuance of the citation. (Evidence Code 413). Wallway failed to ensure that the asbestos-related abatement work was being supervised by a “competent person,” as required the standard. As such, by a preponderance of the evidence, the violation is established.

22. Did Employer violate section 1529, subdivision (f)(1)(A), by failing to perform an initial employee exposure assessment immediately before or at the initiation of the asbestos removal work?

Section 1529, subdivision (f)(1)(A), under “Asbestos,” provides the following:

Each employer who has a workplace or work operation where exposure monitoring is required under this section shall perform monitoring to determine accurately the airborne concentrations of asbestos to which employees may be exposed.

In the citation, the Division alleges the following:

The employer engaged in construction work at 419 Hillside Court, Piedmont, CA, involving removal of more than 100 square feet of 5 – 109% asbestos containing materials and failed to ensure that a competent person performed an initial employee exposure assessment immediately before or at the initiation of the asbestos removal work.

As previously established, Employer was performing Class I and Class II asbestos work at the site. In a letter sent by Hornung to Wallway on January 13, 2014, Hornung asked Wallway the following: “How was the abatement work performed?” Wallway responded as follows: “Surfaces were kept moist, wore suits with respirators, all exterior windows and doors were sealed with plastic, materials was placed in epa [Environmental Protection Agency] certified plastic bags, sealed, labelled and provided to transporter for deposit at Altamont landfill” (Exhibit 11). Wallway did not provide to the Division any information that it, in addition to the actions taken above, performed monitoring to determine accurately the airborne concentrations of asbestos to which employees may have been exposed. Wallway, when given the opportunity, did not respond to the Division’s notice that it intended to cite Employer for a violation of the alleged safety order. (Exhibit 14). As such, a negative inference can be drawn that Employer had no exculpatory information or any mitigating factors to offer to the Division prior to issuance of the citation. As such, a negative inference can be drawn that no such monitoring was conducted at the site. (Evidence Code 413). Therefore, the Division, by a preponderance of the evidence, has established the violation.

23. Were Citations 4 through 8, 11, and 12 issued prior to the expiration of the statutory six month statute of limitations period?

Labor Code 6317 provides, in relevant part, that “no citation or notice shall be issued by the Division for a given violation or violations after six months have elapsed since the occurrence of the violation.”

Regarding Citations 4, 6, 7, 8, 11, and 12, relating to asbestos abatement: Hornung testified that asbestos work was performed by Employer on or after December 18, 2013. Hornung testified that, in an email sent from Wallway on January 3, 2014, and in response to an email from Hornung to Wallway regarding asbestos abatement, Wallway wrote the following:

As previously discussed, enclosed is a dated receipt for purchase of some of the protective equipment that was used for abatement. The abatement was completed prior to mechanical demolition. Under the circumstance, the only further documentation I wish to provide is a receipt for the abated materials. I plan to provide it by next Friday.

Attached to that email (Exhibit 6) was copy of a Home Depot receipt (Exhibit 5). The transaction date on the Home Depot receipt is December 18, 2013. These facts are sufficient to determine that asbestos abatement operations were being conducted at the site on or after December 18, 2013. The citations were issued on June 17, 2014, and were therefore issued within the six month statutory period. It is noted that Wallway presented a series of emails to and from the City of Piedmont which indicate that asbestos abatement was being performed prior to the December 18, 2013. That may have been the case, but Wallway’s email to Hornung (Exhibit 6) and the Home Depot receipt (Exhibit 5) are deemed most reliable in order to establish that asbestos abatement was, in fact, being performed on or after December 18, 2013.

In regard to Citation 5, relating to lead abatement: It is not in dispute that the lead paint inspection was conducted on December 19, 2015, and that the lead removal was conducted on or after that date (Exhibit 19). This fact is sufficient to establish that lead abatement was being conducted at the site on or after December 19, 2013. The citation was issued on June 17, 2014, and was therefore issued within the six month statutory period.

