BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1275087**
QUALITY AG, INC. **P.O. BOX 989** **FILLMORE, CA 93016** **Employer**	**DECISION**

Statement of the Case

Quality Ag, Inc. (Employer) performs construction and agricultural services. Employer's employees worked at a job site owned by Norman's Nursery located at Highway 126 and Hooper Canyon, North Side in Fillmore, California (the worksite). On October 31, 2017, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Mark Pisani (Pisani), commenced an inspection following the report of an accident.

On March 23, 2018, the Division cited Employer for six violations of California Code of Regulations, title 8, alleging that:[1] Employer's Heat Illness Prevention Plan (HIPP) was missing required elements; Employer failed to implement its Injury and Illness Prevention Plan (IIPP) by adequately identifying and evaluating the hazard of working with soil that could be contaminated with coccidioides (cocci) fungal spores; Employer failed to implement its IIPP by providing training on the hazard of working with soil that could be contaminated with cocci fungal spores; Employer failed to allow and encourage employees to take preventative cool down rest breaks in the shade; Employer failed to provide effective training to employees whose work might reasonably result in exposure to heat illness; and Employer did not prevent harmful exposure to cocci fungal spores by utilizing feasible engineering controls.

Employer filed timely appeals of the citations, contesting the existence of the alleged violations, the classification of the citations, and the reasonableness of the proposed penalties. Employer also alleged the abatement requirements were unreasonable; however, the parties resolved the issue of abatement prior to hearing. Employer also asserted affirmative defenses for each citation.[2]

This matter was heard by Aaron R. Jackson, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board or Board) in Van Nuys, California on December 10 and 11, 2019. William Cregar, Staff Counsel, represented the

[1] Unless otherwise specified, references are to sections of California Code of Regulations, title 8.

[2] To the extent that Employer did not present evidence in support of its affirmative defenses said defenses are deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Division. Robert P. Roy, of the Law Offices of Robert P. Roy, represented Employer. The parties submitted closing briefs. The matter was submitted for decision on April 15, 2020.

ISSUES

1. Does Employer's hearsay objection prevent reliance on Pisani's interview notes for a finding of fact?

2. Did employer's written HIPP fail to contain all the elements required by Section 3395, subdivision (i)?

3. Did Employer fail to effectively implement its IIPP by conducting inspections to identify and evaluate the hazard of Valley Fever?

4. Did Employer fail to effectively implement its IIPP by providing training and instruction on the hazard of Valley Fever?

5. Did Employer fail to allow and encourage employees to take preventative cool down rest breaks in the shade?

6. Did Employer provide effective training concerning the hazard of heat illness to its supervisors and employees?

7. Did employer prevent harmful exposure to employees through use of feasible engineering controls?

8. Should Employer have been cited under the Construction Safety Orders rather than the General Industry Safety Orders?

9. Did the Division establish a rebuttable presumption that Citations 3 and 6 were properly classified as Serious?

10. Did Employer rebut the presumption that Citations 3 and 6 were properly classified as Serious?

11. Were the proposed penalties reasonable?

FINDINGS OF FACT

1. In 2017, Employer contracted to install an avocado orchard on a hillside at a worksite owned by Norman's Nursery in the City of Fillmore, located in Ventura County, California.

2. Approximately 18 employees intermittently worked outdoors at the worksite from June 2017 until September 2017. The number of employees at the worksite on any given day ranged from three to 12.

3. Employer had an operative HIPP consisting of eight pages.

4. Employer's HIPP designated its supervisors to call emergency services, and allowed any employee to call for emergency services in the event a supervisor is unavailable.

5. Employer's HIPP required tailgate meetings on hot days and during heat waves to review the importance of drinking water, taking rest breaks, identifying heat related illnesses, and what to do in emergency situations, but Employer's HIPP did not require review of all Employer's high-heat procedures during the tailgate meeting.

6. The written contents of Employer's HIPP did not address the requirement that Employer's response to a heat illness be commensurate with the perceived severity of the illness.

7. The written contents of Employer's HIPP failed to indicate that an employee shall not be sent home without first being offered onsite first aid and/or being provided with emergency medical services.

8. In August 2017, Employer utilized a Division training Power-point entitled "2015 Heat Illness Prevention Training" to train its employees, and no deficiencies were alleged with these training materials.

9. Employer allowed and encouraged preventative cool down rest breaks in the shade.

10. Employer had a written IIPP.

11. Employees engaged in soil disturbing work at the worksite, including removing existing natural vegetation, grading soil, and digging trenches for installation of irrigation lines.

12. During the soil disturbing work at the worksite, Employer did not utilize engineering controls.

13. Feasible engineering controls to address the hazards presented by this worksite included watering the soil or using heavy equipment with enclosed cabs, to prevent or mitigate employee inhalation of dust during dust generating activities.

14. Employees worked with dry and dusty soil.

15. Employer did not provide personal protective equipment to its workers at this worksite to mitigate the inhalation of dust.

16. During the period of August 2017 to mid-September 2017, six employees became ill. These employees had performed work at the worksite. The length of employee illness ranged from a few days to a few months.

17. Employer discontinued work at the worksite on September 25, 2017. Employer stopped work because Employer completed one phase of the project and had not yet commenced the next phase.

18. Employee, Juan Carlos Hernandez (Hernandez), told Mike Richardson, Employer's President, he had been diagnosed with Valley Fever on or about September 15, 2017.

19. Employer had all employees that worked at the worksite tested for Valley Fever.

20. In October 2017 and November 2017, a total of five employees tested positive for exposure to cocci spores; three were diagnosed with Valley Fever and two were diagnosed with cocci pneumonia.

21. Employer had performed the same scope of work at a different location on the same property a few years prior without a single report of illness.

22. After learning of multiple cases of Valley Fever, Employer discontinued its contract with Norman's Nursery, despite not having completed all phases of work required under its contract.

23. Employer never returned to perform work at the worksite after September 25, 2017.

24. In 2016, the year preceding the events in this case, Ventura County had only a modestly elevated rate of Valley Fever compared to other counties with only 7.5 cases per 100,000 people.

25. Mike Richardson and Heather Richardson, Employer's Chief Financial Officer, were unaware of the existence, or potential existence, of cocci spores at this worksite in Ventura County prior to the events of this case.

26. A percentage of persons that contract cocci infections, in the range of five to 10 percent of patients, develop more serious infections, which can cause destructive pneumonia, loss of lung tissue, and lengthy hospitalization for more than mere medical observation.

ANALYSIS

1. Does Employer's hearsay objection prevent reliance on Pisani's interview notes for a finding of fact?

The Division did not call a single percipient witness during its case in chief. Although the Division did attempt to subpoena several witnesses, it was either unable to serve them, or they

did not appear. Despite the absence of these witnesses, the Division chose to proceed with its case. The Division did not make a request for continuance prior to the hearing, at the commencement of the hearing, nor before resting its case.[3]

To establish the elements of the citations, the Division utilized interview notes taken by Pisani during his investigation. Pisani testified he had conducted several employee interviews, the results of which he documented in his notes. Much of Pisani's testimony consisted of his reading of his interview notes into the record. Pisani did not provide comment, elaboration, explanation, or clarification for the majority of the recitation of his notes.

Employer asserted hearsay objections. The issue presented is whether Employer's hearsay objection completely prevented reliance on the notes. At hearing, Employer's objections were noted for the record, but ruling reserved for the Decision.

Pisani's notes do qualify as hearsay in many instances. They are statements made by someone other than the person testifying, which are offered for the truth of the matter asserted. (Evid. Code, § 1200.) However, that does not mean that reliance on the notes for a finding is prohibited in all situations. Hearsay may be relied upon in Board proceedings in certain situations. Section 376.2 of the Board's rules states, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Therefore, it becomes necessary to determine whether the employee statements captured within Pisani's notes fall within one of these categories allowing use as set forth in section 376.2. And, as will be discussed below, there are instances where the notes may be relied upon for a finding of fact because they either supplement or explain other evidence or would be admissible over objection in civil actions, e.g. as an authorized admission. (Evid. Code § 1222.) Likewise, there are instances where reliance on the notes is prohibited as they fall within neither category. But, in each instance, a situation and citation-specific analysis is required, prohibiting the generalized exclusion ruling requested by Employer.

2. Did Employer's written HIPP fail to contain all the elements required by Section 3395, subdivision (i)?

Citation 1, Item 1, asserts a General violation of section 3395, subdivision (i). That section provides:

> Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the

[3] The Division did eventually make a request for continuance to obtain an additional witness at the conclusion of Employer's case. Upon receipt of the request for continuance, the parties were ordered to brief whether this matter should be continued. And after briefing was received from both sides, the Division's request was denied by Order dated February 6, 2020. The Order noted, "The Division offers no persuasive explanation for waiting until conclusion of the Employer's case presentation to make its request for a continuance."

> Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
> (1) Procedures for the provision of water and access to shade.
> (2) The high heat procedures referred to in subsection (e).
> (3) Emergency Response Procedures in accordance with subsection (f).
> (4) Acclimatization methods and procedures in accordance with subsection (g).

In this citation, the Division alleges,

> Prior to and during the course of the investigation, the employers [sic] written heat illness prevention plan was deficient in the following areas:
> (1) The employer's written high heat procedures were missing provisions for holding pre-shift meetings and designating one or more employees to call for emergency medical services.
> (2) The employer's written emergency response procedures were missing effective procedures for communicating with employees, when to summon emergency services, and procedures to ensure that employees exhibiting signs or symptoms of heat illness are monitored and not left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services.

The Division has the burden of proving all elements of a violation by a preponderance of evidence. (*Home Depot, USA, Inc.,* Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017) [other citations omitted]; see also *International Paper Company*, Cal/OSHA App. 14-1189, Decision After Reconsideration (May 29, 2015).) As part of its burden, the Division also bears the burden of proving employee exposure to the violative condition addressed by a safety order. (*Ibid.)*

Exposure to the hazard addressed by the safety order:

There is no dispute that the heat illness safety order applied to the work conducted by Employer, and that actual exposure to the hazard of heat illness existed at this worksite. (See *Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016) [other citations omitted].) Employer contracted to install an avocado orchard at the worksite owned by Norman's Nursery. Heather Richardson testified that approximately 18 employees worked at the worksite. These employees performed outdoor labor and their work related to agriculture, meaning Employer's work was subject to all provisions of the heat illness standard. (§ 3395, subd. (a).) Work occurred intermittently from June 2017 to September 2017,

with much of the work occurring during the summer months.

Employer had an operative HIPP in effect while the work was being performed. Employer's HIPP, consisting of eight pages, was admitted as Exhibit 4. The Division's instant citation concerns the written contents of Employer's HIPP, not its implementation. Relevant here, section 3395, subdivision (i), requires Employer's HIPP to contain the high-heat procedures listed in section 3395, subdivision (e), and the emergency response procedures listed in section 3395, subdivision (f). The Division contends Employer's HIPP, while in general covering many required heat illness topics, failed to contain reference to all the specific high-heat and emergency response procedures.

Instance 1 (High-Heat Procedures):

Within Instance 1, the Division alleges Employer's HIPP failed to contain, in writing, all required high-heat procedures listed in section 3395, subdivision (e), including a specific designation of persons to call emergency services at each worksite and a provision for holding daily pre-shift meetings in high-heat situations. Subdivision (e) states, in relevant part:

> High-heat procedures. The employer shall implement high-heat procedures when the temperature equals or exceeds 95 degrees Fahrenheit. These procedures shall include the following to the extent practicable:
> […]
> (3) Designating one or more employees on each worksite as authorized to call for emergency medical services, and allowing other employees to call for emergency services when no designated employee is available.
> […]
> (5) Pre-shift meetings before the commencement of work to review the high heat procedures, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary.
> […]

Designation of one or more person to call emergency services:

In summary, section 3395, subdivision (e)(3), when read in conjunction with subdivision (i), requires Employer's HIPP to contain high-heat procedures designating one or more employees on each worksite as authorized to call for emergency medical services when the temperature meets or exceeds 95 degrees Fahrenheit, and allowing other employees to call for emergency services when no designated employee is available. Here, the Division contends Employer's high-heat procedures improperly failed to identify by name the persons responsible for calling emergency services at each worksite. The Division's argument is rejected.

The plain language of section 3395, subdivision (e)(3), does not require identification of employees by individual name; it just requires designation of "one or more employees on each worksite as authorized to call for emergency medical services." Employer's HIPP met this requirement.

Employer's HIPP generally indicates its supervisors are responsible for contacting emergency medical services irrespective of the outside temperature. In at least two places, the HIPP indicates supervisors will carry cellular telephones and be instructed on how to call for emergency medical services. (Exhibit 4, pp. 13-4 [Compliance Procedures], 13-4 [Training of Employees].) The HIPP also requires employees to notify supervisors when they recognize signs or symptoms of heat illness and it authorizes any employee to "Call 911 if supervisor is not readily available." (Exhibit 4, p. 13-7 [Responding to Heat Illness Emergencies—Employee Procedures].)

Ultimately, because the HIPP does generally indicate that Employer's supervisors are responsible for contacting emergency services and authorizes any employee to call if the supervisor is unavailable, it has met the minimum requirement to designate one or more employees as authorized to contact emergency services. Designation by supervisorial position, rather than by individual name, as occurred here, is sufficient.

Further, that Employer's HIPP's designation generally applies to all temperatures rather than just high-heat temperatures does not render it deficient, as such a designation will also necessarily apply during, and encompass any, high-heat temperatures. There is no requirement in section 3395 that the written contents of the HIPP mirror the regulation exactly or that the designation exclude temperatures less than 95 degrees Fahrenheit.

Pre-shift meetings:

Next, section 3395, subdivision (e)(5), when read in conjunction with subdivision (i), requires Employer's HIPP to contain procedures for holding pre-shift meetings when the temperature equals or exceeds 95 degrees Fahrenheit "to review the high heat procedures, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary." The Division contends Employer's HIPP failed to comply with this requirement because it did not specifically require a pre-shift meeting when the temperature equals or exceeds 95 degrees Fahrenheit. The Division's argument is rejected in part and accepted in part.

The safety order's requirement to hold a meeting in high-heat is satisfied by Employer's HIPP because it requires tailgate meetings on hot days. Employer's HIPP states, "[o]n hot days and during heat wave[s] the supervisor will hold a short tailgate meeting daily to review the importance of drinking water, of taking rest breaks and on how to identify heat related illnesses and what to do in emergency situations." (Exhibit 4, p. 13-4 [Training of Employees].) It is inferred, particularly when the HIPP is read as a whole, that "hot days" include days when the

temperature meets or exceeds 95 degrees Fahrenheit. (See, e.g., Exhibit 4, pp. 13-6 to 13-8.) Supporting this inference, within a separate section of the HIPP, it states, "It is the company's duty to exercise greater caution and implement measures to protect their employees when the temperature equals or exceeds 95 degrees Fahrenheit." (*Ibid*.) That Employer used inexact language by requiring the tailgate meeting on hot days, rather than specifically referring to 95 degrees Fahrenheit, does not mean the HIPP fails where it substantially complies with the listed requirement.

However, Employer's written summarization of meeting topics for the tailgate meeting fails to comport with the requirements of the regulation. Section 3395, subdivision (e)(5), requires, during this pre-shift meeting, that the employer "*review the high heat procedures*, encourage employees to drink plenty of water, and remind employees of their right to take a cool-down rest when necessary." (Emphasis added.) Here, although Employer's HIPP required a tailgate meeting on hot days, and requires review of certain topics, it failed to require review of <u>all</u> the high-heat procedures during the tailgate meeting. Notably, it failed to require review of Employer's high heat procedures pertaining to effective communication, use of a buddy system, and assigning personnel to look for signs and symptoms of heat illness. (See, e.g., Exhibit 4, pp. 13-6 to 13-8.) Employer's listed tailgate meeting topics were simply too narrow to cover all the high-heat procedures. Of course, as discussed above, the HIPP need not mirror the regulation exactly. Employer might have satisfied this requirement by simply stating it would generally discuss all the high-heat procedures during the tailgate meeting, however, no such general reference was incorporated into this portion of the HIPP. Therefore, Employer's HIPP fails to comply with the requirements of the cited section.

<u>Instance 2 (Emergency Response Procedures)</u>:

Section 3395, subdivision (f)(2), when read in conjunction with subdivision (i), requires Employer's HIPP to list emergency response procedures for responding to possible signs and symptoms of heat illness. When such signs and symptoms of heat illness are observed, subdivision (f)(2), without limitation, requires an employer to take action commensurate with the severity of the perceived heat illness, including initiating emergency response procedures if the observed symptoms are indicators of severe heat illness. The HIPP must also require monitoring of employees exhibiting signs of heat illness. Subdivision (f), specifically states, in relevant part,

> Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:
> […]
> (2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided.
> (A) If a supervisor observes, or any employee reports, any signs or symptoms of heat illness in any employee, the supervisor shall take immediate action commensurate with the severity of the illness.

