

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

In the Matter of the Appeal of:

**MCCARTHY BUILDING COMPANIES, INC.
20401 S.W. BIRCH, SUITE 300
NEWPORT BEACH, CA 92660**

Employer

Inspection No.
1235941

DECISION

Statement of the Case

McCarthy Building Companies Inc. (Employer) is a general contractor. Beginning May 15, 2017, the Division of Occupational Safety and Health (the Division) through Senior Safety Engineer Greg Clark (Clark), conducted an inspection at Employer’s worksite located at 19855 East Highway 41, in Shandon, California. Employer was the general contractor for the construction of a 280-megawatt photovoltaic power plant at the site (the California (Cal) Flats Solar Project) (hereinafter, “the site”).

On November 15, 2017, the Division issued three citations to Employer, alleging four violations of the California Code of Regulations, title 8.¹ Citation 1, Item 1, classified as General, alleges that Employer failed to medically evaluate employees who were required to use respirators. Citation 1, Item 2, classified as General, alleges that Employer failed to retrain employees who were required to use respirators. Citation 2, classified as Serious, alleges that Employer failed to have methods and/or procedures for correcting unsafe or unhealthy conditions that exposed employees to the hazard of contracting Valley Fever.² Citation 3, classified as Serious, alleges that Employer failed to use appropriate respirators when effective engineering controls were not feasible. The Division thereafter issued amended citations to Employer to correct the date(s) of the alleged violations described in the original citations.

Employer filed a timely appeal contesting the existence of each alleged violation, the reasonableness of abatement, the classification of each violation, and the proposed penalties.

¹ Unless otherwise specified, all references are to California Code of Regulations, title 8.

² Valley Fever is a virus caused by a microscopic fungus known as *coccidioides immitis* and it is not known to spread from person to person or between people and animals; exposure typically occurs in connection with ground disturbing activities that release the fungal spores which can then be inhaled. *Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021.)

Additionally, Employer raised numerous affirmative defenses to each citation, including but not limited to, the Independent Employee Act Defense (IEAD).³

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on May 20, 2021, May 12 and 13, 2022, March 2 and 3, 2023 and November 7, 2023. ALJ Chernin conducted the hearing with all participants appearing remotely via the Zoom video platform. William Cregar and Tuyet Tran, Staff Counsel, represented the Division. Attorneys Chad Wishchuk and Marlene Nowlin of Finch, Thornton and Baird, LLP, represented Employer.

The parties stipulated that the hearing would be transcribed by a certified court reporter retained by Employer's counsel, and that the court reporter's transcript would serve as the official record of the hearing. The court reporter's transcript is deemed the official record of this proceeding pursuant to section 376.7, subdivision (b).

During the hearing, the parties entered into a settlement of Citation 1, Item 2, whereby the Division withdrew Citation 1, Item 2, in exchange for Employer waiving its right to cost recovery pursuant to Labor Code section 149.5. Good cause having been shown, the settlement of Citation 1, Item 2, is approved and is incorporated into this Decision.

This matter was submitted on November 1, 2024.

Issues

1. Did Employer provide medical evaluations before employees were fit tested or required to use respirators in the workplace?
2. Did Employer fail to implement its Injury and Illness Prevention Program (IIPP) by failing to correct unsafe or unhealthy conditions?
3. Did Employer use engineering control measures, as far as feasible, to control diseases caused by breathing air contaminated with harmful dusts? When effective engineering controls were not feasible, did Employer require use of appropriate respirators?
4. Did Employer establish any of its affirmative defenses?
5. Did the Division correctly classify Citations 2 and 3 as Serious?

³ Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).

6. Did Employer rebut the presumption that the violations alleged in Citations 2 and 3 are Serious?
7. Is abatement of the violations unreasonable?
8. Did the Division propose reasonable penalties?

Findings of Fact

1. Valley Fever is a virus caused by a microscopic fungus known as *coccidioides immitis* and it is not known to spread from person to person or between people and animals; exposure occurs in connection with ground disturbing activities that release the fungal spores which can then be inhaled.
2. Site owner First Solar was constructing a 280-megawatt photovoltaic solar array at the site. Employer was the general contractor for this project.
3. The site consisted of raw, undeveloped land in Monterey County. The work at the site included trenching and other related tasks that involved disturbing topsoil.
4. Conditions at the site were hot, dry and dusty.
5. Employer was responsible by contract and actual practice for overseeing all of the work being performed at the site by its own employees and by employees of the various subcontractors.
6. At the time of the inspection, Valley Fever was present in Monterey and San Luis Obispo counties and was considered endemic by public health authorities.
7. As a condition of permitting the work at the site, Monterey County required Employer to prepare and implement a Valley Fever Management Plan to minimize employee and public exposure to Valley Fever.
8. Employer's Site Specific Plan incorporated the Valley Fever Management Plan, and it identified Valley Fever as a hazard at the site.

9. Employer's Valley Fever mitigation measures included requiring employees to carry respirators with them while working at the site. Certain tasks performed by employees at the site required the use of N-95 respirators.
10. Employer did not medically evaluate employees who were provided with respirators prior to performing tasks that required their use.
11. Employees under Employer's control performed work at the site that disturbed soil and exposed them to hazardous dust containing Valley Fever spores. This work included using earth moving equipment to disturb and move soil; operation of open-cab skid steers, excavators and loaders; working on foot in close proximity to the equipment performing these activities; and, driving open-air buggies at the site.
12. Employer implemented numerous engineering controls and other safe work practices to reduce the likelihood of employee exposure to Valley Fever spores. These included: speed limits at the site meant to limit the creation of airborne dust; water trucks (26 trucks at the peak of the project) that would water down the roadways at the site ten hours a day; dust goggles; dust masks issued for "unforeseen conditions"; the use of task hazard analyses that included daily pre-work meetings; clothing with long sleeves, long pants, and gloves was required, and coveralls were available; restrooms were available at the site for changing clothes, although this was optional; portable showers were available; and, handwashing stations were available throughout the site and handwashing was discussed. In addition, employees had stop-work authority if conditions became dusty; employees received training and education related to dust prevention and Valley Fever awareness; every soil disturbing activity at the site had a water truck assigned to it; a "zero opacity rule" meant to prevent creation of dust; there was regular sweeping; and, storm water pollution prevention measures were put in place.
13. Employer's engineering controls and other safe work practices that it implemented at the site were insufficient to protect employees from exposure to Valley Fever spores.
14. Valley Fever spores are minute particles two to three microns in size and in a state of comminution. Their small size makes it possible to inhale them into the respiratory tract and lungs.

