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 Number** **1692964** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken L & S Framing, Inc.'s (Employer) Petition for Reconsideration (Petition) under submission, renders the following decision after reconsideration.

JURISDICTION

Employer is a general contractor conducting business in California. On August 23, 2023, the Division of Occupational Safety and Health (Division) commenced its investigation of an injury accident that occurred at Employer's worksite at 7357 Dorstone Way in Sacramento, California. Employer was framing the second story of a residence when an employee, who was a member of the framing crew, injured himself with a pneumatically driven nailer or nail gun while descending a ladder.

On January 19, 2024, the Division issued three citations to Employer alleging three violations of workplace safety standards codified in the California Code of Regulations, title 8.[1] Employer timely appealed.

Administrative proceedings before an administrative law judge (ALJ) of the Board followed, among them a contested evidentiary hearing on July 9, 2024. The ALJ issued a decision (Decision) on January 9, 2025. The Decision held that Employer had violated the safety orders as alleged and imposed civil penalties.

Employer timely petitioned the Board for reconsideration, and the Board took the Petition under submission. In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

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

ISSUES

1. Did Employer's Code of Safe Practices include provisions for the use of pneumatically-driven nailers and staplers where applicable?

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. Is section 1704, subdivision (f), void for vagueness?

5. Did Citation 3 fail to provide Employer with adequate notice of a violation?

6. Did the Division establish a presumption that a serious violation exists for Citations 2 and 3?

7. Did Employer rebut the presumption of a serious classification for Citations 2 and 3?

8. Did the Division prove the accident-related character of Citation 2?

9. Were the penalties properly calculated?

10. Did the Decision correctly address the abatement issue?

FINDINGS OF FACT

In addition to the findings of fact in the Decision (which we adopt as our own), we make these additional findings based on the administrative record.

1. An employee of Employer was seriously injured while working for Employer when a pneumatically driven nailer (the "nail gun" or "gun") discharged or "fired" a nail into the employee's leg. The nail had to be surgically removed.
2. The nail gun used compressed air, supplied to it by a hose, to fire nails.
3. The nail gun could not fire nails unless connected to the compressor, the source of compressed air.
4. That the nail gun fired a nail into the employee's leg shows that the air hose connected the compressor to the gun at that time, and that there was compressed air in the hose.
5. During its investigation of the accident at issue the Division requested documents from Employer.
6. Employer's counsel of record furnished documents to the Division in response to the Division's document request made during its investigation of the accident at issue. Some of those documents were admitted into evidence at the hearing by the ALJ.
7. Employer was legally obligated to investigate the nail gun accident and did so.

DISCUSSION

1. Did Employer's Code of Safe Practices include provisions for the use of pneumatically-driven nailers and staplers where applicable?

Citation 1 asserts a violation of 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.

For background, a construction employer is required to adopt a Code of Safe Practices (COSP) which relates to its operations. (§ 1509, subd. (b).) The COSP must contain language equivalent to that contained in Plate A-3 of the Appendix. (§ 1509, subd. (b).) Appendix A-3, in turn, states, "All persons shall follow these safe practices rules, render every possible aid to safe operations, and report all unsafe conditions or practices to the foreman or superintendent." In summary, these provisions, taken together, demonstrate that Employer's COSP must contain safe practices applicable to its operations, and those rules must be followed by its employees.

In addition, employers that utilize "pneumatically-driven nailers" are explicitly required to include safety rules for the safe use of such devices within their COSP. Section 1704, subdivision (f), states that "The employer's written Code of Safe Practices shall include provisions for the use of pneumatically-driven nailers and staplers where applicable."

Here, the issues involved in Citation 1 are narrow. As discussed in greater detail below (and in the ALJ's Decision), the record demonstrates that Employer utilized and permitted the utilization of pneumatically-driven nailers, thereby requiring that its COSP contain "provisions for the use of pneumatically-driven nailers and staplers. . ." (§ 1704, subd. (f).) There is no dispute that the Employer had a COSP, nor is there any dispute that its COSP had provisions pertaining to the safe use of pneumatically-driven nailers. The sole remaining issue is whether Employer's COSP contained a sufficient number of safety practices, in scope and precision, to cover the safe operation of pneumatically-driven nail guns.