> (B) If the signs or symptoms are indicators of severe heat illness (such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.
> (C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with the employer's procedures.
> […]

The Division's citation asserts the HIPP was missing procedures effectively advising employees when to summon emergency services. The Division also asserts the HIPP was missing procedures for ensuring that employees exhibiting signs or symptoms of heat illness are monitored and not left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services.

When to summon emergency services (taking action commensurate with severity):

Section 3395, subdivision (f)(2)(A)-(B), when read in conjunction with subdivision (i), requires Employer's HIPP to contain provisions for responding to signs and symptoms of heat illness, and requires that the response be commensurate with the perceived severity of the illness. The Division's citation asserts Employer's HIPP was missing effective procedures advising employees when to call emergency services. The citation has merit.

A key flaw in the HIPP is that it does not adequately address the requirement that the response be commensurate with the perceived severity of the illness. (See § 3395, subd. (f)(2)(A).) Employer's HIPP repeatedly requires immediate contact of emergency services for heat illness symptoms as the primary recourse. (See, Exhibit 4, pp. 13-4 [Procedures in Case of Heat Illness], 13-7 [Responding to Heat Illness Emergencies].) However, the HIPP does acknowledge, at least in one location, that contacting emergency responders might not be required in all instances.[4] The HIPP provides very little guidance as to what signs or symptoms might warrant a lesser response, nor those indicating immediate contact of emergency services is required, such as those listed in section 3395, subdivision (f)(2)(B). It fails to discuss symptoms of heat illness that warrant immediate contact of emergency services such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions. (§§ 3395, subd. (f)(2)(B).) As such, Employer's HIPP fails to contain all the written contents required by the cited subdivision.

Monitoring of employees and ensuring they are not sent home:

Section 3395, subdivision (f)(2)(C), when read in conjunction with subdivision (i), requires that an Employer's HIPP contain procedures ensuring employees exhibiting signs and

[4] See, Exhibit 4, pp. 13-7 ["Move them to a shaded are[a] for a recovery period of at least ten minutes. [¶] If the condition appears to be severe or the employee does not recover, than emergency medical care is needed."]

symptoms shall not be left alone or sent home without first being offered onsite first aid and/or being provided with emergency medical services. The Division argues that these components are missing from the Employer's HIPP. The Division's argument has merit.

Here, Employer's HIPP has no statement ensuring an employee shall not be sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with the employer's procedures. The HIPP does not even use the word home, or any other reasonable corollary for the word.

Ultimately, Citation 1 is affirmed. Although Employer did have a generally compliant HIPP, the Division identified specific deficiencies in the written contents of the HIPP, as set forth herein. The Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*Petersen Builders Inc.,* Cal/OSHA App. 91-057, Decision After Reconsideration, (Jan. 24, 1992), fn. 4.) The citation is appropriately classified as General, as it is not serious in nature, but does have a relationship to occupational safety and health. (§ 334.)

3. Did Employer fail to effectively implement its IIPP by conducting inspections to identify and evaluate the hazard of Valley Fever?

Citation 2, Item 1, asserts a Serious violation of section 3203, subdivision (a)(4). That section provides, in relevant part:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> […]
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> […]

In this citation, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on September 25, 2017, employees were engaged in soil disturbing activities, such as performing excavation work to install irrigation lines for an avocado orchard, located near Hopper Canyon Road and Highway 126, in Fillmore, California.
>
> The employer did not implement its Injury and Illness Prevention Program by adequately identifying and evaluating through periodic inspections, the hazards of employees disturbing soil, conducting

> dust generating activities, and being exposed to dust generated by wind, where the soil and dust could be contaminated with coccidioides fungal spores and the employees could contract Valley Fever as a result of workplace activities.

At all relevant times Employer had a written IIPP. The Division does not challenge the written contents of Employer's IIPP. Rather, the Division asserts a failure of implementation. Section 3203, subdivision (a)(4), requires that an employer perform inspections to identify and evaluate hazards. (*OC Communications*, Inc., Cal/OSHA App. 14-0120, Decision After Reconsideration (March 28, 2016).) An IIPP may be satisfactory as written, but still result in a violation of section 3203 if the IIPP is not effectively implemented. (See, e.g., *National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Here, the Division argues Employer failed to effectively implement its IIPP by identifying and evaluating the hazard of Valley Fever.

Exposure to the hazard addressed by the safety order:

Preliminarily, it is necessary to determine whether employees were exposed to the identified hazard, as exposure to a hazard is an element of the Division's burden of proof. (*Home Depot, USA, Inc., supra*, Cal/OSHA App. 1011071.) The hazard in this instance is employee exposure to inhalation of cocci spores during soil disturbing activities, which can cause Valley Fever. Exposure may be established in two different ways. First, the Division may establish exposure by showing that an employee was actually exposed to the zone of danger created by the violative condition, i.e. that the employees have been or are in the zone of danger. (*Dynamic Construction Services, Inc.*, supra, Cal/OSHA App. 14-1471 [other citations omitted].) Alternatively, the Division may establish exposure by "showing the area of the hazard was 'accessible' to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." (*Ibid.*) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Ibid.*)

Heather Richardson testified approximately 18 employees worked at this specific worksite. Work occurred at the worksite intermittently from June to September 2017. Mike Richardson testified that anywhere from three to 12 employees worked at the site on any given day. The testimony established that the employees engaged in soil disturbing activities. Heather Richardson testified that Employer's scope of work included installation of underground irrigation systems. Her testimony, in and of itself, is sufficient for a finding that Employer engaged in soil disturbing work. However, the testimony of Heather Richardson as to the scope of work was also supplemented and explained by Pisani's recitation of his employee interview notes. The notes demonstrated that the employees were indeed engaged in soil disturbing activities in connection with installation of the irrigation systems, including trenching and the use of heavy equipment. The interview notes could be relied upon for a finding of fact as to the scope of work to supplement and explain the testimony of Heather and Mike Richardson. (§ 376.2 [permitting hearsay testimony to supplemental and explain].)

In late August to September 2017, the evidence demonstrates six employees that worked at the worksite became ill. Mike Richardson conceded that one of these employees, Hernandez, informed him he had been diagnosed with Valley Fever in September 2017. Further, Dr. Paul Papanek, M.D., the Division's medical expert, testified on behalf of the Division. He received medical records for five of six employees that became ill after working at the worksite and prepared a medical record summary, which was admitted without objection. The medical records demonstrated that all five of these employees received positive serologic blood tests for exposure to cocci spores in October and November 2017; three employees were diagnosed with Valley Fever and two were diagnosed with cocci pneumonia.

The fact that six employees out of eighteen working at this worksite fell ill, constitutes persuasive evidence of actual exposure to the hazard. Dr. Papanek, credibly testified that such a cluster of cases makes it overwhelming likely that the employee's contracted Valley Fever at the worksite. Approximately one of every three employees that worked at this worksite became ill and received a positive blood test for exposure to cocci spores. In contrast, Dr. Papanek's report indicated that in 2016, the year prior to the events in this matter, Ventura County had only a modestly elevated rate of Valley Fever compared to other counties with 7.5 cases per 100,000 people. As such, Employees that worked at this worksite were thousands of time more likely to contract Valley Fever. This constitutes persuasive statistical evidence that work at this worksite actually exposed employees to the hazard of Valley Fever.

Elements of the cited safety order:

Notwithstanding the finding of exposure, to prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish two additional elements: a triggering event occurred requiring an inspection to identify and evaluate hazards; and Employer failed to effectively implement its duty to inspect, identify and evaluate the hazard. (*OC Communications*, Inc., *supra*, Cal/OSHA App. 14-0120.)

As to the first element, an employer's duty to inspect, identify, and evaluate is trigged, and must be implemented, under section 3203, subdivision (a)(4), by, at minimum, three events: (1) when the program is first established, (2) when new substances, processes, procedures, or equipment are introduced, or (3) whenever the employer is made aware of a new or previously unrecognized hazard. (§ 3203, subd. (a)(4)(A)-(C).) Here, the Division's allegations do not concern establishment of the IIPP. Nor did the Division demonstrate there were any new substances, processes, procedures, or equipment introduced into the workplace. The evidence generally demonstrates Employer had done this type of work for many years, and had even done a similar project on the same property a few years earlier without prior incident. Therefore, the remaining issue is whether Employer was made aware of new or previously unrecognized hazard.

The Division argues Employer had knowledge, or should have had knowledge, of the potential existence of Valley Fever at this worksite for two reasons.

