

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

OREGON OCCUPATIONAL SAFETY	)	Docket No. 15-00011SH
& HEALTH DIVISION	)	Citation No. M2900-057-15
)	
Plaintiff,	)	Docket No. 15-00014SH
	)	Citation No. U0205-025-15
)	
	)	Docket No. 15-00025SH
	)	Citation No. U0205-035-15
)	
	)	Docket No. 15-00026SH
	)	Citation No. R3320-044-15
)	
vs.	)	Docket No. 15-00027SH
	)	Citation No. R3320-044-15
)	
	)	Docket No. 16-00024SH
	)	Citation No. R3320-048-15
)	
	)	Docket No. 16-00025SH
	)	Citation No. U0205-039-15
)	
BAY AREA ATHLETIC CLUB, INC.)	
)	
Defendant.	)	AMENDED
	)	OPINION AND ORDER

On April 21, 2017, an Opinion and Order was entered in the above-captioned matters. Amendment is necessary to correct and clarify the evidentiary record. The amendments are in bold.

Pursuant to notice, a consolidated hearing was convened and recorded on July 6, July 7, and July 8, 2016 by Administrative Law Judge Claudette Mirassou McWilliams in Eugene, Oregon. The hearing reconvened on October 17, 2016. Plaintiff, OR-OSHA, was represented by Senior Assistant Attorney General

Kyle J. Martin. Safety Compliance Officers (SCO), Tom Hoffman, Regan Danielson, and Ann Peterson appeared as OR-OSHA representatives in connection with the seven challenged citations. The Defendant, Bay Area Athletic Club, Inc. (Bay Area) was represented by George A. Burgott. Bay Area owner, Mark McPeck, appeared as the employer representative. Witnesses were excluded under OAR 438-085-0835. The hearing was continued for the telephonic presentation of recorded closing arguments which were presented on November 18, 2016.

EXHIBITS

1. Offered Exhibits

At hearing, OR-OSHA offered Exhibits 1 through 161.¹ **OR-OSHA offered a Notice of Proposed Assessment of Civil Penalties; Notice of Proposed Order to Cease and Desist; and Notice of Final Order on Default as Exhibit 161. The objection to its admission was sustained and the document originally marked as Exhibit 161 was not admitted. During the hearing, OR-OSHA offered a letter written by Dennis Dalton, which was received as Exhibit 161 rather than Exhibit 162. The document received into evidence during the hearing as Exhibit 161 is hereby renumbered Exhibit 162.**

Bay Area offered Exhibits 11A, 14A through 14F, 15A through 15C, 19A, 37A, 37B, 38A through 38F, 50A, 51A, 62A, 66A, 79A, 83A, 83B, 84A through 84H, 85A, 91A, 99A through C, 101A through 101F, 102A, 108A, 115B,² 118A through F, 124A, 125A, 131A through 131C, 135A, 136A, 136B, 143A, 143B, and 144A through K.

¹ Many of the exhibits offered by OR-OSHA include copies of administrative rules, pleadings in the form of citations, and the contents of the forum's file. None of these documents assist the adjudicator in ascertaining the facts or safeguarding the rights of the parties. OAR 438-085-0825(3). Neither do such writings constitute proof determinative of an issue in dispute. They should not, therefore, be included in the evidentiary record even under the relaxed standard of ORS 183.450(1), which allows admission of "evidence of a type commonly relied upon by reasonably prudent persons in conduct of their serious affairs." ORS 183.450(1).

Seven citations were consolidated for hearing. The exhibits offered by OR-OSHA were not integrated despite consolidation. Instead, OR-OSHA offered a complete set of exhibits in connection with each citation. This resulted in multiple duplications and "placeholder" exhibits which were illegible photocopies of photographs or other documents. They are properly excluded from the record as "unduly repetitious" or illegible. ORS 183.450(1); *Camacho v. SAIF*, 263 Or App 647, 330 P2d 1242 (2014)(Evidence cannot be disregarded because it is unintelligible.)

² There is no Exhibit 115A.

2. Withdrawn Exhibits

The following exhibits were withdrawn because they were duplicates of other offered documents or illegible: Exhibits 27, 28, 29, 64, 84B, 84D, 84G, 84H, 101A, 101E, 101F, 108A, 131C, 136A, 143, 143A and 143B.

3. Excluded Exhibits

The following exhibits are excluded because they are duplicates or illegible:³ Exhibits 38C, 38D, 38E, 51A, 62A, 84F, 99B, 99C, 115, 115B, 118A, 118C, 118D, 118E, 118F, 124A, 131A, 131B, 135A, 144A, 144B, 144C, 144D, 144E, 144F, 144G, 144I, 144J, and 144K.

The following exhibits were excluded: Exhibits 14B, 14C, 14D, and 15C, 84E, 84F, 85A, 101B, 101C, 101D, 102A, 119, 120, 121,⁴ 135A, and 136B, 147-150, and 155-**161**⁵.

3. Admitted Exhibits

The following exhibits are received into evidence: **1 through 6**, 7 through 11, 11A, 12 through 14, 14A, 14E, 14F, 15, 15A, 15B, 16 through 19, 19A, 20 through 26, 30 through 37, 37A, 37B, 38, 38A, 38B, 38F, 39 through 50, 50A, 51, 52 through 62, 63, 65, 66, 66A, 67 through 79, 79A, 80 through 83, 83A, 83B, 84, 84A, 84C, 85, 86 through 91, 91A, 92 through 99, 99A, 100, 101, 102, 103 through 108⁶, 109 through 114, 116 through 118, 118B, 122 through 124, 124A, 125, 125A, 126 through 131, 132 through 135, 136, 137 through 142, 144, 144H, 145, 146, 151 through 154 and **162**.

³ Some of these exhibits may have been initially admitted into evidence before they were found to be illegible or duplicates causing them to be excluded *sua sponte*. (Exs. 51A, 124A, 131A, 131B, 144A, 144B).

⁴ Exhibits 119, 120, 121, 147-150, are copies of Oregon administrative rules, while helpful, they are not evidence.

⁵ Exhibits 155 through 160 are photocopies of portions of the Hearings Division's file. OR-OSHA offered them into evidence rather than requesting that notice be taken of the contents, assuming *arguendo* that they have probative value.

⁶ After further consideration, the entirety of Exhibit 108 is received into evidence.

ISSUES

Bay Area challenges the following citations issued by OR-OSHA between March 12, 2015 and October 22, 2015:

1. M2900-057-15 in Docket No. 15-00011SH (Ex. 10);
2. U0205-025-15 in Docket No. 15-00014SH (Ex. 35);
3. U0205-035-15 in Docket No. 15-00025SH (Ex. 116);
4. R3320-044-15 in Docket No. 15-00026SH (Ex. 61);
5. R3320-044-15 in Docket No. 15-00027SH (Ex. 83);
6. R3320-048-15 in Docket No. 16-00024SH (Ex. 99); and
7. U0205-039-15 in Docket No. 16-00025SH (Ex. 141).

MOTION TO DISMISS

On April 5, 2016, OR-OSHA filed a Motion to Dismiss Docket Nos. 16-00024SH regarding Citation No. R3320-048-15 and 16-00025SH involving Citation No. U0205-039-15, on the grounds that Bay Area had not timely filed a hearing request within 30 days of receipt of the citations. ORS 654.078(1)(3); OAR 437-001-0255(1). An Interim Order was issued on May 25, 2016, which denied the Motion to Dismiss because OR-OSHA had not adequately established proof of service. Specifically, OR-OSHA had not proven that the documentation consisting of “return receipt” cards offered to prove service of the citations were connected in any way to Citation Nos. R3320-048-15 and U0205-039-15.

OR-OSHA filed a Motion to Reconsider on June 3, 2016, which was the subject of an offer at proof when the hearing was convened on July 6, 2016.⁷ At hearing, the affiant in support of the Motion to Reconsider, Michelle A. Houser, testified under the rule, thereby providing Bay Area with an opportunity for cross-examination. Houser’s credible testimony revealed information about the date stamp that was discernible from the original document returned to OR-OSHA

⁷ Absent a showing of why the information supplied by affidavit and testimony could not have been provided at the time of the original Motion to Dismiss, the merits of the dismissal motion were not revisited at hearing other than to confirm adherence to the original decision.

rather than a photocopy many generations removed from the original offered into evidence. As the supervisor of the Citation Processing Unit, Houser was able to provide the connective link between the previously offered return receipt cards and the OR-OSHA citations.

After further consideration and deliberation, the evidence presented as an offer of proof is admitted into the evidentiary record. Based upon that evidence, I find that OR-OSHA has satisfied that the agency perfected service of the citations in both cases. That does not end the inquiry, however, as Bay Area contends that the doctrine of equitable estoppel precludes dismissal. I disagree.

The Oregon Supreme Court discussed the doctrine of equitable estoppel in *Stovall v. Sally Salmon Seafood*, 306 Or 25, 31-37, 760 P2d 1317 (1988), citing its earlier decision in *Marshall v. Wilson*, 175 Or 506, 154 P2d 547 (1944) in which it commented that:

“This doctrine of equitable estoppel or estoppel *in pais* is that a person may be precluded by his act or conduct, or silence when it was his duty to speak, *from asserting a right* which he otherwise would have had.’ (Emphasis added.)”
306 Or at 34.

The *Stovall* Court further looked to *Bash v. Fir Grove Cemeteries, Co.*, 282 Or 677, 687, 581 P2d 75 (1978), in which the Supreme Court recognized that:

“The doctrine of estoppel is only intended to protect those who materially change their position in reliance upon another’s acts or representations.” *Infra*.

