00-14715

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Petition Would Effectively Ban Engineered Stone

The Western Occupational and Environmental Medical Association (WOEMA), which in 2023 petitioned the Cal/OSHA Standards Board for an emergency standard to better protect workers in California's countertop fabrication industry, now says it is time to ban fabricating engineered stone altogether.

WOEMA has requested "expedited" rulemaking to prohibit "all fabrication and installation tasks," including cutting, grinding, and polishing engineered stone that contains more than 1% crystalline silica. "This action is necessary in light of the continuous epidemic of silicosis that is causing disabling disease and death among California fabrication workers as a result of their workplace exposure to silica dust," writes WOEMA President Rosalie Banasiak, MD, FACOEM.

The organization says safer alternatives have emerged on the market that are crystalline silica-free, have the same look and feel as engineered stone, and won't disrupt the market. The Standards Board heard this week from Dr. Robert Harrison, a former Board member, about his findings from a trip to Australia to learn how the nation has adapted since banning engineered stone in 2024.

Cal/OSHA adopted a temporary emergency standard in 2023 and, in December 2024, permanent revisions that banned wet-cutting of engineered stone for "high-exposure trigger tasks" when the stone contains at least 0.1% crystalline silica. Since then, the Division of Occupational Safety and Health has stated that even wet-cutting of the material releases some silica.

'The Evidence is Now Clear'

Banasiak says WOEMA appreciates the efforts of the Board for "implementing tougher standards in the last two years," but states, "the evidence is now clear that engineered stone containing crystalline silica is too toxic to fabricate and install safely, and education and enforcement alone will not be sufficient to curtail the escalating occupational health emergency caused by this product."

Occupational health physician and WOEMA member Dr. Robert Blink, MPH, FACOEM (and a former Standards Board member), tells *Cal-OSHA Reporter,* "This is by far the most acute, life-threatening and dangerous thing I've seen in my practice. There's nothing even close to it. It really requires extraordinary measures. What we've got in place simply isn't good enough."

> "This action is necessary in light of the continuous epidemic of silicosis."
> – Dr. Rosalie Banasiak

Wouldn't an outright ban require legislative action? Blink says legislation "would be a good way to deal with this and I think ultimately probably will be required, but the legislative process takes a long time and is influenced by a lot of factors."

He estimates that there are roughly 4,000 workers in engineered stone fabrication in California ("We don't know the true number, that's part of the problem, but it's probably in that realm," he says). But he believes that about 25% of those 1,000 workers who likely will develop silicosis will die from pulmonary fibrosis. Silicosis takes about five years to kill a person, so that means about 200 of those unfortunate workers could die per year.

"Engineered Stone" *continued on page 14720*

IN THIS ISSUE

It is 9,028 days since our last lost-time accident.

New VPP, Reach, SHARP & Golden Gate Employers

The Cal/OSHA Consultation Service has recognized 18 employers for their safety efforts, including requalification for the Voluntary Protection Program, certification into VPP-Construction, the Reach program for employers working toward VPP, the Safety and Health Achievement Recognition Program (SHARP), and the Golden Gate Partnership Program.

VPP Recertifications

Cintas Corp. for its facility in Gilroy. The uniform plant features 165 employees and originally received VPP certification in November 2018. Cintas has an experience modification rating (EMR) of .49 and workers' comp coverage with LM Insurance.

Sacramento Municipal Utility District's Hydroelectric Generation-Fresh Pond facility in Pollock Pines. The electricity plant has 89 employees and originally qualified for VPP in November 2019.

Sunoco LP's Crockett Terminal has been a VPP site since October 2011. The fuel storage facility features 22 employees. Sunoco has an EMR of .69 and workers' comp through ACE American Insurance.

VPP-Construction

The new VPP-C site is the **Shea Homes Enclave Project** in Pleasanton. Shea has almost 100 employees at the single-family home site, with a .87 company EMR and workers' comp through Liberty Mutual Fire Insurance.

VPP-Reach

San Diego Gas & Electric for its Kearny Transmission and Substation Operations. The facility employs more ☞

Saying –30– to 2025

The typographical mark "—30—" means the end of the story. And with this issue we say good-bye to 2025, *Cal-OSHA Reporter's* 52nd year of publication. After our annual Christmas/New Year's break, we will return with our January 9th, 2026, edition.

The new year promises to be busy, with long-awaited regulatory action on employers' first-aid kits and process safety management reforms getting public hearings in January; possible action on a general industry workplace violence standard; the continuing quest to revise rules on the use of autonomous equipment in agriculture; and a new request to ban the use of engineered stone in countertop manufacturing. There will likely be many other important developments.

Cal-OSHA Reporter will be there every step of the way as we enter the latter half of the 2020s. As always, it is our great privilege and honor to serve California's occupational safety and health community.

Have a happy Hannukah, a merry Christmas, and a safe and happy New Year. On to 2026!

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than 250 people. Reach is recognition for employers who are close to qualifying for VPP. SDG&E is permissibly self-insured.

SHARP

Whiting-Turner Contracting Co., based in Irvine, for a Kaiser Permanente project in Aliso Viejo. The company has 135 employees, an EMR of .51, and coverage with Travelers Property Casualty.

Golden Gate Partnership Program

Alcal Specialties, an employer in Rancho Cordova, was recognized for its work on a San Francisco project. The company has an EMR of .90 and workers' comp through LM Insurance.

Briggs Electric, of Tustin, for a Mission Viejo project. This employer has an EMR of .83 and WC from Travelers Property Casualty.

Jurupa Valley's **Christian Brothers Mechanical Services** for a project in Reseda. The employer has an EMR of .89 and workers' comp through AIU Insurance.

H.A. Bowen Electric, based in San Leandro, for working at a Bay Area Rapid Transit station in Oakland. The company has an EMR of .66 and workers' comp through Zurich American.

Maruichi American, a Santa Fe Springs manufacturer of steel tubing and piping. The company has an EMR of .87 and workers' comp coverage with Travelers Property Casualty.

Nichols Pistachios, a Hanford employer, for operations in Seaside, Monterey County. Nichols has an EMR of 182 and coverage through Zenith Insurance.

