BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1195278**
NUSIL TECHNOLOGY, LLC **2343 PEGASUS DRIVE** **BAKERSFIELD, CA 93308**	**DECISION**
Employer	

Statement of the Case

NuSil Technology, LLC (Employer) is a manufacturer of medical devices and components. On November 30, 2016, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Greg Clark, commenced an inspection of Employer's job site located at 2343 Pegasus Drive in Bakersfield, California (job site). On May 30, 2017, the Division cited Employer for seven alleged violations of California Code of Regulations, title 8, as follows: failure to report a serious illness to the Division; failure to evaluate employee work duties and environments to determine whether two illnesses were work-related for purposes of recording them on the Log of Work-Related Injuries and Illnesses; failure to select and provide appropriate respirators; failure to cover hazardous liquid containers to prevent inadvertent contact with employee skin; failure to perform hazard assessments to select appropriate personal protective equipment; failure to monitor the work environment for hazardous concentrations of airborne contaminants; and failure to monitor employee exposure to airborne formaldehyde.

Employer filed timely appeals of the citations on the grounds that the safety orders were not violated, the classifications were incorrect, and the abatement requirements and proposed penalties were unreasonable. Additionally, Employer asserted a series of affirmative defenses for each of the citations.[1]

This matter was heard by Kerry Lewis, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (Appeals Board), in Bakersfield, California, on August 6 through 8, 2019, and November 5, 2019. Melissa J. Fassett, attorney with Price, Postel

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).) Additionally, there were no outstanding abatement issues at the time of hearing and Employer did not put forth any evidence regarding reasonableness of abatement. As such, the abatement issue is moot and will not be discussed herein.

& Parma, LLP, represented Employer. Eric Compere, Staff Counsel, represented the Division. The matter was submitted on February 14, 2020.

Issues

1. Was Employer required to report to the Division an employee's illness or injury that presented at the workplace if it was subsequently deemed to not be work-related?

2. Did the Division issue Citation 1, Item 1, within the six-month statute of limitations established by Labor Code section 6317?

3. Was Employer required to evaluate two of its employees' illnesses to determine whether they were work-related for purposes of recording them on the Log of Work-Related Injuries and Illnesses?

4. Did Employer properly evaluate the respiratory hazards in the workplace by making a reasonable estimate of employee exposure to a concentration of an airborne contaminant that would occur if the employee was not using respiratory protection?

5. Did the Division establish that there was employee exposure to hazardous liquids capable of inflicting physical injury upon contact with the skin?

6. Did Employer select, and have each affected employee use, the types of personal protective equipment that will protect employees from the hazards identified in its hazard assessment?

7. Did the Division establish that Employer failed to promptly monitor when and where employees reported symptoms that may be consistent with exposure to a contaminant known to have been released in their work area?

8. Did Employer establish that it met the exception to the requirement that it monitor employees to determine their potential exposure to formaldehyde?

9. Was Citation 1, Item 3, properly classified as a General violation?

10. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

11. Are the proposed penalties for Citation 1, Item 3, and Citation 2 reasonable?

Findings of Fact

1. On February 22, 2016, Tony Lilly (Lilly) suffered a stroke while working at the job site and was hospitalized for six or seven days. Medical professionals determined that the stroke was not work-related.

2. Employer did not report Lilly's stroke to the Division at any time. Lilly informed the Division about his stroke in April or May of 2016.

3. The Division did not issue citations to Employer until more than one year after learning of Lilly's stroke.

4. In June of 2016, Kevin O'Bryan (O'Bryan) filed a workers' compensation claim for alleged cumulative injuries incurred during his employment with Employer. A physician determined that O'Bryan's injuries were not caused by his working conditions.

5. Despite having medical information that both Lilly's and O'Bryan's injuries or illnesses were not work-related, Employer recorded them on its Log of Work-Related Injuries and Illnesses.

6. Numerous chemicals used in Employer's processes have the potential to cause injury, illness, disease, impairment, or loss of function.

7. Employer has a comprehensive written respirator program that includes mandatory medical evaluations and fit testing for use of a full-face respirator.

8. In implementing its respirator program, Employer did not establish the concentration of airborne contaminants to which its employees would be exposed if they were not wearing a respirator.

9. At the time of the Division's original inspection, there was a squeeze bottle of isopropyl alcohol sitting on a work surface that had a broken spout, resulting in a hole in the lid measuring approximately 0.25 inches in diameter.

10. At the time of the Division's original inspection, there was a resin drum that was partially uncovered and had a U-shaped hose inserted into the open portion. The Division's investigator, Greg Clark (Clark), did not observe any employees working with the hose and had no knowledge of how the hose would be removed from the drum.

11. Employer conducted Job Hazard Assessments to determine whether there were hazards present which necessitated the need for personal protective equipment (PPE).

12. Employer implemented a PPE program that included identifying numerous types of gloves the employees could use for various processes.

13. The only gloves readily available for the employees in the manufacturing rooms were thin, clear "food service" gloves that melted rapidly when contacting many of the chemicals the employees used. The employees had difficulty obtaining the other types of gloves and usually wore the food service gloves.

14. When Employer received a complaint that there may have been exposure to airborne contaminants in excess of permissible levels, Employer obtained air samples to ensure that the concentrations were not excessive.

15. There were no complaints that would give Employer a reasonable suspicion that there was excessive exposure to airborne contaminants between August 2016 and the issuance of the citations on May 30, 2017.

16. The previously-reported and investigated instances of possible excessive exposure were resolved and did not continue throughout the six-month period prior to issuance of the citations.

17. Tetramere D4 (D4) is a chemical used in Employer's processes that has the potential for creating formaldehyde if heated above 150 degrees Celsius in the presence of air.

18. Employer's processes use a vacuum to remove all oxygen. In addition to the vacuum pumps, Employer uses nitrogen to further ensure that oxygen is not present when the chemicals, including D4, are being heated.

19. In late 2013, one of Employer's chemists, Jaquelyn Heffner Jones (Jones), performed laboratory testing to determine whether Employer's processes using D4 could create formaldehyde. Jones was unable to replicate the conditions used in the manufacturing processes because her testing equipment was unable to remove as much oxygen as was removed during the manufacturing process.

20. Even in the presence of more oxygen than exists in the manufacturing process, Jones did not generate formaldehyde at actionable levels until the D4 was heated to 200 degrees Celsius, a temperature higher than Employer uses in its processes.

21. In addition to the objective data obtained from Jones' testing, Employer performed numerous tests in the manufacturing rooms to determine whether formaldehyde was detected. The tests resulted in a finding that there was no detectable formaldehyde.