24. Did the Division establish that Citation 1, Items 1 through 8, and Citations 6 through 10, were correctly classified as “general?”

Section 334, subdivision (b), provides the following:

General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.

In regard to Citation 1, Items 1 through 8, Employer did not appeal the classifications of any of the items in Citation 1. Employer stipulated at the hearing that he was not contesting those classifications. As such, the general classifications of Items 1 through eight are established.

In regard to Citation 6, a violation of section 1529, subdivision (e)(6), the Division established that a competent person did not supervise the asbestos abatement work. The competent person ensures that correct procedures are utilized during the abatement of asbestos, a known carcinogen. The improper handling of asbestos during the abatement process can have negative impact on the health of the employees at the work site. As such, the general classification is sustained.

In regard to Citation 7, a violation of section 1529, subdivision (f)(3)(A), the Division established that Employer failed to conduct daily monitoring representative of the exposure of each employee assigned to work within a regulated asbestos abatement area. Detection of levels of asbestos present in the air during the abatement process serves to ensure the safety of each employee handling asbestos, a known carcinogen. As such, the general classification is sustained.

In regard to Citation 8, a violation of section 1529, subdivision (k)(9)(A), the Division established that Employer failed to initiate an asbestos training program, and failed to ensure that employees hired and directed to perform asbestos removal work participated in the training. Training employees in the proper methods used during asbestos abatement serves to ensure the safety of each employee handling asbestos, a known carcinogen. As such, the general classification is sustained.

In regard to Citation 9, a violation of section 1532.1, subdivision (d)(1)(A), the Division established that Employer failed to make a pre-job determination whether any employee could be exposed to any materials containing lead above the action level while demolishing and removing painted wallboard and various wooden structures known to employer to contain lead based paint. Exposure to unsafe levels of lead can have a negative impact on health. As such, the general classification is sustained.

In regard to Citation 10, a violation of section 1532.1, subdivision (l)(2), the Division established that Employer failed to ensure that employees performing lead abatement work were adequately trained, and failed to provide to the Division all materials relating to the employee information training program and certification. Lack of training could lead to worker exposure to unsafe levels of lead, which can have a negative impact on health. As such, the general classification is sustained.

The “willful” characterizations of Citations 6 through 10 are addressed *infra*.

25. Did the Division establish that Citations 4 and 5 were correctly classified as “regulatory?”

Section 334, subdivision (a), provides the following:

Regulatory Violation - is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

In regard to Citation 4, a violation of section 341.6, subdivision (a); Hornung provided unrefuted testimony that this violation pertains to paperwork or posting, and as such was classified as “regulatory.” The regulatory classification of Citations 4 is therefore established.

In regard to Citation 5, a violation of section 1532.1, subdivision (p); Hornung provided unrefuted testimony that this violation pertains to written notification, and as such was classified as “regulatory.” The regulatory classification of Citation 5 is therefore established.

The “willful” characterizations of Citations 4 and 5 are addressed *infra*.

26. Did the Division establish rebuttable presumptions that each of the violations associated with Citations 2, 3, 11, and 12 were serious?

Labor Code section 6432, in relevant parts, states the following:

(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 actual hazard may consist of, among other things: [...]

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

The Appeals Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001), citing *Oliver Wire & Plating Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980).) The evidence must not lead to impossibility, must be within human reason and logic, must not be speculative, and thus based on actual events and circumstances that are proven to exist. (*Oliver Wire & Plating Co., Inc. supra.*)

Labor Code section 6432, subdivision (e) provides as follows:

“Serious physical harm” as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment that results in any of the following:

- (1) Inpatient hospitalization for purposes other than medical observation.
- (2) The loss of any member of the body.
- (3) Any serious degree of permanent disfigurement.
- (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

In regard to Citation 2; Employer violated section 1712, subdivision (c)(1), by failing to guard exposed ends of rebar projections with protective covers. Hornung provided unrefuted testimony that this violation presents an impalement hazard which could result in piercing, organ damage, blood loss, or a fatality. As such, the Division established that a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The realistic possibility of death or a serious physical harm, combined with the existence of the actual hazard caused by the failure to guard exposed ends of rebar projections with protective covers, establishes a

rebuttable presumption that the violation was properly classified as a serious violation.

