BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1235941**
MCCARTHY BUILDINGS COMPANIES, INC. **20401 S.W. Birch, Suite 300** **Newport Beach, CA 92660** **Employer**	**DECISION AFTER RECONSIDERATION [DIVISION'S PETITION]**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

This is the second time that the Board has reviewed a petition for reconsideration concerning the appeal of McCarthy Building Companies, Inc. (Employer or McCarthy). The Board first considered this matter in *McCarthy Building Companies, Inc*., Cal/OSHA App. 1235941, Decision After Reconsideration (March 12, 2026) (DAR). There, Employer sought reconsideration of a Decision by the ALJ affirming, relevant here, Citations 2 and 3. Citation 2, classified as Serious, alleges that McCarthy failed to implement methods and/or procedures for correcting unsafe or unhealthy conditions related to Valley Fever exposure. Citation 3, classified as Serious, alleges that McCarthy failed to use appropriate respirators when effective engineering controls were not feasible. On reconsideration, however, the Board reversed the decision of the ALJ and vacated both citations, finding that the Division failed to demonstrate exposure to the hazard of Valley Fever.

Being newly aggrieved, the Division now files its own petition for reconsideration (Petition) challenging the Board's decision vacating Citations 2 and 3. This second petition for reconsideration is authorized by *Ventura Coastal, LLC v. Occupational Safety and Health Appeals Board* (2000) 58 Cal.App.5th 1, 23. Within *Ventura Coastal*, the California Court of Appeal held that if a party prevails initially before the ALJ, and on petition for reconsideration by the other party, the decision is reversed, the party who initially prevailed becomes an aggrieved party for the first time and may petition for reconsideration. [1]

[1] Notably, Employer's Answer argues that we should disregard the precedent set forth in *Ventura Coastal, LLC v. Occupational Safety and Health Appeals Board*, *supra*, 58 Cal.App.5th at 23, and decline to consider the Division's petition. However, we are not persuaded, and we will not cavalierly disregard a published appellate decision.

The Division's Petition raises multiple changes to the Board's DAR. The Division argues that: (1) the ALJ prejudicially prohibited it from introducing evidence that would have proved coccidioides (cocci) spores were present at the worksite; (2) the Board erroneously credited testimony by Dr. Marvin Pietruszka (Dr. Pietruszka) finding that one employee, Rainer Lipp (Lipp), did not acquire Valley Fever at the worksite (worksite or jobsite); (3) the ALJ failed to identify all exhibits admitted into the record, prejudicing the Board's review of this matter; (4) the Board made several findings of fact that are not supported by the record; and (5) the Board should modify its exposure analysis for health hazards. All arguments not included in the Petition are deemed waived. (Lab. Code, § 6618.) We have also considered Employer's Answer to the Petition.

ISSUES

1. Did the ALJ improperly prevent the Division from introducing evidence demonstrating that cocci spores were present at the worksite?

2. Did the Board err in crediting testimony by Dr. Pietruszka finding that Lipp did not acquire Valley Fever at the worksite?

3. Did the ALJ fail to correctly identify all exhibits admitted into the record?

4. Should the Board modify its exposure analysis when considering health hazards?

5. Did the Board correctly conclude that the Division failed to demonstrate any employee acquired Valley Fever at the worksite?

6. Did the Board correctly conclude that the Division failed to demonstrate that Employer's engineering controls and safe work practices were insufficient?

7. Did the Board correctly conclude that the inspector testified that employee exposure had largely ceased at the time of his inspection?

FINDINGS OF FACT

Except as modified herein, the Board incorporates by reference the findings of fact contained in its Decision After Reconsideration in this matter, dated March 12, 2026.

DISCUSSION

1. Did the ALJ improperly prevent the Division from introducing evidence demonstrating that cocci spores were present at the worksite?