15. Valley Fever spores become airborne when soil is mechanically disturbed or disturbed by the effect of wind.
16. Valley Fever spores are harmful to breathe in, as they can cause a local inflammatory reaction and can lead to the destruction of lung tissue and decreased lung capacity. Valley Fever infections can spread to the bones and brain and can interfere with daily activities.
17. Symptoms of Valley Fever infection can include fever, chills, weakness, shortness of breath, cough, neurologic impairment, bone pain, disfiguring skin disorder, and destruction of bone and joint tissue, although many infected patients are asymptomatic.
18. The air at the site was contaminated with Valley Fever spores, both due to activities at the site that disturbed soil, as well as due to wind bringing Valley Fever spores onto the site from adjacent raw land.
19. Employees' assigned activities at the site exposed them to the hazard of inhaling Valley Fever spores.
20. Employer did not require the use of N-95 respirators although it was aware that engineering controls and safe work practices implemented at the site were insufficient to prevent atmospheric contamination by Valley Fever spores.
21. Employer's violations at the site were ongoing in nature and constituted continuing violations.
22. Employer was aware of the hazard of Valley Fever spores at the worksite, but did not ensure that employees were properly trained on how to avoid exposures and left too much decision-making to the discretion of employees.
23. Failing to implement procedures to prevent and correct violations involving exposure to Valley Fever spores exposes employees to the risk of contracting a potentially life-threatening infection.
24. Failing to require the use of N-95 respirators when engineering controls and other safe practices are insufficient to fully mitigate the risk of Valley Fever exposes employees to the risk of contracting a potentially life-threatening infection.

25. It was feasible for Employer to medically evaluate employees who were provided with N-95 respirators.
26. It was feasible for Employer to implement procedures to avoid and correct violations involving exposure to Valley Fever spores. Employer could have more strictly enforced its safe work practices and provided adequate training to employees on how and when to use N-95 respirators to avoid infection.
27. The Division's penalties were calculated consistent with the penalty-setting regulations.

Analysis

1. Did Employer provide medical evaluations before employees were fit tested or required to use respirators in the workplace?

Section 5144, subdivision (e)(1), states:

(e) Medical evaluation. Using a respirator may place a physiological burden on employees that varies with the type of respirator worn, the job and workplace conditions in which the respirator is used, and the medical status of the employee. Accordingly, this subsection specifies the minimum requirements for medical evaluation that employers must implement to determine the employee's ability to use a respirator.

(1) General. The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace. The employer may discontinue an employee's medical evaluations when the employee is no longer required to use a respirator.

Citation 1, Item 1 alleges:

Prior to and during the course of the inspection, including, but not limited to, on May 17, 2017, the employer did not determine through medical evaluation their own employee's ability to wear a respirator before allowing them to wear a respirator to protect against exposure to harmful airborne dust contaminated with *Coccidioides* fungal (Valley Fever) spores.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. *Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it,

has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence.

United Parcel Service, Cal/OSHA App. 1158285, Decision After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

Applicability

Section 5139 states that the Article containing the cited safety order “sets up minimum standards for the prevention of harmful exposure of employees to dusts, fumes, mists, vapors, and gases.” Here, as discussed more fully below, substantial evidence offered during the hearing establishes that Employer as the general contractor had control over employees working at the site, including its own employees, and employees of subcontractors. Furthermore, substantial evidence discussed more fully below establishes that employees were exposed to harmful dusts at the site.

Employer, relying on an unpublished Court of Appeal decision *Granite Construction Co. v. Occupational Safety & Health Appeals Bd.*, 2023 Cal. App. Unpub. LEXIS 6802 | 2023 WL 7485250, argues that section 5144 is inapplicable to the facts at bar. The Court of Appeal’s unpublished decision is not citable and is not controlling law pursuant to California Rules of Court, Rule 8.1115(a). Accordingly, Employer’s argument is without legal support and is not considered further.

For the foregoing reasons, the safety order applies to Employer’s operations at the site.

Violation

The Appeals Board has stated that:

To establish a violation, in addition to the issue of exposure, the Division must demonstrate, relevant here, two elements: (1) an employee was fit tested or Employer required the use of a respirator in the workplace, and (2) the employer failed to provide a medical evaluation to determine the employee’s ability to use a respirator.

Papich Construction Company, Inc., supra, Cal/OSHA App. 1236440.

Clark testified that he issued Citation 1, Item 1, because he concluded during his investigation that Employer had not medically evaluated employees’ ability to wear respirators who were required to carry and use N-95 respirators at the site. This conclusion is supported by Clark’s interviews with several employees. Nothing in the record suggests otherwise.

Clark credibly testified that Employer required its own employees and subcontractors' employees to carry N-95 respirators with them at all times while on site. In addition, Employer's Site Specific Plan (Exhibits A, B.1 through B.6) incorporates a Valley Fever Management Plan adopted for the project by the site owner. Clark credibly testified that the Valley Fever Management Plan was required by Monterey County as a condition of approving construction of the solar project at the site. The Site Specific Plan acknowledges the hazard of dust-borne Valley Fever at the site, and requires that "all employees, during all phases of the project" must be issued dust masks "to be used in unforeseen conditions that pose an immediate risk" and further requires that N-95 respirators be used by employees as determined by the applicable Job Hazard Analysis for the task being performed. (Exhibit B.1, p. 12.) In *Papich Construction Company, Inc., supra, Cal/OSHA App. 1236440*, the Appeals Board inferred based on identical facts as those here that requiring employees to carry dust masks and N-95 respirators with them at all times at the site meant that their use was mandatory under certain conditions. Here, Employer's Site Specific Plan acknowledged that certain tasks would require the use of an N-95 respirator. Thus, it is reasonable to infer from the evidence that Employer required the use of such respirators under certain conditions at the site.

