BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1564732**
CALVARY CHAPEL OF SAN JOSE **1175 Hillsdale Avenue** **San Jose, California 95118**	**DECISION AFTER RECONSIDERATION AND ORDER OF REMAND**
Employer	

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 and Order of Remand in the above-entitled matter.

JURISDICTION

On November 18, 2021, two inspectors from the Division of Occupational Safety and Health (Division or Cal/OSHA) were denied consent to inspect the premises of Calvary Chapel of San Jose (Employer), a private school located on church grounds.

On November 29, 2021, the Division sought an "inspection warrant" from the Santa Clara County Superior Court. The Division supported their request for a warrant with two declarations: one from Richard Haskell (Haskell), Associate Safety Engineer, and another from Lisa Brokaw (Brokaw), Staff Attorney.

On November 29, 2021, a Judge of the Santa Clara County Superior Court granted the Division's request for an inspection warrant. The Division subsequently conducted a site inspection, commencing on November 30, 2021.

On March 10, 2022, the Division issued five citations to Employer, alleging twelve violations of safety orders contained in title 8 of the California Code of Regulations,[1] and totaling $67,330 dollars in penalties. Employer filed timely appeals of all the citations on March 21, 2022.

On July 18, 2022, Employer filed a motion to suppress evidence, arguing all evidence from the inspection should be suppressed because the warrant had been issued without probable cause. The Division filed an opposition on July 28, 2022. Employer filed a reply on August 16, 2022.

On September 1, 2022, Administrative Law Judge (ALJ) Kerry Lewis issued an Order on Motion to Suppress Evidence (Order), which granted Employer's motion. The ALJ, relying on the Board's prior jurisprudence, concluded she had jurisdiction to rule on the motion to suppress

[1] References are to title 8 of the California Code of Regulations unless otherwise specified.

evidence, and granted the motion after determining the warrant had been issued without probable cause. The ALJ's Order also excluded any evidence arising from the Division's inspection of the site.

On September 30, 2022, the Division filed a timely Petition for Reconsideration. The Division's Petition argues:

1. The Board may and should consider this interlocutory petition for reconsideration.
2. The Board does not have constitutional authority to review a superior court's decision and therefore acted in excess of its powers.
3. Employer attempted to procure this Order by fraud by misstating the applicable standard of review.[2]
4. If *arguendo* the Board has authority to assess the validity of inspection warrants, the evidence does not justify the finding of fact that the warrant is insufficient.
5. If *arguendo*, the inspection warrant lacked probable cause, the Board should apply the good faith exception to the exclusionary rule and deny Employer's motion to suppress.
6. Even if the inspection warrant was not obtained in good faith, the Board should not apply the exclusionary rule where correction of OSHA violations involving unsafe or unhealthy working conditions is at issue.

(Petition, pp. 1-31.)

Upon determining interlocutory review was appropriate, the Board took the Division's Petition under submission. Employer filed an Answer. Thereafter, the Board requested further briefing on federal authority. The parties filed their briefs on January 30, 2023.

ISSUES

1. Does the Board, as an administrative agency, have jurisdiction to entertain a motion to suppress evidence, based on an assertion that the Superior Court improperly issued a warrant without probable cause?

2. Assuming the Board may entertain a motion to suppress evidence and review the adequacy of the warrant, did sufficient probable cause exist for issuance of the warrant in this matter?

3. Assuming the warrant was issued without probable cause, did the ALJ properly apply the exclusionary rule to suppress all evidence acquired as a result of the invalid warrant?

4. Assuming that application of the exclusionary rule is appropriate, should the Board apply the "good faith" exception to that rule in this case?

[2] The Division asserts that the Employer attempted to secure the order by fraud by misstating the applicable standard of review, arguing that the Employer argued for an outdated standard despite clear contrary law. (Petition, p. 17.) This argument need not detain us long. The Board does not find any fraud occurred. Even assuming, *arguendo*, that some misstatements of the relevant standard occurred, it does not appear that any intent to defraud existed. Further, the ALJ does not appear to have been misled by any alleged misstatements, as discussed herein.

FINDINGS OF FACT

1. On November 18, 2021, Inspectors from the Division were denied consent to inspect the premises of Employer, a private school located on church grounds.

2. On November 29, 2021, the Division sought an "inspection warrant" from the Santa Clara County Superior Court. The Division supported their request for a warrant with two declarations: one from Haskell, Associate Safety Engineer, and another from Brokaw, Staff Attorney.

3. Haskell's declaration identified the reason that the Division sought to inspect Employer's premises.

4. Haskell's declaration stated, "We were directed to open this inspection in response to a complaint made to the Division's Fremont District Office on November 16, 2021 that Calvary Christian Academy was not complying with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting requirements."

5. Haskell's declaration also stated, "On November 18, 2021, we went to the school's administrative office, where we were met outside by a woman who later identified herself as Jenny Wood. Ms. Wood came from inside the office and was not wearing a face covering."

6. On November 29, 2021, a Judge of the Santa Clara County Superior Court granted the Division's request for an inspection warrant.

7. The Division commenced a site inspection on November 30, 2021.

DISCUSSION

1. Does the Board, as an administrative agency, have jurisdiction to entertain a motion to suppress evidence, based on an assertion that the Superior Court improperly issued a warrant without probable cause?

The Division's petition for reconsideration argues, at length, that the Board and its ALJ lack authority to evaluate the validity of the inspection warrant issued by the Santa Clara County Superior Court, and lack authority to grant Employer's motion to supress evidence. The Division argues that the California Constitution solely vests courts with original jurisdiction to review such warrants for errors. (Petition, pp. 6-9, citing Cal. Const., art VI, §§ 10, 11.) The Division contends the Legislature can only divest the courts of such jurisdiction if they enact a law pursuant to express or implied constitutional authority, which the Division argues did not happen here. (Petition, p. 9.)

Additionally, although the Division recognizes that the Board has previously found it had authority to review an inspection warrant based on the California Supreme Court's decision in *Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638 (*Goldin*), the Division argues that the *Goldin* decision is inapposite, as it concerns the Public Utilities Commission (PUC) a much different agency with different constitutional authority. (Petition, pp. 11-16.)

