BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1499137**
EMPLOYBRIDGE HOLDING COMPANY **dba SELECT STAFFING** **3829 PLAZA DRIVE, SUITE 602** **OCEANSIDE, CA 92056** **Employer**	**DECISION**

Statement of the Case

Employbridge Holding Company, DBA Select Staffing (Employer), provides temporary employees. Beginning September 21, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Bahman Nahoray (Nahoray), conducted an inspection arising from reports of illness from coronavirus disease 2019 (COVID-19) at a meal packaging facility, located at 45000 Yucca Avenue, in Lancaster, California (the site).

On April 6, 2021, the Division cited Employer alleging two violations. Citation 1 alleges Employer failed to effectively implement its written injury and illness prevention program (IIPP) by not investigating COVID-19 illness at the site. Citation 2 alleges Employer failed to identify and correct COVID-19 transmission hazards. The Division cited three instances under Citation 2 but withdrew the first instance at the hearing, leaving only the second and third instances at issue.

Employer did not file a timely appeal of the citations. Its late appeals request was granted. It thereafter filed an unopposed motion to amend its appeals to expand the grounds of the appeals, contesting the existence of the violations as to both Citations 1 and 2, and the reasonableness of the proposed penalty for Citation 2. Employer asserted various affirmative defenses as to both citations.[1]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) over the following four days: June 13, 2023, June 14, 2023, August 22, 2023, and November 8, 2023. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video

[1] Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

platform. Attorney Michael Rubin, of Ogletree Deakins, represented Employer. Sesilya Saraydarian, Staff Counsel, represented the Division. The matter was submitted on May 7, 2024.

Issues

1. Did Employer fail to investigate COVID-19 illness as required by its Injury and Illness Prevention Program?

2. Did Employer fail to inspect and correct COVID-19 transmission hazards?

3. Is Citation 2 properly classified as Serious?

4. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

5. Is the proposed penalty for Citation 2 reasonable?

Findings of Fact

1. Employer's employees (Employees) worked as temporary staff for Employer's client (Client).

2. Employees worked among Client's other workers in Building B at the site.

3. Beginning April 2020, Client limited Building B entry only to workers already assigned to that building.

4. Employer's IIPP requires Employer to conduct an exposure investigation upon notice of serious illness of an Employee.

5. COVID-19 is an aerosol-transmissible illness which may lead to hospitalization and death.

6. Between April 2020 and October 2020, Client notified Employer that a COVID-19 outbreak affected Employees.

7. Employer was aware that COVID-19 was a new hazard affecting its Employees.

8. Employer did not conduct an exposure investigation after receiving notice of the outbreak.

9. Employer reviewed state and federal government COVID-19 guidance publications in the spring and summer of 2020 but did not update its September 2020 site evaluation form to include COVID-19 hazards.

10. Employer called Employees by telephone and took notes on their performance but did not gather information from them about COVID-19 hazards.

11. Clear hanging panels in Building B separated workers who faced each other across assembly lines, but none were installed between adjacent workers.

12. Workers in Building B did not observe social distancing, and they had no six-foot distance markers.

13. COVID-19 aerosols can travel around hanging panels.

14. The Division did not discuss the feasibility of engineering controls against exposure to COVID-19 aerosols.

15. Transmission of COVID-19 is a realistic possibility if no inspection or correction of transmission hazards occur after an outbreak.

16. Employer took no steps to gather information about COVID-19 transmission hazards from Client or Employees.

17. The proposed penalty for Citation 2 is calculated in accordance with penalty-setting regulations.

Analysis

1. Did Employer fail to investigate COVID-19 illness as required by its Injury and Illness Prevention Program?

Citation 1 alleges a violation of section 3203, subdivision (a)(5),[2] which requires:

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum;

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

[…]
(5) Include a procedure to investigate occupational injury or occupational illness.

The Division alleges:

> Prior to and during the course of the Division's Inspection, Employbridge Holding Company dba Select Staffing, a provider of temporary employees failed to effectively implement its written Injury and Illness Prevention Program covering its employees in that the employer did not investigate CVOID-19 [*sic*] illness.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Section 3203, subdivision (a), requires employers to establish, implement, and maintain an effective IIPP. Even when an employer has a comprehensive IIPP, the Division may still demonstrate a violation by showing a failure to implement one or more elements. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Thus, to establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement," or "maintain" an "effective" program. An IIPP can be found not effectively established, maintained, or implemented on the ground of one deficiency if that deficiency is shown to be essential to the overall program. (*Hansford Industries, Inc. DBA Viking Steel*, Cal/OSHA, App. 1133550, Decision after Reconsideration (Aug. 12, 2021).) Workplace illness investigation is essential to a workplace safety program that includes illness prevention.