See also Meier & Frank Co. v. Smith-Sanders, 115 Or App 159, 163, 836 P2d 1359 (1992). Bay Area relies upon the availability of the doctrine against a state agency citing *Webb v. Dept. of Revenue*, 205 WL 3309836, 18 Or Tax 381 (2005).

In order for Bay Area to benefit from application of equitable estoppel, it is essential that the employer have detrimentally relied upon a representation that caused it to materially change its position. Those circumstances are not present here.

OR-OSHA clearly understood from email communications between McPeek and Appeals Support Specialist Stanley Wisniewski that McPeek intended to appeal any and all citations that had been or would be issued. Yet, the two latest citations were issued when OR-OSHA knew that McPeek would be sailing in the Black Sea. Nonetheless, the individual registered with the State of Oregon as president of the corporation which was open for business during McPeek's absence, Kelly Sharp, remained in Oregon subject to service on behalf of Bay Area. Consequently, there was no change in position which prejudiced Bay Area's ability to receive service of the citations. Indeed, even McPeek received earlier citations while at sea (Ex. 155-26).

Moreover, it is equally clear that McPeek was in communication with Sharp and others via email, some of which documented the owner's intention not to take action in response to other citations issued by OR-OSHA. The fact remains that personal service upon Mark McPeek was not essential to valid service of the citations which would trigger the running of the time period for the filing of a timely appeal of the most recent citations. The Motion to Dismiss should, therefore, be granted.

CREDIBILITY

1. In General

Credibility depends upon those qualities of a witness that make their testimony believable. In order to be credible, a witness must have the ability to perceive, the ability to recall, and the ability to communicate. Finally, the witness must be free from bias that affects those abilities or provides motivation for testifying in a certain manner. Stated otherwise, any person called to testify must:

1. Recognize the necessity of telling the truth;
2. Have knowledge of the matter from personal observation;
3. Have some recollection of that knowledge at the time of testimony;
4. Be able to communicate that knowledge; and
5. Be free from any disqualification that would render the person's testimony presumably inaccurate or prejudicial.

Laird C. Kirkpatrick, *Oregon Evidence* §601, 602 (6th ed. 2016 Supplement).

These requisite elements of credibility may be tested by impeachment which addresses:

1. A defect in capacity to perceive, recall or recount as when the recollection of a witness is impaired by intoxication, or poor memory, or the ability to perceive is diminished by poor eyesight;
2. Character for untruthfulness;
3. Prior criminal convictions;
4. Bias or interest; and
5. Prior inconsistent statements.
Id.

2. Demeanor

The hearing in these consolidated cases was tried over four days with the final day of testimony taking place months after the opening session. The duration of the hearing provided more than sufficient time to assess the demeanor of the many witnesses for OR-OSHA and Bay Area.⁸ Demeanor is an important element of credibility.

It is noteworthy that the demeanor of those individuals with a current or past employment relationship with Bay Area stood in marked contrast to the more relaxed bearing of the OR-OSHA representatives. Throughout the several days of hearing, the tension in the hearing room was palpable. Nonetheless, once the testimony of the OR-OSHA witnesses was completed the compliance officers lined the back wall of the hearing room, where they sat for the remainder of the proceedings. Their behavior was circumspect and respectful, just as it was when they testified.

⁸ In current usage, demeanor means manner, comportment, or bearing. *Dictionary.com Unabridged*. Random House, Inc. 2 April 2017. <Dictionary.com <http://www.dictionary.com/browse/demeanor?s=t>> The word can refer to an individual's presence, disposition, attitude or deportment. *Roget's 21st Century Thesaurus, Third Edition*. Philip Leif Group 2009. 02 Apr. 2017. <Thesaurus.com <http://www.thesaurus.com/browse/behavior>>.

In marked contrast, when the employees and former employees of Bay Area took the stand, they manifested clear signs that they were physically uncomfortable. When asked whether she was a member of the safety committee, Kelly Sharp began tapping her leg and hesitating before she responded. During other portions of her testimony she would wring her hands. Mrs. Sharp was actually in tears when she left the witness stand. The stress may have been why she had difficulty understanding questions and took long pauses before answering.

Kelly Sharp was not the only witness who appeared to be intimidated by the close proximity of Mark McPeek as they testified although the women, including Alisha Anderson, seemed to be affected more, possibly because of their continuing employment at Bay Area. When he was asked if he was pressured, Jake Sharp did not answer directly when he could have responded with a simple yes or no. Others looked away or down while testifying in an apparent effort to avoid the penetrating stare of Mark McPeek.

3. Pre-Hearing Conduct

McPeek is a large man with an intimidating presence who has used profanity and coarse language in communicating with his staff. The greater weight of the evidence establishes that he has also attempted to manipulate testimony and the production of evidence through intimidation before hearing. For example, Jake Sharp credibly testified that McPeek, who was seated next to him after completing portions of a document, told Sharp what to write and made him sign Exhibit 66. In support of that claim, Sharp noted that the language included in the document was not the type that he would use. He further testified that there had been a lot of hostility directed at him by McPeek since the OR-OSHA investigation.

Kelly Sharp provided another example of a heated incident in which McPeek was trying to find out what Jake would say about his leg going through the roof. McPeek called Sharp a liar and directed him to write a letter to retract his statement. During the course of the conversation, McPeek started from his chair toward Sharp, telling him “to get the f. . . out of the club and not come back.”

Intimidation before the hearing was not limited to the Sharps. Alisha Anderson could not say why she signed Exhibit 37B-7 acknowledging that she had received training when she had not. She testified that McPeek did not tell her to lie directly. She appears to have instead qualified her prior comments by admitting to exaggerating parts of her recorded statement. See further discussion regarding Citation R3320-044-15 in Docket No. 15-00027SH.

It is also noteworthy that more than one witness from Bay Area used the sentence, “I am unaware,” frequently enough to suggest coaching in preparation for hearing.

4. Recollection and Responsiveness

When the first safety compliance officer was called to the stand, he was questioned in detail regarding the contents of his field notes, rather than his report, or his actual observations and investigative results. For Regan Danielson, it became clear that this method was employed because he did not have an independent memory about many matters, including what he learned about Bay Area employees continuing to perform electrical work after the first inspection. He did recall, however, that he did not tell the employee to wear fall protection when he went into the dangerous area above the raquetball courts to take pictures for OR-OSHA. Even Ann Peterson, who was much more confident in her testimony, seemed unable to recall what she cited the employer for without a copy of the citation.

Both SCO Hoffman and SCO Peterson failed to consistently testify in a direct and responsive manner for different reasons. Hoffman did not answer questions posed to him directly, but instead responded in narrative form that exceeded the scope of the inquiry. In contrast, when Peterson did not respond directly, she appeared to provide information that she wanted to relate rather than what was responsive to the question. This occurred in connection with questions regarding the sufficiency of nitrile gloves or a face shield as protective equipment, or questions posed about the SDS sheets and the eye wash.

The testimony of Mark McPeek was punctuated by non-responsive and self-serving statements that were, at times, contradictory. He contradicted himself when he testified that employees do not enter the area above the false ceiling, then stating that they almost never did, then finally qualifying that they did so to install LED fixtures. On the whole, it was difficult to get a straight answer from McPeek. Based upon his demeanor at hearing, as well as the content of his testimony which stands in marked contrast to the credible testimony of other witnesses, I do not find Mark McPeek to be a credible witness on behalf of Bay Area. Accordingly, I assign little to no weight to his testimony.

Considering the totality of the testimony presented by Jake Sharp, Kelly Sharp, Alisha Anderson, Tom Hoffman, Ann Peterson, and Regan

Danielson, I find them to be credible witnesses taking into consideration the behavior of McPeek before hearing. I do, however, view the testimony of Danielson with caution based upon his poor recollection. Dennis Dalton is an excellent witness who responded to questions in a forthright manner without equivocation or obfuscation. I find him to be a very persuasive witness whose testimony is deserving of greater weight.

FINDINGS OF FACT

Bay Area is an athletic club housed in a two-story building which contains a swimming pool, several hot tubs, locker rooms and racquetball courts on the first floor. The second floor houses the weight room, daycare, front desk and administrative offices. Exercise classes taught by Bay Area employees are also offered to members who pay dues to use the facilities. Members may use the club at any time.

Bay Area is an Oregon employer with 30 to 40 employees subject to the Oregon Safe Employment Act. The business is owned by Mark McPeek. Kelly Sharp, who has worked for Bay Area for eight-to-ten years, is listed as the corporation president and registered agent with the State of Oregon. Kelly Sharp sometimes signs documents as assistant manager, although she has never been officially given the title by McPeek. She has used a variety of titles in her work, including corporate President (Ex. 15-2). Her husband, Jake Sharp, worked on the maintenance crew with Dennis Dalton. Bay Area employed Dalton from mid-2013 until his resignation was effective on February 15, 2015 (Ex. 161). Alicia Anderson continues to work at Bay Area.

The club has seven exit doors, six of which are padlocked at night when the front door on the upper level is locked with a deadbolt. The doors are locked in this manner while the maintenance crew works at night. The key to unlock the padlocks is kept upstairs in a bank bag at the front desk. Glass doors in the pool area cannot be easily opened preventing egress from the building. Dalton, who worked from 9:00 p.m. to 3:30 or 4:00 a.m. was trained to padlock the doors after customers departed although the fact that there was only one key made him feel unsafe when the doors were locked.