After careful review of each of the Division's various assertions and arguments, we disagree that the Board does not have jurisdiction to evaluate alleged infirmities in the search warrant once an appeal has been initiated.[3] There are three areas of law that support the Board's jurisdiction to entertain the motion to suppress evidence, which include: (a) the doctrine of exhaustion of administrative remedies, both generally and as incorporated into the Board's operative statutes; (b) persuasive federal authority; and (c) the California Supreme Court's decision in *Goldin*, *supra*, 23 Cal.3d 638. Any one of these areas, even considered alone, constitutes sufficient support for the Board's actions. Together they overwhelmingly support the Board's authority to review the warrant. We address each point *seriatim*.

a) The Board's Operative Statutes.

The Board's operative statutes and the doctrine of exhaustion of administrative remedies support the conclusion that once an appeal has been initiated, all issues, including whether a warrant was issued absent probable cause, must be first presented to, and considered by, the Board, prior to seeking judicial review.

Once an appeal has been initiated before the Board, the Board's operative statutes require parties to contest the citations, and all related issues, to a final decision before the Board prior to seeking judicial review. (Lab. Code, § 6600-6633.) The statutes permit a party aggrieved by a final order or decision of a hearing officer to file a petition for reconsideration before the Board. (Lab. Code, § 6614.) The filing of such a petition for reconsideration is a prerequisite to judicial review, and all issues not in that petition are waived. (Lab. Code, §§ 6615, 6618.) Labor Code section 6615 states,

> No cause of action arising out of any final order or decision made and filed by the appeals board or a hearing officer shall accrue in any court to any person until and unless the appeals board on its own motion sets aside such final order or decision and removes such proceeding to itself or such person files a petition for reconsideration, and such reconsideration is granted or denied.[4]

Labor Code section 6618 states,

> The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration.

Taken together, Labor Code sections 6615 and 6618 set forth an exhaustion requirement, providing that all objections, irregularities, and illegalities arising from a final order or decision are waived,

[3] We observe that the motion to suppress was filed after the Employer initiated its appeal; consequently, we need not, and do not, address the mechanisms for challenging the validity of a warrant prior to the initiation of an appeal before the Board.

[4] No cause of action accrues until and unless a petition for reconsideration is filed and such reconsideration is granted or denied. (*Nelson & Sloan v. Workers' Comp. Appeals Bd.* (1978) 79 Cal. App. 3d 51, 55-56 [discussing Labor Code section 5901, which is largely identical to section 6615].)

and not subject to court review, unless first presented to the Board via a petition for reconsideration. As relevant here, these statutes demonstrate that the adequacy of the warrant must first be presented to the Board, and such remedies exhausted, to prevent waiver.

In addition to those statutes, the general doctrine of administrative remedies also requires that issues as to the adequacy of the warrant be first raised before the Board. The exhaustion doctrine requires that "before seeking judicial review a party must show that he has made a full presentation to the administrative agency upon all issues of the case and at all prescribed stages of the administrative proceedings." (*Bleeck v. State Board of Optometry* (1971) 18 Cal.App.3d 415, 432 [other citations omitted].) "Under the doctrine of the exhaustion of administrative remedies, a party must go through the entire proceeding to 'a final decision on the merits of the entire controversy' before resorting to the courts for relief." (*Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1055 [other citations omitted]; accord *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd*. (2005) 35 Cal.4th 1072, 1080.)

Finally, although the Division suggests that the constitution only vests courts with jurisdiction to consider the validity of inspection warrants, we observe that the Board's operative statutes, including those that require exhaustion of remedies as a prerequisite to judicial review, were enacted by the Legislature pursuant to constitutional authorization. They constitute a part of the California Occupational Safety and Health Act (the Cal/OSH Act), which was adopted pursuant to Article XIV, section 4 of the California Constitution.[5] (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 725-727.) "Article XIV, section 4 grants the Legislature plenary power, unlimited by any provision of the California Constitution, to create and enforce a complete system of workers' compensation, by appropriate legislation." (*Ibid*.) "A complete system of workers' compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workers" and "full provision for securing safety in places of employment." (Cal. Const., art. XIV, § 4.) This constitutional provision provides the Legislature "full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation[.]" (*Ibid*.) In short, and contrary to the arguments advanced by the Division, the exhaustion requirement contained in the Board's operative statutes has a constitutional imprimatur.

b) Federal Authority.

A large body of federal authority also exists finding the federal Occupational Safety and Health Review Commission (OSHRC), the federal equivalent to the Board, has the authority to consider challenges to the validity of inspection warrants. We conclude that this federal authority also provides persuasive guidance supporting the Board's review of the warrant. "The Board has acknowledged the similarity between its role and the Federal Commission and in its decisions occasionally turns to Federal Commission decisions and related [f]ederal authority for guidance, even if it is not required to do so." (*Dynamic Construction Services, Inc.*, Cal/OSHA App. 1005890, Decision After Reconsideration (Dec. 1, 2016); see also *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, 550 ["It has been held that when California's laws are

[5] These provisions were formerly found, in substantially identical form, in Article XX, section 21.

patterned on federal statutes, federal cases construing those federal statutes may be looked to for persuasive guidance."].)

The OSHRC did not always review challenges to inspection warrants. Prior to 1978, the Federal OSH/Act purportedly authorized warrantless inspections by OSHA compliance officers. (*Chromalloy Am. Corp*., 1979 OSAHRC LEXIS 328, 7 OSHC (BNA) 1547, 1979 OSHD (CCH) P23,707 (O.S.H.R.C. July 17, 1979) (*Chromalloy*).) The OSHRC declined to address the constitutionality of OSHA inspections because such a review might require it to pass judgment on the constitutionality of its enabling legislation. (*Ibid*.) However, in 1978, the United States Supreme Court held, in *Marshall v. Barlow Inc*. (1978) 436 U.S. 307, that warrantless OSHA inspections were unconstitutional. Thereafter, the OSHRC found this change in the law "placed the Commission in a posture where it is now clearly competent to address the inspection warrant issues." (*Chromalloy*, *supra*, 1979 OSAHRC LEXIS 328.) The OSHRC stated,

> The Commission recognizes that finding itself in the position of reviewing a magistrate's determination with respect to the issuance of an inspection warrant is unusual and we accept this role reluctantly. To do otherwise, however, is to create a separate and collateral review mechanism through the federal courts that will operate either concurrently with or to the exclusion of the review procedure created by Congress in the Act. See 29 U.S.C. §§ 651(3), 659, 660, and 661. Clearly, the Supreme Court in Barlow's could not have intended parties to litigate fully the inspection warrant issues in a separate federal court action either before the statutory review process is permitted to begin or concurrently with the statutory adjudication of the "merits" of the alleged safety and health violations. Such a result is without question contrary to one of the principle congressional purposes in creating the Review Commission, namely, timely adjudication. This is especially so since both "routes" of review lead, in almost all instances, to the same United States Court of Appeals.