Employer's COSP was entered into evidence as Exhibit 13. It contains several enumerated items, eight of which appear to pertain to the safe operation of 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.

(Ex. 13, original paragraphing omitted.)

Here, we agree with the ALJ that "the evidence submitted during the hearing supports a conclusion that Employer's COSP was deficient in several ways." (Decision, p. 7.)

First, as correctly concluded by the ALJ, the record demonstrates that Employer did not require its employees to follow all the safety rules set forth in the COSP. (Decision, p. 7.) The COSP requires that employees "[o]perate and maintain pneumatic fasteners according to manufactures [sic] instruction." (Ex. 13.) However, the evidence supports the conclusion that Employer never made the safety manual available to employees. For example, Employer provided Barrios' training records to Karimi during the inspection which merely stated "manuals available upon request." (Ex. 14, p. 3.) As the ALJ correctly noted, "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." (Decision, p. 7.) Further, Barrios denied reviewing the manufacturer's manual before using the nail gun.

Second, we conclude that the Employer failed to have a sufficient number of safety rules, in scope and precision, to cover the safe operation of pneumatically-driven nail guns. When reaching this conclusion, we are mindful of the warnings and instructions contained in the manufacturer's instruction and safety manual ("Manual") for the nail gun. (Exhibit 12.) Although the COSP includes some safe practices as quoted above, the Manual states several other warnings that are not included in Employer's COSP.

The Manual contains several "warnings" concerning using the nail gun. It states the term "**WARNING**" "indicates a potentially hazardous situation which, if not avoided, could result in death or serious injury." (Manual, p. 3, original emphasis.) Among the warnings given in the Manual which are not found in Employer's CSP are the following, with original emphases:

- **3. NEVER POINT TOOL AT YOURSELF OR OTHERS IN WORK AREA.** [¶] Never point the Nailer toward yourself or others, whether it contains fasteners or not. If fasteners are mistakenly driven, it can lead to severe injuries. [Page 4.]
- **5. KNOW AND UNDERSTAND WHAT TRIGGER SYSTEM YOU ARE USING**. Read and understand section titled "METHODS OF OPERATION" (pages 19-21). [Page 4, quotation marks in original.]

- **2. [¶]** (4) **Disconnect the Nailer from the air source before . . .** lowering or otherwise moving the Nailer to a new location. [Page 5.]
- **(9) Do not attach the hose or Nailer to your body.** [Page 5.]

The Manual also points out other dangers which have a "**WARNING**" flag at the beginning of their respective paragraphs, such as the risk of hearing loss and driving nails into an improper work surface, which are also omitted in the COSP. (Page 5.) Indeed, pages 3 through 7 of the Manual have a "**WARNING**" header at the top of each page.

Employer's COSP omits several warnings regarding safe use of the nail gun that are emphasized in the Manual, as detailed above. We think that many (if not most) of these emphasized safety rules should be reflected in Employer's COSP. These warnings reflect important safety considerations for employees operating a nailer and are meant to prevent injuries. In short, the CSOP failed to include "adequate instructions to apprise employees of all of the various potentially dangerous tasks they may perform and how to avoid injury therefrom. . ." (Decision, p. 8.) As the ALJ correctly held, "Employer's COSP did not relate to its operations with the required exactitude with respect to operation of pneumatically-driven nail guns." (Decision, p. 8.) We conclude, therefore, that Employer's COSP fails to contain adequate warnings regarding the use of the nail gun, in violation of section 1704, subdivision (f), as alleged.

However, in reaching this holding, we do not, as Employer suggests, hold that Employer must repeat verbatim the contents of each warning within the Manual within its COSP. Section 1704, subdivision (f) is a performance standard. (Gov. Code § 11342.570.) We have held that performance standards intentionally lack specificity and instead establish a goal or requirement while leaving it to employers to design appropriate means of achieving that end. (*Rios Farming Company, LLC*, Cal/OSHA App. 1336276, Decision After Reconsideration (Feb. 6, 2023), citing *Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) Our discussion of the Manual is merely used to demonstrate that important safety practices were not considered or included in the COSP, not to require the wholesale adoption of the Manual in the COSP. Employer has some flexibility in selecting the safety rules for the COSP provided that the rules include all appropriate and reasonable provisions for the safe use of pneumatically-driven nailers that otherwise substantively address the relevant safety hazards.