22. Establishing the concentration of an airborne contaminant that would occur if the employee were not using respiratory protection has a relationship to employee health and safety.

23. Clark was current on his Division-mandated training at the time of the hearing.

24. The penalties for Citation 1, Item 3, and Citation 2 were calculated in accordance with the Division's policies and procedures.

Analysis

1. Was Employer required to report to the Division an employee's illness or injury that presented at the workplace if it was subsequently deemed to not be work-related?

California Code of Regulations, title 8, section 342, subdivision (a),[2] under "Reporting Work-Connected Fatalities and Serious Injuries," provides:

> Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

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

> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.
>
> The Alleged Violation Description (AVD) for Citation 1, Item 1, provides:
>
> Prior to and during the course of the inspection, including but not limited to, on April 7, 2017 [*sic*], the employer did not report to the Division a serious illness which occurred in a place of employment or in connection with a place of employment. On or about February 22, 2016, an employee was hospitalized for a period in excess of 24 hours for other than medical observation.
>
> Section 330, subdivision (h), provides, in relevant part:
>
> "Serious injury or illness" means any injury or illness occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation […] .

The definition of "serious injury or illness" in section 330, subdivision (h), uses the language "occurring in a place of employment or in connection with any employment." The definition does not use the term "work-related," nor does it refer to the cause of the injury or illness.

The Appeals Board has repeatedly held that the cause of the injury or illness is not a determining factor with regard to the reporting requirements of section 342, subdivision (a). The Appeals Board has stated that section 342, subdivision (a), "requires reporting of employee injuries, illnesses and deaths which occur on an employer's premises, even if they are not work related." (*Honeybaked Hams*, Cal/OSHA App. 13-0941, Denial of Petition for Reconsideration (Jun. 25, 2014) [employee suffered fatal heart attack on his lunch break while relaxing outdoors on the employer's premises].) "Requiring reports of illnesses, injuries and deaths occurring at work, or that have a tangible connection to work, even if not ostensibly work related, provides the Division with the opportunity to acquire data that may allow it to recognize patterns indicating workplace hazards, which employers might not have sufficient expertise or experience to recognize on their own." (*Western Digital Corporation*, Cal/OSHA App. 1200858, Decision After Reconsideration and Order of Remand (May 16, 2019).)

One of Employer's employees, Lilly, suffered a stroke at the job site on February 22, 2016. Lilly testified that he was hospitalized for six or seven days. Employer did not dispute the extent of Lilly's hospitalization or that he had suffered a stroke at the job site. However, Employer did not report the incident, asserting that there was no requirement to do so because it was quickly determined that the cause of the stroke was not work-related. Dawn Howard (Howard), Employer's

former Director of Human Resources, testified that Employer was informed that the stroke was deemed "personal" and not work-related approximately two hours after Lilly was admitted to the hospital.

Employer did not assert that it was unaware that Lilly was hospitalized for more than 24 hours. Rather, Employer argued that Lilly's illness was not work-related and, thus, there was no obligation to report it to the Division. As set forth above, the threshold issue for whether an illness or injury is reportable under section 342, subdivision (a), is whether it is serious, not whether it is work-related.

The Division established by a preponderance of the evidence that Lilly suffered a serious illness at Employer's place of employment. There was no dispute that Employer did not report the injury to the Division. Accordingly, Employer violated section 342, subdivision (a), by failing to report Lilly's serious illness to the Division.

2. Did the Division issue Citation 1, Item 1, within the six-month statute of limitations established by Labor Code section 6317?

Employer argues that the citation was untimely because it was issued more than six months after the Division learned of the illness. Lilly's stroke occurred on February 22, 2016. Lilly testified that he reported it to the Division approximately two or three months later. Citation 1, Item 1, asserting a violation for the failure to report a serious illness was issued on May 30, 2017.

Labor Code section 6317, provides, in relevant part:

> If, upon inspection or investigation, the division believes that an employer has violated […] any standard, rule, order, or regulation […] of the Labor Code, or any standard, rule, order, or regulation established pursuant to this part, it shall […] issue a citation to the employer. […] A citation or notice shall not be issued by the division more than six months after the occurrence of the violation. For purposes of issuing a citation […] an "occurrence" continues until it is corrected, *or the division discovers the violation*, or the duty to comply with the violated requirement ceases to exist.

(Emphasis added.)

The Appeals Board has held that the time to issue a citation begins to run when the violation occurs, or upon the Division's learning of the violation, if later. (*Bimbo Bakeries USA*, Cal/OSHA App. 03-5216, Decision After Reconsideration (Jun. 9, 2010).) Accordingly, for purposes of violations for failure to report a serious injury or illness, the six-month statute of limitations is considered tolled until the time the Division learns of an employee injury. (*Bayles Ranch*, Cal/OSHA App. 86-1270, Decision After Reconsideration (Feb. 4, 1988).)

In *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014), the Appeals Board found a citation to be timely because it was issued within six months of the date the Division was made aware of an employer's failure to report a serious injury. In the instant matter, the statute of limitations was similarly tolled for the violation of section 342, subdivision (a), because the Division had no way of knowing about the illness due to Employer's failure to report it. However, the tolling of the statute of limitations ended when Lilly informed the Division about his illness. Therefore, as the Division learned that Employer failed to report Lilly's injury in approximately April or May of 2016, and did not issue the citation for failure to report until May 30, 2017, the circumstances are unlike those in *Bellingham Marine Industries, Inc., supra*, and the Division failed to issue Citation 1, Item 1, within six months of Lilly informing the Division about his illness.

Labor Code section 6317 gives the Division authority to issue citations only within the six-month period following the occurrence of a violation. The citation for failure to report Lilly's illness was issued approximately one year after the Division learned of it. As such, the issuance of the citation exceeds the Division's authority. Accordingly, Citation 1, Item 1, is vacated.

3. Was Employer required to evaluate two of its employees' illnesses to determine whether they were work-related for purposes of recording them on the Log of Work-Related Injuries and Illnesses?

Employer was cited for a violation of section 14300.5, subdivision (b)(3), which pertains to the evaluation of injuries and illnesses to determine whether they are work-related for purposes of recording them on the Log of Work-Related Injuries and Illnesses (Form 300). Section 14300.5 provides, in relevant part:

> (a) Basic requirement. You must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in Section 14300.5(b)(2) specifically applies.

(b) Implementation.

[…]

(3) How do I handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work?

In these situations, you must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition.