(*Chromalloy*, *supra*, 1979 OSAHRC LEXIS 328.) We find the above rationale sound and equally applicable to California's Act.

There have been multiple legal challenges to the OSHRC's competence and ability to review inspection warrants. Indeed, there is marked, if not uncanny, similarity between many of the prior challenges against the OSHRC, and those made now by the Division against the Board. However, such arguments have been repeatedly rejected by the vast majority of Circuit Courts. These courts have found the OSHRC should first review motions to suppress evidence under the doctrine of exhaustion of administrative remedies.[6] (*Babcock & Wilcox Co. v. Marshall* (3d Cir.

[6] The federal courts have also noted that the federal OSH/Act, like the California OSH/Act, contains provisions that require exhaustion of administrative remedies. "Section 10(a) of the OSH Act requires parties to contest OSHA citations before the Review Commission before obtaining judicial review." (*In re Kohler Co*. (7th Cir. 1991) 935 F.2d 810, 811, *citing* 29 U.S.C. § 659.) Section 11(a) of the Act provides that "no objection that has not been argued before the Commission shall be considered by the court..." (*Ibid*., citing 29 U.S.C. § 660.)

1979) 610 F.2d 1128, 1135-1141; *Donovan v. Sarasota Concrete Co.* (11th Cir. 1982) 693 F.2d 1061, 1065-1067; *In re Kohler Co*. (7th Cir. 1991) 935 F.2d 810, 811-815; *Robert K. Bell Enters. v. Donovan* (10th Cir. 1983) 710 F.2d 673, 675; *In re J. R. Simplot Co.* (9th Cir. 1981) 640 F.2d 1134, 1137; *In re Gould Pub. Co.* (2d Cir. 1991) 934 F.2d 457, 459-461; *In re Establish Inspection of Metal Bank of Am., Inc.* (3d Cir. 1983) 700 F.2d 910, 914-916; *Baldwin Metals Co. v. Donovan* (5th Cir. 1981) 642 F.2d 768, 771-777.) Some Circuit Courts have also found that the OSHRC should first review motions to suppress evidence based on equitable principles. (*Marshall v. Cent. Mine Equip. Co.* (8th Cir. 1979) 608 F.2d 719, 721-722; see also *Baldwin Metals Co. v. Donovan*, *supra*, 642 F.2d at 775.) We find the analysis in the aforementioned federal decisions, particularly those based on exhaustion of administrative remedies principles, to be apposite and persuasive.

Courts have required parties to exhaust remedies for multiple reasons, including: (1) protecting and preserving administrative autonomy and separation of powers; (2) facilitating judicial review by allowing the administrative agency to create a record; (3) facilitating judicial economy in the event the issue becomes mooted because the agency grants the relief sought (4) avoiding piece-meal review and consequent delay; and (5) the absence of irreparable harm due to the availability of later judicial review. (*In re Kohler Co*., *supra*, 935 F.2d at 812-813; *Babcock & Wilcox Co. v. Marshall*, *supra*, 610 F.2d at 1137-1138; *In re Gould Pub. Co*, *supra*, 934 F.2d at 459-460; *In re Establish Inspection of Metal Bank of Am., Inc.*, *supra*, 700 F.2d at 914-915.) Indeed, as to the last point, the question is not whether the issues may be heard by an Article III court, but when. (*Babcock & Wilcox Co. v. Marshall*, *supra*, 610 F.2d at 1135-1137.)

The Circuit Courts have also found that the exhaustion requirement does not offend separation of powers principles, but ensures administrative autonomy and prevents delay tactics. For example, they have noted:

> The Review Commission will not sit in direct review of the decision of the magistrate. As already indicated, the decision to issue the inspection warrant is complete and cannot be negated. If the challenge is raised by Babcock, the problem for the Review Commission will be whether to use the evidence obtained from the inspection. In deciding whether to use this evidence the Review Commission must of course, makes its own judgment as to the propriety of the warrant, but such a determination does not reverse the magistrate's action, nor does it contravene a judicial order. The OSHA official would not be in contempt if he were to decide not to execute a warrant signed by the magistrate, and an administrative tribunal does not flout the authority of the judiciary by refusing to consider evidence that has been obtained pursuant to a warrant issued by a judge or magistrate.

(*Babcock & Wilcox Co. v. Marshall*, *supra*, 610 F.2d at 1136.)

> Nothing the Review Commission does now can affect the validity of the warrant. The Commission will merely decide whether to admit the evidence obtained by means of the warrant. . . . Requiring Kohler to exhaust its administrative remedies in this case thus does

> nothing to diminish the authority of the magistrate's warrant or to disenfranchise the district court by eliminating its ability to review the warrant. Indeed, the only infringement of separation of powers would occur if we were to preempt the Commission from considering whether to suppress evidence obtained during an inspection; that course "would be to allow the magistrate to control admissibility determinations in contravention of administrative autonomy." [Citation] We therefore conclude that "any conflict between two branches of government over the propriety of the warrant is mostly imaginary, while the conflict with the statutory scheme and administrative exigencies if exhaustion is not required will be quite real." [Citation.]

(*In re Kohler Co*., *supra*, 935 F.2d at 814.)

We conclude that the aforementioned federal authority provides a persuasive rationale for the conclusion that the Board also has authority to review warrants to determine whether to admit evidence acquired therefrom in its administrative proceedings.

c) The *Goldin* Decision:

Relying on *Goldin*, the Board has previously held "there is not only jurisdiction to determine constitutional infirmities in a search warrant, but a clear duty imposed upon the Appeals Board to do so." (*Kaiser Steel Corporation*, *Steel Manufacturing Group*, Cal/OSHA App. 80-826, Decision After Reconsideration (Sept. 30, 1981) (*Kaiser Steel*), citing *Goldin*, *supra*, 23 Cal.3d 638; see also *Forty-Niner Sierra Resources, Inc*., Cal/OSHA App. 90-165, Decision After Reconsideration (July 15, 1991) (*Forty-Niner*).) The ALJ relied on this authority when granting the motion to suppress. However, the Division argues that the *Goldin* decision is inapposite because it concerns the PUC, a much different agency than the Board with different authority. After careful review, we disagree, and reaffirm the conclusion that the *Goldin* decision supports the Board's review of the warrant.