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

Citation 2 alleged a violation of section 1704, subdivision (b)(2), which provides: "(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 alleged that employer did not ensure that the nail gun was operated in accordance with the Manual, resulting in an employee's serious injury. (Decision, pp. 8-9.) The Division alleged that Employer failed to ensure that the pneumatically-driven nail guns were operated according to the following instructions from the manufacturer's Manual: (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. (Decision, p. 9) The Decision upheld the violation, finding the evidence proved the violation. (Decision, pp. 9-12.)

Employer, in opposition argues in its Petition that the Decision relied on inadmissible hearsay evidence in upholding Citation 2. (Petition, pp. 5-9.) We disagree.

As a preliminary matter, even assuming the evidence relied upon by the ALJ is hearsay, it does not mean it is inadmissible or that it cannot be considered. Section 376.2, regarding the use of hearsay evidence in Board proceedings, provides: "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." In summary, hearsay may be used in two circumstances: (1) if it would be admissible over objection in civil actions; and (2) if it supplements or explains other evidence. (§ 376.2.)

Here, all of the evidence relied upon by the ALJ correctly fell within each of these two exceptions as discussed further below.

Documents and Evidence Admissible Over Hearsay Objection:

The ALJ correctly concluded that Employer's accident investigation report (Ex. 8) would be admissible over a hearsay objection in a civil proceeding.

The Division received documents from Employer, transmitted to the Division by Employer's counsel, in response to the Division's "Document Request Sheet" (Ex. 18). The Document Request Sheet is a standard form used by the Division to obtain information relevant to an investigation. The Document Request issued in this matter asked for copies of various documents "[a]s discussed during the inspection[.]" (Ex. 18.) Among the items requested were … Employer's accident investigation report and related documents. (*Id*.) Employer's "accident investigation" report was provided to the Division in response to the Division's Document Request (Ex. 18) and no other report concerning the accident was offered in evidence.

Employer's accident investigation report (Ex. 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. While it is couched in equivocal terms (i.e. "may have"), we agree with the ALJ that that Employer's statement is admissible under an exception to the hearsay rule. It is most appropriately viewed as an admission and, as such, is admissible over a hearsay exception as an admission under Evidence Code section 1220 and/or 1221. [2]

"The hearsay rule does not bar statements [of the declarant] when offered against the declarant in an action in which the declarant is a party." (*People v. Horning* (2004) 34 Cal. 4th 871, 898, citing Evidence Code § 1220.) Evidence Code section 1220 states, "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of

[2] We also agree with the ALJ that Employer's attempt to couch its conclusion as equivocal should be viewed as an attempt to obfuscate the truth and avoid identifying the root cause of the accident. (Decision, p. 10.)

whether the statement was made in his individual or representative capacity." "Documents prepared by the opposing party are not subject to exclusion under the hearsay rule, because they are admissions. … Express admissions may be oral or written. … Written admissions are found in many types of informal and formal documents, and the fact that a writing is made pursuant to a statute, e.g., an income tax return, does not preclude its use." (*Jazayeri v. Mao* (2009) 174 Cal. App.4th 301, 325, referencing Evid. Code § 1220, [citations and internal quotations omitted].)

Further, the investigation report constitutes an adoptive admission. Evidence Code section 1221 states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." "The theory of adoptive admissions expressed in [Evidence Code] section 1221 is that the hearsay declaration is in effect repeated by the party; his conduct is intended by him to express the same proposition as that stated by the declarant." (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 149 [Internal quotation marks and citations omitted].) Thus, the investigation report is admissible over the hearsay objection.

The ALJ was correct that "[t]he only reasonable conclusion that can be drawn from the evidence is that Barrios did injure himself because he misused the nail gun."[3] (Decision, p. 10.) Further, the accident investigation report indicates that Barrios discharged a nail into his leg, notwithstanding the equivocal language in the accident report.