First, the Division contends Employer should have been aware of the hazard of Valley Fever prior to commencement of work at this worksite due to the generalized availability of information concerning Valley Fever in the mainstream media and from governmental sources such as the Center for Disease Control (CDC) and the California Department of Public Health (CDPH). The Division produced articles from the CDC and CDPH demonstrating that Valley Fever had been recognized to exist in Ventura County. Pisani said this information was available in 2017. However, the Division's arguments on this point consists largely of speculation.

The worksite at issue here was in Ventura County, where Valley Fever was not recognized as highly endemic in the preceding year. There was also no evidence that it was recognized as highly endemic in any other year prior to the events in this case. Again, Dr. Papanek's medical report, prepared for the Division in this case, indicated that in 2016, the year prior to the events in this matter, Ventura County had only a modestly elevated rate of Valley Fever compared to other Counties with approximately 7.5 cases per 100,000 people.

Mike Richardson and Heather Richardson both credibly testified that they were unaware of the hazard of Valley Fever in Ventura County prior to the events of this case. The Division points to no specific document or source of information actually received, obtained, or reviewed by Employer, or its management personnel, that apprised it of the existence of the hazard of Valley Fever in this particular county. Although it might have been possible that this information was available to Employer, the existence of facts within the Division's burden of proof will not be assumed. (See, e.g., *MDB Management, Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) As such, the Division failed to demonstrate that Employer was made aware of a new or previously unrecognized hazard prior to commencing the work based upon the Division's theory of general availability of information.

The Division also argues that, even if Employer did not know of the existence of Valley Fever prior to commencing work at this worksite, it received information while work occurred at the worksite, apprising it of the hazard of Valley Fever, and triggering the regulatory duty to inspect, identify, and evaluate. Here, the evidence supports the Division's assertions.

Mike Richardson and Heather Richardson both testified that Employer stopped work at this worksite on September 25, 2017. Heather Richardson said work stopped because Employer had completed one particular phase of the project, and had not yet commenced the next phase.

Prior to stopping work at the worksite on September 25, 2017, Mike Richardson conceded that Hernandez told him he had tested positive for Valley Fever. Mike Richardson specifically testified he learned about the Valley Fever diagnosis from Hernandez before September 25, 2017. Mike Richardson's testimony on this point is supplemented and explained by an interview Pisani conducted with Hernandez, which Pisani recounted at hearing.[5]

[5] The statements of Hernandez to Pisani concerning his Valley Fever diagnosis supplement and explain the statement made by Mike Richardson, Employer's President, concerning what was said to him by Hernandez, and are therefore admissible under section 376.2. (See, also, Evid. Code §§ 1222, 1280 [Official record.].)

Hernandez told Pisani that in early September 2017 he had experienced chest pain, coughing, and difficulty breathing and he sought medical assistance and called in sick to work. Hernandez told Pisani that he was diagnosed with Valley Fever on approximately September 15, 2017 and said he informed Employer the same day. The record, including exhibits introduced by Employer, also demonstrates Employer had been apprised of other employees at this worksite falling ill in late August through mid-September 2017, including employee Jose Vasquez. Therefore, it is clear that, prior to discontinuing work at this worksite, Employer had been apprised of the potential hazard of Valley Fever at the worksite triggering its duty to inspect, identify and evaluate.[6]

Turning to the second element of the violation, i.e. whether Employer effectively implemented its duty to inspect, evaluate and identify the hazard, Employer did take action to inspect and evaluate the hazard. There is no commercially available test to evaluate whether cocci spores exist in the soil. However, Mike Richardson testified that, upon being apprised of the potential hazard of Valley Fever, he had every employee that performed work at the worksite, including himself, tested for exposure to cocci spores. The medical report prepared by Dr. Papanek demonstrates that, beginning in early-October 2017, at least five other employees received positive tests demonstrating exposure to the cocci spores. Given the absence of any commercially available soil test for cocci spores, Employer acted reasonably to identify and evaluate the hazard by having all its employees tested.

The Division's closing brief argues Employer had been made aware of Hernandez's Valley Fever diagnosis on or about September 15, 2017, but continued work on the project until September 25, 2017. It further contends Employer should have removed the employees from the project immediately, or engaged in other immediate engineering controls to ameliorate the hazard. However, there are flaws with the Division's argument. Most notably, the Division's argument primarily addresses correction of the hazard, rather than inspection, identification, and evaluation. Correction of the hazard is governed by section 3203, subdivision (a)(6), a subdivision which was not cited by the Division. (§ 3203, subd. (a)(6)—["Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard…"].) The Division appears to have lost sight of the subdivision it actually cited. (See, e.g., *Harris Rebar Northern California Inc.,* Cal/OSHA App. 1086663, Decision After Reconsideration (Sept. 27, 2017).) No amendment was sought.

Consequently, the Division did not establish Employer violated section 3203, subdivision (a)(4). Citation 2, Item 1, is dismissed.

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[6] Employer cites to Labor Code section 6709, a recently enacted statute requiring Valley Fever training, in support of the assertion that it should not be required to recognize a hazard that the Legislature had not yet recognized. However, Employer cites to no authority demonstrating that statute operates as a defense to any citation herein. A contention is waived by failure to cite to legal authority and to the record. (*Shimmick Construction Company*, Cal/OSHA App. 1080515, Denial of Petition for Reconsideration (March 30, 2017).) In any event, the aforementioned evidence demonstrates that Employer was indeed made aware of a new or previously unrecognized hazard triggering its duty to act under section 3203.

4. Did Employer fail to effectively implement its IIPP by providing training and instruction on the hazard of Valley Fever?

Citation 3, Item 1, asserts a Serious violation of section 3203, subdivision (a)(7). That section provides, in relevant part:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> […]
> (7) Provide training and instruction:
> (A) When the program is first established;
> […]

The Division's citation asserts the following:

> Prior to and during the course of the inspection, including but not limited to, on September 25, 2017, the employer did not provide training and instruction to its employees given job assignments involving soil disturbing activities, such as performing excavation work to install irrigation lines for an avocado orchard, located near Hopper Canyon Road and Highway 126, in Fillmore, CA., where the soil could be contaminated with coccidioides fungal (Valley Fever) spores.
>
> Employees were not provided training on the hazards of coccidioides fungal spores, including but not limited to, its presence, exposure controls, disease symptoms, and treatment.

The Division does not challenge the written contents of Employer's IIPP. Rather, the Division asserts there has been a failure of implementation of training concerning Valley Fever. Training is the touchstone of any effective IIPP. (*National Distribution Center, LP, supra,* Cal/OSHA App. 12-0391 [citations omitted]; *Timberworks Construction, Inc*., *supra,* Cal/OSHA App. 1199473.)

Exposure to the hazard addressed by the safety order:

Again, exposure to the hazard of Valley Fever was established, as discussed in the preceding section.

Elements of the cited safety order:

To prove a violation of section 3203, subdivision (a)(7), based upon a theory of failure of implementation, the Division must establish two elements: a triggering event occurred requiring implementation of training; and Employer failed to effectively implement the training and instruction. (See, e,g., *Timberworks Construction, Inc*., *supra*, Cal/OSHA App. 1199473.)

As to the first element, the duty to implement and provide training and instruction arises in several situations, including, without limitation, when the program is first established, to all new employees; to all employees given new job assignments for which training has not previously been received; whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; and whenever the employer is made aware of a new or previously unrecognized hazard. (§ 3203, subdivisions (a)(7)(A)-(F).) Here, as already discussed in the preceding section, Employer was made aware of the new and/or previously unrecognized hazard of Valley Fever, triggering its duty to provide training and instruction to its employees on the subject.

Turning to the second element, i.e. whether Employer implemented its program to provide effective training and instruction, Mike Richardson admitted Employer did not provide employees any training or instruction on Valley Fever either prior to, or during, any work at the worksite. The testimony regarding the absence of training was also supplemented by Pisani's notes pertaining to his January 2018 interviews of employees, most of whom told Pisani that they received no training either before or after working at the worksite on the hazard of Valley Fever. (§ 376.2.)

Employer's failure to provide training in the few weeks following the first Valley Fever diagnosis might have been, at least initially, excusable, but Employer did not merely wait a few weeks to provide the required training. Here, despite the fact that Employer learned of the first Valley Fever diagnosis in mid-September 2017, and received multiple other Valley Fever diagnoses in October 2017, the evidence demonstrates Employer failed to conduct any Valley Fever training until at least March 2018, more than five months after learning of the first diagnosis. Employer's brief concedes no Valley Fever training was conducted until March 2018. (Employer's Post-Hearing Brief, p. 3; see also Exhibit 4.)

