

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

In the Matter of the Appeal of:

**L & S FRAMING, INC.
1145 TARA COURT
ROCKLIN, CA 95765**

Employer

Inspection No.

1692964

DECISION

Statement of the Case

L&S Framing, Inc. (Employer), is a general contractor. Beginning August 23, 2023, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Ali Karimi (Karimi), conducted an accident investigation at Employer's worksite located at 7357 Dorstone Way, in Sacramento, California (the site). Employer was engaged in framing work on the second story of a home under construction when an employee injured himself with a pneumatically-driven nail gun while descending a ladder (the accident).

On January 19, 2024, the Division issued three citations to Employer, alleging three violations of the California Code of Regulations, title 8.¹ Citation 1, classified as General, alleges that Employer failed to adopt a Code of Safe Practices that included provisions for the safe use of a pneumatically-driven nail gun. Citation 2, classified as Serious Accident-Related, alleges that Employer failed to ensure that its employees operated pneumatically-driven nail guns in accordance with the manufacturer's requirements. Citation 3, classified as Serious, alleges that Employer failed to effectively train its employees on the safe operation of pneumatically-driven nail guns.

Employer filed a timely appeal contesting the existence of each alleged violation and the reasonableness of abatement. Employer also challenged Citations 2 and 3 on the grounds that the classification of each violation is incorrect and the proposed penalties are unreasonable. Additionally, Employer raised numerous affirmative defenses to each citation, including but not limited to, unconstitutional vagueness.²

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 July 9, 2024. ALJ Chernin conducted the hearing with all participants appearing

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

² 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).)

remotely via the Zoom video platform. Jordan Davis, Staff Counsel, represented the Division. Perry Poff, attorney with Donnell, Melgoza and Scates LLP, represented Employer.

This matter was submitted on January 1, 2025.

Issues

1. Did Employer fail to include in its Code of Safe Practices (COSP) provisions for the safe use of a pneumatically-driven nail gun?
2. Did Employer fail to ensure that its employees operated pneumatically-driven nail guns in accordance with the manufacturer's instructions?
3. Did Employer fail to effectively train its employees on the safe operation of pneumatically-driven nail guns?
4. Did Employer establish any of its affirmative defenses?
5. Did the Division correctly classify Citations 2 and 3 as Serious?
6. Did Employer rebut the presumption that the violations alleged in Citations 2 and 3 are Serious?
7. Did Employer's violation of section 1704, subdivision (b)(2), cause a serious injury to an employee?
8. Is abatement of the violations unreasonable?
9. Did the Division propose reasonable penalties?

Findings of Fact

1. Jose Mauricio Barrios (Barrios) was employed by Employer on the date of the accident.
2. Barrios was performing work while using a pneumatically-driven nail gun, a Metabo HPT NR83A5 (the nail gun), just before the accident.
3. Barrios accidentally shot himself in the leg with the nail gun while descending a ladder. At the time, the nail gun was attached to Barrios' tool belt and was still connected to the air hose.

4. It was unsafe for Barrios to not receive instructions pertaining to the various potentially dangerous tasks identified in the manufacturer's manual for the nail.
5. The manufacturer's manual includes many safety rules, including disconnecting the nail gun from the air hose when the nail gun was not in use or when moving it to a new location, and not attaching the nail gun to one's person, such as by hanging it off of a tool belt.
6. Employer's safety training and COSP did not cover all of the rules listed in the manufacturer's manual.
7. Failing to ensure that employees use pneumatically-driven nail guns according to the manufacturer's requirements creates a realistic possibility that an employee will suffer a serious physical harm or death from the hazard of misusing a nail gun, which can result in driving a nail into flesh and bone and leading to hospitalization for more than observation.
8. Failing to provide effective training to employees on how to safely use pneumatically-driven nail guns according to the manufacturer's requirements creates a realistic possibility that employees will suffer serious physical harm or death from driving a nail into their flesh and bone, because they will not recognize that they are using the nail guns in an unsafe manner.
9. Barrios' failure to use the nail gun in a safe manner, consistent with the manufacturer's requirements, resulted in Barrios accidentally firing a nail into his leg, requiring hospitalization and surgery.
10. Employer's COSP and training do not address all of the manufacturer rules for pneumatically-driven nail guns. Employer has not demonstrated that it has amended either its COSP or training to cover the deficiencies discussed herein.
11. The Division calculated the penalties in accordance with the Division's policies and procedures.

Analysis

- 1. Did Employer fail to include in its Code of Safe Practices (COSP) provisions for the safe use of a pneumatically-driven nail gun?**

Section 1704, subdivision (f), states:

The employer's written Code of Safe Practices shall include provisions for the use of pneumatically-driven nailers and staplers where applicable.