Orange County Water District in Fountain Valley. OCWD is self-insured.

Quality Production Services, a construction company based in Rancho Dominguez, is working on the aforementioned Reseda project. The company has an EMR of .84 and insurance with Zurich American.

Ranker AMG, a Sacramento glazier, is working on a project in the same city. Ranker has an EMR of .70 and is covered by National Union Fire Insurance.

W.L. Butler Construction, a Redwood City contractor, for a project in Irvine. The company has a .92 EMR with w/c from Zurich American.

Walters & Wolf Glass, based in Fremont, for a project in Perris. The contractor has an EMR of .61 and workers' comp with Arch Insurance.

Livermore's WMA Landscape Construction, for project work in Seaside. WMA has an EMR of .97 and is covered for workers' comp by Praetorian Insurance.

Click here to learn about the various Cal/OSHA partnership programs and how you or your clients can qualify.

Citations in Esparto Blast

Amid criminal investigations into the massive and deadly July 1st explosion at an Esparto fireworks storage facility, Cal/OSHA's Division of Occupational Safety and Health has cited the employer for one regulatory and 13 serious violations. The Division seeks $221,000 in penalties against Devastating Pyrotechnics, which is based in San Francisco.

On July 1st, fireworks stored at a rural facility exploded, an event captured by a Sacramento news helicopter. Seven people died in the explosion. The company, owned by Kenneth Chee, 48, and others, provided fireworks for municipal Fourth of July and New Year's shows around the state.

According to Wendy Wilcox, executive assistant to Yolo County District Attorney Jeff Reisig, CalFire is the lead agency investigating the incident. The Yolo D.A.'s office is also involved.

Cal/OSHA's Bureau of Investigations also is investi-

Citations: Devastating Pyrotechnics

Title 8 Section Cited	Citation Type	Alleged Violative Condition	Proposed Penalty
GISO §3203(a)(4)	Serious Accident-Related	Employer did not implement adequate procedures for identifying and evaluating practices on storing and handling pyrotechnic materials.	$16,200
GISO §3220(e)(1)	Serious Accident-Related	Employer failed to provide training on emergency evacuation and did not designate or train sufficient personnel to assist in evacuation.	$16,200
GISO §3221(d)(1)	Serious Accident-Related	Employer failed to apprise employees of the fire hazards associated with the materials at the worksite.	$16,200
GISO §3203(a)(6)	Serious Accident-Related	Employer did not establish procedures to remove all exposed personnel from the area when an imminent hazard existed.	$16,200
GISO §3203(a)(7)	Serious Accident-Related	Employees who worked with and around hazardous pyrotechnic materials were not trained on the explosion, fire and toxic exposure hazards of the compounds.	$16,200
GISO §3380(f0(1)	Serious	Employer failed to conduct a workplace hazard assessment and provide employees appropriate PPE.	$16,200
GISO §5194(e)(1)	Serious	No written hazard communication program.	$16,200
GISO §5194(g)(1)	Serious	Employer failed to obtain or develop Safety Data Sheets for each hazardous chemical used in the workplace.	$16,200
GISO §5194(h)(1)	Serious	No effective information or training on hazardous chemicals present in the work area.	$16,200
GISO §6151(g)(1)	Serious	No training on use of portable fire extinguishers	$16,200
GISO §3668(a)(1)	Serious	Employer failed to ensure that each industrial truck operator was competent to do so.	$16,200
GISO §3395(h)(1)	Serious	Employer failed to provide effective heat illness prevention training.	$13,500
GISO §3395(i)(1)	Serious	No effective heat illness prevention plan.	$13,500
GISO §3650(t)(4)	Serious	Employer allowed employees to ride on a pallet placed on the forks of a lift truck.	$10,800
DOSH §342(a)	Regulatory	Employer failed to immediately report the fatalities from the July 1 incident.	$5,000
Total:			$221,000

gating. "Cal/OSHA's role in this investigation is to focus on worker safety, examining what occurred, determining which workplace safety laws were violated, and identifying the protections and procedures that must be in place to prevent a tragedy like this from occurring again," says Department of Industrial Relations public information officer Denisse Gomez. BOI may refer a case to the district attorney.

The corporation is registered in San Francisco, the home of Kenneth Chee, who is identified as the organization's principal. The property, owned by Jack Lee, the firm's operations manager, was raided under a warrant last July by officers from multiple agencies. According to the *San Francisco Chronicle*, owner Chee "was denied licensing by the Bureau of Alcohol Tobacco, Firearms and Explosives raising questions about the company's legal authorization to operate."

OSHA Defense Veteran Calling it a Career

In the late 1970s, Fred Walter, fresh out of law school, was working in personal injury defense in Southern California's maritime industry. He moved to Northern California, where he found himself doing workers' compensation subrogation work. "It was a step up from collections," he remembers. "I hated it."

Fred Walter

Hated it so much that he was considering becoming a bartender when he met Robert "Bob" Peterson, considered the "godfather" of the Cal/OSHA defense bar. That meeting changed his career. Forty-five years and many cases later, Walter is retiring. Over the past several years, he has been of counsel at the Conn Maciel Carey law firm.

"I was working for a workers' comp law firm, and I started calling around other attorneys, asking if they did OSHA defense," he tells *Cal-OSHA Reporter*. "None of them did. I called Bob and said, 'I don't know about this. I mean, nobody does this.' His answer was, 'Yeah, isn't it great?'"

Peterson, the first chief counsel for the Cal/OSHA Appeals Board, pioneered the defense bar. "After a few years of turning around the battleship, I was the second one doing it full time," Walter says.

Going Legalistic

The Healdsburg-based attorney says the early days of Cal/OSHA were a less formal process and has, over the years, become more legalistic. "When I started out in the '80s, it was you against a district manager. They would call the legal department for advice on how to handle the hearing, but it was rare that you'd see a [Division of Occupational Safety and Health] attorney show up. Now they've got a lot of them."

He likens what's happened with the Cal/OSHA system to how deltas form. "I knew this was going to happen from the beginning. Rules accrete like a delta," Walter observes. The original intent of the appeals system was that employers could represent themselves. "Now it's lawyer against lawyer and it's so much more adversarial."

