

# Recent Cal/OSHA Appeals Board Decisions Address Inspection Warrants, Exclusion of Evidence, and Employee Foot Protection

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The California Occupational Safety and Health Appeals Board (OSHAB) recently issued two decisions of interest to employers in California. In *In re Calvary Chapel of San Jose*, the Board examined issues concerning an inspection warrant and the exclusion of evidence acquired during an inspection. In *In re 99 Cents Only Stores, LLC*, the Board affirmed an employer's liability for a workplace safety order violation for failing to provide adequate foot protection to an employee who sustained foot injuries at work.

## Quick Hits

On November 2, 2023, OSHAB held in *In re Calvary Chapel of San Jose* that the Board does have jurisdiction to hear a motion to suppress evidence, finding that a superior court improperly issued a warrant without probable cause.

On November 8, 2023, OSHAB held in *In re 99 Cents Only Stores, LLC*, that an employer violated Title 8, section 3385, of the California Code of Regulations, for failing to provide appropriate foot protection to its employees.

## Background

OSHAB is a three-member judicial body whose members are appointed by the governor and confirmed by the California State Senate. The Board reviews appeals from employers regarding citations that the California Division of Occupational Safety and Health (Cal/OSHA) issues for alleged violations of workplace safety and health laws and regulations.

## Summary of Cases

*In re Calvary Chapel of San Jose*

Calvary Chapel of San Jose, a private school located on church grounds, denied consent for a Cal/OSHA inspector to inspect the school's premises. In response, Cal/OSHA sought and secured an inspection warrant from Santa Clara County Superior Court. Cal/OSHA conducted a site

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inspection, and thereafter issued five citations for twelve alleged violations of safety orders under Title 8 of the California Code of Regulations, along with orders to abate the alleged violations. Calvary Chapel timely appealed the citations. In July 2022, Calvary Chapel moved to suppress all evidence from the inspection, on the ground that insufficient probable cause existed to support issuance of the inspection warrant in the first place. In September 2022, the administrative law judge (ALJ) presiding over Calvary Chapel's appeal granted the motion to suppress after concluding that precedential decisional authority gave her jurisdiction to rule on the motion to suppress issued by the superior court. Cal/OSHA timely appealed the ALJ's ruling and the Board agreed to review the ruling.

The Board considered the following four issues: (1) whether the Board, as an administrative agency, has jurisdiction to entertain a motion to suppress because a superior court allegedly issued a warrant without probable cause; (2) assuming the Board has jurisdiction, whether sufficient probable cause existed to support the issued warrant; (3) if the superior court properly issued the warrant, whether the ALJ properly applied the exclusionary rule to suppress all evidence; and (4) if the ALJ properly excluded evidence, whether the Board should apply the "good faith" exception to the exclusionary rule. The Board addressed on the first three, and remanded the case back to the ALJ for further proceedings on the fourth issue.

### **Issue One—Board Jurisdiction**

On the first issue, the Board ruled that it had jurisdiction to entertain a motion to suppress. The Board fundamentally based its decision on the doctrine of administrative exhaustion, a rule that requires aggrieved parties to present all issues of their case at the administrative agency proceeding—whenever such proceeding is mandatory—before seeking a judicial court to review said issues. Under this doctrine, the Board determined that Calvary Chapel had to raise all evidentiary issues to the ALJ first before seeking a ruling from a superior court. The Board also looked to Supreme Court of California precedent in *Goldin v. Public Utilities Commission* (1979), in which the court held that another administrative agency had the proper authority to review the adequacy of probable cause for an issued warrant. Based on the factual similarities between *Goldin* and the case at hand, the Board ruled that it had jurisdiction to consider a motion to suppress evidence, just as the agency in *Goldin* did, because the constitutional principles underlying the analysis of the adequacy of evidence for a warrant to issue are untethered to a particular agency, but apply equally to all agencies.

### **Issue Two—Sufficient Probable Cause**

Next, the Board, relying on statutory and constitutional requirements for issuing a warrant, affirmed the ALJ's ruling that Cal/OSHA's warrant application lacked the requisite probable cause. While the Board found that Cal/OSHA's declaration in support of the warrant application contained factual assertions of Calvary Chapel's alleged violations of Title 8 safety orders that satisfied the Labor Code and Code of Civil Procedure's requirements to obtain an inspection warrant, it did not satisfy the constitutional floor for establishing probable cause.

The Board relied on the analysis of the constitutional issue as detailed in *Salwasser Manufacturing Company v. Occupational Safety and Health Appeals Board* (1989). There, the Court of Appeal, Third Appellate District, held that the criminal probable cause standard does not apply for warrant applications based on employee complaints of workplace safety order violations. Instead, a "lesser standard of administrative probable cause" controls, which requires a showing that a proposed inspection is based on a "reasonable belief" of a past or an ongoing violation with specific evidence to support the reasonable suspicion. The Board then noted that Cal/OSHA's declaration in support of

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its warrant application did not have enough factual evidence to demonstrate even the lower applicable standard, i.e., a reasonable suspicion that Calvary Chapel had violated any Title 8 safety orders. Therefore, the Board in its decision affirmed the ALJ's finding that the warrant was insufficiently supported by probable cause.

