

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

**EMPLOYER SOLUTIONS
STAFFING GROUP II, LLC**
7301 Ohms Lane, Suite 405
Edina, MN 55439

Employer

DOCKET 12-R3D6-3207

DECISION

In the Matter of the Appeal of:

FASTEMPS INC.
7828 Haven Avenue, Suite 103
Rancho Cucamonga, CA 91730

Employer

DOCKETS 12-R3D6-3208

DECISION

STATEMENT OF THE CASE

Employer Solutions Staffing Group II, LLC (ESSG) and Fastemps Inc., (Fastemps) (Employers) are engaged in the business of employee staffing. On April 12, 2012, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer, Carmen Cisneros (Cisneros) conducted an accident inspection at a work site at 14680 Monte Vista Avenue, Chino, California (the site). On September 28, 2012, the Division cited Employers for the following alleged violations of the occupational safety and health standards and orders found in California Code of Regulations, title 8¹: Citation 1, Item 1, failing to report a serious injury; and Citation 1, Item 2, for failing to establish, an effective written Injury and Illness Prevention Program (IIPP).

Employers filed an appeal for both violations, contesting the existence of the violation of the safety orders, the classification, and the reasonableness of the proposed penalties. Employer pleaded affirmative defenses as indicated in

¹ Unless otherwise specified, all references are to Sections of California Code of Regulations, title 8.

Employers' Appeal filed with the Occupational Safety and Health Appeals Board (Exhibit 1).

The matter came on regularly for hearing before Clara Hill-Williams, administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on June 3, 2014 and February 26, 2015. Employers were represented by Attorney Rebecca Levine. The Division was represented by Staff Counsel Kathryn Woods. The ALJ extended the submission date to August 28, 2015.

ISSUES

1. Did the secondary Employer's report to the Division meet the primary Employers' reporting obligation?
2. Was the penalty proposed for Employers' failure to report the serious injury reasonable?
3. Did the Employers establish an effective written Injury and Illness Prevention Program that met all of the requirements of the program?
4. Was the penalty proposed for Employers' failure to establish, an effective written IIPP reasonable?

FINDINGS OF FACT

1. On February 10, 2012, ESSG and Fastemps entered into an agreement titled "Employee Recruiting and Placement Outsource Agreement" (Exhibit 4). Under the terms of the agreement, ESSG retained Fastemps to obtain work site clients and recruit temporary employees.
2. Fastemps is an agency from whom Phoenix Hill obtains temporary employees to work at its work site. On March 27, 2012, employee Reginald Campbell (Campbell) was assigned to work at the Hill Phoenix work site.²
3. On March 27, 2012, Campbell suffered a serious injury at the Hill Phoenix work site that required more than 24 hours hospitalization.³
4. On March 27, 2012, Omar Isordia (Isordia), the product manager for Hill Phoenix notified the Division of Campbell's serious injury within eight hours on behalf of Hill Phoenix.

² The parties stipulated that Fastemps and Hill Phoenix had a contractual relationship to supply workers for Hill-Phoenix's work site.

³ At the hearing the parties stipulated that employee Campbell suffered a serious injury.

5. On March 27, 2012, Isordia sent an email to Dianna Ehrnman (Ehrnman), the contact person at Fastemps to notify Fastemps of Campbell's serious injury and hospitalization.
6. Ehrnman called the hospital to follow up regarding Campbell's injury on March 28, 2012, but did not know whether Fastemps or ESSG was responsible for reporting serious injuries to the Division.
7. Neither Fastemps nor ESSG reported the injury to the Division.
8. Fastemps and ESSG acknowledged establishing a written Injury and Illness Prevention Program (IIPP) at the time Cisneros requested a written IIPP.

ANALYSIS

1. Did the secondary Employer's report to the Division meet the primary Employers' reporting obligation?

Employer was cited under section 342(a) which reads as follows:

Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.

Immediately means as soon as practically possible but not longer than eight hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.

The Division alleged:

The employer did not report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health the serious injury of an employee, which occurred in connection with employment, within 8 hours after the employer knew or with diligent inquiry would have known of the death or serious injury.