"Rules accrete like a delta"
– Fred Walter

Walter also laments that it's become harder and harder to communicate with Cal/OSHA inspectors, and, more importantly, that they lack the real-world experience that previous inspectors possessed. To become a compliance, safety, and health officer (CSHO) these days, candidates must hold an engineering degree. "They're hiring people straight out of college, and they really don't get it."

DOSH and the Department of Industrial Relations are considering changes to the system that would consider work experience in hiring CSHOs, but when such reforms could take effect is unknown at this point.

Fewer Defenses

Walter also laments the fact that DOSH now has a policy of not reducing serious, accident-related classifications without approval by the Legal Unit, although he notes, "The closer you get to hearing, the more reasonable they become." But many employers, particularly construction companies, will fight tooth and nail to avoid a serious violation because it could hurt their chances of bidding for work in the prequalification stage. "They don't want that serious on their record."

Hearings have gotten supersized, as well. "When I started out, it would be me and the [administrative law] judge, who would travel to the district office for the hearing, routine-

ly in the district office's conference room. You'd start at nine and be done by 11:30 or 12, then go out to lunch." These days, hearings are often set for two days, with the first morning devoted to pre-hearing motions and stipulations.

One could argue that the process has become more legalistic, driven by attorneys, starting with Peterson, who have formulated more strategies to defend against citations. Walter says it's just the opposite: "We have fewer defenses to citations than we did before. We only have a couple for serious classifications."

"Most employers I've come across are trying to do the right thing by their employees. I've run across very few who could be described as 'Mr. Burns.'"
– Fred Walter

Walter says the most satisfying part of his job has been working with his clients, both at the Walter & Prince Firm (which dissolved several years ago when Lisa Prince left to start her own firm) and at Conn Maciel. "Especially in the early days, they just had something horrific happen, they were being asked questions, fingers were pointing and they needed somebody to guide them through the process." Walter says he has learned over the years that he has a calming effect on often-chaotic situations.

He adds, "The class of clients I like the best were loggers. They're all small and family owned and most of them are second or third generation. I'd call a client and say, 'We've got an offer to settle, and I think you might want to consider it.' The answer would be, 'Well, that's great, because mom and dad are coming over tonight and we'll talk about it over dinner.'"

The longtime defense attorney says, "Most employers I've come across are trying to do the right thing by their employees. I've run across very few who could be described as 'Mr. Burns.'"

As for his most memorable cases? He remembers an incident he handled in Wilmington where workers had been tasked with cleaning a storage tank with a collapsible roof. The roof was being held up by "little legs," Walter says, but the crew saw that they were unstable and called out the safety manager, who agreed. He was in the process of placing danger tape when the roof collapsed -- killing the safety professional. "That was a hard case," he comments.

Walter says he will not miss deadlines, but will miss his Conn Maciel colleagues. "They are all top notch," he comments.

He says he looks forward to, tackling his list of "honeydo's" and to do some traveling.

"I have great plans for what I'd like to do, starting with sleeping in."

"Engineered Stone"

continued from page 14715

"You're getting a new death every day-and-a-half or so that we delay in prohibiting the substance," Blink asserts. "That's why we're trying to do everything we can."

Dr. Robert Blink

Why pursue expedited rulemaking rather than the emergency version, as WOEMA did with the revisions to the silica standard under General Industry Safety Orders §5204? "Emergency rulemaking does not offer any opposition a chance to make their voice heard," he tells *Cal-OSHA Reporter*. "We want to be open and above-board and hear others' arguments. This is just too important to do things surreptitiously or sloppily."

Safer Alternatives?

Blink asserts that Australia's move away from engineered stone has been virtually seamless, thanks to alternative materials that replicate its look and feel. They are composed of amorphous silica and manufactured in the same manner as the engineered product. "Amorphous silica is a different substance and is much safer," Banasiak says in the WOEMA petition. "A recent Australian government evaluation confirmed that the prohibition is largely working as expected."

"It's basically ground glass," Blink says of amorphous silica, which he calls "nuisance dust" that has not been regulated because it's not considered a serious health hazard. "Crystalline silica particles are sharp and jagged, and seem to do bad things with your cells when they get ingested in the body." He says the amorphous version has been studied extensively over the years. "Now, do we know for sure what's going to happen if you start incorporating it into these products? No, we do not. But what are the chances it's going to be as bad as crystalline?

Occupational health authorities are saying its time to ban the fabrication of engineered stone in Califfornia and have petitioned Cal/OSHA for regulatory changes.

At this point we believe that it's really quite innocuous."

He likens any concerns over the alternatives to "worrying about the ants in the basement when there's an axe murderer in the living room."

> "This is by far the most acute, life-threatening and dangerous thing I've seen in my practice."
> – Dr. Robert Blink

Would the use of alternatives necessitate using the same regulatory scheme currently used for engineered stone? "We're not making any commentary about any substitutes," Blink says, "except for the fact that they do exist and they have been put in place in Australia successfully." He adds that switching to the alternatives has not required "any significant retooling." He says they have "had essentially zero economic impact, no job loss and no financial effects on the suppliers."

If that proves true, it could be a solution to a thorny and seemingly intractable problem. "We can't just stand by and watch people die," Blink says. "We now have more data."

Click here to see the WOEMA petition.