The Division's Petition argues that the ALJ prejudicially prohibited it from questioning Lipp regarding his medical records. (Petition, pp. 6-8.) The Division argues that the medical records would have demonstrated that Lipp acquired a Valley Fever infection at the worksite, thereby proving that cocci spores were present.

For background, Lipp, a McCarthy water truck driver, brought a copy of his medical records on his own volition to the hearing. The Division states that it "attempted to question Mr. Lipp about his Valley Fever diagnosis and the medical records he brought to the hearing to show that cocci spores were at the jobsite. However, the ALJ denied the Division the opportunity to question Mr. Lipp about his medical records and illness." (Petition, p. 7.) The Division argues that the ALJ did not allow the witness to look at his medical records to determine the time frame for when the employee had valley fever. (Petition, p. 7.)

We have carefully considered the Division's argument and citations. The record, however, does not support the Division's argument.

The record demonstrates that the Division's counsel did ask Lipp to look at his medical records to ascertain the time-period he had Valley Fever, whereupon opposing counsel objected that the testimony required a medical opinion. (Transcript [5.13.22], pp. 135-137.) Thereafter, the parties discussed the objection and relevance of when Lipp had been ill. However, before the ALJ made a ruling, the Division's counsel stated, "I was just asking Mr. Lipp to look at the medical records to determine a tight- -- tighter time frame for when he had Valley fever. But that's fine. We can move on. We don't need to do that." (Transcript [5.13.26], p. 137 [underline added].) It was only after this concession that the ALJ sustained the objection. We view Division Counsel's statement as an abandonment of this line of inquiry, and a waiver of the Division's argument on this point.

The Division also asserts, citing to specific portions of transcript, that the "ALJ determined that no medical testimony about the witness was relevant and evidence of his medical condition was not allowed because the citation was not accident related." (Petition, pp. 7-8 [citing Transcript [5.13.22], pp. 154-155.) However, the record reveals a more nuanced interaction. Within the pages cited by the Division, McCarthy's counsel began to ask Lipp questions regarding his medical record and workers compensation claims. At that point, however, the Division's Counsel asserted relevance objections to the questions, noting that the citations were not Accident-Related. (Transcript [5.13.22], pp. 152-155.) The judge sustained the objections. We conclude that through this colloquy the Division again waived the issues that it now raises; it cannot on the one hand object to the introduction of this information and then complain when the judge sustains its objection.

For the reasons discussed above, we do not find that the ALJ prejudicially prohibited the Division from introducing evidence regarding Lipp's medical background. Rather, when the record is considered in appropriate context, it is clear that the Division, through its conduct, previously conceded and/or waived argument on the points it now raises.

2. Did the Board err in crediting testimony by Dr. Pietruszka finding that Lipp did not acquire Valley Fever at the worksite?

Dr. Pietruszka reviewed Lipp's medical records and testified that Lipp did not acquire Valley Fever at the worksite. (Transcript [3.03.23], p. 117.) The Division contends that the Board erroneously credited this testimony. The Division argues that Dr. Pietruszka's testimony actually demonstrates that Lipp acquired a Valley Fever infection at the worksite. (Petition, pp. 8-9.)

Dr. Pietruszka testified that Lipp did not acquire Valley Fever as a result of work at the worksite. (Transcript [3.03.23], p. 117.) He reviewed Lipp's medical records and lab tests (taken in May of 2017) and testified that his Valley Fever infection stemmed from "an older infection that had to be at least 8 months or more going back from the time the test was taken." (Transcript [3.03.23], pp. 119-120.) Going back eight months, Dr. Pietruszka said, "we wind up someplace in November or so perhaps or October, September . . . " (Transcript [3.03.23], p. 119-120.) The Division states,

> Mr. Lipp started working for McCarthy in June of 2016 so during the infection period of September, October or November 2016 . . . Mr. Lipp was working for McCarthy at the CalFlats jobsite. Mr. Lipp had been working there for several months already. Therefore, Dr. Pietruszka conclusion that Mr. Lipp [sic] infection occurred outside of the time he worked for McCarthy was incorrect.

