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# Nonconsensual Cal/OSHA Inspections after *Salwasser*: They're Still Illegal

ANTHONY T. CASO\*

*The possible far-reaching penal consequences of a Cal/OSHA inspection force us to conclude that the search and seizure requirements of the Fourth Amendment and article I, section 13 of the California Constitution mandate a probable cause requirement for inspection warrants. We reach this conclusion with full awareness that our holding will nullify nonconsensual Cal/OSHA inspections in the traditional administrative sense. The 'cause' standard for administrative inspections provided in Code of Civil Procedure section 1822.52 will not apply to Cal/OSHA inspections.<sup>1</sup>*

In a decision that could lead to federal preemption<sup>2</sup> of the California Occupational Safety and Health Act (hereinafter referred to as Cal/OSHA),<sup>3</sup> the California Court of Appeal for the Fifth Appellate District struck down the inspection scheme of the state act.<sup>4</sup> The court held that the legality of inspections conducted by the Division of Occupational Safety and Health (hereinafter referred to as DOSH) would be tested against the criminal probable cause standards of the State and

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1. *Salwasser Manuf. Co. v. Municipal Ct.* 94 Cal. App. 3d 223, 231, 156 Cal. Rptr. 292, 297-98 (1979).

2. See Comment, *Criminal Probable Cause in Administrative Searches Under California OSHA: Mandated or Preempted?*, 11 PAC. L.J. 1019 (1980).

3. CAL. LAB. CODE §§6300-6708.

4. See 94 Cal. App. 3d at 234, 156 Cal. Rptr. at 299.

Federal Constitutions.<sup>5</sup> The basis of the decision was the fact that criminal sanctions permeate the state act.<sup>6</sup> To date, the holding in *Salwasser* has been largely ignored by DOSH. Instead of complying with the court's ruling, DOSH has chosen to promulgate regulations that purport to separate criminal and civil investigations within the division.<sup>7</sup> The purpose of this article is to examine the legal effect of these regulations.

#### FEDERAL AND STATE OCCUPATIONAL SAFETY AND HEALTH LEGISLATION

The Occupational Safety and Health Act of 1970 (hereinafter referred to as Fed/OSHA)<sup>8</sup> is, perhaps, the most comprehensive federal regulatory scheme enacted by Congress. With the declared purpose of assuring safe and healthful working conditions for every working person in the nation,<sup>9</sup> the Act seeks to regulate *every* place of employment in *every* state and territory of the country.<sup>10</sup> The sweeping jurisdiction granted to the Secretary of Labor by the Act is limited, however, by provisions of Fed/OSHA that allow the states to assume responsibility for the development and enforcement of their own occupational safety and health laws.<sup>11</sup> Any state wishing to supplant Fed/OSHA with its own regulatory scheme may submit a plan for the development and enforcement of the necessary laws and regulations to the Secretary of Labor.<sup>12</sup> The Secretary *must* approve the state plan if it meets certain enumerated standards<sup>13</sup> including a provision

For a right of entry and inspection of all work places subject to [Fed/OSHA] which is at least as effective as that provided [by this Act] and includes a prohibition on advance notice of inspections.<sup>14</sup>

For the enforcement of its provisions, Fed/OSHA provides inspectors with free access to any place where work is performed so long as the inspection is conducted at a "reasonable" time and in a "reasonable" manner.<sup>15</sup> The Supreme Court, however, has superimposed a warrant requirement on this broad inspection authority. In *Marshall v. Barlow's, Inc.*,<sup>16</sup> the Court held that nonpublic areas of commercial fa-

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5. *Id.* at 231.

6. *Id.*

7. See 8 CAL. ADMIN. CODE §§344.50-344.53.

8. 29 U.S.C. §§651-678.

9. *Id.* §651(b).

10. *Id.* §653.

11. *Id.* §667.

12. *Id.* §667(b).

13. *Id.* §667(c).

14. *Id.* §667(c)(3).

15. *Id.* §657.