Applicability

Section 3203, subdivision (a), requires employers to include a procedure for investigation of occupational illness. There is no dispute that Employees worked at the site and Employer was required to comply with section 3203, subdivision (a), and thus also subdivision (a)(5).

Violation

Employer's IIPP refers to Employer as "Select," and a customer of its staffing service as a "client." The IIPP requires Employer to rely on clients to provide notification and investigation of any serious illness to staff provided by Employer. (Ex. 7.) It then requires:

> Upon notice Select will conduct an accident/exposure investigation at the client site. Investigation findings will be reviewed internally as well as with the client to find reasonable solutions to prevent future accident/exposure [*sic*]
>
> ProLogistix will also participate in the client's investigation at the workplace.

The IIPP refers to "ProLogistix" twice but does not describe its relationship to Employer. The IIPP does not outline any procedural steps for Employer's investigation. The IIPP's table of contents shows that an "Incident Investigation Form" and "Injured Associate Statement" form are in Appendices D and E, respectively. However, neither appendix was included in the exhibit and the IIPP makes no other reference to these forms. Finally, the last page of the IIPP requires Employer to keep records of its worksite inspections, which must include the inspector's name, identified hazards, and corrective actions.

An IIPP that merely requires a review of an investigation, without including an investigation procedure, is sufficient if Employer's other operations require investigation procedures. (*Sentinel Insulation Inc.*, Cal/OSHA App. 92-030, Decision After Reconsideration (Jul. 22, 1992) [policy required foreman and supervisor to know how to conduct investigations].) Here, Employer's IIPP requires an investigation and a review of investigation findings. However, the IIPP lacks investigation procedures and there is no evidence showing that Employer's other operations require investigation procedures, so the IIPP does not meet the modest requirements of this safety order. Notwithstanding this superseding deficiency, Employer's compliance will be evaluated using the IIPP's extant requirements and references.

It is undisputed that Employees were assigned to work at Client's meal-packaging business. Employer's contract with Client required Client to record on-site illnesses and encouraged Client to perform on-site injury investigations. (Ex. C.) Client investigated COVID-19 transmissions at the site from April through the end of June 2020. (Ex. 13, E, EE – II; Hearing Transcript Volume (TR) II 42).[3] Client informed the Division of the COVID-19 outbreak in Building B affecting at least two Employees in October 2020. (Ex. U 5, V; TR II 61.) Client also notified Employer between April and October 2020 that Employees either tested positive or were in close contact to those affected by COVID-19 at the site. (TR IV 50, 70.)

Employer offered testimonial evidence that, in response to receiving notice, it performed investigations with interviews and tracing, and admitted that documentation did not occur until the end of that time frame. (TR IV 51 – 56.) Despite this assurance that it made records, and even though the IIPP requires maintenance of such records, Employer did not provide any. Additionally, Employer provided no evidence that it: worked with ProLogistix; completed the appendix forms

[3] Four volumes comprise the transcript of the audio recording which serves as the official record. Each volume corresponds in sequence to each of the four days of hearing.

identified in the IIPP's table of contents; reviewed the Client's on-site illness records forms; or worked with the Client to find solutions to prevent future exposures.

Employer's failure to produce illness inspection records that it distinctly asserts it created during an exceptional time of spreading illness diminishes the credibility of related testimony. Testimony that Employer elicited claiming that Employer reviewed investigation findings both internally and with the Client is also rendered less credible. Thus, the weight of the evidence in the record supports a finding that Employer did not conduct illness investigations as its IIPP required. Accordingly, the Division has met its burden of proof to establish a violation of section 3203, subdivision (a)(5), and Citation 1 is affirmed.

2. Did Employer fail to inspect and correct COVID-19 transmission hazards?

Citation 2 alleges a violation of section 3203, subdivisions (a)(4) and (a)(6), which require:

> (a) Effective July 1,1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> […]
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> (A) When the Program is first established;
> Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
> (B) Whenever new substances, processes, and procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
> (C) Whenever the employer is made aware of a new previously unrecognized hazard.
> […]
> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard;
> (A) When observed or discovered; and,
> (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

The Division alleges:

Prior to and during the course of the Division's inspection, including but not limited to, on April 29, 2020, Employbridge Holding Company dba Select Staffing, a provider of temporary employees, failed to effectively identify, evaluate, and correct workplace hazards relating to COVID-19 affecting its employees, including, but not limited to, the following hazards:

Instance 1: [withdrawn]

Instance 2: lack of physical barriers to separate employees engaged in packing of meals in Building B and line numbers two and three.