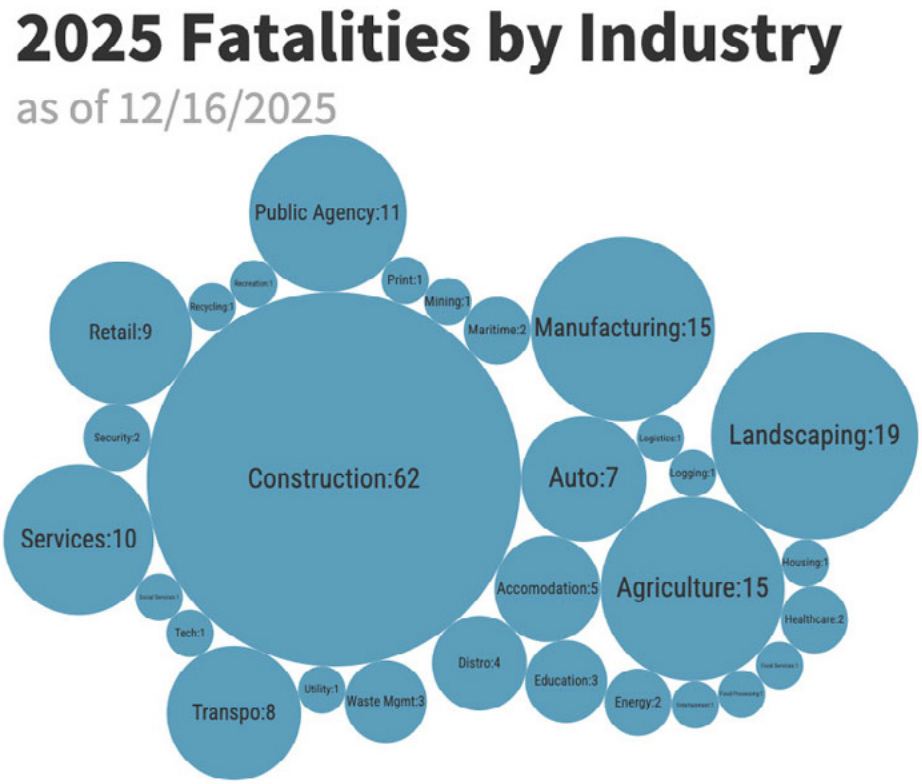
Workplace Fatality Update

There are eight new California workplace fatalities, including three struck-by incidents.

At the Yolo County Central Landfill near Davis, a dump truck driver was killed in his cab while two trucks operated by **Northern Recycling** were unloading. One of the trucks experienced what the county describes as an "industrial accident" that caused its trailer portion to tip over onto the adjacent cab with the driver inside. The driver was pronounced dead at the scene. Yolo County leases the land to Northern Recycling to operate the waste operations. The company has an experience modification rating (EMR) of .63 and workers' comp coverage through New Hampshire Insurance.

In Los Angeles, a tree trimmer employed by **Jesus Crespo Landscaping** suffered fatal head injuries after being struck by a branch that fell from above. The trimmer was pronounced dead at the scene.

In Los Angeles, a self-employed tree trimmer fell up to 30 feet while trimming trees on a residential property. The trimmer succumbed to the injuries after being hospitalized. ☞



Totals for comparable weeks

In Chino, a truck driver for an as-yet unidentified employer was pinned to the ground by a manual metal gate that had rolled off its track. The driver was hospitalized but died of the injuries.

In an act of workplace violence, one employee of the **Los Angeles Sanitation Department** shot another employee at the Glendale Water Reclamation Plant in Atwater Village, then committed suicide. The victim was 35 years old, and the alleged shooter was 30. Los Angeles is permissibly self-insured.

There are three fatal incidents have unknown origins or whether they are work-related. They are:

In Hanford, an employee of TOS Farms was found unresponsive in a walnut tree pruning tower by a coworker and was pronounced dead at the scene. TOS has a .57 EMR and is insured by Travelers Property Casualty.

In Selma, a street sweeper employed by the **City of Selma** was found unconscious inside the equipment he was operating and transported to a hospital, where he was pronounced dead. The city is permissibly self-insured.

In another landscaping incident, an employee of **Ivan Alvarez Vasquez** was found in a residential swimming pool with a gas-powered leaf blower strapped to his back. He was hospitalized but died the same day.

Note: In some cases, *COR* was unable to ascertain license, EMR, or insurance data.

Job Postings

To find out more about our advertising program, contact us at addepartment@cal-osha.com.

SUMMARIES OF RECENT CAL/OSH APPEALS BOARD DECISIONS

Cal-OSHA Reporter is pleased to provide, for our valued subscribers, graphs indicating cited employers' experience modification rating (X-Mods) over the designated years.

FAILURE TO APPEAR – GOOD CAUSE

Labor Code §6611 –

The Appeals Board found that Employer did not demonstrate good cause for its failure to appear.

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LOS ANGELES POLICE DEPARTMENT
49 *COR* 40-9015 [¶23,376R]

Digest of COSHAB's Denial of Petition for Reconsideration dated November 20, 2025, Inspection No. 1599318

Ed Lowry, Chair.

Judith S. Freyman, Board Member.

Marvin P. Kropke, Board Member.

Background. Los Angeles Police Department (Employer) was issued one citation by the Division of Occupational Safety and Health (the Division) on November 23, 2022, subsequent to an inspection conducted on or about June 6, 2022, at a place of employment maintained by Employer. The citation alleged one regulatory and two general violations of Title 8, California Code of Regulations. Employer timely appealed.

The assigned Administrative Law Judge (ALJ) scheduled a status conference for Sept. 2, 2025. The record showed Employer failed to appear and make a showing of good cause. Accordingly, the ALJ issued an Order Dismissing Appeal for Failure to Appear (Order) on Sept. 12, 2025. The Order noted that Employer had failed to appear at an earlier scheduled Feb. 26, 2024 status conference. The Order provided Employer the opportunity to establish that its failure to appear was for good cause, stating that Employer had 15 days to respond, and that if Employer failed to respond in that time the Order would become final. In addition, the Order stated that Employer had the opportunity to file a petition for reconsideration (Petition) within 30 days from the date the Order became final. Employer did not file a response to the Order and instead timely filed a Petition with the Appeals Board (Board). The Division did not answer the Petition.

Decision after reconsideration.

Pursuant to Labor Code §6617, there are five grounds upon which a petition for reconsideration may be based. Here, Employer's petition asserted none of the statutory grounds, reason enough for the Appeals Board to deny the petition. (Lab. Code § 6617; *Busy Bee Painting, Inc.*, Cal/OSHA App. 1701088, Denial of Petition for Reconsideration (Feb. 6, 2025) [**Digest** ¶23,323R].)