In regard to Citation 3, Employer violated section 1712, subdivision (d), by using protective covers over rebar projections which were not designed to be used as protective covers. Hornung provided unrefuted testimony that this violation presents an impalement hazard which could result in serious internal bleeding or broken bones. As such, the Division established that a realistic possibility that serious physical harm could result from the actual hazard created by the violation. The realistic possibility of death or a serious physical harm, combined with the existence of the actual hazard caused by using protective covers over rebar projections which were not designed to be used as protective covers, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

In regard to Citation 11, Employer violated section 1529, subdivision (d)(5), by failing ascertain whether the person(s) hired to remove ACM from the project site was certified for asbestos removal work. Hornung provided unrefuted testimony that this violation presents a respiratory hazard which could result in diseases such as asbestosis or mesothelioma, which can lead to death. Hornung testified that asbestos fibers, when released into the air, can be breathed, and that any amount of asbestos breathed-in increases the incidence of respiratory disease. Wallway provided no information to the Division whether any certified asbestos worker performed the work. A certified asbestos worker could have ensured that proper engineering controls were in place. It is found that failure to conduct asbestos abatement operations utilizing a certified abatement worker presents the possibility of employee exposure to asbestos fibers. As such, the Division established that a realistic possibility that serious physical harm could result from the actual hazard created by the violation. The realistic possibility of death or a serious physical harm, combined with the existence of the actual hazard caused by failing to ascertain whether the person(s) hired to remove ACM from the project site was certified for asbestos removal work, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

In regard to Citation 12, Employer violated section 1529, subdivision (f)(1)(A), by failing to perform an initial employee exposure assessment immediately before or at the initiation of the asbestos removal work. Hornung provided unrefuted testimony that this violation presents a respiratory hazard which could result in diseases such as asbestosis or mesothelioma, which can lead to death. Hornung testified that asbestos fibers, when released into the air, can be breathed, and that any amount of asbestos breathed-in increases the incidence of respiratory disease. Hornung also testified that an exposure

assessment is necessary to ensure that employees are using the correct personal protective equipment and that correct engineering controls are being utilized to prevent exposure to a known carcinogen. The lack of performing an initial employee exposure assessment presents the possibility of employee exposure to asbestos fibers. As such, the Division established that a realistic possibility that serious physical harm could result from the actual hazard created by the violation. The realistic possibility of death or a serious physical harm, combined with the existence of the actual hazard caused by failing to perform an initial employee exposure assessment immediately before or at the initiation of the asbestos removal work, establishes a rebuttable presumption that the violation was properly classified as a serious violation.

The “willful” characterizations of Citations 2, 3, 11, and 12 are addressed *infra*.

27. Did Employer rebut the presumptions of the serious classifications in Citations 2, 3, 11, and 12 by demonstrating that it did not and could not with the exercise of reasonable diligence know of the existence of the violations?

Employer appealed the serious classifications of the violations in Citations 2, 3, 11, and 12.

Section 6432, subdivision (c), provides as follows:

If the Division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation.

Failure to exercise supervision adequate to insure employee safety is equivalent to failing to exercise reasonable diligence, and will not excuse a violation on the claim of lack of employer knowledge. (See *Stone Container Corporation*, Cal/OSHA App. 89-042, Decision After Reconsideration (March 9, 1990).) Reasonable diligence includes the obligation by foremen or supervisors to oversee the entire work site where safety and health hazards are present if exposure to an unsafe condition exists (See *A. A. Portanova & Sons, Inc.*, Cal/OSHA App. 83-891, Decision After Reconsideration (March 19, 1986), pp. 4-5.). A hazard that could have been discovered through periodic safety inspections is deemed discoverable through reasonable diligence. (See *Anheuser-Busch, Inc.*, Cal/OSHA App. 84-113, Decision After Reconsideration

(July 30, 1987); and *Sturgeon & Son, Inc.*, Cal/OSHA App. 91-1025, Decision After Reconsideration (July 19, 1994).)