We also infer from the foregoing that the nail gun was still connected to the air hose, as it could not have discharged a nail into the injured employee's leg if it had not been so connected. Further, the Manual states that the nail gun should be disconnected from the air hose before changing location, so again there is non-hearsay evidence that the manufacturer's instructions were not followed.

Documents and Evidence Admissible to Supplement and Explain:

Next, the ALJ correctly relied on evidence that, even if hearsay, may be used to supplement and explain the information in the accident investigation report and to explain the circumstances of the accident. (§ 376.2.)

As noted by the ALJ, the statements made to Karimi by Barrios may be used to supplement and explain the cause of the accident. (Decision, p. 10.) Barrios told Karimi that the accident occurred while he was descending a ladder with the nail gun hanging from his tool belt by an attached rafter hook, with the air hose still attached. According to Barrios, he used the nail gun in contact actuation mode "all the time" because single actuation mode was too time consuming. "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." (Decision, p. 10.)

The medical records from Kaiser, although hearsay, may also be admitted to supplement and explain the cause of the accident. The medical records state that a nail was surgically removed

[3] We agree with the ALJ that the equivocal "may have" language in the accident investigation summary is an attempt to obfuscate the truth and avoid identifying the root cause of the accident. (Decision p. 9.)

from the injured employee's leg. (Ex. 11.) Additionally, the injured employee informed the Kaiser staff upon his intake at the hospital that "I was coming down the later [sic] and the nail gun hit my leg and went off." (Ex. 9, quoting employee's hand-written statement on a Kaiser form, also dated and signed by employee.)

The statements made to Karimi by Diaz also supplement and explain the conclusion that the nail gun hung from Barrios' belt, was in contact actuation mode, and was not disconnected from the air hose. As noted by the ALJ,

> 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.
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> (Decision, p. 11.)

Further, Jensen Fasteners Inc.'s "tool inspection" report may be considered to supplement and explain the other evidence. Employer, through its counsel of record, produced a copy of a "tool inspection" report from Jensen Fasteners, Inc. in response to the Division's document request. (Ex. 10.) The report is dated four days after the accident and reports the results of a test of a "NR83A5," the model of the nail gun involved in the accident. The report notes that the "trigger has been placed in the bounce fire position," and concludes, "[b]y using elimination we have to assume that the tool was hanging on belt hook, and trigger made contact with bag at same time it hit his leg causing tool to fire." (*Id*.) This document explains how the accident most likely occurred.

Here all of the aforementioned evidence demonstrates that Barrios used the nail gun in a manner contrary to the Manual. The Manual is clear that nail gun should be detached from the air hose when moving from one location to another. Further, the Manual is clear that the nail gun should not be attached to a person's belt by a rafter hook. The ALJ's Decision correctly concluded that "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)." (Decision, p. 11.)

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

Citation 3 alleged that Employer violated section 1704, subdivision (g), which as relevant here provides:

> (g) Training.
>
> (1) The requirement 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 operation understands the operating and safety instructions.

Citation 3 alleged Employer failed to train its employees who operated the nail gun in question as required by section 1704, subdivision (g), and listed six separate instances of such failure. (Decision, pp. 12-13.) The ALJ correctly pointed out that a single deficiency or instance can support a violation. (Decision, p. 13, citing *Arana Residential and Commercial Painting, Inc*., Cal/OSHA App. 1568252, Decision After Reconsideration (Oct. 18, 2024).) The Decision focused on Instance 4, which stated, "The [E]mployer'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." (Decision, p. 13, quoting Ex. 1, p. 9.)

Training is the touchstone of any effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002).) It is not enough for employers to simply provide employees training. For training to be considered effective, the training must also be of sufficient quality to make employees "proficient or qualified" on the subject of the training. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).) The Appeals Board has found that the purpose of section 3203, subdivision (a)(7), "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through 'training and instruction.'" (*Timberworks Construction*, *Inc*., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

We agree with the Decision's analysis. As noted in the discussion of Citation 1, Employer's COSP failed to include reasonable analogs pertinent to several safety warnings from the nail gun manufacturer's operating Manual. We can infer that the warnings omitted from the COSP were not included in the nail gun training given to the injured employee, or indeed any other employees who were assigned tasks involving the use of nail guns. Further, Employer failed to put on any evidence showing that it did train the injured employee on the Manual's warnings which were not included in the COSP. The exhibits in evidence which address nail gun training and safety also do not include all the warnings found in the Manual. (See Exhibits H, I, J, K, L, and M.) Accordingly, we affirm the Decision and hold that Employer had committed the violation charged in Citation 3.