In *Goldin*, the California Supreme Court evaluated a case brought before the PUC under Rule 31, which provided that phone service shall be refused or disconnected upon receipt from any authorized law enforcement official of a writing signed by a magistrate finding that probable cause exists to believe that the use made or to be made of the service is prohibited by law, or the service is being used as an instrumentality to violate or assist in the violation of the law. (*Goldin*, *supra*, 23 Cal.3d at 646.) Rule 31 provided that any person aggrieved by action taken pursuant to this standard is to receive immediate notice and has the right to immediately file a complaint with the PUC in which he may also request interim relief. (*Ibid*.)

In *Goldin,* the phone services of the petitioner were terminated by the phone company after a court found probable cause to believe that certain telephone numbers were being used for illegal purposes. (*Goldin*, *supra*, 23 Cal.3d at 647-648.) After its telephone services were discontinued, petitioner challenged the discontinuation of its telephone service before the PUC. Among a panoply of various legal challenges, the petitioner in *Goldin* argued that the PUC improperly precluded it from challenging the magistrate's finding of probable cause. (*Id.* at 667-668.) The

PUC initially took the position that it was under no obligation to determine whether probable caused existed for the summary termination of telephone services. (*Ibid*.) However, the Supreme Court disagreed and found it appropriate for the PUC to review the adequacy of probable cause, noting,

> In a civil administrative proceeding of this nature, where the liberty of the subscriber is not at stake, it is sufficient for purposes of the interim protection involved that the Commission limit itself to the face of the affidavits and an assessment of their adequacy to support the magistrate's finding.
>
> It should be noted in this respect that the above matter will normally arise in the context of an application by the subscriber for interim relief pending final determination of his complaint. If the Commission concludes that there is inadequate basis for the magistrate's finding, it should thereupon grant interim relief. Even in cases when it appears to the Commission that the finding is adequately supported by the affidavits presented to the magistrate, it may wish to consider the strength and character of the showing made as a factor to be weighed, along with pressing need or imminent economic damage, in its determination whether or not interim relief should be afforded to the subscriber.

(*Goldin*, *supra*, 23 Cal.3d at 668.)

Next, during the hearing before the PUC, the law enforcement personnel introduced evidence obtained via warrant. Petitioner argued that the PUC improperly considered this evidence because it was derived from an invalid warrant. (*Goldin*, *supra*, 23 Cal.3d at 667.) It was argued that the PUC could not evaluate the validity of the warrant. (*Id*. at 669.) However, the California Supreme Court found that the PUC had the power to assess the validity of the warrant. (*Id*.) The Supreme Court stated,

> It is urged that the Commission was without legal authority to determine the validity of a search warrant pursuant to which certain evidence presented was obtained. Again, we do not agree. Although the Commission is not required to undertake the kind of examination which would be necessary if the subscriber, as a "defendant" in a criminal case, would be entitled to invoke pursuant to a motion under section 1538.5 (cf. Pub. Util. Code, § 1701), we believe that its authority in cases of this nature includes the power to make an assessment of the affidavits presented in support of a search warrant pursuant to which evidence sought to be introduced before it was obtained, and to determine therefrom whether they contain a sufficiently objective and credible basis for the magistrate's finding. […] In making this assessment, of course, the Commission should be cognizant of applicable constitutional safeguards, [fn.18] but it should admit the subject evidence if it

> determines, disregarding those aspects of the affidavits which clearly fail to withstand constitutional scrutiny, [fn.19] that a sufficient basis for admission exists. [Citations.] We find no violation of this standard in the instant case.

(*Goldin*, *supra*, 23 Cal.3d at 668-669.)

As already noted, the Division seeks to distinguish the *Goldin* decision on the basis that it concerned the authority of the PUC, a much different agency than the Board, with different powers and constitutional authorization. However, we disagree that the *Goldin* decision is limited to the PUC. The Court's relevant analysis in *Goldin* did not rely on any unique constitutional provisions governing the PUC. Further, the decision oftentimes used relatively broad language, which indicated its holding applied to administrative agencies more broadly. For example, within footnote 18 of the above-quoted passage, the Court stated, "Article III, section 3.5 of the state Constitution, added thereto as a result of approval by the voters at the primary election held June 6, 1978, places certain restrictions *on administrative agencies* relative to their refusal to enforce statutes on constitutional grounds. *It does not affect their enforcement of their own rules or their competence to examine evidence offered before them in light of constitutional standards*." (*Goldin*, *supra,* 23 Cal.3d at 669, fn. 18 [emphasis added].) Likewise, within footnote 19 of the above-quoted passage the Court also stated, "*An administrative agency*, especially one of the stature of the Public Utilities Commission, must refuse to consider 'evidence inconsistent with the dignity of its proceedings and the fair administration of justice.'" (*Goldin*, *supra*, 23 Cal.3d at 669, fn. 19 [emphasis added].)

Furthermore, as Employer's Answer notes, the Division also fails to acknowledge that the Board's operative rules of practice and procedure provide it a grant of authority similar to that of the PUC. (Answer, pp. 5-6.) These rules give Board ALJ's authority "to rule on objections, privileges, defenses, and the receipt of relevant and material evidence . . . ." (§ 350.1.)

Ultimately, we conclude that the *Goldin* decision continues to support the proposition that the Board's "authority in cases of this nature includes the power to make an assessment of the affidavits presented in support of a search warrant pursuant to which evidence sought to be introduced before it was obtained, and to determine therefrom whether they contain a sufficiently objective and credible basis for the magistrate's finding." (*Goldin*, *supra*, 23 Cal.3d at 668-669.)

For the reasons stated above, we reject the Division's assertion that the Board lacked jurisdiction to consider the adequacy of the declarations presented in support of the warrant.

2. Assuming the Board may entertain a motion to suppress and review the adequacy of the warrant, did sufficient probable cause exist for issuance of the warrant in this matter?