Maintenance work was performed by Jake Sharp, Dennis Dalton and Sidney Wilbur. Their tasks included patching the roof, emptying buckets of collected water in the area above the false ceiling, and cleaning. The latter task involved removing trash, vacuuming, and cleaning showers, saunas, mirrors, and

pool with potentially injurious chemicals including muriatic acid, 30-Seconds Outdoor Cleaner containing bleach, HASACHLOR, E-ZCLOR, and Clorox Bleach. Dalton wore nitrile gloves when handling pool chemicals. Following the OSHA inspections, McPeck bought face shields which Dalton used when handling muriatic acid.

No Safety Data Sheets or other information was available to employees for the muriatic acid, chlorine, cleaning products and other hazardous chemicals. Even for the few Safety Data Sheets that may have been present, they were not accessible to employees as they were kept at the front desk. Employees were not told how to obtain the hazard information or how to obtain it from the Safety Data Sheet. Training on extreme pH chemicals was not given to employees. After the second OSHA inspection, Dalton saw a notebook containing some Safety Data Sheets (Ex. 113-12).

Bay Area did not conduct an assessment to determine if the use of personal protective equipment or other protective equipment was necessary or the nature of potential exposure to respiratory hazards and air contaminants. The employer did not provide personal protective equipment such as neoprene or rubber gloves, respirators, or face shields, instead providing only nitrile gloves (Ex. 113-4), dust masks and swim goggles. Employees were not instructed in the use of the goggles, dust masks, or saline (Ex. 23-10). Rubber boots were available. A face shield was purchased after the first inspection, which Dalton used without any instruction. Neither did Bay Area require the use of such items to protect against chemical exposure to the eyes, through skin absorption.

Bay Area did not provide an adequate eyewash or shower, instead relying upon a hanging garden hose. The sink in the mechanical room by the locker rooms, intended by management to be used as an eyewash, is located 100 feet away on the opposite side of the building from where HASACHLOR is used in the swimming pool. In order to enter the room, a handle must be turned. Knobs on the sink must also be manipulated to activate the flow of water. Employees were not told to use the sink as an emergency eyewash station (Ex. 113-5). Muriatic acid is frequently used in the mechanical room of the pool area (Ex. 113-9). Bay Area did not have a written hazard communication program for employees working with hazardous substances. The employer did not have a cross-referencing list of hazardous chemicals on site.

Both Dalton and Sharp worked on the HVAC systems, replaced the lights in the building, changed electrical motors, and replaced or removed conduit.

Working with 220 volt and 110 volt motors can involve the installation of a pump motor among others even though Sharp is not a licensed electrician. Neither is Dalton. Bay Area does not have energy control procedures as mandated by the OSEA. Neither does it have a lockout or tagout procedure. Training was provided after the OSHA inspection consisting of identification of which breakers correlated to which pumps and demonstrating how to shut off the breakers and how to install the pool pumps. Dalton has been shocked working on a hot tub pump when the breaker had not been turned off.

Breaker panels to the HVAC system which was, at times, located on the roof, are in the weight room where they are sometimes turned on by club members and exercise instructors to activate air blowers. In February, 2015, the electrical panels in the weight room, which were accessible to members, contained hot terminals in the on position while Jake went to the roof to work to check exposed conductors. Before that time, Sharp experienced the fans being turned on from below while he was working around the system on the roof. Blower motors located on the roof were replaced on a weekly basis, when in use.

Sharp is also exposed to open conductors while changing breakers on the club's several breaker panels. Workers are not always able to see the breaker box from the location where they are working on electrically energized equipment. To protect themselves from being shocked, as Dalton has been, employees have been instructed to put masking tape over the breaker with a note not to turn it on. The masking tape method was implemented long after Dalton began work at Bay Area.

Maintenance workers went through a vent to reach an area between a false ceiling and the roof (Exs. 15-3, 73-7 & 73-26). The workers went there to install and maintain lights as well as monitor ventilation and water leaks from the roof in the ceiling above the racquetball courts. Workers were up there almost daily in rainy season. Buckets are placed in the area to catch water leaking through the roof (Ex. 73-14). Water stains are visible from the racquetball courts in the ceiling above (Ex. 15-3).

The maintenance crew was responsible for changing all the lighting in the building to LED. When working on the electrical box above the courts next to the light housing, the lights had to be turned off behind the front desk (Ex. 73-15). Working on lights required the crew to negotiate the area between the false ceiling and the roof. In that area, the 5/8" drywall ceiling rests on trusses about four feet apart, 20 feet above the racquetball courts below. Sharp and Dalton moved from

truss to truss to traverse the false ceiling, at times crawling on their stomachs. Workers were never told to use fall protection, nor was it provided, despite the potential for falling through the drywall to the ground below.

Bay Area does not have a safety committee which meets the requirements of the OSEA because McPeek does not want to pay employees for spending time in meetings. Bay Area does not maintain an OSHA 300 log. Safety meetings were not conducted on March 20, 2015 or May 20, 2016. Dalton was unaware of a “BAAC Policy” handwritten by McPeek regarding working above six feet, performing electrical work (Ex. 15A) or lockout/tagout procedure (Ex. 15B).

Forms indicating that he had received training regarding personal protective equipment and confirming that a hazard assessment occurred were signed by employees who feared their continued employment would be jeopardized if they failed to sign as requested (Ex. 37B). When the forms were signed, there was brief discussion and Dalton was shown where the face shields and nitrile gloves were located, but no training or written materials provided. A list of hazardous chemicals used in the work of the maintenance crew was never provided.

McPeek told Jake Sharp to limit his time with SCO Hoffman to five minutes and not to show him the roof where Sharp had previously fallen through a “spongy” spot to his waist. SCO Hoffman observed the sagging portions of the roof and declined to leave the roof access point because it did not appear safe.

Inspections were conducted by SCO Tom Hoffman on February 11 through February 24, 2015 resulting in issuance of Citation M2900-057-15 in Docket No. 15-00011SH (Ex. 10). When SCO Hoffman returned on multiple occasions between May 6, 2015 and May 19, 2015, the conditions alleged in the Citation M2900-057-15 persisted, resulting in issuance of Citation R3320-044-15 for Failure to Abate on July 1, 2015 in Docket No. 15-00027SH (Ex. 83). Connor Chard signed for the citation on July 6, 2015 (Ex. 83-6).

When SCO Hoffman returned on multiple occasions between May 19, 2015 and July 15, 2015, the conditions alleged in the Citation M2900-057-15 persisted, resulting in issuance of Citation R3320-048-15 in Docket No. 16-00024SH, for Failure to Abate on October 15, 2015 (Ex. 99). Connor Chard signed the United States Postal Service return receipt on October 17, 2015 (Ex. 99-6 & Houser Tx.).

Multiple inspections were conducted by SCO Ann Peterson on March 11, 2015 through March 26, 2015, resulting in issuance of Citation U0205-025-15 in Docket No. 15-00014SH on April 23, 2015 (Ex. 35). When SCO Peterson returned on multiple occasions between June 9, 2015 and September 14, 2015, the conditions alleged in the Citation U0205-025-15 persisted, resulting in issuance of Citation U0205-039-15 in Docket No. 16-00025SH (Ex. 141) for Failure to Abate on October 22, 2015 (Ex. 141). The United States Postal Service return receipt confirming service of the citation on Bay Area was signed on October 24, 2015 (Ex. 141-8).

Multiple inspections were conducted by SCO Regan Danielson from May 6, 2015, through May 19, 2015, resulting in issuance of Citation R3320-044-15 in Docket No. 15-00026 or 27SH on July 8, 2015 (Ex. 61). The United States Postal Service return receipt confirming service of the citation was signed by Connor Chard on July 10, 2015 (Ex. 61-5).

CONCLUSIONS OF LAW AND OPINION

I. Burden of Proof

Under the Oregon Safe Employment Act (OSEA), OR-OSHA bears the burden of proving the allegations of the challenged citations by a preponderance of the evidence. OAR 438-085-0820(1), (3). That burden of proof applies here where the parties do not dispute that Bay Area is subject to the OSEA set forth at ORS 654.001 *et seq.*

Essential elements of proof require that OR-OSHA establish the applicability of the cited standard, its violation and employee exposure to the hazardous condition. *See OR-OSHA v. Moore Excavation, Inc.* 257 Or App 567, 307 P3d 510 (2013)(Oregon adoption of federal standard requiring proof that it was reasonably predictable that employees would be exposed to violative condition).

When a serious violation is alleged, the citation will not be upheld if the employer “did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” ORS 654.086(2). A serious violation exists in a place of employment for purposes of ORS 654.0011 to 654.295, 654.423 and 654.750 to 654.780 if:

“ * * * there is a substantial probability that

death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” ORS 654.086(2).

II. Citation No. M2900-057-15

A. Citation 1 Item 1

1. The Allegation

OR-OSHA contends that Bay Area committed a serious violation of the OSEA meriting a \$240 penalty based upon its failure to establish a safety committee, as required by OAR 437-001-0765(1). Abatement was required by March 19, 2015 (Ex. 10-4).

2. The Law

Employers are required by OAR 437-001-0765 to establish a safety committee or conduct safety meetings to communicate and evaluate safety and health issues. Not all employers have the option of choosing between a safety committee or holding safety meetings, dependent upon the number and types of employees. OAR 437-001-0765(1).