In Citation 1, Item 2, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on November 30, 2016, the employer did not evaluate the employees['] work duties and environment to determine if events or exposures in the work environment either caused or contributed to reported work illnesses before two (2) illnesses on the 2016 Cal/OSHA Form 300 Log (Cases 6-16 and 8-16) were determined not to be work-related.

The Division claimed that Employer violated section 14300.5, subdivision (b)(3), based on an assertion that two injuries or illnesses in 2016 were not properly evaluated to determine whether they were work-related. The two situations at issue for Citation 1, Item 2, are Lilly's stroke in February of 2016 and a workers' compensation claim by O'Bryan alleging that he had multiple cumulative injuries over the course of his employment, including injuries to his head and hands, and to his circulatory, respiratory, and nervous systems.

Pursuant to section 14300.5, subdivision (a), there is a presumption that these injuries and illnesses that allegedly occurred in the work environment are work-related unless an exception from section 14300.5, subdivision (b)(2), specifically applies. The circumstance in section 14300.5, subdivision (b)(2), that applies to the Lilly and O'Bryan situations is:

(2) Are there situations where an injury or illness occurs in the work environment and is not considered work-related?

Yes. An injury or illness occurring in the work environment that falls under one of the following exceptions is not work-related, and therefore is not recordable:

[…]

(B) The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment.

[…]

As set forth above, within two hours of his admission to the hospital, medical personnel informed Employer that Lilly's stroke was not caused by working conditions. Additionally, Howard testified that a physician determined that O'Bryan's injuries were not work-related. Both employees conceded that their illnesses or injuries had not been deemed work-related.

The Division argues that, pursuant to section 14300.5, subdivision (b)(3), Employer was required to evaluate Lilly's and O'Bryan's work environment and job tasks to determine whether there were work-related contributing factors to the illnesses. However, this provision of the safety order is applicable only if "it is not obvious whether the precipitating event or exposure occurred in the work environment or occurred away from work[.]" (§14300.5, subd. (b)(3).) That is, the requirement to conduct a more thorough evaluation arises when an employer is unclear about whether the work environment caused or contributed to an injury or illness and does not know whether it is required to record the injury or illness on the Form 300. In the instant matter, Employer had information from medical sources and had no reason to second-guess the nature of the employees' illnesses. As such, the evaluation requirement of section 14300.5, subdivision (b)(3), is inapplicable to the circumstances for which the Division cited Employer.

It is noted that, despite having reliable information that the two illnesses were not work-related, and were, therefore, not subject to recording provisions based on section 14300.5, subdivision (b)(2)(B), Employer did record them on its Form 300 for 2016.

The Division failed to establish by a preponderance of the evidence that Employer violated section 14300.5, subdivision (b)(3).

4. Did Employer properly evaluate the respiratory hazards in the workplace by making a reasonable estimate of employee exposure to a concentration of an airborne contaminant that would occur if the employee was not using respiratory protection?

Employer was cited for a violation of section 5144, subdivision (d)(1), which provides:

(d) Selection of respirators. This subsection requires the employer to evaluate respiratory hazard(s) in the workplace, identify relevant workplace and user factors, and base respirator selection on these factors. The subsection also

specifies appropriately protective respirators for use in IDLH atmospheres, and limits the selection and use of air-purifying respirators.

(1) General requirements.

(A) The employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and workplace and user factors that affect respirator performance and reliability.

(B) The employer shall select a NIOSH-certified respirator. The respirator shall be used in compliance with the conditions of its certification.

(C) The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH.

(D) The employer shall select respirators from a sufficient number of respirator models and sizes so that the respirator is acceptable to, and correctly fits, the user.

In Citation 1, Item 3, the Division alleged:

Prior to and during the course of the inspection, including but not limited to, on November 30, 2016, the employer did not select and provide an appropriate respirator based on the chemical respirator hazards, including but not limited to, MS211 Nusil tetrahydrofuran (tetrahydrofuran), MS072 xylene (xylene, toluene, ethylbenzene), hydrochloric acid, to which workers are exposed to [*sic*] in Manufacturing Rooms. The employer did not identify or reasonably estimate the employee airborne chemical exposure within Manufacturing Rooms, nor did the employer consider the atmosphere immediately dangerous to life and health (IDLH).

The purpose of the safety order is set forth in section 5139, which states that, "Article 107 sets up minimum standards for the prevention of harmful exposure of employees to dusts, fumes, mists, vapors, and gases." Therefore, as a threshold issue, the Division must establish that there is the potential for "harmful exposure," which has a specific definition for purposes of Article 107 under Group 16: Control of Hazardous Substances—Dusts, Fumes, Mists, Vapors and Gases.

"Harmful exposure" is defined as, "An exposure to dusts, fumes, mists, vapors, or gases: (a) In excess of any permissible limit prescribed by Section 5155; or (b) Of such a nature by inhalation as to result in, or have a probability to result in, injury, illness, disease, impairment, or loss of function." (§5140.)

There was no dispute that numerous chemicals used and produced in Employer's procedures may result in or have a probability to result in injury, illness, disease, impairment, or loss of function, dependent upon the concentration of the chemical. The Safety Data Sheets (SDS) for two commonly used chemicals, Xylene and Tetrahydrofuran, indicate that they are possible carcinogens, may cause eye or other organ damage, or may cause respiratory irritation. As such, Employer must comply with the provisions of Article 107, including section 5144.

As set forth above, section 5144, subdivision (d), requires the employer "to evaluate respiratory hazard(s) in the workplace, identify relevant workplace and user factors, and base respirator selection on these factors." Section 5144, subdivision (d)(1)(C), provides, in relevant part, that the evaluation of respiratory hazards shall "include a reasonable estimate of employee exposures to respiratory hazard(s) … ." Section 5144, subdivision (b), defines "employee exposure" as "exposure to a concentration of an airborne contaminant that would occur if the employee were not using respiratory protection." Therefore, where there is harmful exposure, as defined in section 5140, an employer is required to evaluate the respiratory hazards in the workplace to determine employee exposure to concentrations of an airborne contaminants that would occur if an employee was not using respiratory protection.

In the instant matter, because there was harmful exposure, as the chemicals commonly used at Employer's job site were of a nature that by inhalation they had a probability to result in, injury, illness, disease, impairment, or loss of function, Employer was required to determine the level of airborne contaminants to which its employees were being exposed if the employees were not using respiratory protection.