While Employer may have discontinued work at the worksite on September 25, 2017, the mere fact that Employer left the worksite does not excuse the extended delay in provision of Valley Fever training. There is no evidence Employer went out of business or otherwise ceased work; indeed, it is inferred that Employer continued its business operations. And after the multiple Valley Fever diagnoses, Employer was on notice of the hazard of Valley Fever in Ventura County, a county where it conducts operations. Employer was on notice that this hazard could exist not just at the worksite, but at other work locations as well. And it was unreasonable and a failure of implementation for Employer to wait until March 2018 to provide training and instruction on the hazard of Valley Fever, particularly after such a large portion of its staff had become ill. Employer offers no sound excuse for such a significant delay in provision of training. For training to be effective, it must also be timely.

Therefore, the Division established Employer violated section 3203, subdivision (a)(7). Citation 3, Item 1, is affirmed.

5. Did Employer fail to allow and encourage employees to take preventative cool down rest breaks in the shade?

Citation 4, Item 1, asserts a Serious violation of section 3395, subdivision (d)(3). That section provides, in relevant part:

> (d) Access to shade.
> […]
>
> (3) Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. An individual employee who takes a preventative cool-down rest (A) shall be monitored and asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.

In this citation, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on September 25, 2017, the employer did not allow and encourage employees to take a preventative cool-down rest in the shade at all times, at a jobsite located near Hopper Canyon Road and Highway 126, Fillmore, Ca.

Exposure to the hazard addressed by the safety order:

Here, there is no dispute that the heat illness standard applies and that employees performed outdoor work. As discussed above, employees worked outdoors and were exposed to the hazard of heat illness.

Elements of the cited safety order:

Turning to the specific citation, section 3395, subdivision (d)(3), requires an employer, at all times, to allow and encourage employees to take preventative cool-down periods in the shade when employees feel it is necessary to protect themselves from overheating.

The Division does not allege any problems with Employer's written HIPP, which does encourage access to shade. (See, Exhibit 4, pp. 13-4 [Access to Shade].) Rather, Pisani testified he issued the citation because two employees he interviewed, Jose Rafael (Rafael) and Jesus Ibarra (Ibarra), told him during interviews that they were not allowed to take breaks in the shade except during designated lunch and rest breaks.

Rafael and Ibarra did not testify at hearing. Again, Pisani merely recited verbatim the contents of his interview notes, which documented the purported statements of Rafael and Ibarra. Employer asserted timely hearsay objections.

The statements of Rafael and Ibarra concerning lack of access to shade, contained within Pisani's notes, qualify as hearsay. They are statements made by someone other than the person testifying, which are offered for the truth of the matter asserted. (Evid. Code, § 1200.) As such it is necessary to determine (1) whether the statements supplement or explain other evidence or (2) whether the hearsay statements would be otherwise admissible over a hearsay objection in civil proceeding. (§ 376.2.)

Do these statements supplement or explain any other evidence?

Notwithstanding the fact that Rafael and Ibarra's statements are hearsay, as discussed above, they may still be relied upon if they supplement and explain other evidence. (§ 376.2.)

Here, with regard to the specific issue of lack of access to shade (as distinct from other issues raised by the citations), the statements by Rafael and Ibarra do not supplement or explain any other record evidence. There is no other record evidence demonstrating a lack of access to shade. There is only contradictory evidence. For example, Heather Richardson, who testified at hearing, said she was unaware of any supervisor restricting employee access to shade, and noted such an action contradicts Employer's written HIPP. Further, most of the employees interviewed by Pisani actually corroborated Heather Richardson's account of events and indicated they were generally permitted to access shade. As such, based on the foregoing discussion, the statements by Rafael and Ibarra concerning lack of access to shade cannot be used for a finding fact since there is other evidence they supplement an explain.

Are the statements admissible over a hearsay objection?

The second issue is whether the statements of Ibarra and Rafael would be admissible over objection in civil proceeding, including under, for example, the official records exception or authorized admission exception. (Evid. Code §§ 1222, 1280.)

With regard to the official records exception, Evidence Code section 1280 states,

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The

> writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Here, the employee statements recorded in Pisani's interview notes may not be relied upon to prove the truth of the matter asserted. (*See People v. Ayers* (2005) 125 Cal.App.4th 988, 994-996; Evid. § 1280).) "[A] public employee's writing, which is based upon information obtained from persons who are not public employees, is generally excluded because the 'sources of information' are not 'such as to indicate its trustworthiness' . . . ." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1205-1206 [Internal citations omitted].)

Next, the statements are not authorized admissions under Evidence Code section 1222. That section provides,

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

Here, there is no evidence that either of these two employees were authorized to speak on behalf of Employer. (*See, e.g., O'Mary v. Mitsubishi Electronics America, Inc*. (1997) 59 Cal.App.4th 563, 570-572.) Pisani's interview notes recount only that they were laborers, and offer no other indicia demonstrating the employees were authorized to make statements for Employer. Further, while Pisani did interview two management employees, neither of those employees corroborated the assertion that employees did not have ready access to shade.[7]

Based on the foregoing discussion, the statements of Ibarra and Rafael may not be relied upon for the truth of matter asserted under either the official records exception, nor as an authorized admission. Indeed, the only evidence in the record that could be used for a finding of fact demonstrates that Employer did allow and encourage preventative cool-down rest breaks in the shade.

Lastly, the Division's brief argues that lack of access to shade was proven because the Employer-provided pop-up shade canopy was 200 feet away from where the employees were working. However, this argument fails. It was contradicted by the Division's own witness. Pisani specifically testified the citation was not issued due to the placement of the shade, and testified that placement of the shade was not an issue. Therefore, the Division failed to adduce sufficient facts to establish that the distance of the shade from the employees would somehow constitute a lack of access to shade.

[7] For the same reasons, these statements cannot be considered admissions against interest. (Evid. Code. § 1221.)

Consequently, the Division did not establish Employer violated section 3395, subdivision (d)(3). Citation 4, Item 1, is dismissed.

6. Did Employer provide effective training concerning the hazard of heat illness to its supervisors and employees?

Citation 5, Item 1, asserts a violation of section 3395, subdivision (h), which provides, in relevant part:

> Training.
>
> (1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:
> (A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
> (B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.
> (C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.
> (D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).
> (E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life threatening illness.
> (F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.
> (G) The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.
> (H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.
> (I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and

> will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.
> (2) Supervisor training. Prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness effective training on the following topics shall be provided to the supervisor:
> (A) The information required to be provided by section (h)(1) above.
> (B) The procedures the supervisor is to follow to implement the applicable provisions in this section.
> (C) The procedures the supervisor is to follow when an employee exhibits signs or reports symptoms consistent with possible heat illness, including emergency response procedures.
> (D) How to monitor weather reports and how to respond to hot weather advisories.

The Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on October 31, 2017, the employer did not provide effective training to its employees and supervisor whose work should reasonably be anticipated to result in exposure to the risk of heat illness on all the topics required by this subsection.

Exposure to the hazard addressed by the safety order:

Again, there is no dispute that the heat illness standard applies; employees worked outdoors and were exposed to the hazard of heat illness.

Elements of the cited safety order:

The cited safety order requires that Employer provide employees and supervisors effective training on a number of topics concerning heat illness.

Pisani testified the citation was issued because he interviewed a number of employees, including some of Employer's supervisors, and asked them questions concerning their recollection of the heat illness training and he received dissatisfactory answers. Although the employees generally acknowledged receiving heat illness training, Pisani noted several employees could not recall certain heat illness training topics, such as acclimatization or personal and environmental risk factors for heat illness. Therefore, Pisani concluded the training was ineffective.

As a preliminary matter, the evidence offered in support of the citation consists solely of Pisani's recitation of his employee interview notes. And there are considerable obstacles to reliance on such notes for a finding of fact over Employer's hearsay objection because they do not supplement and explain the testimony of any percipient witness, nor do they necessarily fall under any hearsay exception.[8] However, with regard to this particular citation, the evidentiary issues are not dispositive and need not be resolved. Even assuming, arguendo, Pisani's interview notes were credited, and could be relied upon, the evidence nonetheless demonstrates that Employer provided effective training for its employees on heat illness.

Heather Richardson testified that Employer utilized the Division's own training materials to train its employees. Exhibit 4 includes a Division training Power-point entitled "2015 Heat Illness Prevention Training." Pisani authenticated this document as the Division's training materials. The Division did not dispute that these training materials were utilized to train the employees. Employer also produced training sign-in sheets dated August 4, 2017 pertaining to heat illness prevention training, which held the signatures of Employer's employees. The Division alleges no deficiency with its own training materials.