Typically, at least in a criminal law setting, when a warrant has been issued, it is presumed to be legal and the burden is on the defendant to show the warrant's illegality.[7] (See, e.g., *People*

[7] In determining whether there has been an unreasonable search, a threshold issue on a motion to suppress is whether the challenged action has infringed upon an interest protected by the Fourth Amendment, i.e., was there a reasonable expectation of privacy in the place searched. (See, e.g., *People v. Nishi* (2012) 207 Cal.App.4th 954, 960-961.) In

v. Murray (1978) 77 Cal.App.3d 305, 310; *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 101-102.) The defendant may meet its burden through legal argument. (Levenson, Cal. Criminal Procedure (The Rutter Group 2022-23), Motions to Suppress, ¶ 6.17, p. 416.) Here, Employer contends that the Division's declarations supporting the issuance of the warrant were defective and failed to demonstrate requisite probable cause. To evaluate Employer's argument, it is necessary to analyze the contents of the Division's declarations under relevant law. There are two sources of authority governing the requirements for issuance of a warrant: (a) statutory authority; and (b) constitutional case law.

a) Statutory Authority.

Labor Code section 6314, subdivision (b), states that if permission to investigate a place of employment is refused, the Division may seek an inspection warrant pursuant to Code of Civil Procedure section 1822.50 *et seq*. "An inspection warrant is an order . . . signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning." (Code Civ. Proc., § 1822.50.) "An inspection warrant shall be issued upon cause" and "supported by an affidavit, particularly describing the place, dwelling, structure, premises, or vehicle to be inspected and the purpose for which the inspection is made." (Code Civ. Proc., § 1822.51.) "In addition, the affidavit shall contain. . . a statement that consent to inspect has been sought and refused[.]" (*Ibid*.) "Cause shall be deemed to exist if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place, dwelling, structure, premises, or vehicle, or there is reason to believe that a condition of nonconformity exists with respect to the particular place, dwelling, structure, premises, or vehicle." (Code Civ. Proc., § 1822.52.) Labor Code section 6314, subdivision (b), states, "[c]ause for the issuance of a warrant shall be deemed to exist . . . if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division[.]"

In the immediate matter, there are three sentences, all contained in Haskell's declaration, which generally set forth the purported cause for the inspection. Haskell said, "We were directed to open this inspection in response to a complaint made to the Division's Fremont District Office on November 16, 2021 that Calvary Christian Academy was not complying with Title 8, section 3205, COVID-19 Prevention, face covering and outbreak reporting requirements." (Haskell Decl., ¶ 3.) Haskell also stated, "On November 18, 2021, we went to the school's administrative office, where we were met outside by a woman who later identified herself as Jenny Wood. Ms. Wood came from inside the office and was not wearing a face covering." (*Id*. at ¶ 4.) These sentences, the Division contends, are sufficient to meet the statutory cause requirements for issuance of the inspection warrant upon being denied entry. (Petition, pp. 20-24.) The Division notes that its

other words, in order to claim the protections of the Fourth Amendment, a defendant must demonstrate a personal expectation of privacy in the area searched, and that the expectation was reasonable. (*Bimbo Bakeries*, Cal/OSHA App. 03-5215, Decision After Reconsideration (Jun. 9, 2010).) However, we do not reach or analyze this issue. The Division's petition does not raise the issue. There does not appear to be any dispute that Employer had a reasonable expectation of privacy on the school grounds, and any contrary assertion is waived for failure to include it within the petition for reconsideration. (Lab. Code, § 6618.)

"declarations in support of the warrant were drafted to meet the requirements of CCP § 1822.51 while also keeping the complainant's identity confidential." (Petition, pp. 23-24.)

Here, if the aforementioned statutes were the only body of law to consider, a plausible argument exists that the Division's declarations met the bare requirements of the relevant statutes. Labor Code section 6314, subdivision (b), simply states, "[c]ause for the issuance of a warrant shall be deemed to exist . . . if any complaint that violations of occupational safety and health standards exist at the place of employment has been received by the division[.]" (Lab. Code, § 6314, subd. (b); see also, Code Civ. Proc., § 1822.52.) Haskell's declaration discussed such a complaint, noting the Division had received complaints indicating the school had not complied with the face covering and outbreak requirements in section 3205. However, we must go beyond a mere statutory analysis; there is also a body of constitutional case law to consider.

b) Case Law.

Cases discussing the constitutionality of inspection warrants in Cal/OSHA proceedings have stated that the search and seizure requirements of the Fourth Amendment and Article I, section 13, of the California Constitution mandate a probable cause requirement for Cal/OSHA inspection warrants. (*Salwasser Mfg. Co. v. Mun. Court* (1979) 94 Cal.App.3d 223, 231-232 (*Salwasser I*).)

The standard of probable cause, i.e., the level of scrutiny required for a Cal/OSHA inspection warrant, is detailed in *Salwasser Mfg. Co. v. Occupational Safety & Health Appeals Bd.* (1989) 214 Cal.App.3d 625 (*Salwasser II*). *Salwasser II* found that the criminal probable cause standard is not applicable when the warrant application is based on employee complaints, and instead called for a "lesser standard of administrative probable cause." (*Salwasser II*, *supra*, 214 Cal.App.3d at 630.) *Salwasser II* relied on federal circuit court decisions when discussing and defining this lesser standard of administrative probable cause. It stated:

> The circuit courts have attempted to define the parameters of this "lesser standard of administrative probable cause." Of course any inspection under this standard must be reasonable: the public interest in the inspection must outweigh the invasion of privacy which the inspection entails. (*Burkart Randall Div. of Textron, Inc.* v. *Marshall, supra*, 625 F.2d 1313, 1319.) As observed by the court in *U.S.* v. *Establishment Inspection of: Jeep Corp.*, *supra*, "'the evidence of a specific violation required to establish administrative probable cause, while less than that needed to show a probability of a violation, must at least show that the proposed inspection is based upon a reasonable belief that a violation has been or is being committed. . . . This requirement is met by a showing of specific evidence sufficient to support a reasonable suspicion of a violation.'" (836 F.2d at p. 1027, quoting *West Point-Pepperell, Inc. v. Donovan* (11th Cir. 1982) 689 F.2d 950.) However, to say that the same degree of probable cause is not required is not to say that no consideration need be given to the concerns focused on in the criminal setting. (*Marshall* v. *Horn Seed Co., Inc., supra*, 647

> F.2d 96, 102.) Thus, when the warrant application is based on specific evidence of violations, ". . . there must be some plausible basis for believing that a violation is *likely* to be found. The facts offered must be sufficient to warrant further investigation or testing.
>
> "By necessity, such a determination requires the magistrate to consider the reliability of the information tendered in support of the application. Again, a criminal standard is not imposed. Although a 'substantial basis' is not required to credit the information's reliability, there must be some basis for believing that a complaint was actually made, that the complainant was sincere in his assertion that a violation exists, and that he had some plausible basis for entering a complaint." (647 F.2d at pp. 102-103.) Consequently, a conclusory statement in the application that employee complaints have been received by OSHA, without more, is insufficient to establish probable cause.
>
> "The application must at least inform the Magistrate of the substance of the employee complaints, so that the Magistrate may exercise independent judgment as to whether an inspection is justified, rather than acting as a mere rubber stamp validating the decision already reached by the Secretary." (*Burkart Randall Div. of Textron, Inc.* v. *Marshall, supra*, 625 F.2d 1313, 1319.)