Employer asserted that it complied with the respirator requirements because it implemented and maintained a comprehensive respiratory program. Beginning in approximately 2014 or 2015, all of the employees were provided with a full-face respirator that they were required to use if they worked with chemicals that posed a respiratory risk. Employer's respiratory protection program is set forth in writing and requires: medical testing; an annual fit test for the respirators; an initial and annual training with a video and written examination; regular cleaning and maintenance of the respirators; and supervisor oversight to ensure compliance with the program.

In determining what types of respirators and other PPE were required, Employer relied on the SDS for the various chemicals used and generated in its processes. If the SDS indicated that

the chemicals to which employees were exposed required respiratory protection, the employees used a full-face respirator.

However, the safety order, which particularly defines the term "employee exposure," requires more than telling the employees to look at the SDS to decide if they need to wear a respirator. The safety order requires an evaluation of the workplace to determine "employee exposure" by examining the concentration of airborne contaminants that would occur if an employee were not using respiratory protection. Employer and the employees did not know the concentrations of the airborne contaminants to which the employees were exposed in normal conditions because the only testing that was being performed was when an employee made a complaint about excessive odor or other troubling symptoms.

In support of its assertion that its respiratory program was adequate without specific monitoring, Employer presented evidence that it implemented engineering controls to ensure that there was adequate ventilation in the manufacturing rooms to alleviate potential harmful exposure. Employer produced reports that its ventilation system has an air turnover rate far in excess of the minimums required by NFPA (National Fire Protection Association) regulations. However, there was testimony from numerous witnesses that they regularly observed vapors during various manufacturing processes, experienced a "loss of breath" when they were required to stand near the vessels used in the manufacturing process, had burning eyes and nose, had headaches, and smelled strong odors. Lilly testified that he often had to leave the room to escape the strong odors. This testimony supports the inference that Employer's engineering controls did not entirely eliminate possible harmful exposure, and Employer cannot establish that the controls were sufficient because it failed to evaluate the concentrations of airborne contaminants to which the employees were exposed during the various manufacturing processes.

In sum, although Employer had a respirator program, it failed to comply with section 5144, subdivision (d)(1), because there was no estimate of employee exposure during the various manufacturing processes to which the employees were exposed. That estimate of employee exposure required that Employer determine the concentration of airborne contaminants to which employees would be exposed if they were not wearing respirators. Accordingly, Citation 1, Item 3, is affirmed.

5. Did the Division establish that there was employee exposure to hazardous liquids capable of inflicting physical injury upon contact with the skin?

Employer was cited for a violation of section 3302, subdivision (a), which provides:

> For situations other than those addressed by the requirements of Section 3480 where the risk of employee contact exists, hazardous liquids capable of inflicting

physical injury upon contact with the skin (i.e., chemical/thermal burns, harmful temperature extremes) shall be covered, insulated or otherwise guarded against inadvertent contact.

In Citation 1, Item 4, the Division alleged:

Prior to and during the course of the inspection, including but not limited to, on November 30, 2016, the employer did not cover containers of hazardous liquids including a drum labeled Resin Me3Eb 7ViMe, and a damaged squeeze bottle labeled isopropyl alcohol, capable of inflicting physical injury to employees[’] skin in Manufacturing Room #3.

The Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) “Preponderance of the evidence” is usually defined in terms of probability of truth, or of evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Clark testified that he observed a resin drum and a squeeze bottle of isopropyl alcohol that were not fully covered during his inspection on November 30, 2016. The Division has the burden to establish that there was (1) employee exposure to (2) a hazardous liquid “capable of inflicting physical injury upon contact with the skin.”

Clark testified that the isopropyl alcohol was in a squeeze bottle that had a missing spout. The missing spout resulted in an uncovered hole measuring approximately 0.25 inches in diameter. Presumably, an employee could be exposed to the alcohol if the bottle was knocked over or tried to squeeze it without the spout providing direction for the stream. However, Clark did not provide any testimony to support a finding that isopropyl alcohol is capable of inflicting physical injury upon contact with the skin. The only testimony from Clark regarding the potential dangers of alcohol was that “isopropyl alcohol isn’t necessarily some of the really strong stuff… So … it’s not going to result—not a realistic possibility of a serious injury or illness because of this.” This statement is insufficient to conclude that an employee spilling isopropyl alcohol on his skin would suffer physical injury.

Additionally, the testimony about the resin drum was unclear as to how employees were potentially going to come into contact with the resin. Clark testified that there was a resin drum that had a partially open lid with one end of a “U-shaped” hose inserted inside the drum and the other end outside the drum. Clark speculated that an employee would need to remove the hose

from the drum at some point, which would expose the employee to the resin on the portion of the hose that had been inside the drum. However, there was no evidence that employees were actually performing this hose-removal task with any skin exposed. Additionally, Clark did not observe employees involved in this task and Clark did not ask anyone about the process.

The Division did not meet its burden of proof with regard to establishing that there was employee exposure to hazardous liquids capable of inflicting physical injury upon contact with the skin. Accordingly, Citation 1, Item 4, is dismissed.

6. Did Employer select, and have each affected employee use, the types of personal protective equipment that will protect employees from the hazards identified in its hazard assessment?

Employer was cited for a violation of section 3380, subdivision (f), which pertains to selection of personal protective devices and provides:

(f) Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
(B) Communicate selection decisions to each affected employee; and,
(C) Select PPE that properly fits each affected employee.

In Citation 2, the Division alleged:

Prior to and during the course of the inspection, including but not limited to, on November 30, 2016, the employer did not assess the workplace to determine if hazards are present or are likely to be present, which necessitate the use of personal protective equipment (PPE). The employer did not select types of PPE to protect affected employees from the chemical hazards likely present, including but not limited to, MS211 Nusil tetrahydrofuran (tetrahydrofuran), MS072 xylene (xylene, toluene, ethylbenzene), formaldehyde and hydrochloric acid, nor did the employer have each affected employee use the types of PPE that would protect the employee

from the chemical hazards present, including but not limited to, MS211 Nusil tetrahydrofuran (tetrahydrofuran), MS072 xylene (xylene, toluene, ethylbenzene), formaldehyde, and hydrochloric acid in Manufacturing.

Based on the testimony and legal argument proffered by the Division in support of Citation 2, the Division asserts that the basis for its issuance of the citation is the gloves employees were provided for their work in the manufacturing rooms.

Employer's Environmental Health & Safety Coordinator, Jonathan Hall, testified that Employer selected PPE based on a hazard assessment dependent upon the chemicals being used. Employer's former Environmental Health & Safety Manager, George Alva (Alva), testified that Employer performed hazard assessments regularly.[3] The hazard assessment required that the evaluator look for sources of hazards of all types, including chemical exposure via inhalation, ingestion, skin contact, eye contact, or injection.