### **Issue Three—Exclusionary Rule**

The Board limited its ruling on the third issue to the exclusion of evidence leading to the five citations. The Board explained in its decision that the “exclusionary rule” generally requires exclusion of evidence resulting from unlawful search, seizure, or inspection, unless the “good faith” exception applies. However, existing case law holds that the exclusionary rule does not preclude an administrative agency from pursuing corrective actions, and for that reason, the rule does not affect the abatement orders issued by Cal/OSHA. However, this finding was not well developed, as the parties to the appeal had settled the abatement orders by the time this decision was issued, rendering the issue moot.

### **Issue Four—Exception Rule**

For the last issue, the Board opted to send the case back to the ALJ for further proceedings on whether Cal/OSHA acted in good faith in seeking the warrant. Cal/OSHA argued on appeal that if the exclusionary rule applied, the good-faith exception rule should apply as well. The decision relied upon the Supreme Court of the United States' decision in *United States v. Leon* (1984) for its definition of the good-faith exception rule, which provides that evidence that the government acquires is allowed if the government has reasonably relied on a warrant that a neutral magistrate has issued, even if the warrant is “ultimately found to be unsupported by probable cause.” As the ALJ had not conducted any findings on the application of the good-faith exception, the Board remanded the issue to the ALJ for further briefing on the issue to allow findings to be made. Thus, this case may not be over. There may be a further appeal to the Board on the good-faith exception once the issue has been addressed by the ALJ in her rulings on this matter.

### **In re 99 Cents Only Stores, LLC**

99 Cents Only Stores, LLC, appealed a citation for a violation of California Code of Regulations Title 8, section 3385 for failing to provide appropriate foot protection. Cal/OSHA issued the citation in October 2018 and the ALJ held the hearing in May 2021 and June 2022. In October 2022, the ALJ affirmed the citation. 99 Cents Only Stores appealed and argued the ALJ had erroneously ruled that its administrative and engineering controls did not sufficiently negate exposure to foot injury hazards and that Cal/OSHA had improperly classified the citation as a serious violation. The Board affirmed the ALJ's decision. The decision underscores the value of knowing the basis for the regulation to avoid exposure to a citation. In this case, the fact that the employer sold primarily lightweight items alone—which normally would not cause a foot injury—did not exempt the employer from the regulation.

The Board noted that to establish a Title 8, section 3385, violation, Cal/OSHA was required to demonstrate that foot injury hazards to employees existed and 99 Cents Only Stores failed to require adequate foot protection from such hazards. The parties agreed that 99 Cents Only Stores did not require foot protection, instead disputing that the ALJ did not give adequate weight to 99 Cents Only Stores' control measures to eliminate foot injury hazard exposure. 99 Cents Only Stores in part asserted that most of the items it sold were lightweight and small to medium in size, and therefore did not pose foot injury hazards. The Board rejected this argument, emphasizing that the foot protection requirement is not dependent on whether employees work closely with items heavy enough to cause

injuries. The Board also rejected 99 Cents Only Stores' argument that its safety training and other controls for employees to move or lift pallets with items did not pose a workplace hazard, as video surveillance evidence showed that an employee suffered foot injuries while using a manual pallet jack (MPJ) to move a pallet on an incline because the safety training did not discuss the potential dangers of using an MPJ on an incline. Taken together, the Board held that 99 Cents Only Stores' administrative and engineering control measures did not effectively eliminate foot injury hazards to employees, which supported affirming the citation liability.

The Board also upheld the citation's serious violation classification. To start, the Board held that Cal/OSHA had established a rebuttable presumption that it properly classified the citation under the standards laid out in Labor Code section 6432 by demonstrating that an actual foot injury hazard existed and serious injuries could realistically result from that hazard. The Board then considered whether 99 Cents Only Stores had rebutted the presumption by showing that it did not or could not have known about the foot injury hazard. The Board disagreed that the presumption had been rebutted because the hazards to employees "were in plain view" based on the evidence.

Under the plain view doctrine, the Board held that 99 Cents Only Stores could have detected the hazard with the exercise of "reasonable diligence," because 99 Cents Only Stores knew that its employees moved heavy pallets using heavy equipment on a daily basis. The evidence showed 99 Cents Only Stores did not require appropriate protective footwear for those work activities, and therefore, the Board held that 99 Cents Only Stores had not "taken all reasonable steps to anticipate and prevent, or eliminate, employee exposure to the [foot injury] hazard." The Board further clarified that the controlling question was not whether an employer could foresee what an employee would do when a hazard exists, but whether the employer knew or should have known that its employees were exposed to the hazard. Ultimately, the Board affirmed 99 Cents Only Stores' liability for a serious violation of Title 8, section 3385.

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