The evidence demonstrates that effective training did occur using the Division's own training materials. The mere fact that employees could not recite every training topic from memory does not mean the training did not occur, that it was ineffective, or that it did not cover all required materials. And it is further noted that the interview notes show there were a number of topics employees did remember.

Consequently, the Division did not establish Employer violated section 3395, subdivision (h). Citation 5, Item 1, is dismissed.

7. Did Employer prevent harmful exposure to employees through use of feasible engineering controls?

Citation 6, Item 1, asserts a violation of section 5141, subdivision (a). That section provides:

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[8]The Division primarily argued that Pisani's as to the sufficiency of training could be relied on over a hearsay objection because he had interviewed two management employees whose statements were authorized admissions. (Evid. Code, § 1222.) The Division then argued the other non-supervisorial employee statements served to supplement and explain the management statements. (§ 376.2.) However, the potential flaw in the Division's argument is that the only evidence concerning the supervisorial authority of the two employees was their own hearsay statements. No other evidence in the record documented their supervisorial position. And such management statements are typically only admissible as an authorized admission if the Division showed by admissible evidence they were authorized to speak for Employer. (*O'Mary v. Mitsubishi Electronics America, Inc.* (1997) 59 Cal.App.4th 563, 570.) The declarations of an agent, other than his own testimony, are not admissible to prove agency. (*Frank Pisano & Associates v. Taggart* (1972) 29 Cal.App.3d 1, 14.)

> (a) Engineering Controls. Harmful exposures shall be prevented by engineering controls whenever feasible.

The Division alleges:

> Prior to and during the course of the inspection, including, but not limited to, on September 25, 2017 employees were engaged in soil disturbing activities, such as performing excavation work to install irrigation lines for an avocado orchard, located near Hopper Canyon Road, and Highway 126 in Fillmore, CA., where the soil could be contaminated with coccidioides fungal (Valley Fever) spores.
>
> The employer did not prevent harmful employee exposure to coccidioides fungal spores by utilizing engineering controls, such as providing watering methods in sufficient quantities and frequency to minimize spores release into the air.

To establish a violation of section 5141, subdivision (a), there are two elements that must be shown: (1) harmful exposure existed, and (2) Employer failed to use feasible engineering controls to prevent the harmful exposure.

Exposure to the hazard addressed by the safety order:

As to the first element, while the Division established exposure to the hazard Valley Fever under the Board's typical exposure analysis, as identified above, the safety order requires the Division to also establish "harmful exposure." The instant safety order is located in Article 107 under Group 16: Control of Hazardous Substances—Dusts, Fumes, Mists, Vapors and Gases. "Article 107 sets up minimum standards for the prevention of harmful exposure of employees to dusts, fumes, mists, vapors, and gases." (§ 5139.) "Harmful exposure" is defined as, "[a]n exposure to dusts, fumes, mists, vapors, or gases: (a) In excess of any permissible limit prescribed by Section 5155; or (b) Of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function." (§5140.)

Here, the Division established harmful exposure. Dr. Papanek and Pisani both testified inhalation of cocci spores, which are part of the amalgamate that constitutes dust, can result in illness, impairment and loss of lung function. Dr. Papanek's medical report opined that inhalation of a single microscopic spore can result in a cocci infection. Dr. Papanek testified, and the Division's medical report also noted, that in a percentage of persons an infection can spread throughout the lungs and to other organs in the body, including the brain, bones, and skin, causing devastating tissue destruction. Further, several employees were actually made ill through inhalation of the spores. The medical records documented five employees had positive serologic tests demonstrating exposure to cocci spores after working at this site; three employees were diagnosed with Valley Fever and at least two were diagnosed with cocci pneumonia. As such, the Division established the first element of a violation.

Use of feasible engineering controls:

Turning to the second element of a violation, i.e. whether Employer failed to use feasible engineering controls, it is undisputed that Employer did not use engineering controls. Heather Richardson admitted Employer did not use any engineering controls. Her testimony is supplemented by Pisani's employee interview notes, which generally recount that employee's said the soil was dry and dusty and also recounted that some of the earthmoving equipment had cabins open to the outdoor environment. (§ 376.2.) Further, Employer does not dispute that it did not know of the hazard of Valley Fever while working at the worksite, supporting the inference that failed to use engineering controls to prevent the hazard.

The evidence demonstrates feasible engineering controls existed. Engineering controls are defined as, "[m]ethods of controlling occupational exposure to injurious materials or conditions by means of general or local exhaust ventilation, substitution by a less hazardous material, by process modification, or by isolation or enclosure of health hazard-producing operations or machinery." (§ 5140.) Dr. Papanek mentioned that watering the soil would reduce the risk of inhaling the spores, which could be considering an engineering control or process modification. Pisani also stated Employer could utilize earthmoving equipment that possesses enclosed cabs and air filters. As such, the Division established the second element of a violation, i.e. that feasible engineering controls existed and were not used.

Although Employer argues it did not have actual knowledge that Valley Fever existed at this worksite, or in Ventura County during the cited time period, the cited safety order merely states, "[h]armful exposures shall be prevented by engineering controls whenever feasible." There is nothing in the language of the regulation that makes actual employer knowledge an element of the violation. [9]

In ascertaining the meaning of a regulation, "[w]e first look to the language of the regulation itself." (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 100-101; see also *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54-55.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the [agency]." (*Ibid*.) The plain meaning rule does not prohibit the Board from determining "whether the literal meaning of the [regulation] comports with its purpose…." (*Ibid*.) "[W]e do not construe a regulation in isolation, but instead read it with reference to the scheme of law of which it is a part, so that the whole may be harmonized and retain effectiveness. [Citations.]" (*Ibid*.)

The sole word in the cited regulation that could conceivably refer to employer knowledge is the term "feasible." An employer might attempt to argue that it is not feasible to engage in an engineering control where it does not know of the hazard. However, the term "feasible," based

[9] Of course, that is not to say that an employer can never obtain relief for unknown hazards, an employer can raise the issue of knowledge in an effort to defeat the citation by asserting an affirmative defense commonly known as the *Newbery* defense, but that defense was never raised here. (See *Newbery Electric Corp.* v. *Occupational Safety & Health Appeals Bd.* (1981) 123 Cal.App.3d 641, 649; *Gaehwiler v. Occupational Safety & Health Appeals Bd.* (1983) 141 Cal.App.3d 1041, 1045.)

on the plain meaning of the word and, quite importantly, the context in which it appears, does not refer to knowledge. It modifies the term engineering control and refers to whether there is an available method, vehicle or mechanism that will address the hazard, not to whether the Employer knows the hazard exists. The term feasible is defined to mean "capable of being done or carried out // a feasible plan" (Merriam-Webster Dictionary (Online) <www.merriam-webster.com/ dictionary/ fixed> [accessed April 29, 2020].) To put it another way, an engineering control may be deemed feasible to prevent a harmful exposure, irrespective of employer knowledge of the hazard.

But even assuming, arguendo, that knowledge was a component of the cited safety order, as discussed above, the evidence demonstrates that Mike Richardson had been informed of the potential hazard of Valley Fever at the worksite prior to September 25, 2017 when Hernandez informed him of his Valley Fever diagnosis. There is no evidence that Employer engaged in any engineering controls, such as watering the soil or providing equipment with enclosed cabs, during the time period after being informed of the Valley Fever diagnosis and before departing the site. Rather, the evidence, including statements by Heather Richardson, demonstrates no engineering controls were ever utilized.

Consequently, the Division established Employer violated section 5141, subdivision (a). Citation 6, Item 1, is affirmed.

8. Should Employer have been cited under the Construction Safety Orders rather than the General Industry Safety Orders?

By way of defense for the IIPP citations, Employer argued at hearing that it should have been cited under section 1509 of the Construction Safety Order (CSOs) which governs the IIPP requirements for the construction industry, rather than section 3203 of the General Industry Safety Orders (GISOs). Employer contends it engaged in construction. But Employer's argument is unavailing.

Even assuming, arguendo, that some of Employer's work pertaining to installing the avocado orchard was governed by the CSOs, the CSOs will only take precedence over the GISOs, and prevent citation under the GISOs, in the event of an inconsistency. (§ 1502, subd. (b); § 3202; *see also Walsh Shea Corridor Constructors*, Cal/OSHA App. 1093606, Decision After Reconsideration (Feb. 9, 2018).) And sections 1509 and 3203 are in no way inconsistent; the IIPP requirements are identical. Section 1509, subdivision (a), requires "employer… establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders." As such, the Division did not err in citing Employer under section 3203.