(*Salwasser II*, *supra*, 214 Cal.App.3d at 630-631.)[8] *Salwasser II* found that "[t]he probable cause standards outlined for OSHA warrants based on employee complaints should also be applied to such Cal-OSHA warrants." (*Id*. at 632.)

In *Salwasser II*, the appellate court found that the Division's declaration satisfied the administrative probable cause requirement. The Division's declaration stated Division personnel had received a complaint from an employee, they contacted the employee on multiple occasions to discuss the alleged violative conditions, they found the complainant forthright, they formed the opinion that 13 safety violations existed, and each alleged violation was described in some detail. (*Salwasser II*, *supra*, 214 Cal.App.3d at 632-633.) "The details regarding the alleged safety violations and the number of violations listed informed the trial court of the substance of the employee complaint." (*Ibid*.) The *Salwasser II* decision noted that the declaration contained sufficient detail so that "the court could exercise independent judgment as to whether an inspection was justified." (*Ibid*.)

In the immediate case, the ALJ found that Haskell's declaration did not satisfy the probable cause requirements set forth in *Salwasser II*. We agree. Haskell's declaration states, in a conclusory manner, that the Division received a complaint that face mask and reporting requirements were not being followed. As noted in *Salwasser II*, however, a "conclusory statement in the application that employee complaints have been received by OSHA, without more, is insufficient to establish probable cause." (*Salwasser II*, *supra*, 214 Cal.App.3d at 630-631.) The declaration does

[8] See also *Marshall v. Horn Seed Co*., *Inc*. (10th Cir. 1981), 647 F.2d 96, 102-103.

not otherwise demonstrate a basis for believing that a complaint was actually made, that the complainant was sincere in the assertion that a violation exists, and that a plausible basis exists for entering a complaint. (See, e.g., *Id.* at 630-631.)[9]

Next, Haskell's assertion that Ms. Wood came from the inside without wearing a face covering also does not demonstrate probable cause. First, as the Division itself points out, it is possible that she had been wearing a face covering inside, and only took it off before stepping outside of the building. (Petition, p. 22.) Second, even if were to infer that Ms. Wood was not wearing a face covering indoors, that does not necessarily demonstrate a violation of any safety order. Haskell's declaration in support of the warrant demonstrates that the Division was pursuing purported violation of section 3205, governing COVID-19 Prevention. The statement regarding Ms. Wood may lead to an inference that she was not wearing a mask indoors. However, the problem is that the Division did not demonstrate that mask usage was required indoors. Although section 3205 required masks indoors in some instances, it did not require masks in all instances. For example, a mask was not required when an employee was alone in a room, when the employee was eating provided the employee was at least six feet away from other employees, or where the employee cannot wear mask due to mental or medical health condition. (§ 3205, subd. (c)(6).) Haskell's declaration did not address whether any of these exceptions applied. Moreover, there was no outdoor mask requirement.

The Division argues that we should defer to the judge's finding of probable cause, citing to federal decisions. (Petition, pp. 20-21.) However, even if we give the judge's finding due deference, we still cannot conclude that administrative probable cause was demonstrated, as that term is defined and discussed in *Salwasser II*.[10]

Ultimately, the Board concurs with the ALJ and concludes that the Division's declarations did not satisfy the constitutional requirement to demonstrate administrative probable cause, as set forth in *Salwasser II* and the federal authority cited therein.

We agree with the ALJ that the declarations did not demonstrate administrative probable cause. However, notwithstanding that probable cause was not demonstrated, we do clarify one portion of the Order. Within the Order, the ALJ provided a list of questions, arguably contending that a warrant application should contain answers to these questions. The Division's Petition challenges this portion of the ALJ's Order. The Division contends it cannot respond to all of the questions asked without improperly compromising the name and identity of the complainant. (Petition, pp. 18-20.) Ultimately, we clarify that the Division need not necessarily respond to all of the questions listed by the ALJ. We view these questions as illustrative rather than mandatory. We agree that the Division should not be required to publicly disclose any details that could compromise the name or identity of the complainant. (*Sunview Vineyards*, Cal/OSHA App.

[9] The conclusion that the Division did not demonstrate probable cause is also supported by the Board's prior decisions. In cases where the Board previously found probable cause existed for issuance of a warrant, the Board relied on a more robust declaratory showing than exists here. (See *In re Forty-Niner*, *supra*, Cal/OSHA App. 90-165; *Kaiser Steel*, *supra*, Cal/OSHA App. 80-826.)

[10] The Division also argues that the Board should pay deference because the "warrant was issued by a superior court judge, who had the opportunity to examine the inspector on oath, and to satisfy himself of the existence of grounds for granting the warrant in accordance with CCP § 1822.53." However, although the judge may have had that opportunity, there is no allegation that he did so.

1153101, Decision After Reconsideration (July 30, 2021).) We do, however, believe it possible for the Division to supply additional information within the declarations to comply with the *Salwasser II* requirements, while still maintaining confidentiality.[11]

3. Assuming the warrant was issued without probable cause, did the ALJ properly apply the exclusionary rule to suppress all evidence acquired as a result of the invalid warrant?

The Division's petition spends considerable effort contending that the Board should apply the good faith exception to the exclusionary rule, enunciated in *United States v. Leon* (1984) 468 U.S. 897 (*Leon*). (Petition, pp. 24-31.) However, before addressing the exception, we must first address the rule, and the extent of its application in this case.