Citation 1, Item 1, alleges:

Prior to and during the course of the investigation, the employer failed to include all provisions for the use of pneumatically-driven nailers and staplers where applicable to their written Code of Safe Practices.

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 1704 is found within the Construction Safety Orders. There is no dispute that Employer's employees were engaged in construction activities at the site on the date of the accident. Employer does not dispute that it is required to have a COSP. Section 1704 applies to pneumatically-driven nail guns specifically.

Although Employer argued post-hearing that there is no evidence that Barrios used a pneumatically-driven nail gun at the site, the evidence supports such a finding. Karimi testified that, during his investigation, he requested a copy of the manual for the nail gun that was being used by Barrios at the time of the accident. (Exhibit [Exh.] 18.) Karimi further testified that, in response to his request, Employer (via its counsel of record, Perry Poff) provided a copy of a manual pertaining to a Metabo HPT NR83A5 pneumatically-driven nail gun. (Exh. 12.) Employer did not provide any further manuals to the Division prior to the issuance of the citation, and did not provide any evidence during the hearing to dispute that the manual provided by Employer via its counsel of record was the one corresponding to the nail gun that Barrios was using when he was injured. Employer's act of providing the manual to the Division during its investigation in response to a document request, and not correcting the record during the investigation or the pendency of this appeal, is deemed an admission supporting a finding that the manual the Division received from Employer's counsel of record was the manual for the model of pneumatically-driven nail gun that Barrios was using. (See Cal. Evid. Code §§ 1220,

1222.) This finding is further supported by evidence that Employer sought the opinion of a third party after the accident to determine the root cause. (Exh. 10.) The exhibit, which is dated three calendar days post-accident, notes that an inspection was performed on an NR83A5. Although the exhibit does not contain specific mention of a nail gun, the NR83A5 used to identify the tool corresponds exactly to the model number of the nail gun identified in Exhibit 12, and it references an incident involving the tool inadvertently firing. Exhibit 10, which Employer provided, via its counsel, to the Division during its investigation, is deemed an adoptive admission by Employer that the nail gun that was used by Barrios, and subsequently inspected by the third party, was a pneumatically-driven nail gun. (See Cal. Evid. Code § 1221.)

The nail gun Barrios was using at the site is pneumatically-driven. Based on the above-summarized evidence, the safety order applies to Employer.

Violation

Section 1704, subdivision (f), requires that Employer's COSP include provisions for the use of pneumatically-driven nail guns, where applicable. To establish a violation of section 1704, subdivision (f), it is instructive to review the elements of a violation of section 1509, subdivision (b), which provides:

Every employer shall adopt a written Code of Safe Practices which relates to the employer's operations. The Code shall contain language equivalent to the relevant parts of Plate A-3 of the Appendix.

To establish a violation of section 1509, subdivision (b), the Division must establish (1) that an employer failed to have a written COSP; (2) that the COSP did not relate to an employer's operations; (3) that the employer did not adopt the COSP; or (4) that the COSP fails to contain language equivalent to the relevant parts of Plate A-3 of the Appendix. By extension, in order to establish a violation of section 1704, subdivision (f), the Division must establish (1) that Employer failed to have a written COSP; (2) that the COSP did not relate to Employer's operations involving pneumatically-driven nail guns; (3) that Employer did not adopt the COSP with respect to its operations involving pneumatically-driven nail guns; or (4) that the COSP fails to contain language regarding the safe use of pneumatically-driven nail guns and staplers, where applicable.

Karimi testified that he issued Citation 1, Item 1, because he concluded during his investigation that Employer's COSP did not include important points from the manufacturer's manual pertaining to safe operation of the nail gun. He also concluded that the COSP mentioned the manual but did not require employees to read it and did not state that the manual was available to review. A review of Employer's COSP, in view of these allegations, follows below.

a. Did Employer have a written COSP?

In the instant matter, Employer had a written COSP. (Exh. 13.) The Division did not dispute that Employer had a written COSP. Rather, the Division asserted that Employer failed to have a COSP that included provisions for the safe use of pneumatically-driven nail guns where applicable to its operations.

b. Was Employer's COSP sufficiently related to its operations specific to using pneumatically-driven nail guns?

Turning to the next element, the Division argues that Employer's COSP was not sufficiently related its operations because it did not include several important provisions for the safe operation of pneumatically-driven nail guns.

California Code of Regulations, title 8, chapter 4, subchapter 4, Appendix A, Plate A-3 (Plate A-3), contains a list of general safety rules and a parenthetical that provides: "This is a suggested code. It is general in nature and intended as a basis for preparation by the contractor of a code that fits his/her operations more exactly." In *Hood Corporation*, Cal/OSHA App. 89-236, Decision After Reconsideration (June 22, 1990), the Appeals Board explained:

The parenthetical in Appendix A-3 indicates clearly that mere adoption of the rules set forth there is not enough. The Employer must prepare a code that fits its operations more exactly. Section 1509(b) defines the required amount of 'exactness' by mandating that each code must relate to the employer's operations.