On or about March 27, 2012 an employee from a staffing agency, working at a secondary worksite, suffered a serious high pressure oil injection injury to his left hand that required more than 24 hours hospitalization. The employee's left hand made contact with a leak containing hydraulic oil from one of the hydraulic hoses of the foam machine (Cannon Foam) resulting in a laceration to his left hand. The employer was aware that the employee was hospitalized for more than 24 hours as a result of the work-related accident. The employer did not report the injury to the Division.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal App. 4th 472, 483, review denied.)

Labor Code section 6409.1, mandates that serious injuries be reported, and specifies that "every" employer must report a serious injury. Consistent with this mandate, the Board has held that both primary and secondary employers have an obligation to report a serious injury. (*Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).)

Section 342, subdivision (a) requires the employer to report the injury by phone or telegraph to the nearest Division District office within eight hours. As a primary employer, ESSG was responsible for the workers compensation and payroll of the temporary employees recruited by primary employer, Fastemps. Fastemps recruited temporary employees to place at secondary employers' work sites, in this case, Hill Phoenix. At the hearing Ross Plaetzer, ESSG's owner asserted that a dual employment relationship existed with Fastemps and Hill Phoenix as reflected in their written agreements (Exhibits 4, 11 and A-15)⁴. Isordia, testified that he called the Division on behalf of the

⁴ In *Helpmates Staffing Services*, Cal/OSHA App. 05-2239, Decision After Reconsideration (Jan. 20, 2011). The Board held that while the 342, subdivision (a) safety order does not specifically address the dual employment situation, section 342, subdivision (d) allows employers to authorize others to report for them. The Board noted that the existence of an employee or designated person's authority to report for an employer is a question of fact. (Witkin, Summary

secondary employer, Hill Phoenix on March 27, 2012, the day of the accident. Isordia acknowledged that Fastemps provided temporary employees for Hill Phoenix, and that he emailed Ehrnman, Fastemps' contact person on March 27th to notify Fastemps of Campbell's injury. Isordia credibly testified that neither Fastemps nor ESSG told him to report the injury on either Employers' behalf. At the hearing Cisneros, the Division's inspector, testified that during her accident investigation with Fastemps, Ehrnman, stated that she did not know whether Fastemps, ESSG or Hill Phoenix were required to report Campbell's serious injury. Cisneros also stated that during the investigation Ehrnman acknowledged that she assumed Hill Phoenix's report to the Division satisfied Fastemps' obligation to report Campbell's injury.

Thus, Fastemps and ESSG were required to report Campbell's serious injury and could not rely on the report made by Isordia on behalf of Hill Phoenix. Campbell's primary employers, ESSG and Fastemps as well as Hill Phoenix, the secondary employer all had a duty to report the injury to the Division as required by section 342, subdivision (a) regardless of their contractual agreements.

2. Was the penalty proposed for Employers' failure to report Campbell's serious injury reasonable?

Pursuant to section Labor Code section 6409.1, subdivision (b),

In every case involving a serious injury or illness, or death, in addition to the report required by subdivision (a), a report shall be made immediately by the employer to the Division of Occupational Safety and Health by telephone or email. An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars (\$5,000).

In following Labor Code section 6409.1, subdivision (b) above, Cisneros could not modify the penalty because section 342, subdivision (a) is a regulatory citation, which is a violation, other than one defined as Serious or

of California Law, 10th Ed, *Agency and Employment* § 145(2005).) In *Helpmates, supra*, the employer's conduct was consistent with concluding the reporting person was authorized to make a report, as it did not itself report. Since the Division did not rebut the inference of the reporting person's authority to report for the employer, the Board allowed the un-rebutted inference of an authorized report to remain. Here, the facts can be distinguished from the facts in *Helpmates Staffing Services, supra*. However, Cisneros' subsequent investigation, which included: Ehrnman's statements of not knowing which Employer was required to report and not being aware of any reporting system in place; and Cisneros' interview and testimony of Isordia that he only reported for Hill-Phoenix, rebuts the inference that Isordia was authorized to report the injury on behalf of Fastemps.