Employer's Petition consisted of three declarations stating Employer had elected U.S. Postal Service as the preferred method when it filed its appeal form with the Board. The appeal form was signed by the Deputy City Attorney, one of the three declarants, and it was dated Dec. 27, 2022. However, the Dec. 27 appeal form was not received by the Board prior to being included as an exhibit to the Petition filed by Employer in Sept. 2025. The appeal form which was received by the Board and was part of the record, was signed and dated Dec. 28, 2022 and date-stamped as received by fax on Dec. 30, 2022. The Dec. 28 appeal form selected email as the preferred method of service from the Board. Further, it was noted that the Dec. 27 appeal form was prepared using an outdated version of the Board's appeal form (Rev 9/16), and the Dec. 28 appeal form used the then-current version (Rev 10/20).

It is the employer's burden to establish that its failure to appear was for good cause. (*Kevin Semien*, Cal/OSHA App. 13-1499, Denial of Petition for Reconsideration (May 21, 2014) [**Digest** ¶22,359R].) The Board has held that good cause means "a substantial reason, one that affords a legal excuse." (*Michael Muhareb dba Old Mill Café*, Cal/OSHA App. 1763124, Denial of Petition for Reconsideration (May 6, 2025) [**Digest** ¶23,333R]. The Board has repeatedly stated that certain circumstances do not constitute good cause, including internal operating problems on the employer's part that result in the employer not receiving time-sensitive communications. (*Fabrication Technologies Industries, Inc.*, Cal/OSHA App. 1437646, Denial of Petition for Reconsideration (Feb. 22, 2021).) The Board's long-established precedent is clear that failure to receive mail or email due to internal operating problems or miscommunications does not amount to good cause.

The sole appeal form received timely by the Board selected email as the preferred method of service from the Board. Employer offered no explanation for the breakdown and misunderstanding in the possible attempts to submit the appeal form to the Board. Employer also offered no explanation for why the Deputy City Attorney was not checking his email or why, if there had been an internal decision to change the person handling the appeal, the Board was not informed of the change as required. (Board Regulation §355.1, subds. (b), (c).)

The record showed that the status conference was properly noticed, and that Employer did not appear. Based on the foregoing deficiencies of the Petition, the Board concluded that Petitioner failed to demonstrate good cause.

Conclusion.

The Petition was denied, and the Administrative Order Dismissing Appeal for Failure to Appear was affirmed.

ILLNESS AND INJURY PREVENTION PROGRAM (IIPP)

Title 8, California Code of Regulations, §1509(a) –

The evidence presented demonstrated that the Division met its burden to show that Employer failed to effectively implement its IIPP by adequately analyzing and correcting known hazards at the worksite.

CONSTRUCT, INSTALL OR MAINTAIN POSITIVE STOPS

Title 8, California Code of Regulations, §3324(b) –

The Division did not provide sufficient evidence that there was a failure to install and maintain a positive stop or devices on a horizontal sliding gate.

NOTE: According to the Appeals Board, ALJ decisions are not citable precedent on appeal, i.e., they cannot be quoted when one is appealing a citation. There is nothing in the California Code of Regulations about this: it is by Board precedent. "(U)nreviewed administrative law judge decisions are not binding on the Appeals Board." (*Pacific Ready Mix*, Decision After Reconsideration of 4-23-82, and *Western Plastering, Inc.*, Decision After Reconsideration, 12-28-93.) Decisions After Reconsideration (DARs) are precedential and may be quoted in an appeal.

SERIOUS VIOLATION - REBUTTABLE PRESUMPTION -
Title 8, California Code of Regulations, §334(c)(1)

The proffered evidence showed that Citation 1 was properly classified as Serious as there was actual serious physical harm. Employer did not rebut the presumption.

ASSESSMENT OF CIVIL PENALTIES -
Citation 1 was affirmed, and the proposed penalty was assessed. Citation 2 was vacated.

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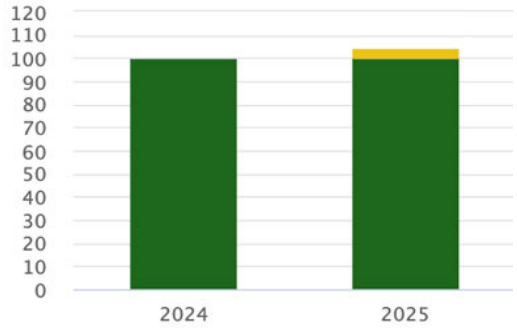
KSJV3 INC. DBA FIVE STAR FENCE
49 *COR* 40-9015 [¶23,377]

Digest *of COSHAB ALJ's Decision dated Nov. 14, 2025, Inspection No. 1722052 (Lancaster)*

Ka H. Leung, Administrative Law Judge

For Employer: George Voskanian, Owner and President

For Division: William Cregar, Staff Counsel



X-MOD GRAPH FROM COMPLINE

Facts. KSJV3 Inc. dba Five Star Fencing (Employer) is a fence fabricator and installer. Between January and June 2024, the Division of Occupational Safety and Health (the Division), through its Associate Safety Engineer (ASE), conducted an inspection at a work site located at 4400 Sahuayo Street, Lancaster, CA (jobsite),

On June 4, 2024, the Division issued two citations to Employer alleging violations of Title 8, California Code of Regulations. The proposed penalties totaled $18,000. The alleged violations included: failure to identify and evaluate a crushing hazard; and failure to construct, install or maintain positive stops or devices on a horizontal sliding gate.

Employer timely appealed, contesting the existence of the alleged violations for each citation, the classifications, the reasonableness of the abatement requirements and the proposed penalties. Employer also asserted multiple affirmative defenses. The Division determined that both citations had been abated prior to hearing, thus the appeal on the unreasonableness of the abatement requirements was determined to be moot. The matter was heard on July 8, 2025 by an Administrative Law Judge (ALJ) and the matter was submitted for decision on Oct. 31, 2025.

Citation 1 -

The Division alleged a violation of §1509(a), which requires employers to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP) with procedures for identifying and evaluating workplace hazards. Furthermore, the Division cited Employer under section 336.10(a) – Multi-Employer Worksite, alleging Employer's employees were exposed to hazards.