Specifically, Employer's hazard assessment addressed the numerous types of hazards to which the employees' hands were exposed. Employer created a glove matrix that informed the employees which gloves were available and the purposes of the various types of gloves. Employer's witnesses testified that the gloves were available at the job site if the employees requested them from the warehouse.

Although Employer had a PPE program that identified gloves sufficient for the various hazards, the witnesses testified that the various types of gloves were not readily accessible. Several witnesses who worked in manufacturing rooms provided consistent testimony that the only gloves that were located in the rooms were clear "food service" gloves that melted instantly when they came into contact with many of the chemicals with which the employees were working. Although the employees conceded that other types of gloves were available from the warehouse or the Research and Development department at a separate location from the manufacturing rooms, the witnesses' testimony told a common story of frustration with obtaining other gloves due to difficulty finding the gloves, lengthy periods waiting for someone to retrieve the gloves, and the other gloves not fitting properly. Clark testified that he requested gloves during one of his visits to the job site and it took ten minutes for someone to bring them to him.

The employees testified that their supervisors saw them using the inadequate or inappropriate gloves and did not instruct them to change gloves. Lilly testified that his supervisor instructed him to wear several pairs of the thin food service gloves if one pair was insufficient for his task, but the multiple pairs still dissolved after a few minutes. Jason Varin testified that he tried

[3] Although the hazard assessments submitted as Exhibit T are from August 2017, Alva testified that Employer performed hazard assessments during prior years using a different format. Alva's testimony is credited because the instructions for how to perform hazard assessments submitted with Exhibit T are dated September 2009.

on multiple occasions to obtain a thicker glove than the food service gloves, but the warehouse did not have any larger options that fit his hands.

The preponderance of the evidence presented results in a finding that Employer did not ensure that its employees used the proper PPE, gloves, for the various hazards to which they were exposed. Because section 3380, subdivision (f), requires that an employer not only select proper PPE, but "have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment[,]" Employer's attempted compliance with the safety order was inadequate. Accordingly, Citation 2 is affirmed.

7. Did the Division establish that Employer failed to promptly monitor when and where employees reported symptoms that may be consistent with exposure to a contaminant known to have been released in their work area?

Employer was cited for a violation of section 5155, subdivision (e)(1), which provides, in relevant part:

> (e) Workplace Monitoring.
>
> > (1) Whenever it is reasonable to suspect that employees may be exposed to concentrations of airborne contaminants in excess of levels permitted in section 5155(c), the employer shall monitor (or cause to have monitored) the work environment so that exposures to employees can be measured or calculated.

In Citation 3, the Division alleged:

> Prior to and during the course of the inspection, including but not limited to, on November 30, 2016, employees worked with hazardous substance [*sic*] including, but not limited to, MS211 Nusil tetrahydrofuran (tetrahydrofuran), MS072 xylene (xylene, toluene, ethylbenzene), hydrochloric acid, and acetone, during production operations including but not limited to Manufacturing Rooms 1, 3, 4 and 8. The Employer did not monitor the work environment so that employees' exposure to concentrations of airborne contaminants including but not limited to, MS211 Nusil tetrahydrofuran (tetrahydrofuran), MS072 xylene (xylene, toluene, ethylbenzene), hydrochloric acid, and acetone, could be measured.

As referenced in the cited safety order, section 5155, subdivision (c), provides, in relevant part:

> (c) Exposure Limits.
>
> (1) Permissible Exposure Limits (PELs).
>
> (A) An employee exposure to an airborne contaminant in a workday, expressed as an 8-hour TWA [Time Weighted Average] concentration, shall not exceed the PEL specified for the substance in Table AC-1.
>
> (B) When substances have additive health effects as described in section (B) of the Appendix to section 5155, the value of D shall not exceed unity.
>
> […]

Section 5155, subdivision (e)(1), demands prompt monitoring where employees are experiencing symptoms that may be consistent with exposure to an airborne contaminant known to have been released in their work area. In all of its prior decisions regarding the duty to monitor under section 5155, subdivision (e)(1), the Appeals Board has assessed the existence of reasonable suspicion based primarily on the release of a known airborne contaminant and the symptoms reported by employees.

In *Kaiser Steel Corporation*, Cal/OSHA App. 83-1069, Decision After Reconsideration (Oct. 9, 1985), the Appeals Board interpreted section 5155, subdivision (e)(1), to require that once reasonable suspicion of exposure to an airborne contaminant arises, particularly symptoms of possible exposure, that the suspicion be dispelled by prompt atmospheric monitoring. "Employer could have satisfied its duty to monitor under section 5155[, subdivision (e)(1),] by simply placing a tube designed specifically to test for styrene in the area of the Jungle Cruise." (*Disneyland*, Cal/OSHA App. 97-2357, Decision After Reconsideration (Jun. 8, 2001) [styrene was used on a catwalk and employees reported strong odor and experienced headaches, nausea and other symptoms.]) These previous Appeals Board decisions contradict the Division's assertions that Employer was obligated to perform monitoring of the employees' breathing space for eight hours to establish whether there was an exposure greater than the PEL for a suspected chemical.

There was ample documentary and testimonial evidence that Employer performed area monitoring when there was a complaint of a strong odor or other concerns reported by employees. (See Exhibit 8.) When testing revealed a concentration greater than the PEL, Employer resolved the problem. The most recent date of testing after a complaint is August 2016, which revealed a concentration of ammonia well below the PEL. There was no evidence presented of any complaints

or other events giving rise to a reasonable suspicion of employee exposure to airborne contaminants in excess of the PEL since August of 2016.

The Division argued that "[a]rea based monitoring for a short period of time conducted sometime after a complaint is made and for a limited chemical spread is not sufficient because it did not monitor all chemicals utilized at the site and did not comply with the computation of how to calculate an 8-hour TWA." (Division Post-Hearing Brief, p. 17, lns. 16-19.) However, the evidence adduced at hearing was that all instances with the potential to raise a reasonable suspicion requiring monitoring took place in August of 2016 or prior. Even if Employer's air monitoring was inadequate to satisfy the Division's determination that an eight-hour sample was required, none of the allegedly noncompliant instances fell within the six-month statute of limitations for issuance of the citation.

a. Statute of Limitations

As set forth above, Labor Code section 6317 requires that citations or notices issued for alleged violations must be issued not more than six months after the occurrence of the violation. Additionally, Labor Code section 6317 provides that "an 'occurrence' continues until it is corrected, or the division discovers the violation, or the duty to comply with the violated requirement ceases to exist." Citation 3 was issued on May 30, 2017.