16. 436 U.S. 307 (1978).

cilities are entitled to the same fourth amendment protection as homes.<sup>17</sup> In so holding, the Court noted that the enactment of the fourth amendment was a response to the use of general warrants and writs of assistance against colonial merchants to enforce revenue measures and search for smuggled goods.<sup>18</sup> In light of this history, the Court held that absent exigent circumstances, warrantless, nonconsensual searches by Fed/OSHA inspectors are inherently unreasonable.<sup>19</sup> The Court did note, however, that Fed/OSHA officials should not be held to the probable cause standard applied in criminal cases.<sup>20</sup> Rather, the Court held that a warrant could issue on the basis of administrative probable cause.<sup>21</sup> In addition to specific evidence of an existing violation, administrative probable cause may be established by a showing that the particular work place was selected for inspection on the basis of reasonable, neutral criteria.<sup>22</sup>

With the enactment of the California Occupational Safety and Health Act of 1973 (hereinafter referred to as Cal/OSHA), the state took advantage of the provisions of Fed/OSHA to take over responsibility for developing and enforcing laws for workers' safety.<sup>23</sup> Under the Act, DOSH is the lead enforcement agency with power, jurisdiction, and supervision over every place of employment in the state.<sup>24</sup> Although similar in many respects to Fed/OSHA,<sup>25</sup> there is one significant point of distinction between the state and federal acts in the area of enforcement. While the enforcement provisions of Fed/OSHA rely primarily on civil penalties,<sup>26</sup> enforcement provisions of Cal/OSHA are permeated with criminal sanctions.<sup>27</sup> It is this difference between the two Acts that the California Court of Appeal relied upon in striking down the use of administrative warrants to conduct nonconsensual Cal/OSHA inspections.<sup>28</sup>

Initially, Cal/OSHA purported to authorize DOSH inspectors to conduct warrantless searches of places of employment.<sup>29</sup> In 1979, however, the inspection procedures under Cal/OSHA were amended<sup>30</sup> to

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17. *Id.* at 311.

18. *Id.*; see AN ANALYSIS BY THE PACIFIC LEGAL FOUNDATION OF THE ANGLO-AMERICAN LEGAL TRADITION TOWARD WARRANTLESS SEARCHES, CONG. REC. E591 (1977).

19. 436 U.S. at 312-13.

20. *Id.* at 320.

21. *Id.*

22. *Id.* at 320-21.

23. See CAL. STATS. 1973, c. 993, §104, at 1954.

24. CAL. LAB. CODE §6307.

25. Compare 29 U.S.C. §§651-678 (1976 & Supp. V 1981) with CAL. LAB. CODE §§6300-6708.

26. 29 U.S.C. §666.

27. CAL. LAB. CODE §§6310, 6314, 6321, 6326, 6413.5, 6423, 6425, 6426.

28. *Salwasser*, 94 Cal. App. 3d at 231, 156 Cal. Rptr. at 297.

29. CAL. STATS. 1973, c. 993, §68, at 1931.

30. CAL. STATS. 1979, c. 241, §1, at 503.

comport with the United States Supreme Court decision in *Barlow's*.<sup>31</sup> According to the statute, DOSH inspectors may obtain an administrative inspection warrant upon a showing of any of the following grounds:

1. the report of an industrial accident, injury, or illness;
2. the receipt of a complaint; or
3. specific neutral criteria for selection of a particular work site for inspection.<sup>32</sup>

Prior to the effective date of this amendment, however, the California Court of Appeal had ruled that DOSH inspectors may not conduct nonconsensual inspections of nonpublic areas of a place of employment without a warrant issued on a showing of criminal probable cause.<sup>33</sup>

### THE *SALWASSER* DECISION

In *Salwasser*, the DOSH inspector, after being twice refused entry to conduct a routine inspection, obtained an administrative search warrant<sup>34</sup> pursuant to a procedure adopted by the state<sup>35</sup> to comply with the United States Supreme Court decisions in *Camara v. Municipal Court*<sup>36</sup> and *See v. Seattle*.<sup>37</sup> The cause proffered for the issuance of the warrant was the fact that the appellant's plant was included on a computer listing of work places that had, at some time in the past, reported industrial accidents that DOSH considered preventable.<sup>38</sup> It thus appears that DOSH complied fully with the administrative cause standard that would be announced in the *Barlow's* decision.<sup>39</sup> Notwithstanding the issuance of the warrant by the Court, appellant continued in his refusal to allow DOSH inspectors access to the non-public work areas of the plant.<sup>40</sup> Appellant was thereafter charged with violating California Code of Civil Procedure section 1822.57<sup>41</sup> which provides that willful refusal to permit an inspection authorized by an administrative warrant is punishable as a misdemeanor. Appellant first

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31. *Id.*, §2; 436 U.S. 307.