The Division bears the burden of proving a violation by a preponderance of the evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001) [**Digest** ¶20,155R].) The Appeals Board has ruled that it must rely on "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" (§376.2), ensuring it meets the necessary reliability standard. (*Sweetheart Cup Company*, Cal/OSHA App. 95-979, Decision After Reconsideration (Nov. 5, 1999) [**Digest** ¶19,709R].)

The Division alleged that, while Employer maintained a written IIPP, it failed to implement it. The facts showed that on Dec. 5, 2023, Employer's employee was welding a sliding metal gate and as he attempted to close the gate for lunch break, it came off the rail, fell and injured him. The Division's District Manager testified that, prior to the accident, the gate's track was installed on a slope, creating a condition where the sliding gate could come off its track and fall, posing a crushing hazard. Employer acknowledged knowing about the slope, which was created by a storm drain. Employer informed the general contractor that the storm drain had to be moved to correct the sloping surface, but the general contractor refused. Employer thereafter installed the gate on a slope.

Employer's IIPP required periodic inspections to identify and assess workplace hazards. When implemented, the IIPP guided the Employer to pause, analyze, and correct potential workplace hazards if anomalies were observed. However, having recognized the slope as a potential hazard, Employer nonetheless proceeded with installation of the metal sliding gate, after being directed by the general contractor. Employer took no further steps to evaluate or implement interim protective measures and continued work. The ALJ determined that had Employer implemented its IIPP, by analyzing and correcting the hazard, the accident likely would have been prevented. Citation 1 was affirmed.

Classification

Citation 1 was cited as Serious under §334(c)(1), which provides that there shall be a rebuttable presumption that a "serious violation" exists in a place of employment if a realistic possibility that death or serious physical harm is demonstrated. The Division testified that there was a realistic possibility that death or serious physical harm could result from the crushing hazard posed by the falling metal sliding gate. In this case, an employee actually sustained multiple bone fractures and was hospitalized for three months as a result. Employer presented no evidence to rebut the presumption. The ALJ concluded that the Division established the Serious classification.

Reasonableness of Penalty

Penalties calculated in accordance with the penalty-setting regulations set forth in §§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.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017) [**Digest** ¶22,708R].)

The Division's District Manager testified that the penalties were calculated in accordance with the Division's policies and procedures. Employer did not produce evidence to rebut the presumptive reasonableness of the calculations. Accordingly, the proposed penalty of $5,400 for Citation 1 was found reasonable by the ALJ.

Citation 2 –

The Division cited Employer for an alleged violation of §3324(b), which provides that positive stops or devices shall be constructed, installed and maintained by a qualified person to resist impact loads.

Employer's owner testified that the gate's end post functioned as a physical stop which prevented the gate from traveling beyond its designed limits. The Division's photographs and engineering drawing of the gate corroborated the owner's testimony regarding the gate's design.

The Division argued, though, that a separate positive stop device should have been installed nonetheless, asserting that such a device should have been mounted to the gate's post. The Division explained that a positive stop was intended to prevent a sliding metal gate from traveling beyond its engineered limits of movement.

The ALJ determined that the photographs submitted did not establish that the gate had traveled beyond its track due to the absence of a positive stop device. There was no physical evidence that the sliding gate had made contact with the end post or traveled beyond its engineered limits. Thus, the ALJ decided that there was no basis to conclude that the end post failed to function as an effective positive stop. The Division failed to provide evidence or examples of why an additional positive stop device was necessary. The ALJ concluded that the Division did not carry its burden of proving a violation of §3324(b). Citation 2, and its associated penalty, was vacated.

Conclusion

Citation 1 was affirmed, and the penalty was sustained.
Citation 2 was vacated.

CODE OF SAFE PRACTICES -

Title 8, California Code of Regulations, §1704(f)

The Division's proffered evidence showed Employer failed to include adequate warnings regarding the safe use of the nail gun in its COSP.

MANUFACTURER'S INSTRUCTIONS –

Title 8, California Code of Regulations, §1704(b)(2)

The Division's proffered evidence showed the nail gun was not operated in accordance with the manufacturer's operating instructions.

TRAINING –

Title 8, California Code of Regulations, §1704(g)

The Division's proffered evidence showed that Employer failed to train its employees on the safe use of the nail gun.

SAFETY ORDER – VAGUE AND UNENFORCEABLE –

The Appeals Board determined that safety order §1704(f) was not unconstitutionally vague or ambiguous. Employer had adequate notice of the violation of the training requirement.

CITATION NOTICE/PARTICULARITY –

Labor Code §6317

The Appeals Board determined that the citation described with particularity the nature of the violation affording Employer due process.

SERIOUS CLASSIFICATION AND REBUTTABLE PRESUMPTION –

Labor Code §6432(a) –

Citations 2 and 3 were properly classified as Serious as there was a realistic possibility of serious physical harm. Employer did not rebut the presumption.

ACCIDENT-RELATED CHARACTERIZATION –

The Appeals Board agreed with the ALJ's determination that the Division demonstrated a causal nexus between the violation and serious injury for Citation 2.

ABATEMENT –

Employer did not demonstrate that the abatement requirements and timeframe for Citations 2 and 3 were unreasonable.

ASSESSMENT OF CIVIL PENALTY –

The citations were affirmed, with the Board's adjustment in penalty for Citation 3.

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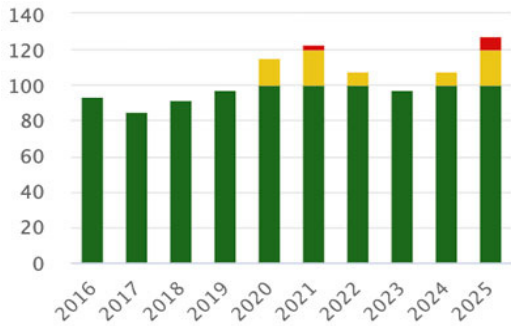
L &S FRAMING, INC.
49 *COR* 40-9017 [¶23,378R]

Digest of COSHAB's Decision After Reconsideration dated December 3, 2025, Inspection No. 1692964.

Ed Lowry, Chair.

Judith S. Freyman, Board Member.

Marvin P. Kropke, Board Member.