The Division argued that Employer's failure to conduct employee monitoring pursuant to section 5155, subdivision (e)(1), is a continuing violation. The Appeals Board has previously held that, regardless of when a violation is initiated, its "occurrence" continues until it is corrected. (See *Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (April 5, 2002).) The Division must issue a citation within six months of exposure to a hazard unless the hazard is not abated and employees continue to be exposed to the hazard, whether or not an actual exposure event occurred during the prior six months. (*Pacific Telephone Co. dba AT&T*, Cal/OSHA App. 06-5053, Denial of Petition for Reconsideration (Aug. 11, 2011); *United Airlines, Inc.*, Cal/OSHA App. 83-595, Decision After Reconsideration (Apr. 24, 1986) [exposure to inclement weather not shown in six months prior to violation, but violation continued as long as Employer failed to provide personal protective equipment.])

However, there is no evidence that the isolated instances where there was a reasonable suspicion of excessive levels were not remedied long before the six-month statute of limitations period. The testimony from the six manufacturing employees related instances where there may have been exposure to concentrations of airborne contaminants in excess of PELs, but none of those instances occurred during the six months prior to the issuance of the citation. Indeed, most of the witnesses were employed by Employer for many years, with several of them leaving the company long before the inspection occurred. One of the Division's witnesses, Richard Jamison,

stopped working for Employer in 2013, so everything he testified about occurred between 2001 and 2013. The three Division witnesses that worked for Employer during the six months prior to the issuance of the citations did not provide any testimony that there were circumstances that would lead Employer to reasonably suspect that they were exposed to concentrations of airborne contaminants in excess of PELs. The employees who testified about a spill or a strong odor gave no information regarding when these events may have happened. For example, Lilly testified about times that he needed to leave the manufacturing room because of strong odors, but he worked for Employer during the period of 2011 to February 2016. Lilly's testimony lacked sufficient information to determine if his complaints occurred during the period at the beginning of his employment or the end. Additionally, Lilly was not working during, and therefore provided no testimony about, the six-month period before the issuance of Citation 3 on May 30, 2017.

In sum, Employer's response to the instances where there was a reasonable suspicion of exposure to excessive concentration of chemicals was not a violation of section 5155, subdivision (e)(1). Furthermore, even if Employer's testing was inadequate, the issuance of Citation 3 is void due to the fact that it was more than six months since the most recent alleged violation in August 2016, when a complaint of an ammonia odor was determined to be present at a much lower concentration than actionable. The alleged monitoring violation is not a continuing violation because there was no evidence that there was a continuing reasonable suspicion of exposure to excessive concentrations. Therefore, the duty to comply with the violated requirement ceased to exist when the suspected exposure was remedied.

Accordingly, Citation 3 is dismissed.

8. Did Employer establish that it met the exception to the requirement that it monitor employees to determine their potential exposure to formaldehyde?

Employer was cited for a violation of section 5217, subdivision (d)(1), which provides:

(1) General.

(A) Each employer who has a workplace covered by this standard shall monitor employees to determine their exposure to formaldehyde.

(B) Exceptions.

Where the employer documents, using objective data, that the presence of formaldehyde or formaldehyde-releasing products in the workplace cannot result in concentrations of airborne formaldehyde that would cause any employee to be exposed at or above the action level or at or above the STEL [Short-Term Exposure Limit] under foreseeable

conditions of use, the employer will not be required to measure employee exposure to formaldehyde.

(C) When an employee's exposure is determined from representative sampling, the measurements used shall be representative of the employee's full shift or short-term exposure to formaldehyde, as appropriate.

(D) Representative samples for each job classification in each work area shall be taken for each shift unless the employer can document with objective data that exposure levels for a given job classification are equivalent for different work shifts.

In Citation 4, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on November 30, 2016, employees worked with formaldehyde in Manufacturing Rooms, including but not limited to Manufacturing Rooms 1, 3, 4 and 8 wherein the employer did not monitor the work environment to determine either the full shift or short-term employee exposure to airborne formaldehyde.

Section 5217, subdivision (a), sets forth the scope and application of the standard: "This standard applies to all occupational exposures to formaldehyde, i.e. from formaldehyde gas, its solutions, and materials that release formaldehyde." Despite the Division's allegation in the AVD for Citation 4, Employer's employees did not work with formaldehyde. Employer does not use the chemical in its processes, none of the previous monitoring for formaldehyde revealed any detectable levels, and the multiple post-inspection monitoring reports performed by three outside consulting firms and a comprehensive monitoring report completed by Employer all revealed no detectable levels of formaldehyde in any of the manufacturing rooms. However, one of the chemicals used by Employer, D4, has the capability of forming formaldehyde vapors when heated to temperatures above 150 degrees Celsius in the presence of oxygen. (Ex. 3, p. 3.) As such, Employer is subject to the provisions of section 5217.

Employer argues that it was in compliance with the safety order because it had objective data that the presence of formaldehyde or formaldehyde-releasing products in the workplace cannot result in concentrations of airborne formaldehyde that would cause any employee to be exposed at or above the action level or at or above the short-term exposure limit (STEL) under foreseeable conditions.

Employer asserted that the procedures used in its manufacturing make the creation of formaldehyde highly improbable. First, Employer's processes are performed under vacuum. The witnesses testified about how they create a vacuum in the vessels and add nitrogen to ensure that

all oxygen has been removed from the vessels before they introduce D4 and heat. The testimony was consistent among the witnesses that removing oxygen is required in order to eliminate the fire risk. This lack of oxygen in the process also makes it less probable that formaldehyde will be created. As such, the foreseeable conditions under which D4 was used would not have the key component set forth on the SDS, which is heated "in the presence of air."

Jones, a chemist in Employer's Research and Development department, performed laboratory testing with D4 to ascertain whether Employer's processes were capable of creating formaldehyde. Jones testified that she was unable to replicate the exact conditions in the manufacturing rooms because she was working with an open system and could not create as complete a vacuum as existed in the manufacturing process. In the laboratory, Jones was working with glassware that was open to the air, so she attempted to use nitrogen and had a vacuum pump, but the level of oxygen present was significantly higher than that present in the manufacturing process. In contrast, the manufacturing process used a negative pressure exhaust vacuum that went through a scrubber and discharged outside of the building.