An employer with fewer than ten employees can have a safety committee or safety meetings. There must be at least two members for an employer with 20 or fewer employees. OAR 437-001-0765(2). The number of required members of a safety committee also depends on the number of employees. The committee must have an equal number of employer-selected members and employee-elected members. A manager can serve as an employer-selected member. Employees can elect another employee or a supervisor to represent them. The committee cannot have a majority of employer-selected members. The members must, *inter alia*, be trained in accident and incident investigation principles and know how to apply them, be trained in hazard identification, receive

safety committee meeting minutes, and represent the major activities of the company.

If there are employees who do other than office work, the safety committee must meet monthly. OAR 437-001-0765(5). The Committee must establish a system for employees to report hazards, establish a procedure for reviewing inspection reports and evaluate all accident and incident investigations. OAR 437-001-0765(8). A record of the meeting containing mandated information must be available to all employees and kept for three years. OAR 437-001-0765(6).

Any hazards identified during the meeting must include recommendations for correcting them and a correction date. The safety committee must also have procedures in place for workplace safety and health inspections. OAR 437-001-0765(7). Those inspections must be conducted by those who have been trained in hazard identification. *Infra*.

3. Conclusion of Law and Reasoning

I agree with OR-OSHA's SCO Hoffman that OAR 437-001-0765 applies to Bay Area and the circumstances alleged in the contested citation (Ex. 16-2). The exercise of reasonable diligence would have revealed the violation to the employer. *Id.*; ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

At the time of the inspection and citation, Bay Area was an employer with 30-to-40 employees. It was required to have a safety committee that met at least monthly because there were employees who did other than office work. None of the employees who testified confirmed the existence of a safety committee, much less regular meetings, before SCO Hoffman's first inspection. (Testimony of Jake Sharp, Kelly Sharp, and Alicia Anderson). The absence of safety meetings is consistent with the owner's statement to Jake and Kelly Sharp that he did not want to pay employees for attending meetings (Ex. 16-1). McPeek's rationale for not having meetings explains why he told Alicia Anderson to lie about them to avoid incurring the additional expense of the imposition of a penalty for having failed to conduct the required meetings (Ex. 75-3, 4).

According to SCO Hoffman, the probability of injury here was low, and the severity rating is serious, based upon the condition of the establishment

(Ex. 16-1). Applying the matrix considerations summarized in the violation worksheet and taking into account the appropriate adjustment factors of size and good faith, a penalty of \$240 is appropriate. *Id.*

B. Citation 1 Item 2

1. Alternative Allegations

OR-OSHA contends that Bay Area committed a serious violation meriting a \$240 penalty because it had not developed and implemented written energy control procedures (Ex. 10-4). Abatement was to be completed by March 26, 2015. In the alternative, the agency contends that employees had been working on electrical wiring without locking out and or tagging out the circuits at the electrical panels.

2. The Law

The regulations regarding energy control procedures are found in 29 CFR §1910.147(c)(4)(i) which provides, in pertinent part, that:

“(i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in activities covered by this section.” (Ex. 21-5).

The standard for the control of hazardous energy by means of lockout or tagout⁹ is set forth in §1910.147(a)(1) and (2), as follows:

“(1) Scope.

“(i) This standard covers the servicing and maintenance of

⁹ §1910.147(b) definitions: “(1) **Lockout**. The placement of a lockout device on an energy isolating device, in accordance with an established procedure, ensuring that the energy isolating device and the equipment being controlled cannot be operated until the lockout device is removed; (2) **Lockout device**. A device that utilizes a positive means such as a lock, either key or combination type, to hold an energy isolating device in a safe position and prevent the energizing of a machine or equipment. Included are blank flanges and bolted slip blinds; (3) **Tagout**. The placement of a tagout device on an energy isolating device, in accordance with an established procedure, to indicate that the energy isolating device and the equipment being controlled may not be operated until the tagout device is removed; and (4) **Tagout device**. A prominent warning device, such as a tag and a means of attachment, which can be securely fastened to an energy isolating device in accordance with an established procedure, to indicate that the energy isolating device and the equipment being controlled may not be operated until the tagout device is removed.”

machines and equipment in which the unexpected energization or start up of the machines or equipment or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy.”

“(2) Application.

“(i) This standard applies to the control of energy during servicing and/or maintenance of machines and equipment.” (Ex. 21-1).

29 CFR §1910.333(b)(2) governs lockout and tagging. Specifically, it mandates that:

“(2) Lockout and tagging. While any employee is exposed to contact with parts of fixed electric equipment or circuits which have been deenergized, the circuits energizing the parts shall be locked out or tagged or both in accordance with the requirements of this paragraph.” (Ex. 22- 2).

A written copy of the procedures must be maintained by the employer and made available to employers and others. 29 CFR §1910.333(2)(i). *Id.*

3. Conclusions of Law and Reasoning

I agree with the position of OR-OSHA’s SCO Hoffman that 29 CFR §1910.147(c)(4)(i) applies to Bay Area and the circumstances alleged in the contested citation (Ex. 16-4). The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

The greater weight of the evidence from Dennis Dalton, Jake Sharp and Kelly Sharp uniformly establishes that there was no written lockout/tagout procedure (Ex. 77-2). Moreover, in his three years at Bay Area, no training was provided to Dalton. Because he had been trained at Knife River in such systems, Dalton understood that McPeck’s verbal instructions to turn off the equipment and

then place masking tape over a switch with a “do not turn on” sign was insufficient.

The inadequacy of the method is clear from the occurrence of even one instance of a worker, such as Dalton as he testified, being shocked while working on motors. Both Jake Sharp and Dalton changed blowers and worked on electrical motors, filtration systems, LED lights, pool lights, hot tub motors, elliptical machines and opened electrical boxes. At the time of the first inspection, a water pump and another electrical motor being worked on by Jake Sharp were found in his office (Ex. 16-3). Equipment was generally 110 volts, but did include 220 or 240 volts for the larger units. McPeek’s personal belief, as expressed to an electrical inspector or fire marshal, that such duties did not constitute “electrical” work is not controlling here. Rather, such a characterization serves to accentuate the strength of his self-interest in responding to investigations involving Bay Area.

It is especially important that some of the work that was done was outside the room where the breakers were located, as was the case when work was done on the roof, or on the electrical wires in the false ceiling area. The workers had to negotiate a ladder to reach the area above the false ceiling to work on lights. Work on the roof also took the employees out of the weight room where the “hot” breaker panels for the roof equipment were located (Ex. 16-3). This allowed exercise instructors and racquetball players to activate the motorized units despite the tape and handwritten sign.

The employer argues that a system or procedure was not required because no electrical work was performed after February 2015. It further maintains that a system was unnecessary because there is no evidence that the equipment was energized. I disagree on both counts. Even if Dalton’s work with the front door switch or doorbell did not constitute “electrical” work carried out after February 15, 2015, the fact remains that the greater weight of the evidence establishes that it was performed before the date of the February 11th inspection. The evidence also shows that even though Dalton was told not to do electrical work, his assigned tasks after February 15 included electrical work (Ex. 76-12). He had been told by McPeek to change out motors (76-11). The testimony of Tom Hoffman also confirms that the breakers for power to the roof were activated and “hot.”

SCO Hoffman testified that the probability of injury here was low, and

that the severity rating is serious (Ex. 16-3).¹⁰ Applying the matrix considerations summarized in the violation worksheet and taking into account the appropriate adjustment factors of size and good faith, I find that a penalty of \$240 is warranted (Ex. 16-4).

C. Citation 1 Item 3

1. The Allegation

A serious violation worthy of a proposed penalty of \$1,680 is alleged in connection with the absence of adequate fall protection. Specifically, OR-OSHA alleges that:

“a) Employees were working on the air handling and light systems while walking and crawling on the trusses above the racquetball court at an approximate height of 20 feet above the floor below. No fall protection was being utilized to prevent a fall hazard.” (Ex. 10-4).

2. The Law

OAR 437-002-0134(5)(a) provides that:

“(5) Fall Protection

“(a) All employees must be protected from fall hazards when working on unguarded surfaces more than 10 feet above a lower level or at any height above dangerous equipment.” (Ex. 20-3)

3. Conclusions of Law and Reasoning

I agree with the assertion of OR-OSHA’s SCO Hoffman that OAR 437-002-0134(5)(a) applies to Bay Area and the circumstances alleged in the contested citation (Ex. 16-6). I further conclude that the exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

¹⁰ SCO Hoffman’s Violation Worksheet refers to a medium serious violation because “It appears that there have been close calls in the past.” (Ex.16-3).

I find that OR-OSHA has met its burden of proof regarding the fall protection allegation. My reasoning follows.

Maintenance workers, Dennis Dalton and Jake Sharp, entered the crawl space between a false ceiling and the roof to work on ventilation systems, change lights, fix leaks and empty buckets placed in the crawl space to collect water from the leaks. They did not have fall protection when they entered the space which was over 20 feet above the area below (Ex. 17-6). The false ceiling contains drywall held in place by trusses four feet apart which are anchored by wire. Drywall over court seven is falling down and the drywall in other areas has water damage.

When getting into position to work on lights, Dalton would slide over 2 x 4s on his stomach because the flooring would flex if he was standing around the light. When actually working on the lights, he would hang on the truss joists, which vibrated, creaked and moved when subjected to weight or vibration from movement over the 2 x 4s.

McPeek maintains that the material between the trusses is epoxy impregnated paneling connected with 5/16" bolts, making the surface impervious to a sledge hammer. He concedes that this was not the material over the last eight feet at one end of the building. In that area, the surface was drywall that can be pierced with a foot or hand (Ex. 76-21). According to McPeek, workers had no reason to enter that area to install lights or empty buckets because there were none in that area.