General that pertains to permits, posting, record keeping, and reporting requirements as established by regulation or statute.⁵ Thus the \$5,000 penalty is assessed.

3. Did the Employers fail to establish an effective written Injury and Illness Prevention Program that met all of the requirements of the program?

Section 3203, subdivision (a), Injury and Illness Prevention Program provides:

Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing...

The Division alleged:

On or about March 27, 2012, Fastemps Inc. had not established, implemented, and maintained an effective written Injury Illness Prevention Program for its employees. The employer did not provide the Division with a written Injury and Illness Prevention Program. On or about March 27, 2012 an employee, working at the secondary employer's work site (Hill Phoenix Walk-Ins), suffered a serious high pressure oil injection injury to his left hand that required more than 24 hours hospitalization. The employee's left hand made contact with a leak containing hydraulic oil from one of the hydraulic hoses of the foam machine (Cannon Foam) resulting in a serious left hand injury.

In *Labor Ready* Cal/OSHA App. 13-0164, Decision After Reconsideration, (Aug. 28, 2014), the Board reiterated that it has previously held that both the primary and secondary employer have responsibility for the safety of employees, given the Labor Code's command that "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein [and] every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees." (*Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001), Labor Code sections 6400, subdivision (a) and 6401; see also section 6400, subdivision (b)). These mandates of the Labor Code are given regulatory life in section 3203, subdivision (a), which requires "every employer" to establish an effective IIPP. Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee

⁵ Section 334, subdivision (a).

also remained under the partial control of the original employer. When general and special employers share control of an employee's work, a dual employment arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts. (*Sully-Miller Contracting Co.*, Cal/OSHA App. 99-896, Decision After Reconsideration (Oct. 30, 2001), *Marsh v. Tilley Steel Co.* (1980) 26 Cal. 3d 486)

Here, Cisneros determined that ESSG and Fastemps were the primary employers from interviews with Isordia and Erhnman; the agreements between ESSG, Fastemps and Hill Phoenix; and because ESSG and Fastemps provided employees to Hill Phoenix's work site (Exhibit 4). During Cisneros' investigation, she requested a written IIPP from ESSG and Fastemps (Exhibit 3)⁶. However, she did not receive a written IIPP from ESSG or Fastemps. Both Fastemps and ESSG stipulated that there was not an IIPP at the time Cisneros made the request. At the hearing Cisneros acknowledged receiving training records from Phoenix Hill, the secondary employer. However, she stated that these documents were not sufficient because every employer associated with the employee (Campbell) is required to have the training procedures communicated to the employee.

Cisneros determined that ESSG and Cisneros were in violation of not having an IIPP, which she classified as a general violation, because the violation was not of a serious nature, but has a relationship to occupational safety and health of employees. Thus, ESSG and Fastemps as primary employers did not have a written IIPP at the time Cisneros requested the written IIPP, in violation of the safety order.

4. Was the penalty proposed for Employers' failure to establish, an effective written IIPP reasonable?

The Division must calculate proposed penalties in accordance with its regulations and present proof sufficient to support its calculations on likelihood, etc. (*Gal Concrete Construction Co.*, Cal/OSHA App. 89-317/318, DAR (Sept. 27, 1990).) The Division must properly rate the employer's safety program and its experience to justify a penalty. (*Monterey Abalone*, Cal/OSHA App. 75-786, DAR (March 15, 1977).) Cisneros' penalty calculations (See C-10 Worksheet - Exhibit #4) were correctly determined in accordance with the Division's policies and the California Code of Regulations.

In following the procedures as listed on the C-10 Penalty Worksheet, severity of a general violation is based upon the degree of discomfort, temporary disability and time loss from normal activity (including work) which an employee is likely to suffer as a result of occupational illness or disease

⁶ Request for Production of Documents Form, Dated April 17, 2012.

which could result from the violation. When the safety order violated does not pertain to employee illness or disease, severity shall be based upon the amount of medical treatment likely to be required or which would be appropriate for the type of injury that would most likely result from the violation. Cisneros classified severity as low because the violation of not having a written IIPP was program related.