Jones heated the D4 in the presence of this higher level of oxygen and did not generate levels of formaldehyde that exceeded the PEL until the temperature reached 200 degrees Celsius. Jones testified that the vessels used in the manufacturing process are heated to 175 or 180 degrees Celsius. The PEL for formaldehyde is 0.75 parts per million (ppm) and the laboratory test generated 0.440 ppm at 175 degrees Celsius and 0.810 ppm at 200 degrees Celsius. Again, these levels were created in the presence of more oxygen than Employer's typical manufacturing conditions.

Jones' laboratory testing was not performed under the exact conditions that existed in the manufacturing rooms; in fact, it was under less-favorable conditions. That is, Jones established objective data that the levels of formaldehyde produced *in the presence of oxygen* at temperatures used during the typical manufacturing process were not at or above the action level. Because oxygen is required to form formaldehyde from D4, Employer's process that creates a stronger vacuum would generate even less formaldehyde than the amounts produced in the laboratory test.

Additionally, when employees reported that they believed they smelled formaldehyde in Manufacturing Room 8, Employer performed monitoring to determine if there was an issue. The documented test results of monitoring in December 2013 and January 2014 reveal no detectable levels of formaldehyde. On three separate days in 2013 and 2014, in two locations within Room 8, Employer conducted testing over a period of six to eight hours and there was no formaldehyde detected. There was additional testing performed in 2015 and 2016, with no detectable formaldehyde on any of the dates. Thus, Employer had objective data in the form of testing after employee complaints of odor.

In sum, Employer was not required to monitor its employees for formaldehyde exposure because it had the objective data that excused such monitoring pursuant to section 5217, subdivision (d)(1).

Accordingly, Citation 4 is dismissed.

9. Was Citation 1, Item 3, properly classified as a General violation?

Employer's appeal asserted that the classification of Citation 1, Item 3, was incorrect. Citation 1, Item 3, is classified as a General violation. Section 334, subdivision (b), defines a General violation as "a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."

Determining the level of exposure to airborne contaminants for purposes of selecting appropriate respirators has a relationship to employee health. Employer's employees work with potentially hazardous chemicals. The inhalation of those chemicals directly impacts their health. Accordingly, Citation 1, Item 3, is properly classified as General.

10. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

Labor Code section 6432 provides, in relevant part:

(a) 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 actual hazard may consist of, among other things:
(1) A serious exposure exceeding an established permissible exposure limit.

(2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.
[…]

(e) "Serious physical harm," as used in this part, means any injury or illness, specific or cumulative, occurring in the place of employment or in connection with any employment, that results in any of the following:

(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.

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

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Clark testified that he was current on his Division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citations as Serious.

The Appeals Board has defined the term "realistic possibility," as used in Labor Code section 6432, subdivision (a), to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) In order to meet its burden of establishing the rebuttable presumption of a Serious violation, the Division must introduce satisfactory evidence demonstrating the types of injuries that could result from the actual hazard created by the violation and the possibility of those injuries occurring. (*MDB Management, Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).)

For Citation 2, Clark testified that the hazard involved in failing to require employees to wear the appropriate gloves is that exposure to chemicals used by Employer could affect target organs and cause "skin issues." When asked about the basis for his determination that Citation 2 was Serious, Clark said: "It was a realistic possibility of serious injury or illness and a lot of it has to do with these chemical exposures of ongoing effects such as breathing issues, you know kind of the dermal issues, the skin issues, body organs. You know so these different type of things, which are really a loss of function or the efficiency of the body. You know a person not having the energy that they used to and these type of things."

Clark also testified that he reviewed the chemicals' SDS, Table AC-1 (part of section 5155), and some information he found online from various government agencies: National Institute for Occupational Safety and Health (NIOSH); Centers for Disease Control and Prevention (CDC); and the Environmental Protection Agency (EPA). The Division requested that the Appeals Board take official notice of the materials Clark printed from the three agencies' websites. Employer objected to the Division's Request for Official Notice.

a. Official Notice

Section 376.3 sets forth the matters of which the Appeals Board may take official notice:

a) In reaching a decision, official notice may be taken, either before or after submission of the proceeding for decision, of any generally accepted technical or scientific matter within the field of occupational safety and health, and determinations, rulings, orders, findings and decisions, required by law to be made by the Division, the Appeals Board or the Standards Board.

(b) The Appeals Board shall take official notice of those matters set forth in Section 451 of the Evidence Code, including but not limited to:

(1) The decisional, constitutional, and public statutory law of this State and of the United States and the provisions of any county or city charter;

(2) The contents of each occupational safety and health standard and order or notice of the repeal of such standard and order;

(3) The true signification of all English words and phrases and of all legal expressions;

(4) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

(c) The Appeals Board may take official notice of those matters set forth in Section 452 of the Evidence Code, including but not limited to:

(1) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States;

(2) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States;

(3) Records of any court of this state or any court of record of the United States or of any state of the United States;

(4) Facts and propositions that are of such common knowledge within California that they cannot reasonably be the subject of dispute;

(5) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

The Division asserts that the seven printouts from CDC and EPA websites are "government reports" that are permitted to be considered for the taking of official notice. The printouts are: "pocket guides" to acetone, benzene, and formaldehyde; "chemical safety cards" for dichlorosilane and trichlorosilane; a NIOSH publication regarding carcinogenicity of formaldehyde; and a hazard summary for hydrochloric acid. The materials are technical and voluminous, with references to information presumably found in other parts of the websites but not included with the materials submitted by the Division.

The Division has not identified what portions of the materials are pertinent to its case, asserting only that they "relate to the scientific data of chemicals alleged by the Division to be at issue in this case." (Division's Request for Official Notice, p. 4, ln. 22.) Of note, two of the chemicals included in the Division's request, dichlorosilane and trichlorosilane, were not listed in the citations, were never mentioned during the hearing, and were not discussed in the parties' post-hearing briefs. This overbroad submission of dozens of pages of information without indicating the premise for which the data should be used diminishes the usefulness of the information for any proposed purpose.

Although the website materials are likely considered government reports, and categorized as "official acts of the legislative, executive, and judicial departments of the United States," the taking of official notice is discretionary. (§376.3, subd. (c).) For all of the above reasons, the Division's Request for Official Notice is denied. The exhibits attached to the Request for Official Notice were marked for identification as Exhibit 15 during the hearing. Therefore, Exhibit 15 is not admitted into the record.

b. Clark's Testimony Regarding Serious Classification

As set forth above, the Division must produce "some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MDB Management, Inc.*, *supra*, Cal/OSHA App. 14-2373.) "While it may well be that industrial trucks,

by their very nature present a hazard of crushing actions to feet, the assertion must still be proven by the Division through credible and sufficient evidence; *it will not be assumed*." (*Home Depot USA, Inc*., Cal/OSHA App. 1011071, Decision After Reconsideration (May 16, 2017). [Emphasis added.])