Instance 3: The employer did not enforce physical distancing of at least six feet in all directions among employees engaged in packing of meals in Building B and line numbers two and three.

CCR T8, 3203(a)(4) and CCR T8, 3203(a)(6)

Or, in the alternatives [*sic*] as Instance 2:

CCR T8, 5141(a). Control of Harmful Exposure to Employees. Engineering Controls.

(a) Engineering Controls. Harmful exposure shall be prevented by engineering controls whenever feasible.

Prior to and during the course of the Division's inspection, including, but not limited to, on April 29, 2020, the employer failed to prevent potential harmful exposures to airborne particles containing the virus that causes COVID-19 by ensuring the use of feasible engineering controls, such as physical barriers consisting of plexiglass shields or other impermeable dividers or partitions, at the conveyor line for meal packing in Building B and line numbers two and three.

Section 3203, subdivision (a)(4), requires employers to include procedures for identifying and evaluating workplace hazards in their IIPPs under enumerated conditions, including awareness of a previously unrecognized hazard. (*OC Communications, Inc.* Cal/OSHA App. 14-0120, Decision after Reconsideration (Mar. 28, 2016).) These procedures must include "scheduled periodic inspections to identify unsafe conditions and work practices." (*Brunton Enterprises, Inc.* Cal/OSHA App. 08-3445, Decision after Reconsideration (Oct.11, 2013).) The Division must first show an employer's awareness of a new or previously unrecognized hazard and then its failure to conduct an inspection to identify and evaluate the hazard. (*Ibid*.)

Section 3203, subdivision (a)(6), is a "performance standard," which establishes a goal or requirement, while leaving employers latitude in designing an appropriate means of compliance. (*BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014), citing *Davey Tree Service*, Cal/OSHA App. 082708, Denial of Petition for Reconsideration (Nov. 15, 2012).) Merely having a written IIPP is insufficient to establish that an employer has implemented the IIPP because proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0378, Decision After Reconsideration (Oct. 5, 2015).)

Thus, an employer's IIPP may be satisfactory as written, but still result in a violation of section 3203, subdivision (a)(6), if the IIPP is not implemented through a failure to correct known hazards. (*L&S Framing, Inc.,* Cal/OSHA App. 1173183, Decision after Reconsideration, (Apr. 2, 2021.) A violation of this section may be found where an employer does not have methods or procedures to correct unsafe or unhealthy conditions; or fails to implement methods or procedures to respond appropriately to such conditions in a timely manner. (*Wal-Mart Stores Inc. Store #1692,* Cal/OSHA App. 1195264, Decision After Reconsideration, (Nov. 4, 2019) citing *BHC Fremont Hospital, Inc.*, *supra,* Cal/OSHA App. 13-0204.) "The safety order requires employers to… take appropriate corrective action to abate the hazards." (*Ibid.*)

Application

Mary Kochie (Kochie), a Nurse Consultant III with the Division for the past 23 years, testified as an expert witness on COVID-19 based on her knowledge and professional experience. The pandemic event was a new hazard, emerging in 2019 and increasing in significance such that by March 2020, the national Centers for Disease Control and Prevention (CDC) issued guidance. (TR II 123, TR III 5.) She testified that, by May 2020, it was well established that the illness was an aerosol transmissible disease that could affect breathing and compromise the ability to oxygenate the blood. Kochie explained that COVID-19 was most transmissible between people up to three to six feet apart, taking approximately 15 minutes to infect a person. She explained that infection could lead to development of severe illness, organ damage, and death. She testified that some infections lead to hospitalization for treatments such as medication or ventilation. As such, the Division demonstrated that transmission of COVID-19 was a new hazard.