(Petition, p. 9.)

We have carefully considered the Division's argument but remain unpersuaded. The Division's argument isolates certain portions of Dr. Pietruszka's testimony without considering it in context and misconstrues other portions of his testimony.

Dr. Pietruszka did not strictly limit the infection origination period to the eight months preceding the lab test. Rather, he said the test results reveal "an older infection that had to be *at least* 8 months or more. . ." (Transcript [3.03.23], pp. 119-120 [emphasis added].) Additionally, Dr. Pietruszka's conclusion that this was an older infection, preceding Lipp's work at the worksite, was not solely based on the test results, but also on the existence of granulomas, which take a significant amount of time to develop. When discussing the granulomas, Dr. Pietruszka stated,

> It would not have developed within weeks or months even of the exposure. It could theoretically be many months, and easily an ongoing process of developing such a large granuloma could take six months to a year or more. It's not uncommon to find these large granulomas in individuals who have been exposed even years before. So, to me, the finding of the lab tests together with this large granuloma -- there were several granulomas, a smaller one and larger one - indicates that this is an old lesion.

(Transcript [3.03.23], pp. 120-121.) Dr. Pietruszka affirmed that the infection could have actually occurred "many months to years prior to May 2017." (Transcript [3.03.23], p. 121.)

Ultimately, when Dr. Pietruszka's testimony is considered in appropriate context, it does not—as the Division suggests— demonstrate that he erred when he testified that the infection did not arise while working at the site.

Further, even if we construe Dr. Pietruszka's testimony in the light most favorable to the Division, the most that can be said of Dr. Pietruszka's testimony is that it is inconclusive regarding the timing of Lipp's infection. He said, it had to be "an older infection that had to be *at least* 8 months or more. . ." (Transcript [3.03.23], pp. 119-120 [emphasis added].) He said that the development of the granulomas could take "*six months to a year or more*." (Transcript [3.03.23], p. 120 [emphasis added].) He affirmed that the infection could have actually occurred "*many months to years prior to May 2017*." (Transcript [3.03.23], p. 121 [emphasis added].) Again, his testimony does not prove, as the Division implies, that Lipp acquired the infection while employed at the worksite, nor does it demonstrate exposure; at most, it supports the conclusion that the infection time period cannot be linked to the worksite by a preponderance of the evidence.

Moreover, even if we were to assume, *arguendo*, that the evidence showed that Lipp acquired the infection during the time-period he worked for McCarthy, it does not necessarily prove that he acquired the infection at work. Lipp testified he lived in San Luis Obispo County. (Transcript [5.13.26], pp. 139-140.) We have previously concluded that Valley Fever is endemic in that county. Further, critically, the Division has conceded—through the testimony of Clark and Dr. Papanek—that it is difficult to prove that an employee acquired an infection at the jobsite when the employee both lives and works in an endemic area. (Transcript [5.12.26], pp. 197-198; Transcript [3.02.23], pp. 128-129.)

In sum, the Division has not proved that the Board erred in crediting Dr. Pietruszka's testimony. Further, even if we viewed the evidence in the light most favorable to the Division, the infection cannot be linked to the worksite by a preponderance of the evidence. [2]

3. Did the ALJ fail to correctly identify all exhibits admitted into the record?

The Division's Petition alleges that there are multiple instances where the ALJ's exhibit summary failed to correctly identify when an exhibit had been admitted into the record, which the Division contends prejudiced the Board's review of this matter. The Division states it "found at least 10 exhibits that were admitted into evidence by the ALJ during the hearing, but they did not become part of the hearing record." (Petition, pp. 10-11.)