It is noteworthy that McPeek also testified that the employees could deal with leaks without going into the crawl space because the leaks are on the roof. His testimony that the employees did not enter the crawl space to empty buckets is readily contradicted by the photographs of buckets in that area which corroborate the testimony of Dalton and Sharp and stand in sharp contrast to the suspect testimony of McPeek (Ex. 73-14). The citation does not allege that the workers were in the crawl space to empty buckets. Their testimony about that activity, however, is substantiated by the presence of the buckets. McPeek's assertion that the workers did not need to enter the crawl space because they could repair the leaks by working only on the roof rings hollow in light of the buckets that required attention even if they were not used to repair the leaks.

While it is disturbing that the compliance officer allowed one of the workers to return to the dangerous area for the purpose of gathering evidence to be used in prosecution of the safety citation, the failure of the officer to observe or test

the material between the trusses does not impugn the credible testimony of Dennis Dalton and Jake Sharp. McPeck may be an engineer with superior qualifications to determine the load bearing qualities of materials, but I reject his testimony as unreliable, as previously discussed.

SCO Hoffman testified that the probability of injury here was low, and that the severity rating is death, based upon exposure to a fall of 20 feet (Ex. 16-5). Applying the matrix considerations summarized in the violation worksheet and taking into account the appropriate adjustment factors of size and good faith, I find that a penalty of \$1,680 is appropriate (Ex. 16-6).

D. Citation 2 Item 4

1. The Allegation

OR-OSHA contends that Bay Area committed an other than serious violation to be abated by March 19, 2015, meriting a \$100 penalty because it had more than ten employees without keeping the OSHA 300 log (Ex. 10-5).

2. The Law

Former OAR 437-001-0700(3)(b)¹¹ provides that companies with more than ten employees must:

“* * * keep Oregon OSHA injury and illness records unless your business is in a specified low hazard retail, service, finance, insurance or real estate industry in Table 1. If so, you do not need to keep Oregon OSHA injury and illness records unless the government asks you to keep the records under 437-001-0700(22).”

3. Conclusions of Law and Reasoning

I agree with SCO Hoffman that 437-001-0700(3)(b) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of

¹¹ Changes to these rules did not become effective until after the relevant time period.

the cited provision. I reason as follows.

Kelly Sharp is the employee who signs her name as the assistant manager despite never officially been given that title. She informed SCO Hoffman and SCO Danielson that Bay Area did not maintain an OSHA 300 log (Ex. 16-7). She reaffirmed that absence when she testified. I reject McPeek's unpersuasive contradictory assertion that such records were maintained given that nothing was shown to SCO Hoffman during his inspection. If the log was in the filing cabinet in his office it could have been revealed. McPeek's testimony that the log was kept in the file of each employee so that each file would have to be read raises the question of whether or not what he was contending was the log was sufficient for that purpose, or even reasonably accessible.

According to SCO Hoffman the probability of injury here was low, and that the severity rating is "other than." Applying the matrix considerations summarized in the violation worksheet (Ex. 16-7), I find the proposed penalty of \$100 is warranted.

III. Citation U0205-020-15 (15-00014SH)

A. Citation 1 Item 1a

1. The Allegation

OR-OSHA alleges a serious violation meriting a proposed penalty of \$400 based upon the employer's violative conduct concerning personal protective equipment (PPE) or other protective equipment. In particular, Bay Area allegedly failed to perform a site hazard assessment, or provide approved PPE on site despite exposure to hazardous environments, chemical hazards, and mechanical irritants during the course of work activities. Abatement by May 7, 2015 was required (Ex. 35-4).

2. The Law

OAR 437-002-0134(1)(a) states that:

“(1) Hazard assessment and equipment selection.

“(a) The employer must assess the workplace to determine if hazards are present, or are likely to be

present, which necessitate the use of personal protective equipment (PPE) or other protective equipment. If such hazards are present, or likely to be present, the employer must:

“(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;

“(i) All protective equipment must be of safe design and construction for the work to be performed.

“(ii) Protective equipment must be worn and used in a manner which will make full use of its protective properties.

“(B) Communicate selection decisions to each affected employee; and,

“(C) Select PPE that properly fits each affected employee.” (Ex. 45-1).

3. Conclusions of Law and Reasoning

I agree with the characterization of OR-OSHA’s SCO Peterson that OAR 437-002-0134(1)(a) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

There is no evidence that Bay Area ever completed a hazard assessment as contemplated by the OSEA.

Kelly Sharp testified that before the OR-OSHA inspection, workers would cover their mouth with a sweatshirt and open the windows for ventilation when handling chemicals without gloves or masks. An apron was onsite according

to Sharp, but it was never seen by Dalton, who only used disposable gloves for scrubbing with muriatic acid. These nitrile gloves did not protect against all of the chemicals onsite, some of which required the greater protection given by neoprene or rubber. Despite McPeek's claim that there were neoprene gloves on the premises, none were shown to the inspector.

The only eye protection available was swim goggles in the pool equipment room which were inadequate because they did not seal tightly enough to the face to prevent the entry of chemicals from the side.

Face shields were purchased after the inspection, but instructions for their use were never given.

SCO Peterson maintains that the probability of injury here was medium because several employees were exposed daily to hazards without adequate control measures. The severity rating is medium based upon daily exposure to corrosive or toxic chemicals without adequate control measures creating risk of severe burns, blindness, and permanent negative health outcomes for multiple body systems (Ex. 32-1). I find that the proposed penalty of \$400 to be warranted.

B. Citation 1 Item 1b

1. Allegation

Bay Area is alleged to have failed to have provided sufficient eye protection for employees working with extreme pH chemicals, thereby committing a serious violation without penalty, but subject to immediate abatement.

2. The Law

Under OAR 437-002-0134(8)(a):

“(a) The employer must ensure that each affected employee use appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.” (Ex. 45-4)

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that OAR 437-002-0134(8)(a) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion based upon the following.

To the extent that a face shield is considered eye protection, there was one on the premises, although Dalton testified that he was not instructed in its use. Moreover, the mask that SCO Peterson saw during her inspection did not meet the applicable standards for protective eyewear as it was not suitable for protection from chemicals. To the extent that she disputes McPeek's claim that the swimming goggles were adequate because they seal to the face, I defer to SCO Peterson's superior knowledge of the equipment required to satisfy the regulatory provisions.

No penalty has been assessed.

C. Citation 1 Item 1c

1. The Allegation

OR-OSHA alleges a serious violation without penalty requiring immediate abatement based upon the absence of hand protection for employees working with multiple extreme pH chemicals.

2. The Law

OAR 437-002-0134(12)(a) mandates that:

“(a) Employers must select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.”

3. Conclusions of Law and Reasoning

I agree with OR-OSHA's SCO Peterson that OAR 437-002-0134(12)(a) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision.

Kelly Sharp testified that the misplaced gloves were not used until following the first inspection. SCO Peterson testified that the nitrile gloves that were in a box onsite did not address all chemicals, as would neoprene or rubber gloves. McPeek contends neoprene gloves were onsite, but there is no evidence to substantiate that claim.

OR-OSHA does not seek a penalty.

D. Citation 1 Item 2

1. The Allegation

OR-OSHA contends that Bay Area committed a serious violation worthy of a \$400 penalty and abatement by April 30, 2015, by failing to provide an eyewash or shower for employees working with multiple extreme pH chemicals, specifically that an approved eyewash station had not been installed for affected employees. (Ex. 35-2).

2. The Law

Under OAR 437-002-0161(5)(a):

“(5) Emergency Eyewash and Shower Facilities.

“(a) Where employees handle substances that could injure them by getting into their eyes or onto their bodies, provide them with an eyewash, or shower, or both based on the hazard.

“(A) Emergency eyewash and showers must meet the following:

”(i) Locate it so that exposed employees can reach it and begin treatment in 10 seconds or less. The path must be unobstructed and cannot require the opening of doors or passage through obstacles unless other employees are always present to help the exposed employee.

“(ii) Water must flow for at least 15 minutes.

“(iii) Install the equipment according to manufacturer’s instructions.

“(iv) The eyewash must have valves that stay open without the use of the hands. The shower must not be subject to unauthorized shut-off.

“(v) Follow the system manufacturer’s criteria for water pressure, flow rate and testing to assure proper operation of the system.

“(vi) Emergency shower and eyewash facilities must be clean, sanitary and operating correctly.

“(vii) In self-contained systems, do not use solutions or products past their expiration date.

“NOTE: If the employer can demonstrate, with the support of a physical board certified in ophthalmology, toxicology or occupational medicine, that an alternative eyewash solution is adequate for their specific hazard, OR-OSHA will accept that solution. An example would be a buffered isotonic solution preserved with a suitable antibacterial agent, that may be less irritating when used in a 15-minute flush.” (Ex. 46-3).

3. Conclusions of Law and Reasoning

OR-OSHA's SCO Peterson maintains that OAR 437-002-0161(5)(a) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

Bay Area does not dispute that the chemicals the employees were working with were caustic chemicals which trigger application of the requirement for an eyewash, shower, or both under OAR 437-002-0161(5)(a). The evidence from Kelly Sharp, Dennis Dalton, and SCO Peterson uniformly recognizes the use of HAZACHLOR, concentrated muriatic acid, and 30-Second Bleach for daily cleaning tasks.