(Emphasis in original.)

The Appeals Board has further explained "[s]ection 1509(b) does not contain a litmus test for determining what constitutes an 'operation' for a particular employer. Thus, what constitutes an 'operation' will depend on the facts and circumstances of each case. ... The next issue is whether Employer's Code of Safe Practices 'related to' the operation[.]" (*Hood Corporation, supra*, Cal/OSHA App. 89-236.) For a COSP to relate to the alleged hazardous activity, it must contain rules that "instruct employees how to avoid each of the potentially dangerous tasks[.]" (*Id.*)

Section 1704, subdivision (f), requires provisions be included where "applicable." Applicable is not defined in the safety order, but is best understood to mean "capable of or suitable for being applied." (www.merriam-webster.com <accessed 10-29-2024>.) Thus, the provisions required to be included in Employer's COSP are those that are capable of or suitable for being applied to Employer's operations pertaining to pneumatically-driven nail guns.

Employer's COSP was entered into evidence as Exhibit 13. It consists of 60 enumerated items, eight of which appear to pertain to the operation of pneumatically-driven nail guns such as the one involved in the accident:

[. . .]

14. Never use a nail gun that is not equipped with a safety spring or is in questionable working condition.

15. Never remove the safety spring from a nail gun.

16. Unplug air hose at nail gun when not in use.

17. Unplug air hoses at compressor during lunch or break.

18. Do not carry pneumatic fasteners by the hose.

19. Do not carry pneumatic fasteners with your finger on the trigger.

20. Operate and maintain pneumatic fasteners according to manufactures [sic] instruction.

[. . .]

22. All compressors, tanks, and other pneumatic equipment, air hoses, and lines shall be properly maintained. Pulleys must be guarded (covered).

(Exh. 13)

The evidence submitted during the hearing supports a conclusion that Employer's COSP was deficient in several ways. First, although the COSP requires employees to operate and maintain pneumatic fasteners (including nail guns) according to the manufacturer's instructions, the Division found no evidence of how Employer made the manual(s) available to its employees and found no evidence that Employer required employees to review the manufacturer's instructions. Employer provided Barrios' training records to Karimi during the inspection that merely stated "manuals available upon request." (Exh. 14, p. 3.) This is not the same as requiring employees to read the manual or prohibiting employees from using pneumatically-driven nail guns until they had read and understood the manual.

The Division alleges that Employer's COSP was deficient for not including certain instructions from the manufacturer of Barrios' nail gun. These included instructions to disconnect the air hose from the nail gun before moving it and not attach the nail gun or its hose to one's body (Exh. 12, p. 5); to not affix the rafter hook (a hook that is placed over a rafter and from which the nail gun may be hung when not in use) to one's clothing or belt (Exh. 12, p. 6); and, to only use the nail gun in single sequential mode when a hook is attached (Exh. 12, p. 7).³ The manufacturer's manual states that these are "IMPORTANT SAFETY INSTRUCTIONS –

³ The rafter hook and single sequential mode are discussed in more depth later in this Decision.

FOR USING NAILERS” and cautions “to reduce the risks of...injury to persons, READ ALL THE INSTRUCTIONS BEFORE USING THE TOOL.” (Exh. 12, p. 4; emphasis in the original.)

Here, it is determined that Employer’s COSP did not relate to its operations with the required exactitude with respect to operation of pneumatically-driven nail guns. It did not “instruct employees how to avoid each of the potentially dangerous tasks[.]” (*Hood Corporation, supra*, Cal/OSHA App. 89-236.) The manufacturer’s manual for the nail gun that was in use at the time of the accident included numerous instructions meant to prevent injuries and which were not included in Employer’s COSP. These instructions, summarized above, related directly to Employer’s operations involving pneumatically-driven nail guns, in particular the one involved in the accident. As discussed below, evidence presented during the hearing established that Employer’s employees were performing the potentially dangerous tasks described in the manufacturer’s manual. Because Employer’s COSP did not include adequate instructions to apprise employees of all of the various potentially dangerous tasks they may perform and how to avoid injury therefrom, it did not meet the requirement of the safety order.

Because it is determined that Employer’s COSP was not sufficiently related to its operations, specifically with respect to the use of pneumatically-driven nail guns, it is unnecessary to analyze whether Employer adopted its COSP. In addition, it is unnecessary to analyze the fourth element because it is determined that Employer’s COSP was deficient in several regards.