4. Is section 1704, subdivision (f), void for vagueness?

Employer argues in its Petition that section 1704, subdivision (f), is unenforceably vague, and unconstitutionally vague and ambiguous as well. (Petition, p. 3.) As Employer acknowledges, the standard to apply in analyzing that argument is found in *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883 (*Teichert*). There the Court of Appeal held:

> 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. If it can be given a reasonable and practical construction that is consistent with the probable legislative intent and encompasses the conduct of the complaining party, the regulation must be upheld.
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> *Teichert, supra*, 140 Cal.App.4th, pp. 890-891 (citations omitted).

Teichert requires that we consider Employer's "conduct in light of the facts of the particular case." Thus, we must compare Employer's nail gun safety instructions in the COSP with the Manual's warnings and consider the circumstances of the accident to reach a determination of whether section 1704, subdivision (f), is vague.

As discussed above, regarding Citation 1, the section 1704, subdivision (f), violation, the Manual contains warnings not included in the COSP which have a direct bearing on the accident here. In particular, the warnings against moving the nail gun without disconnecting it from the air source and not attaching it to one's body are not in the COSP, nor are any reasonable analogs. As the ALJ found, "[The injured employee] accidentally shot himself in the leg with the nail gun while descending a ladder. At the time, the nail gun was attached to [the employee's] tool belt and was still connected to the air hose." (Decision, p. 2; Ex.8, Employer's accident report.) Comparing the COSP's safety warnings with those in the Manual, we conclude the COSP does not contain all the warnings necessary for employees' safe use of nail guns. A COSP does not fulfill its purpose if it omits to address several relevant hazards regarding the safe use of a nail gun emphasized by the nail gun's manufacturer.

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." In the present circumstances, that regulation requires Employer's COSP to provide information for the safe use of nail guns. We believe it reasonable and practical to construe section 1704, subdivision (f), to require Employer's COSP to include the Manual's warnings, since the manufacturer is most likely to understand the mechanisms and hazards involved in using its product, i.e., the nail gun. And we believe that it is reasonable and practical to expect Employer to refer to the Manual as the best resource for information regarding the safe use of the nail gun when it developed that aspect of its COSP. We hold, therefore, that section 1704, subdivision (f) is not unconstitutionally vague or ambiguous under the standard articulated in *Teichert*.

5. Did Citation 3 fail to provide Employer adequate notice of a violation?

Employer argues that Citation 3 is invalid because it "failed to provide [Employer] fair notice of any alleged violation." (Petition, pp. 9-16, quotation from p. 10.) As the Petition recites in detail, Citation 3 alleged a violation of the training requirement in section 1704, subdivision (g). Citation 3 quotes the regulation and then alleges, "Prior to and during the course of the investigation, the employer failed to effectively train their employees/nail gun operators on requirements of [section 1704, subdivision (g)], section 1509 and section 3203(a)(7) in the following instances[.]" The citation then lists six separate instances where Employer violated the training requirements of section 1704, subdivision (g).

The ALJ held that Employer had committed the violation alleged in Instance 4. (Decision, p. 14.) And, as the ALJ made clear in the Decision, we have held that a single instance can support a violation, provided the Division meets its evidentiary burden as to that instance. (*Ontario Refrigeration Service, Inc*., Cal/OSHA App. 1327187, Decision After Reconsideration (Mar. 22, 2022); *Arana Residential and Commercial Painting, Inc., supra*, Cal/OSHA App. 1568252.) Based on that authority, we need not inquire as to whether the Division proved any other of the alleged instances.