Next, Employer also argues, with regard to Citation 6, it should have been cited under the CSOs under section 1541, rather than section 5141 of the GISOs. However, once again, even assuming, arguendo, that some of Employer's work pertaining to installing the avocado orchard was governed by the CSOs, the CISOs will only take precedence over the GISOs in the event of an inconsistency. (§ 1502, subd. (b); § 3202; *see also Walsh Shea Corridor Constructors*, *supra*, Cal/OSHA App. 1093606.) No inconsistency was identified that would prevent concurrent

operation. Accordingly, Employer failed to demonstrate that the Division erred by issuing Citations 3 or 6 under the GISOs.

9. **Did the Division establish a rebuttable presumption that Citations 3 and 6 were properly classified as Serious?**

The Division classified Citations 3 and 6 as Serious. Labor Code section 6432 sets forth the evaluative framework for determining whether a citation has been properly classified as Serious. Labor Code section 6432, subdivision (a), provides, "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." As used therein, the term "realistic possibility" means that it is within the bounds of reason, and not purely speculative. (*Langer Farms, LLC*, Cal/OSHA App. 13- 0231, Decision After Reconsideration (April 24, 2015).) Serious physical harm is defined in Labor Code section 6432, subdivision (e), which states,

> "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.

To meet its initial burden, the Division offered the testimony of Pisani. Pisani testified he is current on all Division mandated training. Because Pisani is current on all Division mandated training, he is deemed competent by operation of law to establish each element of a serious violation. (Lab. Code § 6432, subd. (g).) The Division also offered the testimony of Dr. Papanek, who was deemed an expert witness.

Here, the testimony of both Pisani and Dr. Papanek, while at times straying from the language of section 6432, in aggregate, demonstrated a realistic possibility of serious physical harm for both Citations 3 and 6.

Citation 3 addressed Employer's failure to provide training on Valley Fever. Pisani testified that if employees are not provided training and information concerning Valley Fever, they can contract the disease, since they will not know how to protect themselves. In addition, an absence of training can contribute to potential misdiagnoses, which could worsen an employee's condition due to the absence or delay in proper treatment.

Dr. Papanek also noted that a percentage of persons that contract cocci infections, in the range of five to 10 percent of patients, develop more serious infections, which can cause destructive pneumonia, loss of lung tissue, and hospitalization. The testimony of Dr. Papanek and Pisani demonstrated a realistic possibility of serious physical harm as that term is defined.

Citation 6 addressed Employer's failure to use engineering controls. Pisani testified that dust generated into the air, due to the absence of controls, could be inhaled and lead to a cocci infection. Again, Dr. Papanek testified that a percentage of patients can suffer serious infections, which can cause destructive pneumonia, loss of lung tissue, and hospitalization. Their testimony, in aggregate, established a realistic possibility of serious physical harm

As such, the Division established a realistic possibility of serious physical harm with regard to Citations 3 and 6. Indeed, that six employees actually fell ill at this worksite meets the realistic possibility threshold.

10. Did Employer rebut the presumption that Citations 3 and 6 were properly classified as Serious?

Labor Code section 6432, subdivision (c), provides a mechanism for Employer to rebut the presumption of a Serious violation. It states:

> 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. The employer may accomplish this by demonstrating both of the following:
> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
> (2) The employer took effective action to eliminate employee

> exposure to the hazard created by the violation as soon as the violation was discovered.

Initially, it is noted that Employer sought to raise Labor Code section 6432, subdivision (c), as an affirmative defense; but, the section is not an affirmative defense, nor can it be used to defeat the existence of a violation if proven—it goes only to the classification. It merely provides a mechanism for Employer to rebut the presumption of a Serious violation. "[S]hould the Board find that there is 'a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation,' Labor Code section 6432(c) explicitly provides an employer the opportunity to rebut the presumption of a serious violation." (*Orange County Sanitation District*, Cal/OSHA App. 13-0287, Decision After Reconsideration (May 29, 2015).)

With regard to Citation 3, Employer failed to rebut the presumption of a Serious violation. Here, Citation 3 was affirmed because Employer failed to implement effective training on the hazard of Valley Fever due its unreasonable delay in provision of such training. Mike Richardson learned of the first Valley Fever diagnosis before September 25, 2017, and Employer learned of several other diagnoses in October and November 2017. Notwithstanding multiple confirmed cases of Valley Fever, Employer failed to conduct training on Valley Fever until March 2018, approximately five months later. The delay in provision of such training failed to demonstrate that "employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered." (§ 6432, subd. (c)(2).) Employer did not act with required haste in provision of such training. As such, Employer failed to demonstrate one of the two elements necessary to rebut the presumption.

With regard to Citation 6, Employer again failed to rebut the presumption of a Serious violation. This citation was affirmed due to the failure of Employer to utilize appropriate engineering controls to protect against the hazard of Valley Fever. Employer learned of the potential existence of Valley Fever at the worksite before September 25, 2017, but engaged in no engineering controls to address the hazard prior to departing the worksite, nor is there evidence it adopted any program of engineering controls after it left the site for its other operations. After learning of Hernadez's Valley Fever diagnosis while still at the worksite, Employer had sufficient information to engage in engineering controls such as watering the soil to address the hazard before leaving the site. Consequently, Employer again failed to demonstrate one of the two elements necessary to rebut the presumption. (§ 6432, subd. (c)(2).)

The Serious classifications for Citations 3 and 6 are affirmed.

11. Were the proposed penalties reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc*., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) However, the Division must provide proof that a proposed penalty is, in fact, calculated in accordance with the penalty-setting regulations. (*Plantel Nurseries*, Cal/OSHA App. 01-2346, Decision After

Reconsideration (Jan. 8, 2004); *RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) The Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014); *Plantel Nurseries, supra,* Cal/OSHA App. 01-2346.)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*M1 Construction, Inc*., Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) In the immediate matter, the Division introduced its proposed penalty worksheet, but did not assert it calculated the penalties according to the Division's policies and procedures. Rather, Pisani offered testimony pertaining to the applicable penalty criteria.

Citation 1:

Citation 1, Item 1 was classified as General. The Division proposed a penalty of $410. Employer's appeal contested the penalty amount.

Severity:

With regard to Citation 1, Pisani testified he started with an initial base penalty of $2,000 by rating Severity as high.

Severity for a General violation pertaining to illness is defined under section 335, subdivision (a)(1)(A), which provides:

> i. When the safety order violated pertains to employee illness or disease, Severity shall be based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. Depending on the foregoing, Severity shall be rated as follows:
> LOW-- No time loss from work or normal activity; or minimum discomfort.
> MEDIUM-- Loss of part or all of a day from work or normal activity including time for medical attention; or moderate temporary discomfort.
> HIGH-- Loss of more than one day from regular work or normal activity including time for medical attention; or considerable temporary discomfort.

Section 336, subdivision (b), provides that for a rating of "LOW," the base penalty shall be $1000; for a rating of "MEDIUM" the base penalty shall be $1,500; and for a rating of "HIGH," the base penalty shall be $2,000.

Pisani rated Severity as high due to the potential for an employee to suffer a heat illness if the written program is missing elements. Here, the absence of all required elements in the written HIPP could result in a heat illness. And the evidence demonstrates that heat illness, if improperly addressed, can lead to loss of more than one day from regular work. Pisani testified that heat illness, if not promptly recognized and treated, can lead to serious illness or death. Therefore, the high Severity rating for the base penalty is affirmed.

Extent:

Pisani then testified that the $2,000 base penalty was subject to a modification for Extent. Section 336, subdivision (b), provides that Extent for a General violation is rated under criteria set forth in section 335, subdivision (a)(2), which provides:

> i. When the safety order violated pertains to employee illness or disease, Extent shall be based upon the number of employees exposed:
> LOW-- 1 to 5 employees.
> MEDIUM-- 6 to 25 employees.
> HIGH-- 26 or more employees.

Section 336, subdivision (b), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MEDIUM," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Pisani testified he ranked Extent as low because the citation only concerned a single HIPP program. However, since this safety order pertains to employee illness, Pisani considered incorrect criteria for the Extent rating. Where the safety order pertains to illness, as is the case here, Extent is based on the number of employees exposed. The Division did provide evidence regarding the number of employees at the worksite in other areas of testimony. An Extent rating of Medium is appropriate because Employer had approximately 24 employees in total, and between 6 and 24 of those employees could be affected by the deficiencies in the program. Mike Richardson admitted that as many as 12 employees worked at the worksite on certain days. Therefore a medium Extent rating, rather than low, is found appropriate, resulting in no adjustment of the penalty.