32. CAL. LAB. CODE §6314.

33. *Salwasser*, 94 Cal. App. 3d at 231, 156 Cal. Rptr. at 297-98.

34. *Id.* at 225, 156 Cal. Rptr. at 293-94.

35. CAL. CIV. PROC. CODE §§1822.50-1822.57.

36. 387 U.S. 523 (1967). The Court overruled *Frank v. Maryland*, 359 U.S. 360 (1959), and held nonconsensual inspections by municipal building inspectors unconstitutional absent a warrant. 387 U.S. at 528, 540.

37. 387 U.S. 541 (1967). The Court held that the Fourth Amendment protects commercial buildings as well as private residences from nonconsensual warrantless inspections. *Id.* at 543.

38. *Salwasser*, 94 Cal. App. 3d at 226, 156 Cal. Rptr. at 294.

39. Compare *Id.* at 225-26, 156 Cal. Rptr. at 293-94 with *Barlow's*, 436 U.S. at 320-21.

40. 94 Cal. App. 3d at 226, 156 Cal. Rptr. at 294.

41. *Id.*

moved for dismissal of the complaint for want of jurisdiction and, after that motion was denied, sought a writ of prohibition from the Superior Court alleging that issuance of the warrant violated the search and seizure clauses of the Federal and State Constitutions.<sup>42</sup>

On appeal from the refusal of the Superior Court to issue the writ, the Fifth District Court of Appeal, after analyzing the *Barlow's* decision, noted that "[t]here is a fundamental and far-reaching distinction between Federal and California OSHA legislation insofar as their penalty provisions."<sup>43</sup> According to the court, this distinction is in the fact that with the exception of willful violation of a safety standard resulting in the death of an employee, an employer violating Fed/OSHA standards is assessed a civil penalty while an employer violating those same standards under Cal/OSHA could be found guilty of a misdemeanor punishable by imprisonment in a county jail for up to six months and/or a fine up to \$5,000.<sup>44</sup> Further, under Cal/OSHA, the criminal penalties are applied to both willful and negligent conduct on the part of the employer.<sup>45</sup> The court found that because of this extreme departure from the criminal sanctions under Fed/OSHA, a Cal/OSHA inspection "partakes of an investigation for the discovery of a crime."<sup>46</sup> Thus, the court ruled that the administrative cause standard for issuance of inspection warrants was constitutionally inadequate to allow nonconsensual inspections by DOSH compliance officers.<sup>47</sup> DOSH, however, has yet to obey the mandate of that decision. Instead, DOSH has promulgated regulations that it claims eliminate the need to obtain a criminal probable cause search warrant.<sup>48</sup> We turn now to the question of the legal effect of those regulations.

### THE REGULATIONS

The primary thrust of the regulations<sup>49</sup> is an attempt to draw a strict

42. *Id.*

43. *Id.* at 229-30, 156 Cal. Rptr. at 296-97.

44. *Id.* at 230-31, 156 Cal. Rptr. at 297.

45. *Id.*

46. *Id.* at 231, 156 Cal. Rptr. at 297.

47. *Id.* at 231-32, 156 Cal. Rptr. at 297-98.

48. See 8 CAL. ADMIN. CODE §§344.50-344.53.

49. Article 10. Civil and Criminal Enforcement Policy of the Division of Occupational Safety and Health

344.50. Civil Inspections and Investigations.

Compliance personnel of the Division are responsible for conducting inspections and investigations under the California Occupational Safety and Health Act for the purpose of invoking civil enforcement remedies only. If hazardous or violative conditions are found, the civil enforcement remedies which can be utilized include, but are not limited to, the issuance of citations and civil penalties, special orders, orders to take special action, the initiation of injunction proceedings, issuance of orders prohibiting use, and the revocation or suspension of permits. Division compliance personnel have no authority to initiate criminal proceedings.

dividing line between civil and criminal functions of DOSH.<sup>50</sup> Under the regulations, civil investigations are carried out by compliance personnel<sup>51</sup> while criminal enforcement functions are the exclusive domain of the Bureau of Investigations.<sup>52</sup> Although compliance personnel are limited to the use of civil enforcement remedies,<sup>53</sup> they are *required* to report conditions that may constitute criminal violations to the Bureau for further investigation.<sup>54</sup> The only exception to this reporting requirement is if the compliance officer discovered the alleged criminal violations during a "scheduled inspection according to a general administrative plan."<sup>55</sup> This exception does not apply if the alleged criminal violation is characterized as willful or repeated.<sup>56</sup> Other than the implementation of these regulations and the statutory amendment in response to *Barlow's*, DOSH has not altered its inspection procedures to comply with the *Salwasser* decision.<sup>57</sup> Before analyzing the effectiveness of these regulations in overcoming the

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344.51. Criminal Investigations.