We have held that the liberal rules of administrative pleading require only that a cited employer be informed of the substance of the charge and afforded the basic elements of due process. (*Bigge Group dba Bigge Crane & Rigging Co*., Cal/OSHA App. 317230191, Decision After Reconsideration (Mar. 15, 2019); *Hypower, Inc. dba Hypower Electric Services, Inc*., Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sep. 11, 2013).) Those decisions are consistent with the holding of the California Supreme Court in *Stearns v. Fair Employment Practices Commission* (1971) 6 Cal. 3d. 205, 213. Citation 3 quoted the text of the safety order it alleged was violated, section 1704, subdivision (g), and listed six instances or ways in which the alleged violation occurred. All six involved alleged failures to train employees on the safe use of nail guns. We hold that Citation 3 was more than adequate to put Employer on notice that its training on the use of nail guns and its COSP's content regarding nail gun training and safety were at issue.

The requirement of Labor Code section 6317 that each citation "shall describe with particularity the nature of the violation, including a reference to the [Safety Order] alleged to have been violated" was met here. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010); *DSS Engineering Contractors*, Cal/OSHA App. 99-1023, Decision After Reconsideration (Jun. 3, 2002), citing *Lusardi Construction Company*, Cal/OSHA App. 86-1400, Denial of Petition for Reconsideration (May 31, 1989).) Underpinning Labor Code section 6317 are the due process rights of Employers. (*Id*.) The Board has held, "Due process requires that Employer have sufficient notice of the charge to enable it to prepare a defense." (*Gaehwiler Construction Co.* Cal/OSHA App. 78-651, Decision After Reconsideration, (Jan. 7, 1985); *Teichert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002).)

"As long as an employer is informed of the substance of a 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*., *supra*, Cal/OSHA App. 78-651.) In addition, the Employer must show prejudice to sustain an allegation that the description in the citation was not sufficiently particular. (*DSS Engineering Contractors, Inc., supra*, Cal/OSHA App. 99-1023.) Here, Employer has demonstrated no prejudice resulting from the alleged shortcoming. (*Rex Moore Electrical Contractors & Engineers*, Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (Nov. 4, 2009).) We find Citation 3 provided Employer with adequate notice of a violation of the training requirement in section 1704, subdivision (g).

6. Did the Division establish a presumption that a serious violation exists for Citations 2 and 3?

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

> 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: [¶s] (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 record shows that the injured employee failed to disconnect the air hose from the nail gun he was using, attached the nail gun to his tool belt with a rafter hook, and then started descending a ladder, during which descent the nail gun discharged a nail into his leg. Later that day the injured employee was admitted to hospital for the surgical removal of a nail from his right femur. Under the provisions of Labor Code section 6432 quoted above, there was a serious injury because the employee was admitted to the hospital for purposes other than medical observation

and was placed under general anesthesia for surgical removal of the nail from his right femur. Further, not only was there a realistic possibility of serious physical harm, but there was in fact serious physical harm as a result of the violation.

Given that the evidence proves there was a serious physical harm, Employer's argument that the Division inspector was not shown to be current in his Division-mandated training is moot. Whether the inspector was competent under Labor Code section 6432, subdivision (g) to testify to the existence of the elements of a serious violation, other evidence established at the hearing that the violations alleged in and proven as to Citations 2 and 3 were serious as defined in Labor Code section 6432.

7. Did Employer rebut the presumption of a serious classification for Citations 2 and 3?

Employer argues that the violations were not properly classified as serious. (Petition, pp. 17-19.) We addressed most of the Employer's argument immediately above, and here address whether Employer rebutted the serious classifications. (Petition, pp. 18-19.)

Labor Code section 6432, subdivision (c) provides:

> If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:
> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include but are not limited to those listed in subdivision (b).
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

First, as noted above, the violations here caused a serious injury, so there is no presumption needed. And even if there were a presumption of a serious violation, Employer failed to satisfy both rebuttal elements set forth in Labor Code section 6432, subdivision (c). Subdivision (c)(1) requires a reasonable and responsible employer to take measures before the violation occurs to anticipate and prevent the violation, including training employees to prevent exposure to the hazard, supervising employees exposed to the hazard, and having procedures for communicating to employees the employer's health and safety rules and programs. (Lab. Code § 6432, subd. (b)(1)(A), (C), and (D).) The record established that prior to the violation occurring, Employer had not properly trained its employees on all of the hazards to which they were exposed when using nail guns, and that Employer's COSP failed to include several hazard warnings stated in the Manual. Failure to take the preventative steps called for in Labor Code section 6432, subdivision (c)(1), as is the case here, means the presumption of serious violations were not rebutted.