The evidence further establishes that the only mechanism intended by McPeek to be used as an eyewash was a spigot with an attached hose in a mechanical room near the pool (Ex. 113-45). His testimony that he has provided training on how to use the hose as an eyewash is uniformly contradicted by his employees. Dalton testified that he was never told to use the sink in the mechanical room as an emergency eyewash, while Kelly Sharp was instructed to wash with soap and water if exposed to chemicals. Besides the hose, McPeek relies upon a shower in the pool area to serve as an eyewash.

Both of the examples cited by McPeek do not function as an adequate eyewash in the event of a chemical exposure. As SCO Peterson testified, use of the hose does not allow each eye to be individually and simultaneously flushed. Access to the hose, which requires the use of at least one hand, is hindered by barriers that could prevent access within the mandatory ten-second period. For example, the utility sink is behind a closed door and below a deep shelf making it difficult to reach. It would also be difficult to find the handles in the dark, recessed area creating uncertainty regarding the ability to regulate water temperature.

In rebuttal to McPeek's testimony regarding the adequacy of the hose and shower, OR-OSHA offered the testimony of Technology Specialist David McLaughlin. The expert confirmed what SCO Peterson had noted about the hose

not being hands-free. He further indicated that a shower would not be sufficient because it could push the injurious material to the back of the eyes. Based upon his expert testimony, in combination with the testimony of SCO Peterson and the Bay Area employees, Bay Area did not have an eyewash and shower that complied with OAR 437-002-0161(5)(a).

In the view of SCO Peterson, the probability of injury here was medium due to the daily exposure to hazards in the absence of adequate control measures. The severity rating is medium based upon daily exposure to corrosive or toxic chemicals without adequate control measures creating risk of severe burns, blindness, and permanent negative health outcomes for multiple body systems (Ex. 32-2, 3). I find that the proposed penalty of \$400 is warranted.

E. Citation 1 Item 3a

1. The Allegation

OR-OSHA alleges a serious violation meriting a \$400 penalty that must be abated by April 30, 2015, based upon the absence of a written hazard communication program.

2. The Law

Under 29 CFR §1910.1200(e)(1) provides that:

“(e) Written hazard communication program.

“(1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:

“(i) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as

a whole or for individual work areas); and,

“(ii) the methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.”

3. Conclusions of Law and Reasoning

I agree with SCO Peterson contention that 29 CFR §1910.1200(e)(1) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

At the time of her inspection, no one at Bay Area was able to produce a written hazard communication program, nor a complete and accurate list of chemicals used on the premises. That is consistent with Dalton’s testimony that Bay Area did not have a written hazard communication program. Based upon those facts, I find Bay Area in violation of CFR § 1910.1200(e)(1).

According to SCO Peterson, the probability of injury here is medium because several employees were exposed to multiple chemicals daily. The severity rating is medium because reactionary byproducts of extreme chemicals could increase the severity of exposures also impacted by hazardous chemicals being used in enclosed locations without adequate control measures (Ex. 32-3). I find that the proposed penalty of \$400 is warranted.

F. Citation 1 Item 3b

1. The Allegation

OR-OSHA alleges a serious violation without penalty requiring abatement by May 7, 2015, because the non-existent written hazard communication program did not include a list of the hazardous chemicals known to

be present using an identity referenced on the appropriate safety data sheet. More specifically, Bay Area did not produce a cross-referenced list of chemicals on site in violation of 29 CFR §1910.1200(e)(1)(i).

2. The Law

29 CFR §1910.1200(e)(1)(i) quoted above.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that 29 CFR §1910.1200(e)(1)(i) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I further find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for the following reasons.

Kelly Sharp testified that the former manager, Darren Allison, handled written policies and if there were a book, he would have taken it with him when he left in 2012. She further testified that she was unaware of material data sheets for hazardous chemicals. Alisha Anderson said she collected MSDS¹² binder for safety committee after the OSHA inspection, but did not receive hazard training. More on point to the allegation, Dennis Dalton identified for SCO Peterson additional chemicals onsite that were not covered by MSDS (Ex. 113-12).

No penalty is sought.

G. Citation 1 Item 3c

1. The Allegation

A serious violation without a proposed penalty requiring immediate abatement was alleged in connection with the sufficiency of training regarding safety data sheets and how employees could have obtained and used hazard information regarding the multiple extreme pH chemicals on site.

¹² MSDS has been replaced with SDS as the abbreviated reference to safety data sheets.

2. The Law

29 CFR §1910.1200(h)(1) states:

“(h) Employee information and training.

“(1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.”

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that 29 CFR §1910.1200(h)(1) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

Dennis Dalton, Alicia Anderson and Kelly Sharp uniformly testified that Bay Area did not provide training regarding safety data sheets or how employees could have obtained and used hazard information regarding the many dangerous chemicals that were in use and kept on the premises. Dalton specifically cited the failure to educate him in the proper manner of transporting muriatic acid. Without instruction, he was unsure if carrying chemicals in measuring cups to the hot tubs was the proper practice. In one instance, he reported having dropped a cup of liquid chlorine without response from management.

Similarly, Kelly Sharp testified that the chemical training consisted of being shown the products, the gloves, apron, and closed-toed shoes and how to use them. This training, however, was not conducted until after the OSHA inspection.

Nonetheless, employees signed a document saying that they had reviewed the chemicals. The book with the MSDS sheets was kept behind the front desk, which was not readily accessible to those working in the pool areas or mechanical room. Kelly Sharp has never read MSDS sheets. That was true for Dalton as well, who had never seen the MSDS book or been given any MSDS for chemicals that he was using. Even Alicia Anderson, who was supposed to be on the safety committee, admitted that she did not have any training in hazard identification and that they never went over things like safety data sheets, chemicals and other safety items.

No penalty is sought.

H. Citation 1 Item 3d

1. The Allegation

OR-OSHA alleges a serious violation without penalty, but requiring abatement by May 7, 2015, based upon Bay Area's failure to include appropriate hazard information regarding multiple extreme pH chemicals in employee training, or provide training regarding safety data sheets (SDS) and how to obtain and use appropriate hazard information (Ex. 32-4).

2. The Law

29 CFR 1910.1200(h)(3)(iv) mandates that:

“(3) Training. Employee training shall include at least:

“(iv) The details of the hazard communication program developed by the employer, including an explanation of the labels received on shipped containers and the workplace labeling system used by their employer; the safety data sheet, including the order of information and how employees can obtain and use the appropriate hazard information.” (Ex. 47-16).

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that 29 CFR 1910.1200(h)(3)(iv) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of

reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

Dennis Dalton, Alicia Anderson and Kelly Sharp uniformly testified that Bay Area did not provide training regarding safety data sheets or how employees could have obtained and used hazard information regarding the many dangerous chemicals that were in use and kept on the premises. Dalton specifically cited the failure to educate him in the proper manner of transporting muriatic acid. Without instruction, he was unsure if carrying chemicals in measuring cups to the hot tubs was the proper practice. In one instance, he reported having dropped a cup of liquid chlorine without response.

Similarly, Kelly Sharp testified that the chemical training consisted of being shown the products, the gloves, apron, and closed-toed shoes and how to use them. This training, however, was not conducted until after the OSHA inspection. Nonetheless, employers signed a document saying that they had reviewed the chemicals. The book with the MSDS sheets was kept behind the front desk, which was not readily accessible to those working in the pool areas or mechanical room. She had never read MSDS sheets. That was true for Dalton as well, who had never seen the MSDS book or been given any MSDS for chemicals that he was using. Dalton was never told to use a mask as a PPE or given directions for using a mask or shield. Even Alicia Anderson, who was supposed to be on the safety committee, admitted that she did not have any training in hazard identification and that they never went over things like safety data sheets, chemicals and other safety items.

No penalty is sought (Ex. 35-6).

I. Citation 1 Item 4

1. The Allegation

OR-OSHA alleges a serious violation meriting a \$400 penalty for Bay Area's failure to provide health hazard control measures necessary to protect employee's health from harmful or hazardous conditions related to working with injurious chemicals, the routes of their injurious exposure, respiratory hazards, including but not limited to air contaminants. Abatement by May 14, 2015 was required.

2. The Law

Under OAR 437-001-0760(1)(c);

“(1) Employers’ Responsibilities.

“(c) Every employer is responsible for providing the health hazard control measures necessary to protect the employees’ health from harmful or hazardous conditions and for maintaining such control measures in good working order and in use.” (Ex. 48-12).

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that OAR 437-001-0760(1)(c) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion for several reasons.

The testimony of the maintenance workers and front desk staff establish that Bay Area employees were exposed to numerous hazards due to the absence of efficacious hazard control measures. The evidence is clear that workers were not given adequate eye or hand protection, or a functioning face shield. For what was available, instructions or training were not provided for their use, as was the case with the mask that some employees were told not to use. Neither were workers informed that the hose was intended to be used as an eyewash according to Kelly Sharp. Additionally, they were not given sufficient information or training regarding the hazardous chemicals that were handled daily because MSDS sheets were not provided nor accessible. Despite the use of chemicals such as muriatic acid, the employer failed to provide training regarding the correct handling of such chemicals, resulting in one worker carrying chemicals to the hot tubs in measuring cups. Finally, adequate emergency response mechanisms such as an eyewash were not available.

SCO Peterson asserts that the probability of injury here was medium due to daily exposure to hazards, poor management commitment, and inadequate

control measures. The severity rating is medium based upon multiple serious hazards onsite with multiple workers' compensation claims, serious hazards to multiple body systems with increased exposure related to enclosed locations at the worksite may increase severity of exposure and delay administration of first aide. Other injurious exposures involved respiratory hazards and air contaminants (Ex. 32-5, 6, 7). I find that the penalty of \$400 is merited.