The central function of the Bureau of Investigations, within the Division of Occupational Safety and Health, is to conduct criminal investigations. The Bureau must investigate accidents involving violations of a standard, order, or special order, or Section 25950 of the Health and Safety Code in which there is a serious injury to five or more employees, death, or request for prosecution by a Division representative. The Bureau of Investigations is the only entity within the Division which is empowered to conduct criminal investigations and to refer the results of such investigations when appropriate to a city attorney or district attorney for necessary action. The Bureau must analyze the circumstances surrounding the violation to determine whether the conduct is sufficiently aggravated to fall within the scope of Labor Code Section 6423, 6425 and other penal statutes.

344.52. Referral of Cases Other Than Accident Cases by Compliance Personnel to the Bureau of Investigations.

If Division compliance personnel become aware that there are conditions which may constitute criminal violations, the case must be referred through the Regional Manager/Supervising Industrial Hygienist, with a copy to the appropriate Deputy, to the respective Northern or Southern Office of the Bureau of Investigations. In cases referred for investigation the Supervising Special Investigator will assign the case to a Special investigator for investigation. The investigator will review the facts of the case, interview witnesses, and otherwise, conduct a thorough investigation. The assigned investigator shall prepare a report to the Supervising Special Investigator which shall include a summary of evidence, findings, and recommendations for appropriate action.

344.53. Nonreferral of Other Than Willful or Repeated Violations in the Context of Scheduled Inspections by Compliance Personnel to the Bureau of Investigations.

Whenever the Division conducts a scheduled inspection according to a general administrative plan in contrast to an accident, complaint, or follow-up investigation, Division compliance personnel shall invoke only the civil enforcement remedies as set forth in Section 344.50 unless the violation is characterized as willful or repeated. This section shall not limit the Division's prerogative to enforce Labor Code Section 6326.

50. See Letter from Frances C. Schreiber in Response to Public Records Act Request by Author (copy on file at the *Pacific Law Journal*).

51. 8 CAL. ADMIN. CODE §344.50.

52. *Id.* at §344.51.

53. *Id.* at §344.50.

54. *Id.* at §344.52.

55. *Id.* at §344.53.

56. *Id.*

57. See *The Salwasser Regulations*, THE OSHA ADVISER, April 1980, at 2.

requirement of a criminal type probable cause search warrant to conduct nonconsensual inspections, two points must first be noted.

First, the regulations make only one substantive change in the pre-*Salwasser* Cal/OSHA inspection procedures. That change is *not* the separation of criminal and civil functions within DOSH. The Bureau of Investigations was created by statute in 1973.<sup>58</sup> Since the duties of the Bureau include investigation of requests for prosecution by DOSH personnel and preparation of cases for prosecution,<sup>59</sup> it appears that DOSH compliance personnel were never authorized to initiate criminal proceedings on their own. It should be noted that DOSH agrees with this construction of the statute. In fact, DOSH strenuously argued this point before the Court of Appeal in *Salwasser*.<sup>60</sup> Thus, the only substantive change made by the regulations is the limited prohibition against referral by compliance personnel of alleged criminal violations (other than repeated or willful violations) discovered in the course of a scheduled inspection conducted pursuant to a general administrative plan.<sup>61</sup>

The second point that needs to be made is that *Salwasser* held the Cal/OSHA inspection procedures *facially* unconstitutional rather than unconstitutional as applied. The court noted:

The statute must be judged not by the manner in which the agency chooses to exercise its authority to file criminal complaints, but by the extent of the criminal authority actually granted to the agency.<sup>62</sup>

#### EFFECT OF THE REGULATIONS

The interpretation of a statute by the administrative agency charged with its administration is normally accorded great weight under California law.<sup>63</sup> This is especially true of interpretations rendered at the time the statute is enacted.<sup>64</sup> The courts consider such contemporaneous expressions relevant on the assumption that the agency had a hand in drafting the statute.<sup>65</sup> Even when an agency does render such a substantially contemporaneous interpretation, the courts are only

58. CAL. STATS: 1973, c. 993, §70, at 1932.

59. CAL. LAB. CODE §6315.

60. Petition for Rehearing at 9, *Salwasser Manufacturing Co. v. Municipal Court*, 5 Civ. No. 4296 (Court of Appeal, June 29, 1979) (copy on file at the *Pacific Law Journal*).