8. Did the Division prove the accident-related character of Citation 2?

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].)

Here, the deficiencies in Employer's COSP regarding safe use of nail guns, such as failing to warn against attaching the nail gun to one's person and failing to include a warning to disconnect the nail gun from the air supply before moving it, were established and proven as to Citation 2. Thus, the evidence made a causal nexus between the violation and the employee's serious injury, and this established that the accident-related classification of the violation was correct, contrary to Employer's argument. (Petition, p. 16.)

9. Were the penalties properly calculated?

Employer argues in its Petition that the penalties for the violations were not properly calculated. (Petition, pp. 19-20.) While this may be accurate, we disagree with which calculations were incorrectly made.

The penalties for Citation 1 were not appealed and are not at issue.

Citation 2 alleged a serious accident-related violation. We have affirmed the ALJ's ruling that the violation was serious and accident related. The penalty-setting regulations, at section 336, subdivision (c)(3), provide that the penalty for a serious violation which caused serious injury "shall not be reduced pursuant to this subsection," except for size. And, since Employer has more than 100 employees, it is not eligible for a size reduction. (§ 336, subd. (d)(1).) Therefore, we find the penalty for Citation 2 was correctly calculated.

Citation 3 alleged a serious violation, which we affirmed. Since it was not alleged that this violation caused a serious injury or death, it is eligible for adjustment according to the criteria found in the penalty-setting regulation in section 335, subdivision (a)(B). The Division inspector testified that 280 employees were exposed to the hazard due to ineffective training of employees regarding nail gun usage. That was excessive, since 280 is the total number of Employer's employees, and it is unlikely that all of Employer's employees use or are exposed to others' use of nail guns. However, we can infer from the record that at least six employees were exposed to the hazard created here by Employer's ineffective training. That means that the "extent" of the violation was "medium." (§ 335, subd. (a)(2)(i).) In such circumstances the penalty for a serious violation is not adjusted. (§ 336, subd. (c)(1).) Consequently, the $4,500 increase in the base penalty made by the inspector was incorrect. The gravity-based adjustment to the penalty should have been left at $18,000. And the downward good faith adjustment of 15 percent would then reduce the penalty to $15,300. We therefore adjust the penalty for Citation 3 to $15,300.

10. Did the Decision correctly address the abatement issue?

Employer appealed the abatement requirements in the Citations, and in its Petition challenges the Decision's holding that it had not abated the violations for two reasons. Although Employer claimed in its appeals of the three citations that the abatement requirements were unreasonable, it put on no evidence to support that assertion. (See Notice of Docketed Appeal, issued by Board 1/23/24.) The record shows that the violations were not abated.

Employer first argues that because the violations alleged in Citations 2 and 3 did not occur, no abatement was required. Since we have determined that the alleged violations did occur, we reject that argument. Established violations must be abated. While the filing of an appeal may stay an abatement period (Lab. Code § 6625, subd. (a)), that possibility does not apply here. Filing a petition for reconsideration involving a citation classified as serious does not stay the requirement to abate the hazard affirmed by the decision unless the employer timely requests a stay of abatement and demonstrates that the stay will not adversely affect the health and safety of employees. (Lab. Code § 6625, subd, (b).) Employer has not met those requirements.

The violations noted in Citations 2 and 3 thus have not been corrected or abated according to this record and are thus apparently ongoing. Further, Employer has offered no evidence that the time frame for abatement in the three citations was unreasonable. Therefore, we hold that Employer must abate the hazards identified in the citations. (*Home Depot USA, Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012).) We order that the abatement be accomplished within 30 days from the date of issuance of this decision.

DECISION AFTER RECONSIDERATION

The violations alleged in the Citations are affirmed and the penalties modified as indicated above.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 12/03/2025