Employer provided no evidence regarding training and supervision of its employees. Nor did employer present evidence regarding any safety inspections which may have been performed at the work place. As a result, Employer failed to demonstrate that it did not and could not with the exercise of reasonable diligence know of the existence of the violations in Citations 2, 3, 11, and 12. As Employer failed to rebut the presumptions that those four violations were correctly classified as serious, the serious classifications, as alleged in Citations 2, 3, 11, and 12, are each established by operation of law.

28. Did the Division establish that Citations 4 through 12 were properly characterized as “willful?”

Section 334, subdivision (e), provides the following:

Willful Violation - is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.

The Division has two alternate means of proving the willfulness of an employer's conduct under section 334, subdivision (e). It could prove either (1) that the employer knew the provisions of the cited safety order and intentionally violated them ("intentionally violated a safety law"), or, (2) that the employer knew "that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition." (See *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668 through 1670, Decision After Reconsideration (Oct. 14, 1987); *National Cement Co.*, Cal/OSHA App. 91-310, Decision After Reconsideration (Mar. 10, 1993); and *Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034.)

Wallway, a licensed and experienced general contractor, was aware of requirements relating to asbestos and lead abatement prior to commencement of the work activities. Wallway, as part of his general contractor's licensing requirements, had received training regarding asbestos abatement on at least two prior occasions (Exhibit 21). Wallway was also in receipt of a report from JWS Environmental Asbestos which revealed the existence of actionable levels of asbestos at the work site prior to commencement of the work activities. That report also advised Employer of Cal/OSHA requirements and considerations

relating to asbestos (Exhibit 18). Wallway was also in receipt of a report from Environmental Lead Detect, Inc. which revealed the existence of actionable levels of lead at the work site prior to commencement of the work activities. That report also advised Employer of the existence of Cal/OSHA requirements and considerations relating to lead (Exhibit 19).

Despite being aware of Cal/OSHA requirements regarding asbestos and lead abatement operations, Wallway intentionally and knowingly (1) failed to apply for and obtain a registration from the Division prior to the commencement of asbestos abatement work; (2) failed provide to the Division written notification prior to the commencement of lead abatement work; (3) failed to ensure that the asbestos abatement work was supervised by a competent person; (4) failed to conduct daily monitoring representative of the exposure of each employee assigned to work within a regulated asbestos abatement area; (5) failed to initiate an asbestos training program, and failed to ensure than employees performing the work participated in such a program; (6) failed to make a pre-job determination relating to employee exposure to lead above the action level; (7) failed to ensure that employees performing lead abatement work were adequately trained; (8) failed to bring asbestos-related work into compliance, as required by the standard; and (9) failed to perform an initial employee exposure assessment before or at the initiation of the asbestos removal work. As such, the willful characterizations of Citations 4 through 12 are all established.

29. Were the proposed penalties reasonable?

At the hearing Employer stipulated that the proposed penalties, as shown on the amended Penalty Calculation Worksheet (Exhibit 2), were correctly calculated in accordance with the Director's regulations. As such, all penalty amounts are found to be reasonable.

Duplicative penalties exist regarding the hazards associated with reinforcing steel protrusions, asbestos abatement, and lead abatement. Where two penalties address a hazard which can be eliminated by a single means of abatement, it is improper to impose two penalties (*Thyssenkrupp Elevator Corporation*, Cal/OSHA App. 11-2299, Denial of Petition for Reconsideration (March 11, 2013).