Although Clark is presumed to be competent to testify about the Serious classification, his testimony was insufficient to meet the Division's burden of proof. He made vague statements and generalities about how employees might be exposed to certain chemicals through the skin. However, while there may be potential skin exposure, Clark's testimony failed to demonstrate any possibility that the exposure might result in serious physical harm or death. None of the vague references to possible results of skin exposure were described as requiring hospitalization, loss of a body part, permanent disfigurement, or significant impairment of body function. The Appeals Board will not make an assumption that the failure to require employees to wear appropriate gloves may result in any of these serious consequences and the Division did not meet the relatively low threshold of establishing that serious physical harm could result.

Accordingly, the Division failed to establish that the violation cited in Citation 2 was properly classified as Serious. Citation 2 is amended to a General violation.

11. Are the proposed penalties for Citation 1, Item 3, and Citation 2 reasonable?

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

Citation 1, Item 3

The Division submitted into evidence the Proposed Penalty Worksheet (C-10) and Clark testified about the calculations used to establish the proposed penalty for Citation 1, Item 3. Employer did not present any evidence or argument to rebut the presumption that the penalty was calculated properly, the regulations were misapplied, or there was a circumstance warranting a reduction. As such, the penalty is determined to have been calculated in accordance with the Division's policies and procedures.

Accordingly, the penalty of $935 for Citation 1, Item 3, is reasonable.

Citation 2

As set forth above, the Division followed its policies and procedures with regard to application of adjustment factors when calculating the penalties for the citations. However, because Citation 2 was modified to a General violation, the penalty must be recalculated using a lower Base Penalty amount to calculate a final adjusted penalty.

The Base Penalty for a General violation is determined by assessing the Severity of the violation. The Division's C-10 does not indicate a Severity for Citation 2 because it was previously classified as Serious, and all Serious citations are deemed to have a Severity level of High. The appropriate assessment of Severity is based on factors set forth in section 335, subdivision (a)(1)(A):

i. When the safety order violated pertains to employee illness or disease, Severity shall be based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease which could result from the violation. Depending on the foregoing, Severity shall be rated as follows:

LOW-- No time loss from work or normal activity; or minimum discomfort.

MEDIUM-- Loss of part or all of a day from work or normal activity including time for medical attention; or moderate temporary discomfort.

HIGH-- Loss of more than one day from regular work or normal activity including time for medical attention; or considerable temporary discomfort.

ii. When the safety order violated does not pertain to employee illness or disease, Severity shall be based upon the type and amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Depending on such treatment, Severity shall be rated as follows:

LOW-- Requiring first-aid only.

MEDIUM-- Requiring medical attention but not more than 24-hour hospitalization.

HIGH-- Requiring more than 24-hour hospitalization.

Because the types of injuries or illness potentially resulting from a violation of section 3380, subdivision (b)(1), were not clearly specified and the Appeals Board does make assumptions, the Severity of the violation is rated as Low. Pursuant to section 336, subdivision (b), a Low Severity results in a Base Penalty of $1,000. (§336, subd. (b).)

The Division assigned the Extent and Likelihood factors at a rating of Medium and those assessments will not be disturbed because they were made in accordance with the Division's policies and procedures. As such, the resulting Gravity-Based Penalty is $1,000. (§336, subd. (b).)

Also in accordance with its policies and procedures, the Division applied adjustment factors of 15 percent for Good Faith and 10 percent for History, resulting in a reduction of the Gravity-Based Penalty of 25 percent, or $250.

Clark testified that, although Employer abated the violation for Citation 2, it was not completed within ten days of the abatement date set forth on the citation. As such, no abatement credit is applied to the penalty. (See §336, subd. (e)(2).)

The final Adjusted Penalty for Citation 2 is $750, which is found to be reasonable.

Conclusions

For Citation 1, Item 1, Employer was required to report Lilly's serious illness to the Division. Although Employer failed to report the serious illness as required by section 342, subdivision (a), the Division did not issue a citation for the violation within the six month statute of limitations.

For Citation 1, Item 2, Employer did not violate the provisions of section 14300.5, subdivision (b)(3), because it had reliable medical information that Lilly's and O'Bryan's illnesses or injuries were not work-related.

For Citation 1, Item 3, Employer violated section 5144, subdivision (d)(1), because it failed to properly evaluate respiratory hazards in the workplace because it did not determine employee exposure to a concentration of an airborne contaminant that would occur if the employee were not using respiratory protection. Citation 1, Item 3, was properly classified as General and the proposed penalty is reasonable.

For Citation 1, Item 4, the Division did not establish a violation of section 3302, subdivision (a), because there was no evidence of employee exposure to hazardous liquids capable of inflicting physical injury upon contact with the skin.

For Citation 2, Employer violated section 3380, subdivision (f), because it did not have each affected employee use gloves that would protect them from the hazards identified in hazard assessments. Citation 2 is amended to a General violation and the proposed penalty is amended as set forth herein.

For Citation 3, the Division did not establish a violation of section 5155, subdivision (e)(1). Employer monitored the work environment when there was a reasonable suspicion that employees may be exposed to concentrations of airborne contaminants in excess of permissible levels. The Division did not establish that there were any instances of which Employer should have reasonably suspected excessive concentrations within the six months before issuance of Citation 3. There were no suspected instances that were unresolved to the extent that they would be considered to be a continuing violation of the obligation to monitor.

For Citation 4, the Division did not establish a violation of section 5217, subdivision (d)(1), because Employer documented, using objective data, that the presence of formaldehyde or formaldehyde-releasing products in the workplace cannot result in concentrations of airborne formaldehyde that would cause any employee to be exposed at or above the action level or at or above the STEL under foreseeable conditions of use. Therefore, Employer was not required to measure employee exposure to formaldehyde.

Order

It is hereby ordered that Citation 1, Items 1, 2 and 4, are vacated.

It is hereby ordered that Citation 1, Item 3, is affirmed and the penalty of $935 is sustained.

It is hereby ordered that Citation 2 is affirmed as a General violation and the penalty is modified to $750.

It is hereby ordered that Citations 3 and 4 are vacated.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: 03/10/2020

Kerry Lewis
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**