Employer argues that Citation 1, Item 1, cannot be affirmed because there is no evidence that employees were exposed to an actual hazard. This argument, however, is unsupported by the evidence at hearing. As more fully discussed below, Employer's employees, and employees of subcontractors over whom it exercised safety oversight, engaged in soil disturbing activities that exposed them to hazardous dusts. There is no dispute that Employer and its subcontractors engaged in these activities, and Clark credibly testified that he observed employees operating open cab vehicles and equipment at the site, as well as specialized earth moving equipment, all of which were capable of and did disturb the soil at the site. Moreover, as more fully discussed below, substantial evidence at the hearing established that Valley Fever was endemic to Monterey and San Luis Obispo counties, and site conditions including dry weather and wind created a situation where employees were exposed to the hazard of contracting Valley Fever.

Employer required employees at the site to carry and use N-95 respirators, but it did not medically evaluate employees prior to issuing them N-95 respirators to ensure that they were physically able to use the respirators. The work at the site exposed employees to the risk of contracting Valley Fever via inhalation of harmful dust created through the disturbance of soil at the site as part of the work that Employer was contracted to perform and oversee. For all of the foregoing reasons, therefore, the Division proved a violation by a preponderance of the evidence, and Citation 1, Item 1, is affirmed.

2. Did Employer fail to implement its Injury and Illness Prevention Program (IIPP) by failing to correct unsafe or unhealthy conditions?

Section 1509, subdivision (a), states that “every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.”

Section 3203, subdivision (a)(6), states:

(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:

[. . .]

(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:

(A) When observed or discovered; and,

(B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

Citation 2 alleges:

Instance 1:

Prior to and during the course of the inspection, including, but not limited to, on May 17, 2017, the employer did not implement methods and/or procedures to effectively correct unsafe or unhealthy conditions, work practices or procedures that could result in its own employees exposure to harmful dust contaminated with *Coccidioides* fungal spores, and contracting Valley Fever as a result of workplace activities such as soil disturbance, other dust-generating activities, and while working in windy environments at the Cal Flats Solar site.

Instance 2:

Prior to and during the course of the inspection, including, but not limited to, on May 17, 2017, the employer did not implement methods and/or procedures to effectively correct unsafe or unhealthy conditions, work practices or procedures that could result in employees of Papich Construction, Sachs Electric, Granite Construction Company, Dudek and Althouse & Meade exposure to harmful dust contaminated with *Coccidioides* fungal spores, and contracting Valley Fever as a

result of workplace activities such as soil disturbance, other dust-generating activities, and while working in windy environments at the Cal Flats Solar site.

McCarthy Building Companies, Inc. was responsible for safety and health conditions at the work site by contract provisions and actual practice and failed to protect employees of Papich Construction, Sachs Electric, Granite Construction Company, Dudek, and Althouse & Meade.

Applicability

The parties do not dispute that Employer is a general contractor and that section 1509, subdivision (a), and section 3203, subdivision (a), apply to its ordinary business activities.

Violation

Section 3203, subdivision (a)(6), requires employers to have written procedures for correcting unsafe or unhealthy conditions and it requires the employer to actually implement those procedures by taking appropriate action to correct hazards. *National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Implementation of an IIPP is a question fact. *Ibid.*) Proof of implementation requires evidence of actual responses to known or reported hazards. *Ibid.*) Further, the corrective action taken by the employer must be sufficient in magnitude and scope to address the particular hazard. (*Ibid.*)

Employer adopted an IIPP (Exhibit C) that included procedures for correcting workplace hazards. The Division did not allege that Employer's written program language was deficient; rather, the Division alleges that Employer failed to implement its procedures for correcting unsafe or unhealthy work conditions.

a. Employer was aware of the hazard of airborne dust containing Valley Fever at the site.

Here, Employer was aware of the particular hazard presented by exposure to dust-borne Valley Fever. As mentioned above, Monterey County required Employer to follow a Valley Fever Management Plan in order to "minimize worker and public exposure to" Valley Fever as a result of work at the site. (Exhibit B.1, p. 5.) Employer's Senior Project Manager Chris Vlasak (Vlasak) credibly testified that the Valley Fever Management Plan was incorporated into Employer's Site Specific Safety Plan. The Valley Fever Management Plan specifically notes that Valley Fever "has been reported locally in Monterey, San Luis Obispo, Kern and Fresno counties" and states that the highest number of cases in Monterey County occur between June and January. (Exhibit B.1, p. 8.) In addition, Employer's Valley Fever Training Material notes that certain work activities at the site would require the use of N-95 respirators as a result of the hazard created by exposure to dust likely to contain Valley Fever spores. (Exhibit D, p. 11).

Furthermore, Clark testified that he personally observed employees working under conditions that exposed them to hazardous dust. For instance, Clark credibly testified that he observed employees of subcontractor Papich Construction using earth moving equipment, including an Ozzie Padder (used to separate rocks and debris from soil, which is then moved along a conveyor belt to a loader truck) (Exhibit 12), an open-cab skid steer (a small vehicle with a bucket attached to the front), excavators and loaders. These pieces of equipment, when used as intended, create airborne dust. Clark credibly testified that he saw employees using the equipment, as well as working in close vicinity to the equipment. These facts all weigh toward a finding that Employer was aware that its employees, as well as employees of subcontractors under its control, were engaged in work that exposed them to the hazard of harmful dust carrying Valley Fever spores.

b. Employer did not implement sufficient corrective measures in response to unsafe work practices at the site

Despite being aware that employees under its direction and control were exposed to the hazard of dust-borne Valley Fever spores at the site, Employer did not implement sufficient corrective measures to control or eliminate the hazard. There is no dispute that Employer used numerous engineering controls at the site to mitigate the hazard. Vlasak credibly testified that Employer implemented the following safe work practices: speed limits at the site meant to limit the creation of airborne dust; water trucks (26 trucks at the peak of the project) that would water down the roadways at the site ten hours a day; dust goggles; dust masks issued for “unforeseen conditions”; the use of task hazard analyses that included daily pre-work meetings; clothing with long sleeves, long pants, and gloves was required, and coveralls were available; restrooms were available at the site for changing clothes, although this was optional; portable showers were available; and, handwashing stations were available throughout the site and handwashing was discussed. Additionally, Employer’s Regional Safety Manager Isidro Rascon (Rascon) testified that there were ten safety professionals at the site, and he credibly testified that Employer implemented the dust mitigation measures described by Vlasak, in addition to the following: employees had stop work authority if conditions became dusty; employees received training and education related to dust prevention and Valley Fever awareness; every soil disturbing activity at the site had a water truck assigned to it; a “zero opacity rule” meant to prevent creation of dust; sweeping; and, storm water pollution prevention measures.