For the foregoing reasons, it is determined that the Division established a violation of section 1704, subdivision (f), by a preponderance of the evidence. Citation 1 is thus affirmed.

2. Did Employer fail to ensure that its employees operated pneumatically-driven nail guns in accordance with the manufacturer’s instructions?

Section 1704, subdivision (b)(2), states:

(b) General

[. . .]

(2) All pneumatically-driven nailers and staplers shall be operated and maintained in accordance with the manufacturer’s operating and safety instructions.

Citation 2 alleges:

Prior to and during the course of the investigation, the employer did not ensure that a metabo HPT nail gun model NR83A5 was operated in accordance to [*sic*]

its manufacturer's recommendations. As a result, on or about July 24, 2023, an employee affixed the nail gun to his tool belt without disconnecting it from the air hose, and the nail gun discharged a nail into his right leg causing him a serious injury while he was climbing down a ladder. Ref: metabo HPT NR83A5 manual

Applicability

Section 1704, subdivision (b)(2), applies to Employer's work at the site for the same reason that section 1704, subdivision (f), does – Employer's employees were using pneumatically-driven nail guns at the site when the accident occurred.

Violation

The Division alleged that Employer failed to ensure that the pneumatically-driven nail guns were operated according to the following manufacturer's manual instructions: (1) prohibiting hanging the nail gun by its rafter hook from an employee's tool belt; (2) prohibiting leaving the nail gun connected to the air hose while not in use; and (3) prohibiting leaving the nail gun in contact actuation mode instead of single sequential mode when the hook was attached. Specifically, Karimi testified that the Division determined that certain manufacturer's instructions were violated by Barrios as well as by another employee he interviewed, Sergio Daniel Diaz (Diaz). These included hanging the nail gun by its rafter hook from the employee's tool belt and leaving the nail gun connected to the air hose when it was not being used; and, leaving the nail gun in contact actuation mode instead of single sequential mode when the hook was attached.⁴

To establish a violation, the Division carries the burden of proving by a preponderance of the evidence that an employee used a pneumatically-driven nail gun in a manner inconsistent with one or more of the manufacturer's operating and safety instructions. Employer's accident investigation report (Exh. 8) concedes that Barrios "may have discharged a nail into his right leg while working on a ladder" and notes that Employer transported him so that he could receive medical treatment for his injury. Employer's statement is most appropriately viewed as an admission against its own interest, insofar as it raises the inference that Barrios may have been injured due to Employer's own misfeasance. Additionally, it is an adoptive admission insofar as Employer offered no evidence during the hearing to challenge the conclusion it drew that Barrios

⁴ Karimi testified that in single contact mode, the user must pull back on the trigger and depress the safety at the front of the nail gun against material intended to be nailed, for a nail to fire. In contact actuation mode, Karimi testified that the nail gun would fire a nail every time the safety was depressed against material so long as the operator kept the trigger pulled back. The third-party inspection report (Exh. 10) noted that the nail gun was in "bounce fire position," which the undersigned infers to mean that it was in contact actuation mode.

discharged a nail into his right leg while working on a ladder. (See Evid. Code § 1221.) Employer's attempt at avoiding the application of this rule by couching its conclusion as equivocal by preceding it with "may have" is viewed by the undersigned as an attempt to obfuscate the truth and avoid identifying the root cause of the accident. Accordingly, the statements contained in Exhibit 8 fall into exceptions to the hearsay rule. Employer offered no competing theory or explanation for Barrios' injury, despite having the opportunity to present evidence during the investigation and during the hearing. The only reasonable conclusion that can be drawn from the evidence is that Barrios did injure himself because he misused the nail gun.

This inference is also supported by evidence contained within a third-party report commissioned by Employer shortly after the accident occurred. The report states in relevant part:

[. . .]

trigger has been placed in the bounce fire position [¶] tool did not fire without both trigger and safety actuated [¶] by using elimination we have to assume that the tool was hanging on belt hook, and trigger made contact with bag at the same time it hit his leg causing tool to fire.

(Exh. 10)

Again, this statement is an adoptive admission by Employer, as the report containing the statement was presented to the Division by Employer during the Division's investigation and Employer demonstrably relied on the truth of the statements therein. This report was made at Employer's request and Employer provided it to the Division without correction or explanation, making it an adoptive admission under Evidence Code section 1221.

Other hearsay evidence in the record explains and supplements the above evidence. (See §376.2.) For instance, Barrios told Karimi that when the accident occurred he was descending a ladder after nailing down a top plate. Barrios told Karimi the nail gun was hanging from his tool belt by an attached rafter hook, with the air hose still attached. The nail gun was in contact actuation mode and fired a nail into Barrios' leg when his leg came into contact with the nail gun. According to Barrios, he used the nail gun in contact actuation mode "all the time" because single actuation mode was too time consuming. Barrios denied reviewing the manufacturer's manual before using the nail gun.