IV. Citation No. U0205-035-15

A. Citation 1 Item 1a

1. The Allegation

OR-OSHA alleges a serious violation worthy of a \$13,200 penalty based on Bay Area's failure to abate violations because Bay Area allegedly did not perform a site assessment to evaluate the need for PPE,¹³ nor was PPE provided to employees who were subjected to hazardous conditions which could impair body function through absorption, inhalation or physical contact (Ex. 116-4).

2. The Law

OAR 437-002-0134(1)(a) quoted in connection with Citation U0205-020-15, Citation 1 Item 1a.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that OAR 437-002-0134(1)(a) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision in light of the dearth of evidence demonstrating that Bay Area took meaningful action to assess the need for PPE or provide PPE that would prevent impaired body function resulting from absorption, inhalation or physical contact with injurious substances or air contaminants. Kelly Sharp confirmed that after the OSHA inspection, employees were instructed to wear gloves and masks when handling chemicals, but the gloves were inadequate because, according to SCO Peterson, they were not neoprene or rubber. The fact that the mask remained

¹³ Personal Protective Equipment.

encased in a plastic bag confirms its nonuse consistent with testimony that workers were instructed not to use it. Neither was the welder's mask sufficient to protect against chemical exposure. This inadequacy is especially important in light of Kelly Sharp's testimony regarding prior injuries sustained when a worker's lungs were burned after inhaling chemicals.

As alleged in the original citation for violation of OAR 437-002-0134(1)(a), the probability of injury here was medium because several employees were exposed daily to hazards without adequate control measures. The severity rating is medium based upon daily exposure to corrosive or toxic chemicals without adequate control measures, creating risk of severe burns, blindness, and

permanent negative health outcomes for multiple body systems (Ex. 32-1). I find that the proposed penalty of \$13,200 is warranted.

B. Citation 1 Item 1b

1. The Allegation

OR-OSHA alleges a failure to abate a serious violation without penalty for the employer's alleged failure to have employees use eye and face protection when working with multiple extreme pH chemicals (Ex. 116-4).

2. The Law

OAR 437-002-0134(8)(a) quoted in connection with Citation U0205-020-15, Citation 1 Item 1b.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that OAR 437-002-0134(8)(a) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. The efforts made after issuance of the citation included telling the employees to wear gloves and masks when handling chemicals according to Kelly Sharp, who did not see masks and gloves being used. Sharp knew about the

face mask after the inspection, but it, too, was inadequate protection. That was similar to Dennis Dalton's report that he was never told to use a mask as a PPE, nor given directions in its use or use of the face shield. In fact, Dalton testified that he was not given any training regarding PPE.

No penalty is requested.

C. Citation 1 Item 1c

1. The Allegation

OR-OSHA alleges a failure to abate a serious violation without penalty for the employer's alleged failure to require employees to use hand protection when working with multiple extreme pH chemicals (Ex. 116-5).

2. The Law

OAR 437-002-0134(12)(a), quoted in connection with Citation U0205-020-15, Citation 1 Item 1c.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that OAR 437-002-0134(12)(a) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

Based upon the evidence discussed in the preceding section, I find that OR-OSHA has satisfied its burden of proving that Bay Area failed to abate the cited violation.

No penalty is requested.

D. Citation 1 Item 2

1. The Allegation

Bay Area is alleged to have continued in its failure to provide an eyewash station for employees working with multiple extreme pH chemicals and others subject to a proposed penalty of \$16,000 (Ex. 116-5).

2. The Law

OAR 437-002-00161(5)(a), quoted in connection with Citation U0205-020-15, Citation 1 Item 2.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that OAR 437-002-00161(5)(a), applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision based upon the testimony of Kelly Sharp, Alicia Anderson, and Dennis Dalton, who confirmed the inadequacies of the make-shift method characterized as an eyewash by McPeek. Those same individuals explained McPeek's refusal to install an eyewash because of his mistaken belief that the hose by the sink was an adequate eyewash. McPeek's acknowledgment at hearing of that belief was one of the few potentially believable portions of his testimony.

As alleged in the original citation for violation of OAR 437-002-00161(5)(a), the probability of injury here was medium due to the daily exposure to hazards in the absence of adequate control measures. The severity rating is medium based upon daily exposure to corrosive or toxic chemicals on a daily basis without adequate control measures creating risk of severe burns, blindness, and permanent negative health outcomes for multiple body systems (Ex. 32-2, 3). I find that the proposed penalty of \$16,000 for failure to abate the violation is warranted.

E. Citation 1 Item 3a

1. The Allegation

The employer is alleged to have failed to abate the violation based upon its failure to have a written hazard communication program for employees working with multiple extreme pH chemicals and others subject to an additional penalty of \$13,200 (Ex. 116-6).

2. The Law

29 CFR §1910.1200(e)(1) quoted in connection with Citation U0205-020-15, Citation 1 Item 3a.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that 29 CFR §1910.1200(e)(1) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a continuing violation of the cited provision. Dalton and others credibly testified that there was no written hazard communication program for employees working with chemicals. That did not change following issuance of the original citation.

According to SCO Peterson, the probability of injury here is medium because several employees were exposed to multiple chemicals daily. The severity rating is medium based on reactionary byproducts of extreme chemicals that could increase the severity of exposures, impacted by hazardous chemicals being used in enclosed locations without adequate control measures (Ex. 32-3). I find that the proposed penalty of \$13,200 is appropriate for the continued violation.

F. Citation 1 Item 3b

1. The Allegation

OR-OSHA contends that Bay Area committed a serious violation without penalty because it did not abate its failure to have a written hazard communication program that included a list of hazardous chemicals, including multiple extreme pH chemicals, using an identity that was referenced on the appropriate safety data sheet (Ex. 116-6).

2. The Law

29 CFR §1910.1200(e)(1)(i) quoted in connection with Citation U0205-020-15, Citation 1 Item 3a.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that 29 CFR §1910.1200(e)(1)(i) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a continuing violation of the cited provision. I reach this conclusion based on the lack of persuasive evidence establishing a change in circumstances from those that existed at the time the original citation was issued by SCO Peterson.

No penalty is sought.

G. Citation 1 Item 3c

1. The Allegation

Bay Area is alleged, without penalty, to have continued in its failure to make available chemical-specific information through labels and safety data sheets for employees working with multiple extreme pH chemicals and others. OR-OSHA alleges that employees were not aware of the availability of safety data sheets (Ex. 116-7).

2. The Law

29 CFR §1910.1200(h)(1) quoted in connection with Citation U0205-020-15, Citation 1 Item 3c.

3. Conclusions of Law and Reasoning

I agree with SCO Peterson that 29 CFR §1910.1200(h)(1) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of establishing Bay Area's failure to abate the violation of the cited provision. At the time of SCO Peterson's original visit, the only MSDS onsite pertained to sodium hypochlorite (Ex. 27-1). When OR-OSHA representatives returned to the business, the greater weight of the evidence does not establish a change in that situation upon repeat

inspection (Ex. 71).

No penalty is sought.

H. Citation 1 Item 3d

1. The Allegation

OR-OSHA alleges, without penalty, a serious violation based upon Bay Area's continued failure to provide training on safety data sheets and how they could be obtained and used (Ex. 116-7).

2. The Law

29 CFR §1910.1200(h)(3)(iv) quoted in connection with Citation U0205-020-15, Citation 1 Item 3d.

3. Conclusions of Law and Reasoning

I agree with OR-OSHA's SCO Peterson that 29 CFR §1910.1200(h)(3)(iv) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a continuing violation of the cited provision. At best, the evidence from McPeck is that several dozen SDS are included within a notebook at the front desk (Ex. 27-5). The inaccessibility of the books location and the failure to establish that the MSDS in the book correlate precisely with the chemicals in use, even if accepted as true, would not be enough to meet the requirement of the regulatory provision.

No penalty is requested.

V. Citation R3320-044-15

A. Citation 1 Item 1

1. The Allegation

OR-OSHA alleges a serious violation based upon the padlocking of exit doors from the inside during the night shift while employees were working and

that keys to unlock the padlocks were located at the front desk. The violation is alleged to merit a \$5,600 penalty with an immediate abatement date (Ex. 61-4).

2. The Law

OAR 437-002-0041(4)(c) mandates that:

“(c) Exits must open from the inside without keys, tools or special knowledge. Devices that lock only from the outside are acceptable. There must be nothing on an exit door that could hinder its use during an emergency.”

3. Conclusions of Law and Reasoning

I agree with SCO Danielson that OAR 437-002-0041(4)(c) applies to Bay Area and the circumstances alleged in the contested citation. The exercise of reasonable diligence would have revealed the violation to the employer. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion based upon the credible testimony of Jake Sharp, Dennis Dalton, and Kelly Sharp that the four exit doors are padlocked and the front door dead bolted while the three members of the maintenance crew are working at night between 10:00 p.m. and 4:30 a.m. (Ex. 63). The glass door in the pool area leading outside will not open. The key is kept upstairs in a bank bag at the front desk in the top drawer.

McPeek’s intention to disregard the law regarding the locked doors was confirmed when Kelly Sharp informed SCO Peterson that McPeek had said that he did not care and that the doors would stay locked. Jake Sharp testified that McPeek expressed his view that the prohibition on locking doors while people were working was “bureaucratic bullshit” and that he could do what he wants because it is his building. According to Jake Sharp, McPeek did not think that the maintenance workers needed to have a key to the padlocked doors. The number of employees who have validated the key and lock situation contradicts McPeek’s self-interested testimony that the employees all have keys carried on rings that can open any padlock. Even if that were true, it would not excuse the violation of OAR 437-002-0041(4)(c) , which mandates that doors open without keys.