61. 8 CAL. ADMIN. CODE §344.53.

62. *Salwasser*, 94 Cal. App. 3d at 233, 156 Cal. Rptr. at 298.

63. See, e.g., *Morris v. Williams*, 67 Cal. 2d 733, 748, 433 P.2d 697, 707, 63 Cal. Rptr. 689, 699 (1967); *Whitcomb Hotel, Inc. v. California Employment Commission*, 24 Cal. 2d 753, 756, 151 P.2d 233, 235 (1944).

64. E.g., 67 Cal. 2d at 748, 435 P.2d at 707, 63 Cal. Rptr. at 699; 24 Cal. 2d at 756-57, 151 P.2d at 235.

65. *Id.*

bound to give weight to the agency interpretation.<sup>66</sup> The ultimate responsibility for statutory construction, however, falls to the courts.<sup>67</sup> In promulgating the “*Salwasser*” regulations, DOSH was not engaging in a substantially contemporaneous construction of the search provisions of Cal/OSHA. The statutes forming the basis of the new regulations had been in existence since the enactment of Cal/OSHA in 1973,<sup>68</sup> and had already been interpreted by the Court of Appeal in *Salwasser*.<sup>69</sup> Thus, in promulgating the regulations, DOSH was attempting to effect a substantive change in the scope of the statute. This an administrative agency may not do.<sup>70</sup>

Even if the regulations could have the effect of altering the facial invalidity of the statute, they would not alter the holding in *Salwasser*. As noted above, the only substantive change affected by the regulations is the limited prohibition on referring certain alleged criminal violations discovered by DOSH compliance personnel during the course of an inspection conducted in accordance with a general administrative plan.<sup>71</sup> Notwithstanding this limited prohibition, DOSH compliance personnel are still *required* to report alleged criminal violations of a repeated or willful nature that are discovered during the course of such inspection.<sup>72</sup> Further, compliance personnel are *required* to refer for prosecution the existence of *all* alleged criminal violations discovered during the course of an inspection conducted pursuant to an accident report or complaint.<sup>73</sup> Thus, in spite of the regulations, inspections conducted by DOSH compliance personnel continue to partake of a search for evidence of criminal conduct.<sup>74</sup> Any argument by DOSH that criminal probable cause type search warrants are not to be required since the *purpose* of the search is civil rather than criminal, should be rejected for the reasons stated by the Court of Appeal in *Salwasser*<sup>75</sup> and by the California Supreme Court in *Parish v. Civil Service Commission*.<sup>76</sup>

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66. *E.g.*, *Sanchez v. Unemployment Insurance Appeals Board*, 20 Cal. 3d 55, 67, 569 P.2d 740, 748, 141 Cal. Rptr. 146, 154 (1977); 67 Cal. 2d at 748, 433 P.2d at 707, 63 Cal. Rptr. at 699; 64 Cal. 2d at 757, 151 P.2d at 235.

67. *See id.*

68. The authority cited for promulgation of the regulations is California Labor Code sections 6308, 6314, and 6315. Each of these sections were part of the original Act. CAL. STATS. 1973, c. 993, §55, at 1928; §68, at 1931; §70, at 1932; *see also* 8 CAL. ADMIN. CODE §344.50.

69. 94 Cal. App. 3d at 227-234, 156 Cal. Rptr. at 295-99.

70. *See, e.g.*, 67 Cal. 2d at 748, 433 P.2d at 707, 63 Cal. Rptr. at 699, 24 Cal. 2d at 757, 151 P.2d at 235.

71. *See supra* text accompanying notes 58-61.

72. Compare 8 CAL. ADMIN. CODE §344.53 with *id.* §344.52.

73. 8 CAL. ADMIN. CODE §344.52.

74. *See id.*; *Salwasser*, 94 Cal. App. 3d at 231, 156 Cal. Rptr. 297.

75. 94 Cal. App. 3d at 232-33, 156 Cal. Rptr. at 298-99.