X-MOD GRAPH FROM COMPLINE

Background. L & S Framing, Inc. (Employer), is a general contractor. On Aug. 23, 2023, the Division of Occupational Safety and Health (Division) commenced an accident investigation at 7357 Dorstone Way, Sacramento, CA (worksite). The investigation involved an employee member of a framing crew, who injured himself with a pneumatically driven nailer (nail gun) when he descended a ladder.

On Jan. 19, 2024, the Division issued three citations to Employer for alleged violations of Title 8, California Code of Regulations. Employer timely appealed. A hearing was conducted on July 9, 2024, and an Administrative Law Judge (ALJ) issued a Decision on Jan. 9, 2025, upholding the citations and imposing civil penalties. Employer timely petitioned the Appeals Board (Board) for reconsideration (Petition).

Decision after reconsideration.

The Board engaged in an independent review of the entire record, considered the parties' pleadings and arguments, and did not take any new evidence.

Citation 1 –

The Division cited Employer for a violation of §1704(f), which requires that written Code of Safe Practices (COSP) include provisions for the use of pneumatically-driven nailers and staplers. Under §1509(b), a construction employer is required to adopt a COSP which relates to its operations and contains language equivalent to that contained in Plate A-3 of the Appendix. In addition, employers that use "pneumatically-driven nailers" are explicitly required to include safety rules for their safe use in the COSP.

There was no dispute that Employer had a COSP with provisions regarding the safe use of pneumatically driven nailers. Rather, the main issue was whether Employer's COSP contained a sufficient number of safety practices, in scope and precision, to cover the safe operation of the equipment. The evidence showed Employer's COSP contained several enumerated items, eight of which pertained to the safe operation of nail guns. However, the ALJ concluded Employer did not require its employees to follow all the safety rules set forth in the COSP. Although the COSP required that pneumatic fasteners be operated according to the manufacturer's instructions, evidence showed that Employer never made the safety manual available to employees; rather, the training records indicated the "manuals were available upon request." Further, the injured worker denied reviewing the manufacturer's manual before using the nail gun.

The Board determined that the COSP failed to include "adequate instructions to apprise employees of all the various potentially dangerous tasks they may perform and how to avoid injury therefrom." Thus, the Board concluded that Employer violated §1704(f), as alleged. As a performance standard, Employer had flexibility in selecting the safety rules for the COSP, provided that the rules included all appropriate and reasonable provisions for the safe use of pneumatically-driven nailers and substantively addressed the relevant safety hazards.

Citation 2 –

The Division alleged a violation of §1704(b)(2), which requires that all pneumatically-driven nailers and staplers shall be operated and maintained in accordance with the manufacturer's operating and safety instructions. The Division asserted that Employer failed to ensure that the equipment was operated according to the manufacturer's manual, which resulted in the employee's serious injury. The Decision upheld the violation.

Employer in opposition argued in its Petition that the Decision relied on inadmissible hearsay evidence. The Board disagreed, finding that all of the evidence relied upon by the ALJ correctly fell within the exception to the hearsay rule. First, the documents transmitted to the Division in response to a "Document Request" which included Employer's accident investigation report, contained an admission from the injured employee that he "may have discharged a nail into his right leg while working on a ladder". Further, the Board determined that the investigation report constituted an adoptive admission, as it indicated that the employee discharged a nail into his leg, and the evidence inferred was that the nail gun was still connected to the air hose, as it could not have discharged if it had been disconnected. Therefore, the Board concluded that there was non-hearsay evidence that the manufacturer's instructions were not followed.

The ALJ also relied upon evidence, that even if hearsay, supplemented and explained the information in the accident investigation report as well as the circumstances of the accident. Here, the medical records stated a nail was surgically removed from the injured employee's leg. Additionally, the employee informed the hospital staff upon his intake, that "I was coming down the later [sic] and the nail gun hit my leg and went off." Further, statements made to the ASE by the employee also explained the conclusion that the nail gun hung from the employee's belt, was in contact actuation mode and not disconnected from the air hose.

The "tool inspection" report dated four days after the accident was also considered by the ALJ to supplement and explain other evidence. Specifically, it explained how the accident most likely occurred. It reported the results of a test of a "NR83A5", the model of the nail gun involved in the accident. The Board determined that the ALJ correctly concluded the evidence supported a finding that the nail gun was used contrary to the manufacturer's instructions. Employer violated the safety order.

Citation 3 –

The Division cited Employer for violation of §1704(g), which provides that safety training be conducted prior to initial assignment to operate pneumatically-driven nailers or staplers and refresher training shall be provided when the equipment is observed to be used in an unsafe manner or the operator has been involved in an accident. The Division asserted that Employer failed to train its employees and listed six separate instances of such failure. The ALJ pointed out that a single deficiency or instance could support a violation. (citing *Arana Residential and Commercial Painting, Inc*., Cal/OSHA App. 1568252, Decision After Reconsideration (Oct. 18, 2024) [**Digest** ¶23,305R].)

Training is necessary for any effective IIPP and must be of sufficient quality to make employees "proficient or qualified" on the subject of the training. (*Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003) [**Digest** ¶20,473R].). The ALJ determined that Employer failed to put on any evidence showing that it trained the injured employee on the manual's warnings, which were not included in the COSP. Thus, the Board affirmed the Decision and concluded that Employer violated the safety order.

Vagueness

Employer argued that §1704(f), was unenforceably and unconstitutionally vague and ambiguous as well. The Board had to consider Employer's conduct in light of the facts of the particular case as required by *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883. Thus, the Board had to compare Employer's nail gun safety instructions in the COSP with the manual's warnings, to consider whether the safety order was vague and in doing so, it concluded that the COSP did not contain all the necessary warnings for employees' safe use of nail guns. Further, the Board determined that the COSP did not fulfill its purpose because it did not address several relevant hazards related to the safe use of the nail gun, as emphasized by the manufacturer. The Board concluded that §1704(f) was not unconstitutionally vague or ambiguous as it was reasonable and practical to expect Employer to refer to the manual as the best resource for information regarding the safe use of the nail gun, when it developed that aspect of its COSP.