Likelihood:

Pisani testified the adjusted base penalty was then subjected to a further modification for Likelihood. Section 336, subdivision (b), provides that Likelihood for a General violation is rated under criteria set forth in section 335, subdivision (a)(3), which provides:

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm

> and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as: LOW, MODERATE OR HIGH

Section 336, subdivision (b), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MEDIUM," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Pisani testified that although there were no injuries as a result of the missing elements in the HIPP program, injury was possible and, therefore, he rated Likelihood as moderate. However, the record evidence does not support such a moderate classification. Here, Employer did have a HIPP. Employer's HIPP program, while missing certain specific elements, did contain, in general, most of the elements required by the safety order. That Employer's written HIPP was missing certain specific requirements does not necessarily translate to a moderate probability of injury, particularly when the balance of information contained in the HIPP was generally satisfactory. Further, no information was offered indicating that the absence of the cited provisions have resulted in a probability of heat illness injury based upon experience, statistics or records, or have resulted in previous injuries to Employer's employees. Likelihood is reclassified to low, leading to an adjusted gravity-based penalty of $1,500.

Further Penalty Adjustments:

The penalty adjustments for Good Faith, Size, and History are the same for both Serious and General violations. (§ 335, subd. (b), (c), and (d); § 336, subd. (d).)

Size:

Section 335, subdivision (b), and section 336, subdivision (d)(1), require a 30 percent reduction of the gravity-based penalty if the business has 11-25 employees. Here, Pisani properly applied the 30 percent reduction based on the evidence as to the number of employees.

History:

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide for penalty modifications based upon the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:

> GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.
>
> FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.

> POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

Section 336, subdivision (d)(3), provides that for a rating of "GOOD," 10 percent of the gravity-based penalty shall be subtracted; for a rating of "FAIR," 5 percent of the gravity-based penalty shall be subtracted; and for a rating of "POOR," no adjustment shall be made.

Pisani testified Employer had received a previous Serious citation in the past three years and therefore was not entitled to an adjustment based on History. Pisani's History calculation is appropriate and affirmed.

Good Faith:

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:
> GOOD—Effective safety program;
> FAIR—Average safety program;
> POOR—No effective safety program.

Section 336, subdivision (d)(2), allows an adjustment of 30 percent for "GOOD" rating and 15 percent for a "FAIR" rating.

Pisani testified that Employer had an effective written IIPP and was cooperative during inspection. Pisani also acknowledged that Employer stopped work at the worksite in an effort to prevent further employee exposure. However, because the program had deficiencies both in writing and implementation, he rated Good Faith as fair, entitling Employer to a 15 percent adjustment. On balance, the record evidence supports the fair Good Faith adjustment provided by Pisani. While Employer did engage in many notable efforts to establish, implement, and maintain its safety programs there were deficiencies, as discussed herein, supporting a finding that the program was average.

The penalty adjustments for Good Faith and History are applied, resulting in a combined 45 percent reduction of the gravity-based penalty of $1,500. For Citation 1, the adjusted penalty is $825.

Abatement:

Section 336, subdivision (e)(1), permits the Division to provide a 50 percent abatement credit. Here, Pisani asserted that Employer was entitled to the abatement credit. After rounding

the resultant calculation down to the next lowest five dollar increment, the proposed penalty is $410. (§336, subd. (j).) The proposed penalty of $410 for Citation 1 is found reasonable, but for the reasons discussed herein.

Citations 3 and 6:

Citations 3 and 6 were classified as Serious. Citation 3 had a proposed penalty of $9,900. Citation 6 had a proposed penalty of $12,375. Employer's appeal contested the penalty amounts.

Section 335, subdivision (a)(1)(B), provides that the severity of a Serious violation is high. Section 336, subdivision (c)(1), provides that the initial base penalty of a Serious violation is $18,000. Therefore, $18,000 is the correct base penalty for Citations 3 and 6.

Extent:

Both Citations 3 and 6 pertained to the hazard of becoming ill with Valley Fever. Section 336, subdivision (c)(1), provides that Extent for a Serious violation is rated under section 335, subdivision (a)(2), discussed above. Section 336, subdivision (c), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MEDIUM," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Pisani testified that he ranked Extent as medium for both citations because at least six employees were exposed to the hazard of illness from Valley Fever due to the violations. The record supports Pisani's medium Extent rating and it is affirmed. The medium rating for Extent results in no change to the $18,000 base penalty for each citation.

Likelihood:

Section 336, subdivision (c), provides that Likelihood for a Serious violation is rated under section 335, subdivision (a)(3), which again states,

> Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as: LOW, MODERATE OR HIGH

Section 336, subdivision (c), provides that for a rating of "LOW," 25 percent of the base penalty shall be subtracted; for a rating of "MODERATE," no adjustment to the base penalty shall be made; and for a rating of "HIGH," 25 percent of the base penalty shall be added.

Citation 3

Although Pisani testified that he rated Likelihood as moderate, he failed to provide any sufficient explanation for his Likelihood rating as to this specific citation. Therefore, the Likelihood rating is reduced to low. The Board applies maximum credits when the Division fails to justify its proposed penalty. (*Armour Steel Co.*, *supra*, Cal/OSHA App. 08-2649; *Plantel Nurseries, supra*, Cal/OSHA App. 01-2346.) Therefore, the gravity-based penalty for Citation 2 is calculated at $13,500.

Citation 6

As discussed above, Likelihood is based, in part, on the number of employees exposed to the hazard. With regard to Citation 6, Pisani said he rated Likelihood as high because he concluded six employees became ill and contracted Valley Fever at this worksite, which was a significant portion of Employer's workforce. The evidence also shows that a total of eighteen employees worked at the worksite and had reasonably predictable access to the hazard, all of which supports Pisani's high calculation. However, Pisani did not discuss the second component of the Likelihood calculation, which requires consideration of whether the type of violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Here, Ventura County was not classified as a region where Valley Fever was highly endemic during this time period. In addition, Employer testified it never had any previous illnesses related to Valley Fever. The Division did not discuss any other investigations related to Valley Fever in Ventura County prior to the instant matter. On balance, after considering both required Likelihood considerations, it is found that Likelihood for Citation 3 was properly classified is medium, not high. The medium rating results in no change.

Further Penalty Adjustments:

The penalty adjustments for Good Faith, Size, and History were the same for the Serious violations as for the General violations. (§ 335, subd. (b), (c), and (d); § 336, subd. (d).) This results in a 45 percent reduction of the gravity-based penalty.

For Citation 3, the adjusted penalty is $7,425. For Citation 6, the adjusted penalty is calculated at $9,900.

Abatement

Section 336, subdivision (e)(2), permits the Division to provide a 50 percent abatement credit. Here, Pisani asserted that Employer was not entitled to the abatement credit for either citation since they were not properly abated and verification sent within the time period prescribed for abatement. Pisani's assertions on this point are credited. Employer offered no contradictory evidence as to the exact date for abatement and when certification was submitted. No further adjustment to the penalties is warranted.

For all citations, Employer requests a reduction of the penalties under section 336, subdivision (k), however, that request is denied, which provides that the Division may apply different penalty criteria when multiple violations relate to a single hazard. A discretionary reduction under this section is within the purview of the Division, not the Board.

CONCLUSION

The Division established that Employer's HIPP failed to contain all required elements. Citation 1, Item 1, is affirmed and the penalty of $410 is found reasonable.

The Division established that Employer failed to implement its IIPP by providing effective training on Valley Fever. Citation 3, Item 1, is affirmed. The violation was properly classified as Serious and the modified penalty of $7,425 is found reasonable.

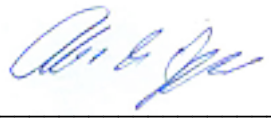
The Division established that Employer failed to prevent harmful exposure through use of feasible engineering controls. Citation 6, Item 1, is affirmed. The violation was properly classified as Serious and the modified penalty of $9,900 is found reasonable.

The Division failed to establish Citations 2, Item 1, 4, Item 1, and 5, Item 1, and Employer's appeal of those citations is granted and the citations vacated.

ORDER

It is hereby ordered that Citation 1, Citation 3, and Citation 6 are affirmed and the penalties are assessed as set forth in the attached Summary Table.

Employer's appeals of Citations 2, 4, and 5 are granted and the penalties vacated.



Dated: 05/06/2020

Aaron Jackson
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 sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**