The Division introduced evidence that Barrios went to the emergency department at a local hospital on July 24, 2023, to receive treatment for the injury he sustained in the accident.

(Exh. 9, 11.⁵) Barrios wrote in his own handwriting that “I was coming down the later [*sic*] and the nail gun hit my leg and went off.” (Exh. 11.)

Diaz told Karimi that “everybody,” including him, would hang the nail gun off their tool belt, and that he and other employees did not disconnect the air hose when ascending or descending a ladder with the nail gun. Additionally, Diaz stated that he normally does not use the nail gun in single actuation mode. Diaz told Karimi that he observed the accident. According to Diaz, he was working to the left of Barrios, heard someone say “hey,” turned and saw Barrios on the ladder with a nail in his leg. He told Karimi that he observed that the nail gun was hooked to Barrios’ tool belt and was connected to an air hose.

Employer objected during the hearing to Barrios’ and Diaz’s statements, citing the hearsay rule. Both Barrios’ and Diaz’s statements to Karimi and Barrios’ statement to his medical provider are hearsay statements under Evidence Code section 1200 because they are out of court statements, which were offered for the truth of the matter asserted. Nonetheless, their testimony is valuable and is admissible under section 376.2 to supplement or explain other evidence. In this case, Barrios’ and Diaz’s hearsay statements supplement or corroborate several pieces of admissible evidence. For instance, Barrios’ and Diaz’s statements summarized above help supplement and explain the statements contained within the third-party tool inspection report (Exh. 10) by confirming that Barrios was in fact descending a ladder with the nail gun hanging off of his tool belt when the nail gun fired, causing Barrios to suffer an injury. These hearsay statements are therefore admissible and may be relied upon under section 376.2.

Additional corroborating evidence is found in Barrios’ treatment summary (Exh. 11), which indicates that a nail went through Barrios’ right femur. Since the nail gun could not operate unless it was attached to the air hose, this evidence helps supplement other evidence that Barrios was moving the nail gun while it was not in use, with the air hose attached.

Taken together, the evidence supports an inference that the nail gun was being moved while attached to an air hose and was attached to Barrios’ person. This inference is supported by evidence that a nail was lodged in Barrios’ femur, requiring medical treatment, and the fact of the injury supports the conclusion that the nail gun was attached to the air hose at the time Barrios was injured. Evidence in the record supports a finding that the nail gun had to be connected to the air hose to fire, and the witness statements, medical records and Barrios’ statements corroborate and explain Employer’s admission that Barrios accidentally discharged a nail into his femur while descending a ladder with a powered nail gun hanging off of his tool belt. The manufacturer’s manual for the nail gun states in clear terms that the nail gun should be

⁵ Because Exhibits 9 and 11 contain personal information that is relevant but of a sensitive nature, insofar as it pertains to Barrios’ personal medical information, the exhibits are placed under seal by the undersigned pursuant to section 376.6.

detached from the air hose when moving it to a new location or when it is still in use; furthermore, the manual states that the nail gun should not be attached to the user's person such as by hanging it from a tool belt by the rafter hook. Here, the evidence strongly supports a conclusion that Barrios used the nail gun in a manner that was contrary to the manufacturer's instructions. Therefore, a preponderance of the evidence supports a conclusion that Employer violated section 1704, subdivision (b)(2). As such, Citation 2 is affirmed.

3. Did Employer fail to effectively train its employees on the safe operation of pneumatically-driven nail guns?

Section 1704, subdivision (g), states in relevant part:

(g) Training.

- (1) The requirements of this Section shall apply in addition to training required by Construction Safety Orders, Section 1509, and General Industry Safety Orders, Section 3203(a)(7).
- (2) Safety training shall be conducted prior to initial assignment to operate pneumatically-driven nailers or staplers.
- (3) Refresher training shall be provided to the operator when:
 - (A) The operator has been observed using the pneumatically-driven nailer or stapler in an unsafe manner; or
 - (B) The operator has been involved in an accident.
- (4) Safety training shall include, but not be limited to, the following elements:
 - (A) The employer's Code of Safe Practices for pneumatically-driven nailers or staplers.
 - (B) The hazards related to each mode of actuation for pneumatically-driven nailers and staplers.
 - (C) Hands-on training to verify that the operator understands the operating and safety instructions.