Many events establish Employer's awareness of this hazard. Kochie testified that by March 2020, the state ordered the closure of all but essential businesses. By April 2020, Client denied site entry to Employer's management representative, detailed further below. Humberto Daniel "Danny" Klee (Klee), Employer's Health and Safety Training Manager, testified that in the spring and summer of 2020, Employer reviewed CDC guidance to develop its own procedures. (TR III 67.) Also, as already discussed, Client made Employer aware that Employees were exposed. Finally, at least one Employee worked at the site in Building B during the time of the alleged violations. (Ex. U and V.) Thus, the Division established the triggering event for Employer's duty to inspect, identify, and evaluate COVID-19 hazards in Building B.

Violation

As discussed above, only the second and third instances are at issue. When a citation alleges more than one instance of a violation of a safety order, the Division need only establish one instance of a violation of a safety order to sustain the violation. (*Shimmick Construction Company, Inc.*, Cal/OHSA App. 1059365, Decision After Reconsideration (Jul. 5, 2019), *Petersen Builders Inc*., Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) In addition

to alleging that Instance Two was an IIPP violation, the Division alleged an alternative to Instance Two (Alternative Instance Two). Alternative Instance Two will be discussed after Instance Three.

a. Instance Two and Instance Three

i. Did Employer inspect Building B at the site?

Klee testified that Employer had no record of hazard assessment for COVID-19 at the site and confirmed that Employer did not conduct any inspection until September 2020. (TR III 152.) Elsa Bermudez (Bermudez), Client's Human Resources Generalist, testified that, by the end of April 2020, Client cancelled all guest and visitor entries at the site, and prohibited inter-plant traffic. (Ex. V.) Although Bermudez arranged for Employer's Market Manager, Yuri Abraamyan, (Abraamyan) and a prospective replacement employee, Diana Ubilluz (Ubilluz), to visit the site, they were denied entry into any of the site's three buildings when they arrived later that week for the visit. (Ex. D, J; TR III 144; TR IV 12 – 13, 71.)

There is no evidence that Employer worked with Client to perform inspections. The Division issued interim guidelines (Interim Guidelines) for COVID-19 in May 2020 (Ex. N; TR I 169.) Employer's September 2020 annual site evaluation form is identical to its June 2017 and December 2019 forms, without COVID-19 hazard updates. (Ex. B.) Employer did not insist on inspections. Abraamyan testified that she never informed Client that Employees would be removed from the site if an in-person walk-through inspection could not take place. (Ex. 7 p. 6; TR IV 74.)

Employer also did not attempt to perform informal inspections. Abraamyan and Klee testified that one of Ubilluz's duties was to make safety observations. With visits denied, Ubilluz resorted to telephoning Employees at the site. (TR III 101, 105; TR IV 63.) Ubilluz's notes from her Employee interviews between June and September 2020 (Ex. M) show that she made 102 calls with occasional repeat interviews. The calls were a few minutes long and irregular in occurrence. She noted advising some Employees to wear masks, showing Employer recognized transmission hazards. She marked all Employees "safe" in a column entitled, "Safety Observation," which contains no observation notes. None of the notes reflect that any inspection, identification, or evaluation of site hazards occurred.

The Division thus established that Employer did not inspect or evaluate Building B for transmission hazards.

ii. Did Employer fail to correct hazards?

The Division's Interim Guidelines identify using "engineering controls such as Plexiglass screens or other physical barriers, or spatial barriers of at least six feet, if feasible" to protect against COVID-19 transmission. (Ex. N 5.)

(1) Instance two: Physical separation barriers

Nahoray visited the site four times during the inspection period. (TR I 47 – 51.) Photographs and videos (Images) he took in Building B show three meal assembly lines. (Ex. 30, 31, 35, 37, 38, 39; TR I 48, 53.) The Division did not specify which of the three lines were "line numbers two and three" as alleged, but reason provides that Line Number Two appears in Images that show the center assembly line. (Ex. 30, 31, 37.)

Each line has clear panels that hang between workers facing one another across the conveyor belt. Workers assemble meals from both sides of each of the three lines, creating six rows of workers. Resembling sneeze guards, the panels are horizontally wide and vertically short, suspended from the ceiling on chains. They extend one or two feet above workers' heads and reach no lower than underarm level. No such barriers exist between workers in the same row.

Kochie testified that physical barriers were important to protect against transmission from droplets and sprays from breathing or coughing. She provided uncontested testimony that these hanging barriers were not as effective for finer aerosols which could still travel over and under these panels. (TR I 143.) She explained that physical exertion produces more aerosols. Employer did not perform an inspection of the site and thus failed to identify the lack of barriers to separate workers on the same side of a line or to evaluate the sufficiency of the barriers between facing workers. Further, Employer offered no evidence to contradict Kochie's assessment of the panels.