Although Employer implemented many safe work practices intended to mitigate or eliminate employee exposure to the hazard of airborne dust containing Valley Fever spores, Employer’s efforts were insufficient because they did not fully eliminate the hazard and placed the onus on employees rather than Employer to determine how to maintain a safe work environment. For instance, Clark credibly testified that he observed employees working with or near earthmoving equipment that was creating airborne dust. The employees Clark observed were not

using respirators. Additionally, Employer's former employee Rainer Lipp (Lipp), who was a water truck driver at the site for approximately nine months, credibly testified that he would regularly talk to other employees through the open window of his truck cab but would only "sometimes" wear a mask. Lipp credibly testified that the job site was dusty, and that windy conditions caused dust to blow around the site. In addition, the driving of the water trucks also created dust. Finally, Lipp credibly testified that although Employer used water trucks to water down the dirt roads at the site in order to mitigate dust, the dirt would dry within 15 to 20 minutes due to typically hot and dry conditions at the site.

Although Employer provided N-95 respirators to employees at the site and required them to be carried by employees at all times, Employer did not establish or implement specific procedures for when said respirators should be used, even though the other measures taken by Employer demonstrably did not adequately control or eliminate the creation of airborne dust at the site. Instead, Vlasak and Rascon both testified that using respirators was voluntary rather than mandatory. Employees were trained that there was no way to prevent acquiring a Valley Fever infection. (Exhibit D, p. 8.) This was directly contradicted at hearing by credible testimony from the Division's expert medical witness Dr. Papanek and Clark that N-95 respirator masks were effective to filter out Valley Fever spores. Employer's voluntary masking policy, combined with the confusing and arguably incorrect information provided in its employee training materials, improperly placed the burden on employees to determine when and how to use respirators to control or eliminate the hazard. (See Lab. Code, §§ 6400, 6401, 6402, 6403, 6404; *National Distribution*, *supra*, Cal/OSHA App. 12-0391; *Staffchex*, Cal/OSHA App. 10- 2456, Decision After Reconsideration (Aug. 28, 2014).) When viewed as a whole, these facts weigh heavily in support of a finding that Employer did not sufficiently implement procedures to correct known hazards at the site.

In summary, Employer was aware of the hazard of airborne dust containing Valley Fever spores, and Employer had a duty to take appropriate action to correct the hazard. Employer implemented insufficient procedures to control or eliminate the hazard. Accordingly, the preponderance of the evidence supports a conclusion that Employer violated section 1509, subdivision (a), by not establishing and implementing procedures for correcting the known hazard of airborne dust containing Valley Fever spores. Thus, Citation 2 is affirmed.

3. Did Employer use engineering control measures, as far as feasible, to control diseases caused by breathing air contaminated with harmful dusts? When effective engineering controls were not feasible, did Employer require use of appropriate respirators?

Section 5144, subdivision (a)(1), states:

(a) Permissible practice.

- 1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitution of less toxic materials.) When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to this section.

Citation 3 alleges:

Instance 1:

Prior to and during the course of the inspection, including, but not limited to, May 17, 2017, the employer did not require its own employees to use appropriate respirators when effective engineering controls were not feasible, or while they were being instituted, to protect against exposures to harmful dust contaminated with *Coccidioides fungal* (Valley Fever) spores during soil disturbance operations and other dust-generating activities and while working in dusty windy environments at the Cal Flats Solar site.

Instance 2:

Prior to and during the course of the inspection, including, but not limited to, May 17, 2017, the employer did not require employees of Papich Construction, Sachs Electric, Granite Construction Company, Dudek, and Althouse & Meaded to use appropriate respirators when effective engineering controls were not feasible, or while they were being instituted to protect against exposure to harmful dust contaminated with *Coccidioides fungal* (Valley Fever) spores during soil disturbance operations and other dust-generating activities and while working in dusty windy environments at the Cal Flats Solar site.

Applicability

The Appeals Board considered the applicability of section 5144 to the Cal Flats Solar site in *Papich Construction Company, Inc., supra*, Cal/OSHA App. 1236440. There, the Appeals Board concluded that section 5144 applied to the work being performed at the site. *Ibid.*) The Appeals Board stated that to reach this conclusion, it was necessary to determine whether cocci spores actually constitute “harmful dust” and whether the air was “contaminated” with that dust. *Ibid.*)

a. Valley Fever spores are dust within the meaning of section 5144

Specifically, the Appeals Board found that Valley Fever spores met the definition of “dust” under section 5140, insofar as that section defines dust as “particles of solid matter, other than fumes, in such a state of comminution that they may be inhaled.” The Appeals Board liberally construed the regulation and rationalized that Valley Fever spores were in a “state of comminution” insofar as they are “particles of solid matter that can become airborne and be inhaled” and in a comminuted state. *Ibid.*, citing *Carmona v. Division of Industrial Safety* (1975) 13 Cal. 3d 303, 313.) Thus, the Appeals Board found that Valley Fever spores were in “a similar state or condition to reduced or pulverized mineral ores” or other minute inhalable particles. (*Ibid.*)