Adequate Notice

Employer argued that Citation 3 was invalid because it "failed to provide fair notice of any alleged violation." The ALJ determined that the citation listed six separate instances where Employer violated the training requirements of §1704(g). The ALJ concluded that Employer had committed the allegation in Instance 4 and made it clear in the Decision that a single instance can support a violation, provided the Division meets its evidentiary burden as to that instance. (*Ontario Refrigeration Service, Inc*., Cal/OSHA App. 1327187, Decision After Reconsideration (Mar. 22, 2022) [**Digest** ¶23,172R]; *Arana Residential and Commercial Painting, Inc.*, supra, Cal/OSHA App. 1568252.).

The Board has held that the liberal rules of administrative pleading require only that a cited employer be informed of the substance of the charge and afforded the basic elements of due process. (*Bigge Group dba Bigge Crane & Rigging Co*., Cal/OSHA App. 317230191, Decision After Reconsideration (Mar. 15, 2019) [**Digest** ¶22,919R];

Hypower, Inc. dba Hypower Electric Services, Inc., Cal/OSHA App. 12-1498, Denial of Petition for Reconsideration (Sep. 11, 2013) [**Digest** ¶22,264R].) Here, the Board concluded that Citation 3 was more than adequate to put Employer on notice that its training on the use of nail guns and its COSP's content regarding nail gun training and safety were at issue. "Due process requires that Employer have sufficient notice of the charge to enable it to prepare a defense." (*Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration, (Jan. 7, 1985); *Teichert Construction*, Cal/OSHA App. 98-2512, Decision After Reconsideration (Mar. 12, 2002).) The Board determined that the Labor Code §6317 requirement that each citation "shall describe with particularity the nature of the violation, including a reference to the [Safety Order] alleged to have been violated" was met here. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010) [**Digest** ¶21,681R].)

In addition, the Employer had to show prejudice to sustain an allegation that the description in the citation was not sufficiently particular. (*DSS Engineering Contractors, Inc*., Cal/OSHA App. 99-1023, Decision After Reconsideration, (June 3, 2002) [**Digest** ¶ 20,307R].) The ALJ and the Board determined that here, Employer demonstrated no prejudice. (*Rex Moore Electrical Contractors & Engineers*, Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (Nov. 4, 2009 [**Digest** ¶21,572R].) Employer was provided with adequate notice of the violation of the training requirement found in the safety order.

Serious classification of Citations 2 and 3

The Division initially bears the burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Labor Code §6432(a)). The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The record showed that the injured employee failed to disconnect the air hose from the nail gun he was using, attached the nail gun to his tool belt with a rafter hook, and then started descending a ladder, when the nail gun discharged a nail into his leg. Later that day the injured employee was admitted to the hospital for the surgical removal of a nail from his right femur. Thus, the Board concluded that there was in fact serious physical harm as a result of the violation of the safety order. The Division proved the citations were serious as defined in Labor Code §6432.

Rebuttable presumption of Citations 2 and 3

Employer argued that the violations were not properly classified as serious. Labor Code §6432(c), provides that an employer may rebut the presumption that a Serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation by demonstrating that:

The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, to anticipate and prevent the violation;

[. . .]

The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as it was discovered.

Subdivision (c)(1) requires a reasonable and responsible employer to take measures before the violation occurs to anticipate and prevent the violation, including training employees to prevent exposure to the hazard, supervising employees exposed to the hazard, and having procedures for communicating to employees the employer's health and safety rules and programs. The record established that prior to the violation occurring, Employer had not properly trained its employees on all of the hazards to which they were exposed when using the nail gun, and that the COSP failed to include several hazard warnings stated in the manufacturer's manual. Therefore, the Board concluded that failure to take the preventative steps called for in Labor Code §6432(c)(1), meant the presumption of serious violations was not rebutted.

Accident-related Characterization of Citation 2

The Division had to demonstrate a "casual nexus between the violation and the serious injury." (*Sherwood Mechanical, Inc*., Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) [**Digest** ¶22,021R].) Here, the deficiencies in Employer's COSP regarding safe use of nail guns, such as failing to warn against attaching the nail gun to one's person and failing to include a warning to disconnect the nail gun from the air supply before moving it, were established and proven as to Citation 2. Thus, the Board determined that the evidence established a causal nexus between the violation and the employee's serious injury and therefore, the accident-related characterization of the violation was correct.

Penalty

The penalty of $850 for Citation 1 was not appealed and thus, not at issue. Employer argued that the penalties for Citations 2 and 3 were not properly calculated.

The Board affirmed the ALJ's ruling that Citation 2 was properly characterized as serious accident-related. The penalty-setting regulations, at §336(c)(3), provide that the penalty for a serious violation which caused serious injury "shall not be reduced pursuant to this subsection," except for size. Since Employer had more than 100 employees, it was not eligible for a size reduction. (§ 336(d)(1).) Therefore, the Board concluded that the penalty of $18,000 for Citation 2 was correctly calculated.

Citation 3 was affirmed as a serious violation and thus was eligible for adjustment according to §335(a)(B). The Division inspector testified that 280 employees were exposed to the hazard due to ineffective training of nail gun usage. However, the Board determined that to be excessive as it was unlikely that all of Employer's employees used or were exposed to others' use of nail guns. In review of the record, the Board determined that at least ix employees were exposed to the hazard created. Thus, the "extent" of the violation was "medium." (§335(a)(2)(i).) and the penalty was not to be adjusted. (§336(c)(1).) Consequently, the $4,500 increase in the base penalty made by the inspector was deemed incorrect and the gravity-based penalty should have been $18,000. The Board adjusted the Good Faith rating downward, reducing the gravity-based penalty to $15,300.

Abatement

The Board determined that the record showed the citations had not been corrected and thus were ongoing. In its Petition, Employer claimed that the abatement requirements and the timeframe for abatement were unreasonable, but presented no evidence to support those assertions. The Board concluded that Employer had to abate the hazards identified in the citations (*Home Depot USA, Inc*., Cal/OSHA App. 10-3284, Decision After Reconsideration (Dec. 24, 2012) [**Digest** ¶22,129R].) and ordered that abatement be accomplished within 30 days from the date of issuance of its decision.

Conclusion. The Board affirmed the citations and modified the penalty of Citation 3 accordingly.