The Division did not discuss the feasibility, as conditioned in the Interim Guidelines, of a barrier solution for floating aerosols, but it did establish feasibility for flying droplets between adjacent workers. Thus, in addition to Employer's antecedent failure to inspect and evaluate the sufficiency of the paneling at the site, Employer also failed to correct the hazard of transmission through droplets with barriers between adjacent workers. For these reasons, the Division established Instance Two as a violation of section 3023, subdivisions (a)(4) and (a)(6).

(2) Instance Three: Distancing

Klee testified that Employer did not verify whether Employees were socially distanced. (TR III 153.) Employer instructed some Employees to wear masks, but Kochie explained that, although transmission time between two people increases from 15 to 27 minutes when they both wear masks, proximity heightens risk of infection. (TR II 157.) Images show workers failing to stay six feet apart. Employer provided no evidence of six-foot distance markers in the meal assembly area of Building B.

The assembly process requires placement of sandwiches and other food items into meal containers travelling rapidly on a conveyor. Workers standing on either side of the narrow assembly lines are only a forearm's distance from a facing worker. Workers on the same side of

an assembly line are irregularly distanced: some stationed with plastic baking trays stacked waist-high between them, some without; all racing to maintain the swift production speed. (Ex. 38, 39.) Videos show workers must prioritize speed over safeguarding distances to avoid disrupting production.

The Division did not discuss the feasibility of distancing in the assembly area, but Images show ample space for repositioning or reducing workers. The Division also did not discuss the length of time workers spent together during a shift, but their chaotic and harried pace suggests the unlikelihood of timed and limited exposures. For these reasons, the Division established Employer failed to correct the hazard of lack of social distancing. Thus, Division established Instance Three as a violation of section 3203, subdivisions (a)(4) and (a)(6).

When a safety standard includes two or more distinct requirements, a violation of the safety standard occurs if an employer violates any one of the requirements. (*Lennar Corporation*, Cal/OSHA App. 1340561, Decision After Reconsideration (Sept. 26, 2023).) Here, the Division established not only that Employer failed to inspect Building B, but that Employer failed to correct the lack of barriers and of social distancing. Accordingly, the Division established a violation of section 3203, subdivisions (a)(4) and (a)(6).

b. Alternative Instance Two

i. Did Employer fail to ensure use of feasible engineering controls?

Alternative Instance Two alleges Employer failed to ensure the use of engineering controls to prevent harmful exposure to COVID-19, violating section 5141, subdivision (a), which provides:

> (a) Engineering Controls. Harmful exposure shall be prevented by engineering controls whenever feasible.

The Division specifically alleges:

> Prior to and during the course of the Division's inspection, including, but not limited to, on April 29, 2020, the employer failed to prevent potential harmful exposures to airborne particles containing the virus that causes COVID-19 by ensuring the use of feasible engineering controls, such as physical barriers consisting of plexiglass shields or other impermeable dividers or partitions, at the conveyor line for meal packing in Building B and line numbers two and three.

To establish a violation of section 5141, subdivision (a), the Division must establish harmful exposure and failure to use feasible engineering controls to prevent the hazard. Employee exposure was established in the preceding section and so engineering controls shall be examined.

Section 5140 defines engineering controls as:

> Methods of controlling occupational exposure to injurious materials or conditions by means of general or local exhaust ventilation, substitution by a less hazardous material, by process modification, or by isolation or enclosure of health hazard-producing operations or machinery.

In ascertaining the meaning of a regulation, "[w]e first look to the language of the regulation itself." (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd*. (2018) 26 Cal.App.5th 93, 100-101.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the [agency]." (*Ibid*.) The plain meaning rule does not prohibit the Appeals Board from determining "whether the literal meaning of the [regulation] comports with its purpose. ..." (*Ibid*.) "[W]e do not construe a regulation in isolation, but instead read it with reference to the scheme of law of which it is a part, so that the whole may be harmonized and retain effectiveness. [Citations.]" (*Ibid*.) In construing a particular clause, it must be read in harmony with other clauses and in context of the statutory framework as a whole. (*Papich Construction Company, Inc.*, Cal/OSHA App. 1204848, Decision after Reconsideration (Oct. 18, 2019).)