Citation 3 alleges:

Prior to and during the course of the investigation, the employer failed to effectively train their employees/nail gun operators on the requirements of this section, section 1509, and section 3203(a)(7) in the following instances:

1. Instance 1: The employer failed to effectively train their employees on hazards related to operating the metabo HPT nail gun model NR83A5 as per its manufacturer's recommendations. Reference 1704 and 1509.
2. Instance 2: The employer failed to ensure their employees are trained on the nail gun's manual in that the employer's training did not include the manufacturer's recommendations of not using the nail gun with the Contact Actuation Mechanism when hook is affixed, not affixing and hooking the nail gun to the body, clothing, belt or other personal items, and disconnecting the air hose when the nail gun not in control or when it is moved to a new location. Reference 1704(b)(2) and the metabo HPT nail gun model NR83A5 manual.
3. Instance 3: The employer failed to provide effective training to the nail gun operator after an accident. References 1704(g)(3)(B) & (B) and 3203(a)(7)(E).
4. Instance 4: The employer's training on their code of safe practices [*sic*] for pneumatically-driven nailers is not an effective training as the Code of safe practices [*sic*] itself did not include all the hazards outlined in the manufacturer's recommendations. Reference 1704(g)(4)(A).
5. Instance 5: The employer failed to train the nail gun operators on the hazards relating to each mode of actuation for pneumatically-driven nailers and staplers. Reference 1704(g)(4)(B).
6. Instance 6: The employer failed to effectively provide hands-on training to the nail gun operators to verify the operator understands the operating and safety instructions. Reference 1704(g)(4)(C).

Applicability

Section 1704, subdivision (g), applies to Employer's operations because, as discussed above, Employer's employees used pneumatically-driven nail guns as part of their assigned duties.

Violation

The Appeals Board has consistently held that a single deficiency or instance can support a violation, such as in the context of an employer's written Injury and Illness Prevention Program. (*Arana Residential Commercial Painting, Inc.*, Cal/OSHA App. 1568252, Decision After Reconsideration (Oct. 18, 2024).) Here, the Division alleges deficiencies in Employer's training program under section 1704, subdivision (g). Although section 1704, subdivision (g), imposes additional requirements above and beyond those required by section 3203, subdivision (a)(7), the same principle is applicable by extension to the citation at bar.

The Appeals Board has previously held:

[I]t is the purpose of section 3203 subsection (a)(7) to provide employees with training and skills that will enable them to understand and avoid any potential hazards that may arise

(*Coast Waste Management, Inc.*, *supra*, Cal/OSHA App. 11-2385, citing *Kelly Global Services*, Cal/OSHA App. 12-0012, Decision After Reconsideration (Sep. 4, 2014).) Again, the reasoning of the Appeals Board in *Coast Waste Management, Inc.*, *supra*, Cal/OSHA App. 11-2385, applies by extension here.

Instance 4

Instance 4 alleges that Employer failed to effectively train employees on its COSP because Employer's COSP was deficient in that it did not address all of the hazards addressed by the manufacturer's manual and which are inherent in the operation of a pneumatically driven nail gun. Section 1704, subdivision (g)(4)(A), requires Employer to effectively train its employees on its COSP as it relates to the safe operation of pneumatically-driven nail guns. As it is already determined that Employer did not adopt a compliant and effective COSP pertaining to the safe operation of pneumatically-driven nail guns, a preponderance of the evidence also supports a determination that Employer violated section 1704, subdivision (g), by not providing effective training on its COSP as it pertains to the work that was being performed at the site.

As noted above, a single instance is enough to support a violation under section 3203, subdivision (a)(7), and by extension section 1704, subdivision (g). Here, the Division established a violation of section 1704, subdivision (g), by a preponderance of the evidence, and Employer offered no evidence to contradict the existence of the violation, because Employer elected to present no witnesses or other evidence to elaborate on its training. Accordingly, a violation of section 1704, subdivision (g), is established, and 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 presented some documentary evidence during Karimi's cross-examination, but rested without calling a single witness during its case in chief. The undersigned has reviewed the record in the light most favorable to Employer to determine which, if any, affirmative defenses were actually litigated or at least discussed by Employer. Employer does discuss its

vagueness defense with respect to Citation 3 in its post-hearing brief. This affirmative defense will be discussed below. All other affirmative defenses pleaded but not actually litigated by Employer are deemed waived.

The Appeals Board assesses whether a regulation is unconstitutionally vague by applying the principles discussed by the Court of Appeals in *Teichert Construction v. California Occupational Safety and Health Appeals Board*, (2006) 140 Cal.App.4th 883:

In considering a vagueness challenge to an administrative regulation, we do not view the regulation in the abstract; rather, we consider whether it is vague when applied to the complaining party's conduct in light of the specific facts of the particular case. [Citations.] If it can be given a reasonable and practical construction that is consistent with probable legislative intent and encompasses the conduct of the complaining party, the regulation must be upheld. [Citations.]

(*National Distribution Center, LP et al.*, Cal/OSHA App. 12-0395, Decision After Reconsideration (Oct. 5, 2015), quoting *Teichert Construction, supra*, 140 Cal.App.4th at 890-891; accord *OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).)