The proposed penalties for the violations of section 1712, subdivisions (c)(1) and (d) both address impalement hazards associated with reinforcing steel protrusions and can be remedied by appropriately guarding the protrusions. The penalty for the violation of section 1712, subdivision (d), is eliminated as duplicative of the penalty imposed for section 1712(c)(1).

The proposed penalties for the violations of section 1529, subdivisions (e)(6), (f)(3)(A), (k)(9)(A), (d)(5), and (f)(1)(A) all address health hazards associated with asbestos abatement operations and can be remedied by adhering to the various specific requirements of section 1529. The penalties for the violations of section 1529, subdivisions (e)(6), (f)(3)(A), (k)(9)(A), (d)(5), are eliminated as duplicative of the penalty imposed for section 1529(f)(1)(A).

The proposed penalties for the violations of section 1532.1, subdivisions (d)(1)(A) and (l)(2) both address the health hazards associated with exposure to lead and can be remedied by adhering to the various specific requirements of section 1532.1. The penalty for the violation of section 1532.1, subdivision (l)(2), is eliminated as duplicative of the penalty imposed for section 1532.1, subdivision (d)(1)(A).

Conclusions

In Citation 1, Item 1, the evidence supports a finding that Employer violated section 1509, subdivision (a), by failing to establish, implement, and maintain an effective written IIPP.

In Citation 1, Item 2, the evidence supports a finding that Employer violated section 1509, subdivision (c), by failing to post a Code of Safe Practices (CSP) at a conspicuous location at the job site or make it readily available to the Division by supervisory personnel.

In Citation 1, Item 3, the evidence supports a finding that Employer violated section 1509, subdivision (e), by failing to conduct “toolbox” or “tailgate” safety meetings, or equivalent, with its crews at least every 10 working days.

In Citation 1, Item 4, the evidence supports a finding that Employer violated section 1512, subdivision (b), by failing to ensure the availability of a suitable number of appropriately trained persons to render first aid.

In Citation 1, Item 5, the evidence supports a finding that Employer violated section 3276, subdivision (e)(11), by failing to ensure that the side rails of a portable ladder extend not less than 36 inches above upper landing.

In Citation 1, Item 6, the evidence supports a finding that Employer violated section 3276, subdivision (e)(15)(E), by failing to ensure that an employee not stand on the top cap of a step ladder.

In Citation 1, Item 7, the evidence supports a finding that Employer violated section 3276, subdivision (e)(16)(C), by failing to ensure that an employee not use a step ladder in the partially closed position.

In Citation 1, Item 8, the evidence supports a finding that Employer violated section 3395, subdivision (f)(3) by failing to provide written procedures for complying with subdivisions (f)(1)(B), (G), (H), and (I) of the heat standard.

In Citation 2, the evidence supports a finding that Employer violated section 1712, subdivision (c)(1), by failing to guard exposed ends of rebar projections with protective covers.

In Citation 3, the evidence supports a finding that Employer violated section 1712, subdivision (d), by using protective covers over rebar projections which were not designed to be used as protective covers.

In Citation 4, the evidence supports a finding that Employer violated section 341.6, subdivision (a), by failing to apply for and obtain a registration prior to the commencement of asbestos abatement work.

In Citation 5, the evidence supports a finding that Employer violated section 1532.1, subdivision (p), by failing to notify the Division prior to the commencement of lead abatement work.

In Citation 6, the evidence supports a finding that Employer violated section 1529, subdivision (e)(6), by failing to ensure that asbestos abatement work was supervised by a competent person.

In Citation 7, the evidence supports a finding that Employer violated section 1529, subdivision (f)(3)(A), by failing to conduct daily monitoring representative of the exposure of each employee assigned to work within a regulated asbestos abatement area.

In Citation 8, the evidence supports a finding that Employer violated section 1529, subdivision (k)(9)(A), by failing to initiate an asbestos training program, and by failing to ensure that employees hired and directed to perform asbestos removal work participated in the training.