To begin with, the Division asserts that Exhibits B2, F, U, CC, DD, EE, LL, MM, and 24 were all admitted into the record but the ALJ failed to properly note that they were admitted. (Petition, pp. 10-11.) The Division argues that "these documents demonstrate that the jobsite was endemic for valley fever and the hazard of valley fever at the jobsite." (Petition, pp. 10-11.) However, while it is true that the ALJ failed to correctly identify all documents admitted in the record, we see no prejudicial error. We have already determined that the jobsite was located in an

[2] The Division also argues that the Board erred by failing to give the ALJ's credibility determinations great weight However, we do not see our holding as necessarily conflicting with any credibility determination, and the Division fails to provide sufficient specificity in its argument on this point to allow meaningful consideration—thereby waiving the point. (§ 391.) Moreover, even if there is a conflict, we need not give the ALJ's determinations great weight merely because the ALJ used the word credible, or a derivation thereof. As we have explained, "We follow the guidance set forth in the Administrative Procedure Act pertaining to judicial review of credibility determinations, and conclude that a credibility determination will only be given great weight if it identifies specific evidence of observed demeanor, manner, or attitude of the witness. (See Gov. Code § 11452.50.) We disapprove of any decisions that hold to the contrary." (*Hamilton Iron Works*, Cal/OSHA App. 1497263, Decision After Reconsideration (June 12, 2024).)

endemic county. Further, the alleged missing evidence is merely cumulative of other evidence in the record. Moreover, the fact that this jobsite is in an area endemic for Valley Fever does not mean that cocci spores were present at the worksite. The Division's own witness, Clark, testified that just because cocci spores are endemic in a county does not mean that they are present everywhere in that county. (Transcript [5.12.26], p. 129.)

The Division next asserts that Exhibit O was admitted into the record but the ALJ failed to properly note that it was admitted. (Petition, pp. 10-11.) The Division argues that it was prejudiced by this error because this document was of "vital importance." The Division argues that this letter from the Department of Public Health "confirmed that there were employees at the CalFlats jobsite who had work-related infections of valley fever." (Petition, p. 11.) Exhibit O consists of a letter from the County of Monterey referring this matter to the Division for investigation. It states, the "California Department of Public Health and Monterey County Public Health have identified 14 cases of confirmed or suspected [Valley Fever] among employees (see Attachment 1, Summary of Cases)."[3] However, as we explain in later sections, Exhibit O does not alter our conclusion that the Division failed to demonstrate exposure to Valley Fever at the jobsite.

4. Should the Board modify its exposure analysis when considering health hazards?

Within the DAR, the Board analyzed the existence of exposure under both aspects of its traditional exposure analysis and concluded that the Division failed to demonstrate exposure. (DAR, pp. 9-14.) The Division argues that the Board should modify its exposure analysis for health hazards. (Petition, pp. 11-14.) The Division argues that there is no way to test for certain health hazards and the assessment should, therefore, be whether there "is a high risk for potential exposure." (Petition, p. 12.)

While we understand the Division's desire for modifications to the Board's exposure analysis, we decline to further modify our exposure analysis for multiple reasons.

First, we are not persuaded that the Board's typical analysis is insufficient or unsuitable to address the hazard of Valley Fever. We have affirmed citations in other Valley Fever cases, including cases arising at this specific worksite. (*Papich Construction Company, Inc*., Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).) The typical exposure analysis has also been in use for multiple decades for a myriad of hazards, proving its versatility. (*Benicia Foundry & Iron Works, Inc.,* Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).)

Second, it would be infeasible to develop a new exposure standard applicable to all (or most) health standards where testing is infeasible. There are many types of health hazards[4] and many considerations applicable to each, including public policy concerns. We cannot possibly foresee the mischief and unintended consequences that would arise were we to attempt to create a

[3] No attachment was included with the exhibit.

[4] To date, the Standards Board has established different standards to address different health concerns including bloodborne pathogens (Cal. Code. Regs., tit. 8, § 5193), aerosol transmissible diseases (Cal. Code. Regs., tit. 8, § 5199), and COVID-19 (Cal. Code. Regs., tit. 8, § 3205).

new uniform exposure standard applicable to *all* health hazards where testing is infeasible, particularly when this case concerns only Valley Fever.