Here, Employer's argument appears to be that the Division cannot allege violations of multiple elements of the same cited safety order while still affording an employer a reasonable opportunity to understand the allegations brought against it. Thus, regarding Citation 3 Employer argues that the Division did not "describe with particularity the nature of the violation, including a reference to the provision of the code, standard, rule, regulation, or order alleged to have been violated." (Labor Code § 6317.) Employer does not cite to any precedential decisions or court opinions that support its argument, and the undersigned is not aware of any such authority. Moreover, Employer's position conflicts with well-settled law:

[A]dministrative proceedings are not bound by strict rules of pleading. As long as an employer is informed of the substance of the violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws.

(*Gaehwiler Construction, Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985).)

The regulation cited by the Division, and the citation issued by the Division, were both sufficiently clear to give fair notice and to enable Employer to prepare a defense in this appeal. Section 1704, subdivision (g), clearly sets forth training requirements in addition to section 3203,

subdivision (a)(7), specifically regarding the use and operation of pneumatically-driven nail guns. There is no factual dispute over whether Employer's employees engage in activity covered by the safety order, and the evidence presented during the hearing supports the conclusion that Employer was obligated to comply with it. A reasonable interpretation of section 1704, subdivision (g), leads to the conclusion that it requires certain enumerated training elements specific to the use and operation of pneumatically-driven nail guns in addition to the training requirements found under section 3203, subdivision (a)(7).

The violation description for Citation 3 presents six instances where the Division found violations of section 1704, subdivision (g). The allegations are determined to be sufficiently clear to put Employer on notice to be able to defend itself in this appeal. Thus, Employer's allegations of vagueness are disingenuous and are rejected.

For the foregoing reasons, it is determined that Employer did not establish any of its affirmative defenses.

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). (Exh. 3.)

At the time of the hearing, Karimi testified he had been employed in employment health and safety positions since 2006. Karimi was employed as an Associate Safety Engineer in the Division’s consultation unit at the time of the hearing, but had previously been employed as an Associate Safety Engineer in the Division’s enforcement unit since March 2021. Karimi received a bachelor’s degree in civil engineering that included courses on occupational safety. Karimi testified that he was current in his Division-mandated training, and the Division provided Karimi’s training records (Exh. 6) demonstrating that he was current in his Division-mandated training. On the basis of these facts, Karimi 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 train employees on the safe use of pneumatically-driven nail guns and to ensure that the nail guns are used according to Employer’s safety rules and the manufacturer’s operating and safety instructions. Karimi testified that he classified Citation 2 as Serious because using nail guns in an unsafe manner and in a way that does not comport with the manufacturer’s operating and safety instructions creates a realistic possibility of a serious injury should the nail gun be misused and fire a nail into a person. Here, the evidence demonstrates that Barrios did in fact suffer a serious physical harm requiring hospitalization and surgery to remove a nail that accidentally fired into his femur.

Karimi testified that he classified Citation 3 as Serious because failing to train employees on the safe use of pneumatically-driven nail guns created a realistic possibility that employees would injure themselves while using the nail guns. He noted that the nails are three-and-a-half inches long and that misuse of the nail guns could result in a puncture wound and cause blindness or death depending on where the nail entered the body. Again, there was evidence here that Barrios, who was not effectively trained by Employer on how to safely use the nail gun, suffered serious physical harm requiring hospitalization and surgery.

The above-summarized evidence supports a conclusion that the Division correctly classified Citations 2 and 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.

(Lab. Code § 6432, subd. (c).)

As noted previously, Employer rested without calling a single witness, and the evidence presented during the hearing does not support a finding that Employer took all the steps that a reasonable and responsible employer would take in like circumstances to anticipate and prevent the violations described in Citations 2 and 3. Employer's training informed employees that they must abide by the manufacturer's requirements, and said that the manuals were available upon request, but nothing in the record suggests that Employer took steps to ensure that its employees received the important information contained in the manuals either through Employer's training program or by ensuring that employees reviewed and understood the manuals. Rather, the record amply demonstrates that Employer provided insufficient training to employees and impermissibly delegated its training responsibilities to the employees directly working with pneumatically-driven nail guns. Thus, it is concluded that Employer did not do all of the things that a reasonable and responsible employer would have done to avoid the violation.

In summary, Employer did not meet its burden of proof and consequently did not rebut the presumption that Citations 2 and 3 were correctly classified as Serious.