The exclusionary rule derives from criminal law and the Fourth Amendment.[12] The purpose of the exclusionary rule is well-articulated in *People v. Jimenez* (2015) 242 Cal. App. 4th 1337, 1364, which states:

> The exclusionary rule "is a 'prudential' doctrine, [citation], created … to 'compel respect for the constitutional guaranty.' [Citations.]" (*Davis v. United States* (2011) 564 U.S. 229, 236 [180 L. Ed. 2d 285, 131 S.Ct. 2419, 2426] (*Davis*).) "Exclusion is 'not a personal constitutional right,' nor is it designed to 'redress the injury' occasioned by an unconstitutional search. [Citations.] The rule's sole purpose … is to deter future Fourth Amendment violations. [Citations.]" (*Id*. at pp. 236–237 [131 S.Ct. at p. 2426].) In other words, the exclusionary rule is limited "to situations in which [deterrence] is 'thought most efficaciously served.' [Citation.] Where suppression fails to yield 'appreciable deterrence,' exclusion is 'clearly … unwarranted.' [Citation.]" (*Id.* at p. 237 [131 S.Ct. at pp. 2426–2427].)

The rule operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." (*Leon*, supra, 468 U.S. at 906 [other citations omitted].)

The Board, in general, applies the exclusionary rule to evidence acquired from an unlawful inspection. (*Beacom Construction Co*., Cal/OSHA App. 80-842, Decision After Reconsideration (Dec. 10, 1981).) In *Southwest Marine*, *Inc.,* Cal/OSHA App. 96-1902, Decision After Reconsideration (Jan. 10, 2002) the Board noted: "There is some question as to whether the exclusionary rule applies to proceedings of this Board. See e.g. *Gikas v. Zolin* (1993) 6 Cal.4th 841. The Board elects to maintain the safeguards contained within the exclusionary rule when it can be established that a warrant was not obtained in good faith." Here, assuming the warrant was

[11] The Division might also seek to file its affidavits, or portions thereof, under seal to protect the confidentiality of the complainant. (See, e.g., *Electronic Frontier Foundation, Inc. v. Superior Court* (2022) 83 Cal. App. 5th 407, 414.)

[12] The California Constitution, Article 1, section 28, prohibits employing an exclusionary rule that is more expansive than that articulated by the United States Supreme Court. (*People v. Robinson* (2010) 47 Cal. 4th 1104, 1119.)

not obtained in good faith (a point we address next), the ALJ properly applied the exclusionary rule in conformance with the Board's authority.

We also note that the bulk of federal authority supports application of the exclusionary rule to OSHA proceedings. The OSHRC and several Circuit Courts have concluded the exclusionary rule should be applied in OSHRC proceedings. (See, e.g., *Donovan v. Sarasota Concrete Co*. (11th Cir. 1982) 693 F.2d 1061, 1070-1071 ["If fourth amendment rights are to be recognized in an OSHA context, it seems reasonable that the only enforcement mechanism developed to date should likewise be recognized."]; *Savina Home Industries, Inc. v. Secretary of Labor* (10th Cir. 1979) 594 F.2d 1358, 1363-64 ["We believe the exclusionary rule would be applicable to OSHA proceedings involving inspections violative of the warrant requirements[.]"]; *Sanders Lead Co*., 1992 OSAHRC LEXIS 64, 15 OSHC (BNA) 1640, 1992 OSHD (CCH) P29,690 (O.S.H.R.C. May 21, 1992).)

However, we reiterate that a caveat exists to the Board's application of the exclusionary rule. As the Board has previously noted, we concur with the Fifth and Sixth Circuits that "the exclusionary rule should not apply to preclude an agency from pursuing corrective actions but may apply for assessment of penalties after the fact." (*Southwest Marine, Inc.*, *supra*, Cal/OSHA App. 96-1902; see also *Smith Steel Casting Co. v. Brock* (5th Cir. 1986) 800 F.2d 1329, 1334; *Davis Metal Stamping, Inc. v. Occupational Safety & Health Review Com*. (5th Cir. 1986) 800 F.2d 1351, 1352; *Trinity Indus. v. OSHRC* (6th Cir. 1994) 16 F.3d 1455, 1461-1462.) The rationale for this conclusion derives from the Supreme Court's decision in *INS* v. *Lopez-Mendoza* (1984) 468 U.S. 1032 (*Lopez-Mendoza*). There the majority opinion stated,

> Presumably no one would argue that the exclusionary rule should be invoked to prevent an agency from ordering corrective action at a leaking hazardous waste dump if the evidence underlying the order had been improperly obtained, or to compel police to return contraband explosives or drugs to their owner if the contraband had been unlawfully seized. On the rare occasions that it has considered costs of this type the Court has firmly indicated that the exclusionary rule does not extend this far. *See United States v. Jeffers*, 342 U.S. 48, 54, 96 L. Ed. 59, 72 S. Ct. 93 (1951); *Trupiano v. United States*, 334 U.S. 699, 710, 92 L. Ed. 1663, 68 S. Ct. 1229 (1948) . . . The constable's blunder may allow the criminal to go free, but we have never suggested that it allows the criminal to continue in the commission of an ongoing crime.

(*Lopez-Mendoza*, *supra*, 468 U.S. at 1046.) Based upon the analysis in *Lopez-Mendoza*, the Fifth Circuit concluded that the exclusionary rule would not apply to an OSHA action brought for the correction of unhealthy working conditions, i.e., abatement. (*Smith Steel Casting Co. v. Brock* (5th Cir. 1986) 800 F.2d 1329, 1334 (*Smith Steel*).) The Fifth Circuit stated,

> Based on Justice O'Conner's reasoning, we do not believe that the exclusionary rule should be invoked to prevent the Secretary of Labor from ordering correction of OSHA violations involving unsafe or unhealthy working conditions, even though the evidence

> supporting the order was improperly obtained. However, illegally obtained evidence must be excluded for purposes of "punishing the crime," i.e. the exclusionary rule should be applied for purposes of assessing penalties against an employer after the fact for OSHA violations, unless it can be shown that the good faith exception applies to the Secretary's actions. Therefore, we hold pursuant to *Lopez-Mendoza* that the exclusionary rule does not extend to OSHA enforcement actions for purposes of correcting violations of occupational safety and health standards. Further, again under Justice O'Conner's reasoning in *Lopez-Mendoza*, we hold that the exclusionary rule applies where the object is to assess penalties against the employer for past violations of OSHA regulations[.]

We find this rationale persuasive and have expressly applied it to Board proceedings (*Southwest Marine, Inc.*, *supra*, Cal/OSHA App. 96-1902), and reiterate that conclusion here.