Here, the record supports a similar conclusion to the one drawn by the Appeals Board in *Papich Construction Company, Inc.*, *supra*, Cal/OSHA App. 1236440. Paul Papanek, MD, the Division’s expert medical witness, credibly testified that Valley Fever spores are “like a seed” and that they typically grow in the top 18 inches of soil in dry, arid areas. Dr. Papanek further testified that people acquire Valley Fever infections after breathing in spores, which are in the range of two to three microns in size, which have become airborne by mechanically disturbing the soil or by the effect of wind. In contrast, Employer’s expert medical witness Marvin Pietruszka, MD, testified that live Valley Fever spores are not “comminuted” because spores are completely enclosed, although he admitted that Valley Fever spores could become aerosolized and were small enough to be inhaled. Dr. Pietruszka’s testimony on the size and mode of transmission of Valley Fever is consistent with Dr. Papanek’s testimony, and both witnesses’ opinion testimony is credited. Applying the definition of “dust” to Valley Fever spores in this matter supports a conclusion that Valley Fever spores are dust within the meaning of section 5144.

b. Valley Fever spores are harmful to breathe

Both Dr. Papanek and Dr. Pietruszka credibly testified that inhaling even a few spores could lead to a Valley Fever infection. Dr. Papanek testified that a Valley Fever infection initially causes a local inflammatory reaction and can lead to the destruction of lung tissue and decreased lung capacity. He also testified that Valley Fever infections can spread to the bones and brain and can interfere with daily activities. Symptoms of Valley Fever infection can include fever, chills, weakness, shortness of breath, cough, neurologic impairment, bone pain, disfiguring skin disorder, and destruction of bone and joint tissue, although Dr. Papanek did acknowledge that more than half of infected patients are asymptomatic. Dr. Pietruszka similarly testified that a small percentage of infected patients can experience serious complications, and he admitted that he had previously treated approximately 12 patients who were hospitalized due to Valley Fever. Dr. Papanek’s and Dr. Pietruszka’s testimony is again credited, and it is found based on the evidence provided during the hearing that Valley Fever spores are harmful to breathe.

c. The air at the site was contaminated with Valley Fever spores

There is no dispute that, at the time of the inspection, Valley Fever was endemic in Monterey County. Employer's Site Specific Safety Plan acknowledged the presence of Valley Fever spores in Monterey County (Exhibit B.1.) and required employees at the site to complete Valley Fever training provided by Employer to minimize the risk of acquiring a Valley Fever infection. (Exhibit D.) Clark credibly testified that Valley Fever is endemic in Monterey County, and his testimony is consistent with the testimony of Dr. Papanek and with the documentary evidence that the County of Monterey considered Valley Fever an important enough health risk that it required a Valley Fever Management Plan as a condition of permitting the development of the site. (Exhibits. B.1, Q.)

Employer does not dispute that it conducted soil disturbing activities at the site or that the site was located in a region where Valley Fever was known to be present. Clark observed soil disturbing activities and dust generation during his site inspection. It is reasonable to infer from the evidence that Employer's activities at the site generated dust containing Valley Fever spores.

d. Employees under Employer's control were exposed to the hazard of inhaling Valley Fever spores

The Appeals Board has enunciated two tests for determining employee exposure:

Under the Board's typical analysis, exposure may be established in either of two different ways. The Division may establish exposure by showing 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. 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." [Citation.] "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." [Citation.]

Papich Construction Company, Inc., supra, Cal/OSHA App. 1236440, quoting *Dynamic Construction Services, Inc.*, Cal/OSHA App. 1005890, Decision After Reconsideration (Dec. 1, 2016.)

Clark testified, and the parties do not dispute, that there is no commercially available test or method for testing for the presence of Valley Fever spores in the environment. The Division offered no direct proof that employees actually contracted Valley Fever at the site, although Lipp

credibly testified that he was diagnosed with Valley Fever during the time period when he was working at the site. Dr. Pietruszka credibly testified that he reviewed Lipp's laboratory test results from May 2017 and concluded that his diagnosis was the result of a previous infection due to the presence of a granuloma, which Dr. Pietruszka testified develop slowly. Nonetheless, Dr. Pietruszka admitted that Valley Fever infection is common in endemic areas. As noted previously, the site was located within an area where Valley Fever was endemic. Lipp testified that, while working at the site, he "sometimes" wore a dust mask, but acknowledged that he got in trouble for not wearing a mask on at least one occasion. As noted previously, Lipp credibly testified that activities at the site, including driving his water truck, generated dust, and he described the site as hot and dusty. Nothing in the record contradicts this portion of Lipp's testimony, and his testimony is credited and afforded great weight. It is reasonable to infer from the evidence that Lipp was actually exposed to the hazard of Valley Fever spores due to his presence at the site, which was located within a county where Valley Fever was endemic, and the fact that he did not always wear a dust mask or N-95 respirator.

Even if the Division had not established actual exposure, sufficient evidence establishes that it was reasonably predictable that employees at the site were exposed to the hazard presented by Valley Fever spores. Vlasak credibly testified that the site encompassed approximately 1,500 acres and extended 13 miles from end to end. He further credibly testified that there were over 1,300 workers present at the site on a daily basis during the peak of the project. Photographs offered into evidence show that the site was rural, with undisturbed topsoil on raw land located within the project area and the surrounding area, including on hillsides. (See, e.g., Exhibits 11, 22, 23, and N.) Wind was a concern at the site, and the presence of wind at the site was documented by Clark. (Exhibit 11.) Dr. Papanek credibly testified that both mechanical disturbance of soil and wind can release Valley Fever spores into the air, and his testimony on this point was not rebutted by Dr. Pietruszka. Therefore, Dr. Papanek's testimony is credited and is afforded great weight. These facts make it reasonably predictable that employees working at the site would come into contact with Valley Fever spores carried on dust generated by work at the site or carried by wind onto and throughout the site.

Finally, as noted previously, Employer was aware of the presence of Valley Fever spores at the site. Employer does not dispute that it was the general contractor at the site or that it was responsible for overseeing its own employees and the work being performed by employees of subcontractors also at the site. Vlasak admitted that Employer was required to adopt a Valley Fever Mitigation Plan. The purpose of the plan was to protect employees at the site, and the general public, from the hazard of acquiring Valley Fever because it was present in the counties where the work was taking place (Monterey and San Luis Obispo). (See Exhibit B.1.) Although Employer provided dust masks to employees at the site, Vlasak and Rascon both testified that masks were voluntary. As noted above, Employer's own training provided to employees at the site did not accurately inform employees that N-95 respirator masks could be used to prevent acquiring Valley

Fever. (Exhibit D.) There is no dispute in the record that Employer directed work at the site that disturbed topsoil and generated dust, although Employer implemented measures to mitigate dust. When viewed as a whole, the evidence establishes that employees under the direction and control of Employer were exposed to the hazard of Valley Fever.