Third, if the Division believes that the current laws are unsatisfactory to address the hazard of Valley Fever, it may pursue the adoption of a new standard. However, that legislative function belongs to the Occupational Safety and Health Standards Board (Standards Board). (Lab. Code, § 142.3.) The Division also plays an essential role in the development of such standards. (Lab. Code, § 147.1). In short, if change is needed, we believe that the Division and Standards Board are in a better position to evaluate the issue, consider the public policy ramifications, and secure regulatory change. We decline to insert ourselves into legislative functions belonging to other agencies.

5. Did the Board correctly conclude that the Division failed to demonstrate that any employee acquired Valley Fever at the worksite?

The Division's Petition argues that the Board erred when it concluded the Division failed to demonstrate that any employee actually acquired Valley Fever at the worksite. The Division states it "presented reliable and undisputed evidence that multiple employees acquired valley fever while working at the CalFlats worksite." (Petition, p. 15.)

To address the Division's argument, we again consider the record evidence. The Division's evidence can be classified into two separate categories: non-hearsay and hearsay.[5] This distinction is important because the Board's rules state that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Cal. Code. Regs, tit. 8, § 376.2.)

Non-Hearsay:

The Division relies on the testimony of Lipp as its primary, non-hearsay evidence to support a finding that employees acquired Valley Fever at the worksite. Lipp testified that he acquired Valley Fever in 2017 while still working at McCarthy. (Transcript [5.13.22], pp. 134-135.)

Hearsay:

The Division also relies on several pieces of hearsay evidence to substantiate an exposure finding. First, Clark, Senior Safety Engineer, testified that three Valley Fever cases were identified and linked to employees that worked for McCarthy. (Transcript [5.20.21], pp. 120-121.) Employer asserted a hearsay objection. (Transcript [5.20.21], pp. 120-122.)

Next, the Division cross-examined Chris Vlasak (Vlasak), McCarthy's Project Manager, regarding several letters that McCarthy received from public health authorities—Exhibits O, 3, and 4— informing McCarthy that there were multiple suspected and confirmed Valley Fever cases.

[5] "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (Evid. Code, § 1200.)

Exhibit O states the "California Department of Public Health and Monterey County Public Health have identified 14 cases of confirmed or suspected [Valley Fever] among employees. . ." Employer asserted a hearsay objection. (Transcript [11.07.23], p. 125.)

Exhibit 3, from the California Department of Public Health (CDPH), purportedly informed Vlasak that the CDPH was currently investigating approximately 15 current or recent employees at Cal Flats who appear to have been recently diagnosed with Valley fever. (Transcript [11.07.23], pp. 93-96.) Employer asserted a hearsay objection. (Transcript [11.07.23], p. 94.)

Exhibit 4 purportedly stated that "CDPH has identified 7 confirmed and 2 probable cases among workers constructing the California Flats Solar Project." (Transcript [11.07.23], pp. 100-103.) Notably, however, neither Exhibit 3 or 4 were introduced into the record. Employer also asserted a hearsay objections. (Transcript [11.07.23], pp. 103-105.)

The Division argues that, on balance, the foregoing evidence sufficiently demonstrates that one or more employees actually acquired Valley Fever at the worksite.

We have carefully reviewed the arguments and the exhibits mentioned in the Division's Petition. However, we reiterate that the Division's evidence lacked reliability and the Division failed to prove by a preponderance of the evidence that any employe actually acquired an infection at the worksite. (DAR, p. 12.) We reach this conclusion for several reasons.

a) The Division failed to prove that Lipp acquired a Valley Fever infection at the worksite.

We conclude that the Division failed to demonstrate that Lipp acquired the Valley Fever infection at the worksite by a preponderance of the evidence.