76. 66 Cal. 2d 260, 267, 425 P.2d 223, 228, 57 Cal. Rptr. 623, 628.

In *Parish*, the California Supreme Court was faced with the issue of the constitutionality of early morning searches by county welfare workers of welfare recipients' homes.<sup>77</sup> The purpose of the project, dubbed "Operation Bedcheck," was to detect the presence of "unauthorized males" in the homes of the recipients.<sup>78</sup> Even though the purpose of the searches was to determine welfare eligibility and thus civil in nature,<sup>79</sup> the court noted that the evidence searched for could form the basis of a criminal prosecution without further culpable conduct on the part of the recipient.<sup>80</sup> Thus, the court held that the legality of the searches must be measured against standards governing searches for evidence of a crime.<sup>81</sup>

Similarly, inspections by DOSH compliance personnel must be measured against standards governing searches for evidence of a crime. As noted by the court in *Salwasser*, the evidence searched for by compliance personnel could, in many cases, form the basis of a criminal prosecution.<sup>82</sup> The regulations promulgated by DOSH do nothing to change this result. Indeed, the regulations reinforce the concerns expressed by the court in *Salwasser* by creating a substantive duty on the part of compliance personnel to refer for prosecution existence of alleged criminal conduct.<sup>83</sup> The only instance in which this substantive duty is qualified is when the inspection is scheduled pursuant to a general administrative plan.<sup>84</sup> Even then, compliance personnel are *required* to refer for prosecution existence of alleged criminal conduct if the violation is characterized as "willful" or "repeated."<sup>85</sup> Thus, the regulations promulgated by DOSH do nothing to alter the holding of *Salwasser* that a criminal, probable cause type search warrant is required to conduct a nonconsensual inspection of the nonpublic areas of a place of employment.

In addition to the failure of the regulations to alter the holding in *Salwasser*, it must be noted that the regulations themselves supply an independent basis on which to require a criminal, probable cause search warrant to conduct a Cal/OSHA inspection. As discussed earlier, the regulations attempt to erect a wall between the civil and criminal functions within DOSH.<sup>86</sup> The apparent theory behind this

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77. *Id.* at 263, 425 P.2d at 225, 57 Cal. Rptr. at 625.

78. *Id.*

79. *Id.* at 265, 425 P.2d at 226, 57 Cal. Rptr. at 626.

80. *Id.* at 266, 425 P.2d at 227, 57 Cal. Rptr. at 627.

81. *Id.* at 267, 425 P.2d at 228, 57 Cal. Rptr. at 628.

82. *See supra* text accompanying notes 42-45.

83. 8 CAL. ADMIN. CODE §344.52.

84. *Id.* §344.53.

85. *Id.*

86. *See supra* text accompanying notes 50-52.

attempt is to restrict applicability of the requirements for criminal probable cause search warrants to searches conducted by the Bureau of Investigations while allowing compliance personnel to obtain warrants pursuant to the lesser standard of administrative probable cause.<sup>87</sup> By operation of the regulations, however, this theory fails because of the substantive duty created by the regulations for compliance personnel to refer for prosecution all alleged criminal violations discovered during the course of an "administrative" inspection.

Referral for prosecution of alleged criminal violations by DOSH personnel must be distinguished from situations where evidence of criminal conduct discovered by municipal health or building inspectors in the course of an administrative inspection is reported to the police. In the latter situation, the health or building inspector is not searching for evidence of a crime. Therefore, the Fourth Amendment privacy interest of the owner or occupant of the place searched is fully protected by the requirement that the inspectors show administrative probable cause to search before a warrant will issue.<sup>88</sup> If, while lawfully engaged in a search pursuant to such a warrant, the inspectors discover evidence of criminal conduct, the discovery may be reported to the police without violating the Fourth Amendment proscription against unreasonable searches and seizures.<sup>89</sup>

Inspections by DOSH compliance personnel are quite different, however. The evidence searched for by compliance personnel is the same evidence that could form the basis of a criminal prosecution.<sup>90</sup> Thus, inspections by DOSH personnel partake of a search for evidence of a crime. Although the regulations prohibit compliance personnel from invoking other than civil enforcement remedies,<sup>91</sup> compliance personnel are required to refer for prosecution evidence of alleged criminal violations discovered during the course of an "administrative" inspection.<sup>92</sup> This provision of the regulations subjugates compliance personnel to the role of agents for the "separate" Bureau of Investigations.<sup>93</sup> The "wall" created between the civil and criminal functions of DOSH is, therefore, illusory.