According to SCO Danielson, the probability of injury here is high because there are electrical hazards identified by the building inspectors which have continued for years, increasing the likelihood of an accident. The severity rating is death because the employees could not exit the building if an emergency such as a fire or earthquake occurred, with death being the most predictable outcome (Ex. 63-1). I find that the proposed penalty of \$5,600 is appropriate for the violation.

VI. Citation R3320-044-15

A. Citation 1 Item 1

1. The Allegation

OR-OSHA alleges a serious violation worthy of a \$15,200 penalty based on Bay Area's failure to abate violations because Bay Area did not establish a safety committee (Ex. 83-4).

2. The Law

OAR 437-001-0765(1). The requirements regarding the establishment and operation of a safety committee are set forth in connection with the discussion of Citation M2900-057-15 in Docket No. 15-00011SH, Citation 1 Item 1.

3. Conclusions of Law and Reasoning

I agree with SCO Hoffman Danielson that OAR 437-001-0765(1) applies to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. I reach this conclusion based upon the following.

SCO Danielson and SCO Hoffman returned to Bay Area on May 6, 2015, to follow up on the inspection conducted by SCO Hoffman on March 12, 2015. Consistent with her testimony at hearing, Kelly Sharp informed the officers that no action had been taken. Sharp's testimony is corroborated by parts of the equivocating testimony of Alicia Anderson, whom I find to be the likely victim of intimidation and coaching, as discussed previously in connection with witness credibility.

When discussing Bay Area circumstances with SCO Danielson and SCO Hoffman while McPeek was at sea, Anderson informed them that she had been assigned to a safety committee and given topics to discuss, but that nothing was done. In her words, “it is a joke” (Ex. 85-1). Out of the presence of McPeek, she also reported, and later testified, that McPeek told her to lie (Ex. 75-3). In particular, she said in her recorded statement that McPeek told her what to write down to document a March 20, 2016 safety meeting which did not occur (Ex. 75-3 to 5).

At hearing, Anderson attempted to disavow those statements saying that she had exaggerated parts of her recorded statement. She further explained that she had been “playing games” because she doesn’t know what “established” means in connection with questions about a safety committee. That “Clinton-like” response, in my view, is the product of intimidation and pre-hearing coaching. Perhaps mindful of the oath that she had given, later in her testimony Anderson denied the occurrence of a safety meeting in March or May of 2015.

I need not rely upon Anderson’s testimony to reach the conclusion that Bay Area remained in breach of the regulations mandating a safety committee, as there is no credible contradictory evidence from employees such as Sidney Wilbur, who reportedly was made a member of the newly-created group.

According to SCO Danielson, the probability of injury here is low with a serious severity rating (Ex. 16-1). I find that the proposed penalty of \$15,200 is appropriate for the continued violation.

B. Citation 1 Item 2

1. Alternative Allegations

OR-OSHA contends that Bay Area failed to develop or implement written energy control procedures mandated by 29 CFR §1910.147(c)(4)(i), or that employees had been working on electrical wiring without locking out and/or tagging out in violation of 29 CFR §1910.333(b)(2), warranting a \$13,250 penalty (Ex. 83-4).

2. The Law

29 CFR §1910.147(c)(4)(i) quoted in connection with Citation

M2900-057-15 in 15-00011SH, Citation 1 Item 2.

29 CFR §1910.333(b)(2) quoted in connection with Citation M2900057-15 in 15-00011SH, Citation 1 Item 2.

3. Conclusions of Law and Reasoning

I agree with SCO Danielson that both 29 CFR §1910.147(c)(4)(i) and 29 CFR §1910.333(b)(2) apply to Bay Area and the circumstances alleged in the contested citation. There can be little question regarding the employer's knowledge of the violation following issuance of a citation alleging the same. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision based upon the lack of credible evidence demonstrating any actions taken by Bay Area that would contradict the testimony of the compliance officer regarding continued violations. Such a conclusion is substantiated by Kelly Sharp's reports that she and Jake were instructed not to do anything to correct the violations (Ex. 78-1). Emails from McPeek corroborate Sharp. On May 7, 2015, McPeek emailed Kelly Sharp, the following:

“Second of all we have no osha issues and we are not going to install the eyewash we're not going to buy rubber suits and boots. we have face and eye and rubber gloves protection for the employees already on site it's right next to the pool check area. It always been there. Now call and Tom from OS HP and have them email me immediately we are not doing anything for fall protection **tell them to fuck themselves blue. We are not doing anything for lockout we do not need any of that we are not required.** Both of the OSHA complaints are being appealed and we will kick their ass in court **I will not not tolerate their shit. They are totally illegal totally inappropriate** and they will lose I will assure you. Tell them to email me immediately

also I will email their supervisor once again we have emailed back and forth and I will get them to cease and desist and to leave you alone until I return. Sent from my iPhone” (Ex. 59-3). (Emphasis added.)

McPeek’s resistance is further demonstrated in a later email in which he wrote:

“Once again nothing at all for OSHA at this point not one thing. Sent from my iPhone” (Ex. 59-4).

The violation has been characterized by SCO Danielson as a medium serious violation because of past close calls in the past (Ex. 16-3). I find that the proposed penalty of \$13,250 is appropriate for the continued violation.

C. Citation 1 Item 3

1. The Allegation

OR-OSHA alleges that Bay Area were not protected from fall hazards above ten feet while working on systems that required that they walk and crawl on trusses above racquetball courts twenty feet below (Ex. 83-5). This violation merits a \$107,520 penalty according to OR-OSHA.

2. The Law

OAR 437-082-0134(5)(a) quoted in connection with Citation M2900057-15 in 15-00011SH, Citation 1 Item 2.

3. Conclusions of Law and Reasoning

I agree with SCO Hoffman and Danielson that OAR 437-002-0134(5)(a) applies to Bay Area and the circumstances alleged in the contested citation. This is a repeat violation based upon a failure to abate the violative conditions. Absent a dispute about receipt of the prior citation, which does not exist here, there is no reason for Bay Area not to be aware of the violation. ORS 654.086(2).

I find that OR-OSHA has satisfied its burden of proving a violation of the cited provision. Kelly Sharp provided evidence that management was instructed by McPeck not to take corrective action which was corroborated by other employees such as Dennis Dalton and Jake Sharp. At most, there was discussion about the workers being told not to enter the crawl space, although it was still necessary to enter the area to change lights or empty buckets of rainwater from the leaks in the roof. Despite signs limiting roof access outside atop the building, employees were told to go to the roof to tar it to prevent leaks according to Kelly Sharp.

The clearest indication of whether corrective action was taken regarding fall protection is seen in McPeck's own communication in which he emailed Kelly Sharp:

“Now call and Tom from OS HP and have them email me immediately **we are not doing anything for fall protection** tell them to fuck themselves blue.”
(Ex. 59-3, emphasis added.)

The violation has been characterized by SCO Danielson as a low death violation (Ex. 16-5). I find that the proposed penalty of \$107,520 is appropriate under the circumstances presented here.

ORDERS

1. In 15-00011SH, Citation No. M2900-057-15:
 - Citation 1 Item 1 is affirmed.
 - Citation 1 Item 2 is affirmed.
 - Citation 1 Item 3 is affirmed.
 - Citation 2 Item 4 is affirmed.

2. In 15-00014SH, Citation No. U0205-020-15:
 - Citation 1 Item 1a is affirmed.
 - Citation 1 Item 1b is affirmed.
 - Citation 1 Item 1c is affirmed.
 - Citation 1 Item 2 is affirmed.
 - Citation 1 Item 3a is affirmed.

- Citation 1 Item 3b is affirmed.
 - Citation 1 Item 3c is affirmed.
 - Citation 1 Item 3d is affirmed.
 - Citation 1 Item 4 is affirmed.
3. In 15-00025SH, Citation No. U0205-035-15:
- Citation 1 Item 1a is affirmed.
 - Citation 1 Item 1b is affirmed.
 - Citation 1 Item 1c is affirmed.
 - Citation 1 Item 2 is affirmed.
 - Citation 1 Item 3a is affirmed.
 - Citation 1 Item 3b is affirmed.
 - Citation 1 Item 3c is affirmed.
 - Citation 1 Item 3d is affirmed.
4. In 15-00026SH, Citation No. R3320-044-15:
- Citation 1 Item 1 is affirmed.
5. In 15-00027SH, Citation No. R3320-044-15:
- Citation 1 Item 1 is affirmed.
 - Citation 1 Item 2 is affirmed.
 - Citation 1 Item 3 is affirmed.
6. Bay Area's Request for Hearing in 16-00024SH, Citation No. R3320-044-15 is dismissed with prejudice.
7. Bay Area's Request for Hearing in 16-00025SH, Citation No. U0205-039-15 is dismissed with prejudice.
8. All other requests for relief are denied.

NOTICE TO ALL PARTIES: You are entitled to judicial review of this Order. Proceedings for review are to be instituted by filing a petition in the Court of Appeals, Supreme Court Building, Salem, Oregon 97301-2563, within 60 days following the date this Order is entered and served as shown hereon. The procedure for such judicial review is prescribed by ORS 183.480 and ORS 183.482.

Entered at Eugene, Oregon on **April 28, 2017**, with copies mailed to:

Workers' Compensation Board

/S/ Claudette Mirassou McWilliams
Claudette Mirassou McWilliams
Administrative Law Judge