There was conflicting testimony regarding Lipp's diagnosis. On the one hand, Lipp offered equivocal testimony regarding the timing of his diagnosis. He stated he acquired Valley Fever infection in 2017 while he worked for McCarthy. However, he also stated he would need to look at his records to determine when he was diagnosed.[6] (Transcript [5.13.22], pp. 135-136.) Contrariwise, Dr. Pietruszka, McCarthy's expert witness, reviewed Lipp's medical records and testified that Lipp did not acquire Valley Fever at the worksite, but rather from an earlier infection based on test results and the existence of granulomas. (Transcript [3.03.23], pp. 117-121.)

When we compare Lipp's testimony to that of Dr. Pietruszka, we find Dr. Pietruszka's testimony to be *more* credible and it carries more weight. Further, at the very least his testimony demonstrates that Lipp's Valley Fever infection cannot be proven to have arisen while he worked for Employer by a preponderance of the evidence.

We also observe that the Division failed to offer any expert testimony regarding Lipp's diagnosis that would rebut the testimony of Dr. Pietruszka. Dr. Papanek, the Division's medical

[6] And although the Division's Counsel initially asked Lipp to review the medical records to obtain a tighter timeframe, the Division abandoned this line of inquiry (upon objection), stating "that's fine. We can move on. We don't need to do that." (Transcript [5.13.26], p. 137.)

expert witness, offered no specific opinions on whether anyone contracted Valley Fever as a result of working at this site. He did not diagnose, or conduct a medical review of, any employee that worked at the site. (e.g., Transcript [3.2.23], pp. 72-75, 81-83, 151-152.) He could not say whether workers contracted Valley Fever as a result of working at the site or due to some other exposure. (Transcript [3.2.23], p. 127.)

Additionally, Lipp also lived in an endemic area and the Division's Petition utterly fails to address testimony by its own witnesses, Clark and Dr. Papanek, who stated that it is difficult to prove that the worksite caused a Valley Fever infection when the worker lives in an endemic area. Dr. Pietruszka also testified that many of the people who live in certain endemic areas—as much as 50 to 60 percent of the population—have already been exposed to cocci. (Transcript [5.13.22], pp. 108-111.)

b) The Division's other hearsay evidence does not prove that any employee acquired Valley Fever at the worksite.

The Division identified several other pieces of hearsay evidence—including Clark's testimony regarding the three Valley Fever cases and the public health letters—that it claims supports the conclusion that employees acquired Valley Fever at the worksite. However, this hearsay evidence may only be considered to supplement and explain other evidence. (Cal. Code. Regs, tit. 8, § 376.2 ["Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."].)

Preliminarily, it is not clear that this evidence actually supplements and explains any other evidence or testimony. There is no other non-hearsay evidence discussing *multiple* Valley Fever cases at the worksite. It is also not clear that this information supplements and explains Lipp's testimony, or that Lipp was one of the cases identified in the letter. Indeed, as noted above, we are also not relying on Lipp's testimony for a finding of fact that he acquired Valley Fever at the worksite.

However, even if we were to find that the identified hearsay can be considered to supplement and explain the conclusion that an employee (or employees) acquired Valley Fever at the worksite, it does not mean that we must credit it or give it weight, and we decline to do so. (See, e.g., *Taylor v. County of Los Angeles* (2020) 50 Cal. App. 5th 205, 213 ["Whether evidence is admissible is different than whether it is good."].)

While Clark testified that there were three Valley Fever cases at this worksite, we give little weight to his testimony on this point. The Division failed to lay a foundation for, or explain, how he determined that there were three Valley Fever cases that arose at the worksite. Clark, as a Senior Safety Engineer, is not a medical professional and not competent to make medical diagnoses, nor did he state where the diagnoses originated. Next, Dr. Papanek, the Division's medical expert witness, offered no specific opinions on whether anyone contracted Valley Fever as a result of working at this site. He did not diagnose, or conduct a medical review of, any employee that worked at the site. (e.g., Transcript [3.2.23], pp. 72-75, 81-83, 151-152.)