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87. See *The Salwasser Regulations*, *supra* note 57, at 2.

88. See *Camara*, 387 U.S. at 534.

89. See *Salwasser*, 94 Cal. App. 3d at 233, 156 Cal. Rptr. at 298.

90. See *supra* text accompanying notes 42-45.

91. 8 CAL. ADMIN. CODE §344.50.

92. *Id.* §344.52.

93. As agents of the criminal enforcement branch of DOSH, compliance personnel are subject to the same constitutional restrictions as the police in search of evidence of a crime. See, e.g., *People v. Zelinski*, 24 Cal. 3d 357, 366, 594 P.2d 1000, 1006, 155 Cal. Rptr. 575, 580 (1979); *Dyas v. Superior Court*, 11 Cal. 3d 628, 632 n.2, 522 P.2d 674, 677, 114 Cal. Rptr. 114, 117 (1974); *People v. Tarantino*, 45 Cal. 2d 590, 290 P.2d 505 (1955).

## PRACTICAL APPLICATIONS

Armed with the knowledge that a nonconsensual Cal/OSHA inspection of nonpublic work areas is illegal unless conducted pursuant to a criminal probable cause search warrant, the employer's interests are best protected if the employer refuses to allow the search to be conducted. The employer, however, may be reluctant to take this course of action when informed that willful refusal to allow execution of the warrant is a misdemeanor.<sup>94</sup> Should DOSH decide to prosecute the individual who refuses to allow the illegal inspection, a writ of prohibition against the criminal proceedings is the proper remedy.<sup>95</sup>

If the employer acquiesces to the authority of the warrant and allows the illegal search to go forward,<sup>96</sup> there are two possible remedies. Whether or not any civil violations are discovered by DOSH compliance officers during the course of the inspection, the employer would have a cause of action for the Constitution-based tort of illegal search.<sup>97</sup> If DOSH inspectors do discover violations of Cal/OSHA safety standards during the course of the illegal inspection and initiate civil enforcement proceedings, the question arises as to the applicability of the exclusionary rule.

Although the exclusionary rule is not generally applied in either civil or administrative proceedings, there is no intrinsic rule of law prohibiting its applicability. Thus, application of the rule is dependent upon whether exclusion of evidence will serve the purposes of the rule.<sup>98</sup> Under both federal and state law, the purpose of the rule is to deter government misconduct.<sup>99</sup> Further, the courts have made clear the fact that application of the rule is *not* a personal constitutional right.

It [the exclusionary rule] is not calculated to redress the injury of the victim of the search or seizure, for any "[r]eparation comes too late." *Linkletter v. Walker*, 381 U.S. 618, 637.<sup>100</sup>

Finally, the United States Supreme Court has intimated that the exclusionary rule should apply only in proceedings where it is the least drastic method of advancing the purpose of deterring government

94. CAL. CIV. PROC. CODE §1822.57.

95. This was the procedure used in the *Salwasser* case. 94 Cal. App. 3d at 226-27, 156 Cal. Rptr. at 294.

96. In acquiescing to the authority of the warrant, the employer must be careful not to "consent" to the inspection.

97. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). An action against DOSH could also be predicated on 42 U.S.C. §1983.

98. *See United States v. Janis*, 428 U.S. 433, 446 (1976).

99. *See, e.g., Stone v. Powell*, 428 U.S. 465, 486; *Janis*, 428 U.S. at 446; *Emslie v. State Bar*, 11 Cal. 3d 210, 229, 520 P.2d 991, 1002, 113 Cal. Rptr. 175, 186 (1974); *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955).

100. 428 U.S. at 486.

misconduct.<sup>101</sup>

In the context of an illegal search by DOSH compliance officers, the least drastic application of the exclusionary rule would be to limit its use to criminal enforcement proceedings. The problem with this approach, however, is that DOSH files criminal complaints only in a very small minority of its cases.<sup>102</sup> Thus, limiting applicability of the exclusionary rule to criminal enforcement proceedings would do little, if anything, to deter future illegal searches by DOSH compliance personnel. Under the rationale of the State and Federal Supreme Court cases, therefore, the exclusionary rule should apply to Cal/OSHA civil enforcement administrative hearings.<sup>103</sup>

The procedure for invoking the exclusionary rule in Cal/OSHA administrative proceedings is different from that used in a criminal enforcement proceeding. In criminal proceedings, Penal Code section 1538.5 provides for a special pretrial hearing solely on the question of whether the evidence should be suppressed. Section 1538.5 applies by its terms only to "criminal defendants," however, the California Supreme Court has held it to be inapplicable to civil administrative hearings.<sup>104</sup> Rather, the Motion to Suppress must be presented to the hearing officer at the time of the administrative hearing.