In Citation 9, the evidence supports a finding that Employer violated section 1532.1, subdivision (d)(1)(A), by failing to make a pre-job determination whether any employee could be exposed to any materials containing lead above the action level while demolishing and removing painted wallboard and various wooden structures known to employer to contain lead based paint.

In Citation 10, the evidence supports a finding that Employer violated section 1532.1, subdivision (l)(2), by failing to ensure that employees performing lead abatement work were adequately trained, and by failing to provide to the Division all materials relating to the employee information training program and certification.

In Citation 11, the evidence supports a finding that Employer violated section 1529, subdivision (d)(5), by failing ascertain whether the person(s) hired to remove asbestos containing materials (ACM) from the project site was certified for asbestos removal work.

In Citation 12, the evidence supports a finding that Employer violated section 1529, subdivision (f)(1)(A), by failing to perform an initial employee exposure assessment immediately before or at the initiation of the asbestos removal work.

ORDER

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

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

Dated: November 09, 2015

KR:kav

KEVIN J. REEDY
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration.

Your petition for reconsideration must fully comply with the requirements of Labor Code Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

For further information, call: (916) 274-5751.

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**JUSTIN WALLWAY,
dba JDW ENTERPRISES, INC. AND WENDI SUE LELKE-WALLWAY**

DOCKETS 14-R1D4-2233 through 2244

Dates of Hearing: May 6, July 8, and July 15, 2015

Division's Exhibits

Exh. No.	Exhibit Description	
1	Jurisdictional documents	ADMITTED
2	Amended Proposed Penalty Worksheet	ADMITTED
3	Letter dated 2/20/15 re: Hornung's Division-mandated training	ADMITTED
4	Contact letter to Employer dated 12/19/13 and attached notes of Hornung dated 12/19/13	ADMITTED
5	Home Depot receipt dated 12/18/13	ADMITTED
6	Emails from Wallway dated 1/3/14 and 1/2/14	ADMITTED
7	Hornung notes dated 1/10/14	ADMITTED
8	DVD recording of work site on 1/10/14	ADMITTED
9	Collection of 8 copies of photos of work site taken on 1/10/14	ADMITTED
10	Hornung notes regarding Home Depot purchase of 12/18/13	ADMITTED
11	DOSH request for documents dated 1/13/14	ADMITTED

12	Hornung notes dated 2/12/14	ADMITTED
13	CAL/OSHA form 1BY dated 4/19/14	ADMITTED
14	CAL/OSHA form 1BY dated 4/24/14	ADMITTED
15	DOSH Inspection Report	ADMITTED
16	Contractors State License Board Detail for JDW Enterprises Inc	ADMITTED
17	Secretary of State Business Entity Detail	ADMITTED
18	JWS Environmental Asbestos report and accompanying Declaration of Joseph Saadeh	ADMITTED
19	Environmental Lead Detect, Inc. Lead report and accompanying Declaration of James Ratti	ADMITTED
20	Demolition Notification form and accompanying Affidavit of Custodian of Records for the Bay Area Air Quality Management District	ADMITTED
21	Records of Wallway open book exams relating to asbestos for Wallway from CSLB and accompanying Declaration of Holly Young	ADMITTED
22	Wallway responses to DOSH letter dated 1/27/14	ADMITTED
23	Hornung notes dated 2/12/14	ADMITTED
24	Copy of 16 CCR sec. 832.21 Class C-21 – Building Moving Demolition Contractor regulation	ADMITTED
25	Building Permit from City of Piedmont and attached emails	ADMITTED

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|-----------|---|-----------------|
| 26 | Emails provided by City of Piedmont regarding asbestos and lead reports along with attached reports (Bates stamp 00102) | ADMITTED |
| 27 | Emails of Robert Akiyama
(Bates stamp 00094) | ADMITTED |
| 28 | Building Permit Application Form
(Bates stamp 0001) | ADMITTED |
| 29 | City of Piedmont Inspection Activity Report
(Bates stamp 00012) | ADMITTED |
| 30 | Emails of Robert Akiyama and attached copy of building permit and field copy of Inspection Record (Bates stamp 00151) | ADMITTED |
| 31 | Emails from Wallway and copy of Demolition Notification form (Bates stamp 00082) | ADMITTED |