The testimony regarding the public health letters also fails to reliably prove that employees acquired Valley Fever at the worksite. The Division's Petition overstates the amount of discussion in the record regarding these letters. The letters were not meaningfully discussed during the Division's case-in-chief. The letters were predominately only discussed briefly on the last day of hearing during the cross-examination of Vlasak, McCarthy's Project Manager. Further, the cross-examination of Vlasak regarding these letters was limited. The Division generally asked Vlasak whether he recalled receiving the letters and what steps Employer took after receiving the letters. The Division never elicited any testimony demonstrating that findings in the letters were accurate or creditable. (Transcript [11.07.23], pp. 93-94, 101-103, 119-120.) Further, the Employer's witnesses offered contradictory testimony. Vlasak said "[w]e never saw any – evidence that – that anyone had been confirmed positive." (Transcript [11.07.23], p. 103.)

The Division did not call any witness from the County of Monterey Health Department or from the CDPH to authenticate, lay a foundation for, or discuss the information and findings in the letters. The Division did not discuss these letters with its medical expert. Further, most of the letters—Exhibits 3 and 4[7]— were not admitted in the record.

The absence of any meaningful authentication or foundation, and the failure to seek the admission of several of the exhibits, reduces the reliability and weight of the information, and leaves us with more questions than answers. We do not know who made the various diagnoses, what testing or methodology they used, what documents and evidence they relied upon, or how they linked the diagnoses to the worksite. We also do not know if any of these putative Valley Fever cases involved employees that both lived and worked in endemic areas—a critical point since the Division's own witnesses stated that it is difficult to prove that the worksite caused a Valley Fever infection when the worker lives in an endemic area.[8] Further, we do not know why Clark's testimony regarding the number of cases differs or conflicts with the numbers referenced in the letters.

Ultimately, if the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not its adversary. (*Webcor Builders*, Cal/OSHA App. 02-2834, Decision After Reconsideration (May 24, 2005).) Here, because we remain in doubt regarding whether there were any Valley Fever cases that arose from exposure at the worksite, the Division did not meet its burden.

Next, while the Division's asserts that the Board is required to apply a relaxed evidentiary standard, we reiterate that there is a difference between the admissibility of evidence and its reliability or weight. (See, e.g., *Taylor v. County of Los Angeles*, *supra*, 50 Cal. App. 5th at 213 ["Whether evidence is admissible is different than whether it is good."].) Even if evidence is admissible it does not necessarily mean it's persuasive, reliable, or good.

[7] Exhibits 3 and 4 were not among the list of exhibits that the Division asserts that the ALJ made an error in the hearing record.

[8] Further, while the Division asserts that Exhibit O was of "vital importance" we observe its contents to be the least probative of the three identified letters. Exhibit O does not even identify a specific number of confirmed Valley Fever cases. It merely states, "there were 14 cases of confirmed *or* suspected [Valley Fever] among employees. . ." (Ex. O [emphasis added].) The "or" is important.

While our rules are more relaxed, that does not mean our function when performing fact-finding is to simply accept the Division's evidence, regardless of its character or quality. This is particularly true when the evidence goes to a fundamental element of the Division's burden. While the Board does not apply the technical rules of evidence, counsel is reminded that the Division "should produce the best available evidence. It would be erroneous for counsel to assume simply because it is admissible, that an inferior grade of evidence has the same weight as a higher form of evidence." (California Administrative Hearing Practice (2nd ed. 2025) § 7.38.) [9]

Here, if these documents were indeed of "vital importance" we think that the Division should have done more to authenticate them, lay a foundation, and prove the accuracy of their contents. The Division should have made more of an effort to prove the conclusions in the letters and attempted to prove they were accurate, and at the very least should have sought the admission of more than just the single (least probative) letter.