7. Did Employer's violation of section 1704, subdivision (b)(2), cause a serious injury to an employee?

The Appeals Board elucidated the Division's burden of establishing accident-relatedness in *United Parcel Service, supra*, Cal/OSHA App. 1158285, as follows:

In order to sustain an accident-related classification, the Division must demonstrate a "causal nexus between the violation and the serious injury." (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) [other citations omitted].) In other words, where the evidence indicates that a serious violation caused a serious injury the violation is properly characterized as accident-related. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015); *MCM Construction*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb 22, 2016).) The Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Ibid.*) But the Division need not show that the violation was the only cause of the injury. (*Ibid.*)

Here, the Division met its burden of demonstrating that Employer's failure to ensure that Barrios used the nail gun in accordance with the manufacturer's operation and safety instructions was more likely than not a cause of Barrios' injury. Credible, competent evidence already discussed established that Barrios was working with a nail gun directly before the accident occurred, and that the accident occurred while Barrios was descending a ladder. The manufacturer of the nail gun requires that nail guns be disconnected from the air hose when moved to a new location or when not in use and prohibits attaching the nail gun to one's person.

Here, evidence received during the hearing established that the nail gun would not have been capable of firing a nail had it been disconnected from the air hose, as required by the manufacturer's operating and safety instructions. The evidence further established that Barrios was descending a ladder with the nail gun attached to his tool belt via a rafter hook. Even though there is some suggestion in the record that the nail gun malfunctioned, the third-party inspection report plainly states that "we have to assume that the tool was hanging on belt hook, and trigger made contact with bag at the same time it hit his leg causing tool to fire." (Exh. 10.) A reasonable inference can be drawn from the evidence presented during the hearing that Barrios' use of the nail gun in a manner that violated the manufacturer's requirements was a cause of his accident. As a result of the accident, a nail penetrated Barrios' right femur and had to be surgically removed.

For the foregoing reasons, it is determined that Employer's violation of section 1704, subdivision (b)(2), caused a serious injury to Barrios.

8. 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.)

Here, Employer presented no evidence that abatement of the violations would be unfeasible, impractical, or unreasonably expensive. Citation 1 alleges that Employer failed to adopt a COSP that adequately addressed the hazards particular to using pneumatically-driven nail guns. Employer has a COSP, and nothing in the record was presented to indicate that it would be unfeasible, impractical or unreasonably expensive for Employer to revise its COSP to include safety information specific to the nail guns that its employees use to perform their work.

Citation 2 alleges that Employer failed to ensure that employees used pneumatically-driven nail guns in accordance with the manufacturer's requirements, and Citation 3 alleges that Employer failed to provide effective training to employees on how to safely use pneumatically-driven nail guns. Employer offered no evidence that it would be unfeasible, impractical or unreasonably expensive for it to revise its training and provide adequate supervision and instruction to ensure that employees use pneumatically-driven nail guns safely in accordance with Employer's safety program and the manufacturer's requirements.

Finally, Employer offered no evidence that it sought or secured a variance from the Standards Board with respect to any of the cited safety orders.

Here, Employer provided insufficient evidence to support the assertion that complying with the safety orders was unreasonable. The requirement that Employer comply with each of the cited safety orders is found reasonable. Therefore, Employer is mandated to comply with the requirements of the safety orders. However, consistent with the Appeals Board's previous precedent concerning abatement, this Decision does not specify the method of abatement. (*United Parcel Service*, *supra*, Cal/OSHA App. 1158285.) Employer may select the least burdensome means of meeting the requirements of the cited section. (*Id.*)

9. 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 policies 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 17, and Karimi credibly testified as to how the penalties were calculated according to the applicable regulations. Employer did not offer any of its own evidence to show that Karimi's calculations were in error. Rather, the totality of the evidence in the record supports Karimi's calculations. Therefore, it is determined that the Division proposed reasonable penalties for the violations identified in Citations 1, 2 and 3.

Conclusion

The evidence supports a conclusion that Employer violated section 1704, subdivision (f), by failing to adopt a COSP that included provisions for the safe use of a pneumatically-driven nail gun.

The evidence supports a conclusion that Employer violated section 1704, subdivision (b)(2), by failing to ensure that its employees operated pneumatically-driven nail guns in accordance with the manufacturer's instructions.

The evidence supports a conclusion that Employer violated section 1704, subdivision (g), by not effectively training its employees on the safe operation of pneumatically-driven nail guns.

Employer did not prove by a preponderance of the evidence any of its pleaded affirmative defenses.

The Division correctly classified Citations 2 and 3 as Serious.

Citation 2 is properly classified as accident-related because the violation caused a serious injury to Employer's employee.

The record lacks any evidence that Employer has come into compliance with the cited regulations or that the Division has unreasonably refused to accept abatement from Employer. Therefore, it is concluded that Employer has not abated the alleged violations.

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

Order

Citation 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. Employer is further ordered to abate the violations identified in these citations.

Dated: 01/09/2025

/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.**