For the foregoing reasons, it is determined that the safety order applied to Employer's work at the site.

Violation

As noted above, the Division established that employees working at the site under the direction and control of Employer were exposed to harmful dusts carrying Valley Fever spores. In order to find a violation of section 5144, subdivision (a)(1), the Division carried the burden of proving that Employer failed to use accepted engineering control measures as far as feasible to prevent atmospheric contamination; and, when effective engineering controls are not feasible to prevent atmospheric contamination, or while being instituted, appropriate respirators were not used. (*Papich Construction Company, Inc., supra*, Cal/OSHA App. 1236440.)

a. Employer failed to use accepted engineering control measures as far as feasible to prevent atmospheric contamination

There is no dispute that Employer used engineering control measures to mitigate dust at the site. As discussed previously, Employer used methods including spraying down dirt with water and provision of coveralls and on-site showers to manage employee exposure to Valley Fever spores. Employer's measures, however, were not all mandatory. Vlasak testified that changing rooms were available at the site, as well as showers, but employees were not required to change their clothes or shower even after working in conditions that exposed them to airborne dust. Vlasak denied knowing whether employees used the showers or the provided coveralls, and he testified that he only saw people changing out of wet clothes in the open-air parking lot. Rascon also testified that changing rooms were available, but he did not testify whether the rooms were used by employees. Furthermore, although many of the vehicles used at the site had enclosed cabs, not all of them did. Clark credibly testified that he observed open-air cab equipment such as skid steers in use at the site during his inspection. Furthermore, Lipp credibly testified that he regularly talked to other employees at the site through the open window of his truck's cab. Lipp also testified that he did not use the changing rooms to change his clothes at the site.

Employer's implementation of engineering control measures to mitigate or eliminate the hazard of airborne dust containing Valley Fever spores did not go as far as feasible to prevent atmospheric contamination with Valley Fever spores. Although Employer instituted numerous engineering control measures, many of them were not mandatory and consequently were not used by employees, such as the showers, changing rooms and coveralls. Additionally, some of the

engineering control measures were used but were still insufficient to eliminate the hazard. For instance, Clark credibly testified that the water sprayed from the water trucks dried quickly, resulting in resumed dry, dusty conditions. Lipp credibly testified that he observed dust being generated when he would drive a water truck at the site, and that he drove his truck past employees in open-air buggies at times. Wind was present on occasion at the site, which was a rural grazing land surrounded by similarly rural, raw land outside of the boundaries of the project area. Nothing prevented wind from carrying Valley Fever spores into areas where employees were present and working, and Employer's engineering control measures did not effectively mitigate this hazard.

In summary, it is determined that Employer did not implement engineering control measures as far as feasible to prevent atmospheric contamination with Valley Fever spores.

b. When effective engineering controls are not feasible to prevent atmospheric contamination, or while being instituted, appropriate respirators were not used

The record demonstrates that Employer's engineering controls were not effective for preventing atmospheric contamination with Valley Fever spores. Despite Employer's efforts, work activities at the site still generated dust, and that dust was reasonably predictable to carry Valley Fever spores because Valley Fever was endemic in Monterey and San Luis Obispo counties. Furthermore, none of the engineering controls used by Employer eliminated wind either on-site or off-site, and credible testimony from Dr. Papanek established that Valley Fever spores could be carried for some distance by wind activity.

Because Employer did not implement effective engineering controls to prevent atmospheric contamination, the remaining issue is whether appropriate respirators were used in lieu of these measures or while they were being instituted. Here, although Employer provided dust masks and N-95 respirators to employees at the site and required that they be carried on their person at all times, Employer nonetheless failed to ensure that the respirators were used as needed. It is inferred from the record that Employer believed that respirators were needed for certain activities at the site, which is why Employer required that they be carried at all times. Employer did not, however, determine when the respirators should be worn. Employer left that determination to employees, as established through the testimony of Vlasak, Rascon and Lipp. Furthermore, Employer provided insufficient information and instruction to employees on when to wear respirators. Employer's Valley Fever training module (Exhibit D) incorrectly states that there is no way to prevent acquiring a Valley Fever infection, and employees were not aware of when or how to use respirators to protect themselves, as demonstrated through the testimony of Lipp as well as Clark. Lipp credibly testified that he would sometimes wear a dust mask, but not always. Clark observed employees working in close proximity to equipment used in ways that was generating dust in the atmosphere. Furthermore, Employer provided N-95 respirators to employees to use in unforeseen circumstances, but nothing in the record demonstrates that Employer

instructed employees on how to determine when those circumstances arose. The only reasonable conclusion that can be drawn from the evidence is that employees did not use respirators when effective engineering controls were not feasible to eliminate atmospheric contamination with Valley Fever spores, or while such controls were being implemented.

For all the foregoing reasons, therefore, the Division established a violation of section 5144, subdivision (a)(1), by a preponderance of the evidence. Accordingly, Citation 3 is affirmed.

4. Did Employer establish any of its affirmative defenses?

Employers bear the burden of proving their pleaded affirmative defenses by a preponderance of the evidence, and any such defenses that are not presented during the hearing are deemed waived. *RNR Construction, Inc., supra*, Cal/OSHA App. 1092600.) Here, Employer was given the opportunity to present evidence in support of its affirmative defenses during the hearing. Employer did not directly address any of its pleaded affirmative defenses either during the hearing or in its post-hearing brief. However, for purposes of creating a complete record, the undersigned ALJ exercises his discretion to review the record as it pertains to Employer's raised affirmative defenses. Here, the ALJ has determined from a review of the record that the only defenses actually litigated and addressed by Employer were the due diligence defense, and the defense that the action is time-barred by Labor Code section 6317. Therefore, discussion of Employer's affirmative defenses shall be limited to these identified defenses, and all other defenses are deemed waived.