6. Did the Board correctly conclude that the Division failed to demonstrate that Employer's engineering controls and safe work practices were insufficient?

The Division argues that there was a high risk of employee exposure to Valley Fever at this worksite and that Employer failed to implement sufficient engineering controls and safe work practices to reduce the likelihood of employee exposure to Valley Fever. (Petition, pp. 14-16.) The Division asserts that certain engineering controls and safe work practices, such as the use of buses and changing areas, were insufficient because they were optional. (Petition, p. 14.) The Division also argues that the Employer's water suppression efforts were insufficient because the dirt would become dry shortly after application of water. (Petition, p. 14.) We, however, disagree with the Division's conclusions.

First, the record fails to support the conclusion that there was a high-risk of Valley Fever. While Valley Fever is endemic in the counties where the jobsite is located, Clark could not definitively state whether cocci spores existed anywhere on the site. (Transcript [5.12.22], pp. 81-82, 123, 130-131.) Clark stated that just because cocci spores are endemic in a county does not mean that they are present everywhere in that county. (Transcript [5.12.22], p. 129.) Clark did not conduct any tests of the soil, dust, or the wind at the site. Clark stated there is no specific wind or dust measurement that supports any of the citations issued against McCarthy. (Transcript [5.12.22], pp. 119-120, 130-131.) Clark testified there are no commercially available tests. (Transcript [5.12.22], pp. 73-79.) Further, Dr. Papanek also did not personally assess whether there were soil conditions at the site that caused the risk of cocci to be so high that respirators were required. (Transcript [3.2.23], pp. 89-92, 103-104.) Dr. Papanek was also not aware of any lab tests that were conducted. (Transcript [3.2.23], pp. 100-101.) As we previously observed, "[o]n this record, we cannot say with any degree of certainty that any cocci spores existed at this site, much less that they presented a zone of danger to employees at this site." (DAR, p. 12.)

[9] Further, while we do not strictly apply the rules of evidence, many of the rules still provide some guidance. For example, and relevant here, "if weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.)

Next, we reiterate that Employer implemented numerous engineering and safe work practices to reduce the likelihood of exposure to Valley Fever spores in the event that any existed. (DAR, p. 14.)

> 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 prework 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.

(DAR, p. 14.) While these controls are assuredly not perfect in every respect, we continue to conclude that they are sufficient for a hazard that has not been shown to be present. (DAR, p. 14.)

7. Did the Board correctly conclude that the inspector admitted that employee exposure had largely ceased at the time of his inspection?

The Division argues that the Board erred when it stated that Clark had testified that employee exposure had largely ceased by the time of the inspection. (Petition, p. 17.) However, a subsequent review of the record reveals that the Division is in error.

Clark testified that he inspected the jobsite in May 2017 and he did not issue the citations against Employer until November 2017. Clark was questioned regarding the reason for the delay in issuance of the citations. Clark affirmed that employee exposure aspect had ceased. (Transcript [5.12.22], pp. 135-136.) The record reveals the following discussion:

> **Q.** Yes, so my question was, Why didn't you act more promptly with the citation of McCarthy? And during your deposition you said it was because the exposure had ceased. Is that not your opinion now?
> **A**. That was my -- that was my answer. And I mean I don't have any issues with that. I mean there's other factors but, you know, it was getting towards the end of that phase 1 of the project. And it is true that McCarthy was not slated to be the next general contractor on this project.

(Transcript [5.12.22], p. 136.) In short, we see no error in our prior determination.

Ultimately, for the reasons discussed herein and within the Board's prior determination, we conclude that the Division failed to demonstrate exposure.

DECISION

We reaffirm our prior decision. The Division failed to establish a violation of section 1509, subdivision (a). Citation 2, Item 1, is vacated. The Division failed to establish a violation of section 5144, subdivision (a). Citation 3, Item 1, is vacated.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

FILED ON: 07/09/2026