Finally, the employer may be concerned with the cost effectiveness of challenging an illegal Cal/OSHA search. If, during the course of an illegal inspection, DOSH compliance personnel discover "nonserious" violations of Cal/OSHA safety standards, the fine involved may range from a few hundred dollars to no fine at all.<sup>105</sup> The cost of legal services involved in appealing a Cal/OSHA citation, however, is likely to exceed the cost of paying whatever civil penalty may be involved.<sup>106</sup> In such cases, the attorney should be aware of the possibility of obtaining an award of attorney fees against DOSH.

In 1979, the Legislature amended Cal/OSHA<sup>107</sup> to grant the Occupational Safety & Health Appeals Board the discretion to award costs,

101. See, e.g., 428 U.S. at 486; 428 U.S. at 446; *United States v. Calandra*, 414 U.S. 338, 348 (1974).

102. *Salwasser*, 94 Cal. App. 3d at 232, 156 Cal. Rptr. at 298.

103. The Federal Occupational Safety and Health Review Commission has ruled that the exclusionary rule does apply in Fed/OSHA administrative proceedings to suppress evidence discovered during an inspection in violation of the standards set out in *Barlow's*. *Secretary of Labor v. Sarasota Concrete Co.*, April 27, 1981 (49 U.S.L.W. 2711-2712).

104. *Golden v. Public Utilities Commission*, 23 Cal. 3d 638, 668, 592 P.2d 289, 308, 153 Cal. Rptr. 802, 821 (1979).

105. DOSH has discretion to impose no civil penalty for nonserious violations. CAL. LAB. CODE §6427.

106. This statement is based on a conservative estimate of a half day hearing and subsequent briefing. The author of this article, however, devoted more than 200 hours on such a case.

107. CAL. STATS. 1979, c. 1077, § 1, at 3854.

in an amount not to exceed \$5,000, to an employer who prevails in an appeal from a citation.<sup>108</sup> In addition to prevailing on the appeal, the employer must establish by a preponderance of the evidence that issuance of the citation was the result of arbitrary or capricious conduct on the part of DOSH.<sup>109</sup> The decision whether to award costs, and how much to award is totally within the discretion of the Appeals Board and does not appear to be appealable.<sup>110</sup>

#### CONCLUSION

In 1979, the California Court of Appeal for the Fifth District, held the Cal/OSHA inspection procedures facially unconstitutional. DOSH, however, has ignored this ruling which requires criminal probable cause search warrants to conduct nonconsensual inspections. Instead, DOSH has attempted to circumvent the State and Federal Constitutions by promulgating regulations that purport to erect a "wall" between the civil and criminal enforcement duties of DOSH. Analysis of these regulations has shown that this "wall" is illusory.

Until DOSH complies with the ruling in *Salwasser*, employers should be successful in preventing *all* nonconsensual Cal/OSHA inspections. Even if the inspection is allowed to go forward under the authority of an administrative warrant, the exclusionary rule should apply to suppress any evidence discovered during the course of the illegal inspection. Finally, an employer who prevails in an appeal from citation issued as a result of an illegal inspection, should be able to recoup costs, including attorney fees, on the grounds that the actions of DOSH were arbitrary and capricious in light of the *Salwasser* decision.

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108. CAL. LAB. CODE §149.5.

109. 8 CAL. ADMIN. CODE §397.

110. See CAL. LAB. CODE §§149.5, 6627-6629. If the appeal of the citation proceeds to the courts, however, award of attorney fees may be made pursuant to California Code of Civil Procedure section 1021.5 or 42 U.S.C. §1988. To receive an award of fees under 42 U.S.C. §1988, a violation of the employer's rights under 42 U.S.C. §1983 must be pleaded. See generally *Maine v. Thiboutot*, 448 U.S. 1 (1980); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