The base penalty for a general violation is then subject to an adjustment for “extent” when the safety order violated pertains to employee injury, illness or disease, extent is based upon the number of employees exposed. Cisneros classified extent as low as well because the violation was program related.

“Likelihood” is the probability that injury, illness or disease will occur as a result of the violation and is based on the number of employees exposed to the hazard created by the violation and the extent to which the violation has in the past resulted in injury, illness or disease to employees. Again, Cisneros classified likelihood as low because the violation was program related.

Employer was given 10 percent history because ESSG and Fastemps did not have any prior violations, zero percent credit given for size because the number of employees were more than 100; 15 percent good faith credit based upon Employers’ cooperation with Cisneros’ investigation; and a 50 percent abatement credit for Employers’ correction of the violation, resulting in an proposed penalty of \$185, which is assessed.

Conclusion

Fastemps and ESSG as primary employers were required to report Campbell’s serious injury and could not rely on the report made by Isordia on behalf of Hill Phoenix, the secondary employer. Campbell’s primary employers, ESSG and Fastemps as well as Hill Phoenix, the secondary employer all had a duty to report the injury to the Division as required by section 342, subdivision (a) regardless of their contractual agreements. ESSG and Fastemps did not have a written IIPP at the time Cisneros requested the written IIPP, in violation of the safety order. The Division established a regulatory violation of section 342, subsection (a) and a general violation of section 3203(a). Thus, the total assessed penalties are \$5,185.

Order

It is hereby ordered that Citation 1, Items 1 and 2 are affirmed as issued by the Division, as indicated above and as set forth in the attached Summary Table.

It is further ordered that the penalties indicated above and set forth in the attached Summary Table be assessed.

Dated: September 28, 2015

CLARA HILL-WILLIAMS
Administrative Law Judge

CHW: ao

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

**EMPLOYER SOLUTIONS
STAFFING GROUP II, LLC
FASTEMPS INC.**

Dockets 12-R3D6-3207 and 3208

Date of Hearing: June 3, 2014 and February 26, 2015

Division's Exhibits

Exhibit Number	Exhibit Description	Admitted
1A	Jurisdictional Documents – Fastemps Inc.	X
1B	Jurisdictional Documents - ESSG	X
2	ORIENTATION CHECKLIST FOR TEMPORARY EMPLOYEES	X
3	Document Request Form	X
4	Employee Recruiting & Placement Agreements	X
5	Agreement For Temporary Labor Services	X
6	C-10 Penalty Worksheet	X

Employer's Exhibits

Exhibit Letter	Exhibit Description	Admitted
A-1	Field Documentation –Dual Primary Employer	X
A-2	Field Documentation -Worksheet	X
A-3	Field Documentation, Dated August 30, 2013	X
A-4	Photos taken by Employer	X
A-5	Email From Diana Erhnman –Campbell's training	X
A-11	Employee Recruiting & Outsourcing Agreement	X
A-12	Staffing Agreement	X
A-15	Assignment of Staffing Agreements	X
A-16	OSHA Accident Report	X
A-17	Wage Statement	X

Witnesses Testifying at Hearing

1. Omar Isordia
2. Alma Hernandez
3. Carmen Cisneros

4. Timothy Hoylman
5. Ross Plaetzer

CERTIFICATION OF RECORDING

I, Clara Hill-Williams, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

EMPLOYER SOLUTIONS STAFFING GROUP/FASTEMPS INC.
Dockets 12-R3D6-3207/3208

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 316343912/ 316344993

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING or STATUS CONF.	FINAL PENALTY ASSESSED BY BOARD
12-R3D6-3207 & 12-R3D6-3208	1	1	342(a)	Reg	Citation is affirmed	X		\$5,000	\$5,000	\$5,000
12-R3D6-3207 & 12-R3D6-3208		2	3203(a)	G	Citation is affirmed	X		\$185	\$185	\$185
Sub-Total								\$5,185	\$5,185	\$5,185

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$5,185

NOTE: Please do not send payments to the Appeals Board. **All penalty payments must be made to:**

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

ALJ: CHW/ao
POS: 09/28/2015