Here, the Division's petition argues that Employer appealed all citations, and that each appeal challenged the reasonableness of the abatement requirements. (Petition, pp. 29-31.) The Division argues that the exclusionary rule should not apply to the extent that the appeal concerns correction or abatement of unsafe conditions. (*Ibid*.) We agree. However, the extent to which abatement is actually at issue is unclear. It appears the parties have reached an agreement regarding abatement on many, if not all, citations, thereby rendering the issue moot. (See Order Removing Matter from Expedited Status (Dated 7/25/22) ["The parties agree that the Employer has provided satisfactory evidence of abatement of the violations alleged in the above matter."].) If, however, abatement remains at issue on any citation, for the reasons stated herein, we agree that the exclusionary rule will not apply to preclude the Division from pursuing corrective actions, but will apply where the object is to assess penalties against the employer for past violations.

4. Assuming that application of the exclusionary rule is appropriate, should the Board apply the "good faith" exception to that rule in this case?

Again, to the extent the exclusionary rule applies, the Division's petition argues the Board should apply the good faith exception to the rule, enunciated in *United States v. Leon* (1984) 468 U.S. 897 (*Leon*). (Petition, pp. 24-31.)

> In *Leon*, the high court held "the Fourth Amendment exclusionary rule should be modified so as not to bar the use in the prosecution's case in chief of evidence obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." (468 U.S. at p. 900 [82 L.Ed.2d at p. 684].) The court made clear that the government has the burden of establishing "objectively reasonable" reliance (*id*., at p. 924 [82 L.Ed.2d at p. 699]), and it described four limited situations in which such reliance would not be established, and in which suppression under the exclusionary rule would remain an appropriate remedy: (i) the issuing magistrate was misled by information that the officer knew or should have known

> was false; (ii) the magistrate "wholly abandoned his judicial role"; (iii) *the affidavit was "'so lacking in indicia of probable cause'" that it would be "'entirely unreasonable'" for an officer to believe such cause existed*; and (iv) the warrant was so facially deficient that the executing officer could not reasonably presume it to be valid. (*Id*., at p. 923 [82 L.Ed.2d at p. 699], italics added.)

(*People v. Camarella* (1991) 54 Cal.3d 592, 596 [Italics in original].) The good faith exception "embodies the proposition that . . . 'the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable, even though the warrant was ultimately found to be defective.'" (*People v. Machupa* (1994) 7 Cal.4th 614, 623, citing *Illinois v. Krull* (1987) 480 U.S. 340, 348.) The exclusionary rule is designed to deter police misconduct, not to punish the errors of judges or magistrates. (*Leon*, *supra*, 468 U.S. at 916-917.) There exists no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment, nor that exclusion of evidence will have a significant deterrent effect on the issuing judge or magistrate. (*Ibid.*)

The Board follows the good faith exception to the exclusionary rule. (*Southwest Marine, Inc., supra*, Cal/OSHA App. 96-1902.) The Board has previously noted that it will only exclude evidence pursuant to the exclusionary rule when it can be established that the warrant was not obtained in good faith. (*Ibid*.) The OSHRC likewise applies the good faith exception. (*Sanders Lead Co*., *supra*, 1992 OSAHRC LEXIS 64; *Delo Screw Prods. Co*., 1987 OSAHRC LEXIS 89, 13 OSHC (BNA) 1279 (O.S.H.R.C. April 21, 1987).) In addition, several Circuit Courts have also upheld the OSHRC's use of the good faith exception, and/or applied the exception on their own initiative. (See, e.g., *Smith Steel*, *supra*, 800 F.2d at 1333-1334, 1336; *Davis Metal Stamping Inc. v. Occupational Safety & Health Review Commission* (5th Cir. 1986) 800 F.2d 1351, 1354.)[13]

Ultimately, the parties present conflicting arguments as to whether the good faith exception should apply. This dispute involves, at least, four questions: (1) was the judge misled by information that the applicant knew, or should have known, was false; (2) did the judge wholly abandon his or her judicial role; (3) was the affidavit so lacking in indicia of probable cause that it would be entirely unreasonable for the Division to believe such cause existed; and (4) was the warrant so facially deficient that the executing officer could not reasonably presume it to be valid? (See *People v. Camarella* (1991) 54 Cal.3d 592, 596.) As to the third category, *supra*, the

[13] Employer contends that the Division waived any argument that the good faith exception applied by failing to raise the issue before the ALJ. (Answer to Petition, p. 14.) However, we conclude the issue was not waived. First, the Employer raised the issue within its motion to suppress. Second, the Division's alleged failure was excusable, as it was likely engendered by the Board's own error. The Board has previously held the burden to establish the inapplicability of the good faith exception rests on the Employer. (*Southwest Marine*, *supra*, Cal/OSHA App. 96-1902.) However, that holding is in error. The OSHRC has held that the Secretary, as the beneficiary of the good faith exception, has the burden of proof to establish the exception. (*Sanders Lead Co*., *supra*, 15 OSHC (BNA) 1640, 1992 OSHD (CCH) P29,690.) California and federal courts have likewise made clear that the government has the burden of establishing "objectively reasonable" reliance. (*People v. Camarella*, *supra*, 54 Cal.3d at 596 ["The court made clear that the government has the burden of establishing 'objectively reasonable' reliance[.]"]; *People v. Hirata* (2009) 175 Cal.App.4th 1499, 1508 ["[T]he prosecution has the burden of proving that the officer's reliance on the warrant was objectively reasonable."] *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1654-1655.) Because the Division's failure to raise the issue before the ALJ might have been engendered by the Board's own error, we conclude the Division has not waived the issue.

issue is whether a "well-trained officer should reasonably have *known* that the affidavit failed to establish probable cause (and hence that the officer should not have sought a warrant)[.]" (*Ibid*.) "If the officer 'reasonably could have believed that the affidavit presented a close or debatable question on the issue of probable cause,' the seized evidence need not be suppressed." (*People v. Pressey* (2002) 102 Cal. App. 4th 1178, 1191 [other citations omitted].)

The ALJ has not yet ruled on application of the good faith exception in this particular case. Therefore, we remand this matter back to hearing operations for consideration, and a ruling, on the application of the good faith exception in this case. The parties may each file briefs on the application of the exception, with due dates and page limits to be determined by the ALJ.

DECISION

This matter is remanded to hearing operations for further proceedings consistent with the guidance and instructions set forth herein.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 11/02/2023