Employer's Exhibits

- | | | |
|----------|--|-----------------|
| A | Copy of Home Depot Receipt dated 12/18/13 with item descriptions attached | ADMITTED |
| B | 10 pages including documents from CSLB relating to a CSLB investigation, a U.S. Dept. of Labor OSHA Inspection Detail Report, and 4 copies of photos of work site. | ADMITTED |
| C | Emails with Robert Akiyama header
(Bates stamp 00100) | ADMITTED |
| D | Emails with Robert Akiyama header
(Bates stamp 00084) | ADMITTED |
| E | Emails with Chester Nakahara header
(Bates stamp 00229) | ADMITTED |

F	Emails with Robert Akiyama header (Bates stamp 00275)	ADMITTED
G	Emails with Robert Akiyama header and 3 reports regarding asbestos and lead in soil samples (Bates stamp 00279)	ADMITTED
H	Emails with Craig Griffin header with RGA Environmental analysis of soil (Bates stamp 00280)	ADMITTED
I	Email with Craig Griffin header with attached analysis of quantity of lead in the soil (Bates stamp 0323)	ADMITTED
J	Email with header Chester Nakamura regarding soil samples taken for lead content analysis (Bates stamp 0324)	ADMITTED
K	Emails with Robert Akiyama header regarding asbestos removal (Bates stamp 00085)	ADMITTED
L	McDermott Will & Emery law article	ADMITTED
M	DOSH Policies and Procedures specific to Six Month Statute of Limitations	ADMITTED
N	Emails with Robert Akiyama header with copies of 4 photos attached (Bates stamp 00096)	ADMITTED
O	Emails with Robert Akiyama header with copies of 8 photos attached (Bates stamp 00091)	ADMITTED
P	Email with Robert Akiyama header regarding house demolition (Bates stamp 00103)	ADMITTED

Witnesses Testifying at Hearing

David Hornung
Helder Pinto
Ramiro Paredes
Ramiro Magana

CERTIFICATION OF RECORDING

*I, **Kevin J. Reedy**, 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

SUMMARY TABLE PAGE 2 OF 2 14-R1D4-2233 - 2244										
14-R1D4-2239	7	1	1529(f)(3)(A)	WG	ALJ affirmed violation. Penalty eliminated as duplicative of Citation 12.	X		\$7,000	\$6,000	\$0
14-R1D4-2240	8	1	1529(k)(9)(A)	WG	ALJ affirmed violation. Penalty eliminated as duplicative of Citation 12.	X		\$7,000	\$6,000	\$0
14-R1D4-2241	9	1	1532.1(d)(1)(A)	WG	ALJ affirmed violation.	X		\$5,250	\$4,500	\$4,500
14-R1D4-2242	10	1	1532.1(l)(2)	WG	ALJ affirmed violation. Penalty eliminated as duplicative of Citation 9.	X		\$5,250	\$4,500	\$0
14-R1D4-2243	11	1	1529(d)(5)	WS	ALJ affirmed violation. Penalty eliminated as duplicative of Citation 12.	X		\$10,000	\$10,000	\$0
14-R1D4-2244	12	1	1529(f)(1)(A)	WS	ALJ affirmed violation.	X		\$10,000	\$10,000	\$10,000
						Sub-Total		\$75,900	\$71,400	\$33,500
						Total Due				\$33,500
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> All penalty payments must be made to:					(INCLUDES APPEALD CITATIONS ONLY)					
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 citations or items containing penalties. Please call (415) 703-4291 if you have questions					

**ALJ: KR
POS: 11/09/15**