a. The citations are not time-barred by Labor Code section 6317

At the time of the inspection, Labor Code section 6317 required that the Division issue a citation within six months after the occurrence of an alleged violation. The Appeals Board has previously held that the six-month statute of limitations is jurisdictional. *Kiewitt/FCI/Manson (FCM) A Joint Venture*, Cal/OSHA App. 06-2452, Denial of Petition for Reconsideration (Apr. 2, 2009); *Sierra Wes Drywall, Inc.*, Cal/OSHA App. 94-1071, Decision After Reconsideration Nov. 18, 1998.) An exception to the six-month statute of limitations exists, however, when the Division alleges a continuous violation. Under the continuous violation exception, the Division must issue a citation within six months of exposure to a hazard unless the hazard is not abated and employees continue to be exposed to the hazard, whether or not an actual exposure event occurred during the prior six months. *Pacific Telephone Co. dba AT&T*, Cal/OSHA App. 06-5053, Denial of Petition for Reconsideration (Aug. 11, 2011) citing *Los Angeles County Dept. of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002), citing *Johnson Controls, Inc.*, OSHRC No. 89-2614; *United Airlines, Inc.*, Cal/OSHA App. 83-595, Decision After Reconsideration (Apr. 24, 1986) [Exposure to inclement weather not shown in six months prior to

violation, but violation continued as long as Employer failed to provide personal protective equipment.])

Here, the Division opened its inspection on May 15, 2017. It issued citations to Employer on November 16, 2017. Clark testified that he inspected the site on May 15, 16 and 17, 2017. Although Employer argues that by then all soil disturbing activities had finished, Clark credibly testified that he observed employees engaged in soil disturbing activities during those days. Furthermore, Employer does not address the risk of exposure to Valley Fever spores that was created by wind-carried spores entering the site from adjoining raw land or being carried from one area of the site to another. There is no dispute in the record that Valley Fever spores were present and considered endemic in Monterey County at the time of the inspection. Furthermore, nothing in the record suggests that Employer took further steps to eliminate the risk of wind-carried spores from outside the site perimeter after Clark began his inspection, and there is no dispute that there was still active construction work ongoing at the site. Given these facts, it is reasonable to conclude that the violations observed by Clark and documented in the issued citations were ongoing in nature, and thus constituted continuing violations. Accordingly, Employer cannot avail itself of the statute of limitations found in Labor Code section 6317.

b. Employer did not exercise reasonable due diligence

“The evaluation of due diligence requires consideration of the totality of circumstances and various factors may be relevant to its determination.” *McCarthy Building Companies, Inc.*, Cal/OSHA App. 11-1706, Decision After Reconsideration (Jan. 11, 2016.) Those factors include, but are not limited to:

[...] contractually requiring the subcontractor to provide all safety equipment required to do the job, or providing the safety equipment itself; establishing work rules designed to prevent safety violations, such as developing an accident prevention program that is reasonably specific and tailored to the safety and health requirements of particular job sites and/or operations, and that includes training and corrective action; engaging in efforts to ensure that subcontractors have appropriate and reasonably specific accident prevention programs; engaging in appropriate efforts to communicate work rules to its subcontractors; establishing an overall process to discover and control recognized hazards, with the degree of oversight dependent on a number of factors such as the subcontractor’s activity, experience, and level of specialized expertise; and, the general contractor must effectively enforce its accident prevention and safety plans via contractual language, appropriate disciplinary action, and documentation.

McCarthy Building Companies, Inc., *supra*, Cal/OSHA App. 11-1706.) These factors are not exclusive, and not every factor need be considered in every case. *Id.*) Moreover, the weight afforded to any particular factor is within the discretion of the ALJ. (*Id.*)

Here, the evidence weighs toward a conclusion that Employer did not exercise reasonable due diligence. Employer does not dispute that it was the general contractor with oversight over all of the work being performed at the site. Employer was responsible for implementing the Valley Fever Management Plan and provided Valley Fever training to its own employees and employees of subcontractors at the site. Employer's training and implementation of the Valley Fever Management Plan were lacking, insofar as Employer ultimately placed the burden on the employees, rather than itself or its subcontractor's management teams, to implement safe work practices to protect against Valley Fever exposure. In particular, Employer's own Valley Fever training (Exhibit D) provided insufficient information for its own employees or employees of subcontractors to know how to prevent becoming infected with Valley Fever. Employer's training incorrectly stated that there is no way to prevent acquiring the infection and failed to discuss the proper use of respirators to protect against infection. Employees such as Lipp were not provided with sufficient instruction and training to know when and how to take measures to protect themselves against Valley Fever infection. Much weight is given to the evidence that employees such as Lipp demonstrated lack of understanding of how and when to use respirators to protect themselves from Valley Fever, and relied on vague instructions that they could wear dust masks for N-95 respirators when undefined unforeseeable circumstances arose. Based on the facts at bar, it cannot be said that Employer exercised reasonable due diligence at the site, both with respect to its own employees and subcontractors' employees whose safety was part of Employer's overall responsibility. Accordingly, Employer has not established the due diligence defense, and the defense fails.

For the foregoing reasons, Employer did not establish any of its pleaded affirmative defenses by a preponderance of the evidence.

5. Did the Division correctly classify Citations 2, and 3 as Serious?

Labor Code section 6432, subdivision (a), in relevant part, stated at the time of the inspection:

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

- (1) A serious exposure exceeding an established permissible exposure limit.
- 2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

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

“Serious physical harm” is defined as an injury or illness occurring in the place of employment that results in:

- (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.

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. *Sacramento County Water Agency Department of Water Resources, Cal/OSHA App. 1237932, Decision After Reconsideration May 21, 2020.*)

The Division introduced evidence during the hearing that it complied with Labor Code section 6432, subdivision (b)(1), by sending Employer Notice of Intent to Classify Citations 2 and 3 as Serious (1BY). (Exhibit 17.) Employer responded to the 1BYs. (Exhibit 18.)