The term "feasible" is defined to mean "capable of being done or carried out // a feasible plan" (<https://www.merriam-webster.com/dictionary/feasible> [accessed Apr. 26, 2024].) Thus, as used in the safety order, it refers to whether there is an available method or mechanism that will prevent harmful exposure. To establish a violation, the Division must show that Employer did not use engineering controls as far as feasible to prevent transmission. (*Papich Construction Company, Inc., supra*, Cal/OSHA App. 1236440, [engineering controls not used in all applicable circumstances].)

Here, the Division alleges Employer failed to prevent exposure to "airborne particles containing the virus causing COVID-19" with feasible engineering controls. As discussed above, Kochie testified that hanging panels were not effective because aerosols travel. Kochie testified that barriers, distancing, and facial masking each in their own way minimized exposure to COVID-19 and were more effective together in combination. (TR II 145.) However, the Division did not establish that there were any barrier methods that could control aerosols. Images show a suspended box fan and banks of built-in ventilation ducts, intakes, and fans in the assembly area. Without a substrate discussion about the feasibility of mechanisms to control aerosols – whether ventilation or enclosure as the safety order contemplates, or impermeable dividers and partitions as alleged – the Division cannot establish a failure to implement feasible engineering controls.

For the foregoing reasons, the Division did not establish a violation of section 5141, subdivision (a).

3. Is Citation 2 properly classified as Serious?

Employer contested the reasonableness of the proposed penalty for Citation 2. An appeal from a penalty puts at issue the classification of the violation, which the Division then has the burden to prove. (§ 361.3, subd. (c), see *Anderson, Clayton & Company, Oilseed Processing Division*, Cal/OSHA App. 79-131, Decision After Reconsideration (Jul. 30, 1984); *Quang Trinh*, Cal/OSHA App. 93-1697 et. al., Decision After Reconsideration (May 4, 1999).)

Labor Code section 6432, subdivision (a), in relevant part, provides:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> [...]
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra*, Cal/OSHA App. 1237932.) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

(1) Inpatient hospitalization for purposes other than medical observation.
(2) The loss of any member of the body.
(3) Any serious degree of permanent disfigurement.
(4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code § 6432, subd. (e).)

Both Kochie and Nahoray, who was current in his mandated Division training at the time of the hearing, testified that there was a realistic possibility that an Employee could contract COVID-19 and die or suffer serious physical harm from the actual hazard of an employer's failure to identify, evaluate, or correct transmission risks of COVID-19. With no contradiction from Employer, it is found that its failure to identify and evaluate hazards and then to implement corrective measures created a realistic possibility of hospitalization or death because Employees were at risk of contracting this deadly disease. The citation is properly classified as Serious.

4. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both that:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Employer did not: gather information about Building B from the dozens of Employee telephone interviews; request Client to provide or permit photographs or video; or simply remove Employees until on-site evaluation was possible. Klee testified he was not aware of any prohibition against videoconferencing with Employees at the site, but there is no evidence Employer attempted to conduct any such contacts. (TR III 113.) Finally, Employer did not take effective action to eliminate Employee exposure to the hazard of COVID-19 transmission. Employer did not take the steps a reasonable and responsible employer in like circumstances should be expected to take to anticipate and prevent the violation.

Employer offered no evidence to rebut the classification and thus did not rebut the presumption that Citation 2 is a Serious violation.

5. Is the proposed penalty for Citation 2 reasonable?

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

The Division submitted its Proposed Penalty Worksheet showing the penalty calculations. (Ex. 6.) Nahoray testified as to his calculation of the penalties. Employer presented no evidence or

argument that the penalties were improperly calculated. Accordingly, the proposed penalty for Citation 2 is reasonable.

Conclusion

The evidence supports a finding that Employer violated section 3203, subdivision (a)(5), for failure to investigate illnesses.

The evidence supports a finding that Employer violated section 3203, subdivisions (a)(4) and (a)(6), for failure to inspect, evaluate, and correct insufficient barriers and insufficient distancing, in Instance Two and Instance Three, respectively. The citation is properly classified, and the penalty is reasonable.

The evidence does not support a finding that Employer violated section 5141, subdivision (a), for failure to use feasible engineering controls for aerosols as alleged in Alternative Instance Two.

Orders

It is hereby ordered that Citation 1 is affirmed and its penalty is assessed as reflected in the attached Summary Table.

It is hereby ordered that Citation 2 is affirmed and its penalty is assessed as reflected in the attached Summary Table.

Dated: 05/24/2024

Rheeah Yoo Avelar
Administrative Law Judge

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