At the time of the hearing, Clark testified he had been employed in occupational health and safety positions for over 20 years. Clark was the Senior Safety Engineer for the Division’s Bakersfield office at the time of the hearing and had previously been employed by the Division as an Associate Safety Engineer. Clark received a bachelor’s degree in environmental health with a focus on industrial hygiene. Clark testified that he was current in his Division-mandated training. On the basis of these facts, Clark is found to be competent to give opinions related to the Serious classifications of Citations 2 and 3 pursuant to Labor Code section 6432, subdivision (g).

Both Citations 2 and 3 pertain to Employer’s duty to protect employees from being infected with Valley Fever while working at the site. Clark testified that the Division classified Citation 2 as Serious because he observed dust-generating activities being performed by employees of various subcontractors at the site, and in the vicinity of Employer’s own employees who were supervising the work and operating the water trucks. Clark testified that he classified Citation 3 as Serious because Employer’s failure to use effective engineering controls to eliminate the risk of exposure to Valley Fever spores, and Employer’s further failure to require the use of respirators when engineering controls were ineffective to eliminate the hazard, exposed employees to the risk of contracting Valley Fever. Dr. Papanek credibly testified that Valley Fever can cause debilitating injuries including loss of lung function, and that it can spread to the brain and bones of an infected person, causing further injury. He testified that these impairments could interfere with activities of daily living. These facts strongly support a determination that exposure to Valley Fever infection

creates a realistic possibility of permanent impairment under Labor Code section 6432 and, when viewed in light of the evidence as a whole, strongly support a conclusion that the Division correctly classified both Citation 2 and Citation 3 as Serious.

6. Did Employer rebut the presumption that the violations alleged in Citations 2 and 3 are Serious?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists 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.

In order to satisfactorily rebut the presumption, the employer must demonstrate both that:

- (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) [; and]
- (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Id.)

Here, as discussed previously, Employer did not take all the steps that a reasonable employer would have taken to anticipate and prevent the violation, and did not take effective action to eliminate employee exposure to the violation. Even though Employer did utilize many engineering controls and other methods to prevent Valley Fever infection at the site, there were important deficiencies in Employer's approach to safety at the site. For instance, evidence in the record clearly shows that Employer provided inadequate Valley Fever training to its employees and subcontractors' employees, insofar as the training did not accurately explain how to prevent acquisition of a Valley Fever infection by donning an N-95 respirator. Employer provided employees with N-95 respirators and required them to be carried at all times, but did not medically evaluate or fit test employees and left it within the discretion of the employees to determine when to wear the respirators. Employer did not provide employees guidance on when to wear the respirators, leaving employees at risk of not wearing them when necessary. Finally, although Employer provided areas for employees to change their clothes and shower prior to leaving the site, and encouraged handwashing, these were not mandatory. Based on the record as a whole, including the facts summarized here, it is determined that Employer did not rebut the presumption that Citations 2 and 3 were properly classified as Serious violations.

7. Is abatement of the violations unreasonable?

The Division does not mandate specific means of abatement; rather, the employer is free to choose the least burdensome means of abatement. *Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004), citing *The Daily Californian/Caligraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) To establish that abatement requirements are unreasonable an employer must show that abatement is unfeasible, impractical, or unreasonably expensive. See *The Daily Californian/Caligraphics, supra*, Cal OSHA/App. 90-929.)

An employer may seek a variance from the Standards Board if it can show that “an alternate program, method, practice, means, device, or process which will provide equal or superior safety for employees.” (See Labor Code § 143; *United States Cold Storage of California*, Cal/OSHA App. 11-1342, Denial of Petition for Reconsideration (Dec. 21, 2012); *Gates & Sons, Inc.*, Cal/OSHA App. 79-1365, Decision After Reconsideration (Dec. 15, 1980).)

Employer presented limited evidence that abatement is unfeasible, impractical, or would be unreasonably expensive. Employer presented no evidence that it would be unfeasible, impractical, or unreasonably expensive to medically evaluate employees who were provided with N-95 respirators. Employer presented no evidence that it would be unfeasible, impractical, or unreasonably expensive to properly train employees on when to use N-95 respirators to avoid infection with Valley Fever, or to enforce their use when necessary. Employer offered the opinion of Dr. Pietruszka that wearing an N-95 mask could be more dangerous when performing physically demanding work. Dr. Pietruszka’s opinion was not corroborated by other evidence, and Employer failed to explain how every single job on site, including driving open-air vehicles and walking around monitoring for dust, would be negatively impacted by wearing N-95 respirators.

For all the foregoing reasons, therefore, Employer failed to establish that abatement of the violations would be unreasonable.

8. Did the Division propose reasonable penalties?

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

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. *MI Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).)

Here, the Division introduced its proposed penalty worksheet (Exhibit 2), and Clark credibly testified as to how the penalties were calculated according to the applicable regulations. Employer did not offer any evidence that tends to show that Clark's calculations were in error. Rather, totality of the evidence in the record supports Clark's calculations.

In summary, the record supports a finding that the Division proposed reasonable penalties for Citation 1, Item 1, Citation 2 and Citation 3. As noted previously, the parties stipulated during the hearing that Citation 1, Item 2, will be withdrawn and vacated as part of the resolution of this appeal. Therefore, no finding is made as to the calculation of the penalty for Citation 1, Item 2.

Conclusion

The evidence supports a conclusion that Employer violated section 5144, subdivision (e)(1), by failing to medically evaluate employees who were required to use respirators.

The evidence supports a conclusion that Employer violated section 1509, subdivision a), by failing to have methods and/or procedures for correcting unsafe or unhealthy conditions that exposed employees to the hazard of contracting Valley Fever.

The evidence supports a conclusion that Employer violated section 5144, subdivision (a)(1), by failing to use appropriate respirators when effective engineering controls were not feasible.

The evidence supports a conclusion that Citations 2 and 3 were properly classified as Serious.

The evidence supports a conclusion that it was feasible for Employer to abate the identified violations.

The evidence supports a conclusion that the Division proposed reasonable penalties for the identified violations.

Order

Citation 1, Item 1, Citation 2 and Citation 3, and their associated penalties are affirmed and their penalties are assessed as set forth in the attached Summary Table. Citation 1, Item 2, is vacated consistent with the parties' stipulation.

Dated: 11/20/2024

/s/ Howard I. Chernin

Howard I Chernin
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.**