BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	**Inspection No.**
THE KROGER COMPANY **4760 W. Pico Blvd.** **Los Angeles, CA 90019**	**1486257** **DECISION AFTER RECONSIDERATION**
Employer	

The California Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code, issues the following decision after reconsideration.

JURISDICTION

The Kroger Company (Kroger or Employer) owns and operates several grocery store chains throughout the State of California, including the supermarket known as "Ralphs." On July 30, 2020, the Division of Occupational Safety and Health (the Division) commenced an inspection of a Ralphs grocery store located at 4760 W. Pico Blvd., Los Angeles, California.

On January 26, 2021, the Division issued two citations to Employer for three alleged violations of the California Code of Regulations, title 8. Employer did not appeal the first two violations (Citation 1, Items 1 and 2). However, Employer timely appealed Citation 2, Item 1, which alleged a Serious violation of section 3203, subdivision (a)(7),[1] asserting that Employer failed to provide effective safety and health training on the hazard of COVID-19.

The matter was heard by Administrative Law Judge (ALJ) Howard Chernin, via the Zoom platform, on July 21, 2022, and November 16 and 17, 2022. Staff Counsel Melissa Viramontes represented the Division. Attorneys Eric Compere and Krystal Weaver, of Littler Mendelson P.C., represented Employer. ALJ Chernin also granted third-party status to United Food and Commercial Workers, Local 770 (the Union), but neither the Union nor its attorney participated in the hearing.

On February 2, 2023, the ALJ issued a Decision that vacated Citation 2, Item 1. The Division timely filed a petition for reconsideration (Petition), which the Board took under submission.

In making this decision, the Board has engaged in an independent review of the entire record in this matter. The Board has also considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

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

ISSUES

1. Did the Division establish, by a preponderance of the evidence, that Employer failed to provide effective safety and health training on the hazard of COVID-19?
2. Did the Division establish a "Serious" violation of section 3203, subdivision (a)(7)?
3. What is the appropriate recalculated penalty for Citation 2?

FINDINGS OF FACT

1. In late 2019, the Chinese government reported an outbreak of pneumonia of unknown etiology to the World Health Organization.
2. The cause of that outbreak was soon identified as a virus known as SARS-CoV-2, a novel coronavirus that causes the respiratory illness known as "COVID-19."
3. By early 2020, COVID-19 emerged as a global health crisis.
4. By March 2020, COVID-19 constituted a new workplace hazard in California.
5. Kroger owns and operates several grocery store chains throughout the State of California, including the supermarket known as "Ralphs."
6. On July 30, 2020, the Division commenced an inspection of the Ralphs store located at 4760 W. Pico Blvd in Los Angeles, California.
7. At the time of the inspection, the store employed approximately 110 employees and managers, scheduled across three full-time shifts and one part-time shift.
8. Kroger does not dispute that its employees were exposed to the hazard of COVID-19.
9. In response to the emergence of the COVID-19 hazard, Kroger implemented several safety methods and policies to control the spread of COVID-19, including masking, social distancing, temperature checks, disinfection, and plexiglass barriers.
10. Kroger developed a series of oral and written communications to its employees on the COVID-19 hazard, and how to avoid the hazard.
11. Kroger communicated information to employees regarding the hazard of COVID-19. Kroger's communication methods predominantly consisted of handouts of printed information, announcements over its in-store public address system, posters, and the use of an online feed.
12. In disseminating information about its COVID-19 policies and procedures, Employer relied on oral and written communications that were not amenable to documentation, as described in section 3203, subdivision (b)(2), with the "employee name or other identifier, training dates, type(s) of training, and training providers."
13. While Employer utilized informal coaching and observation to implement and enforce some of its COVID-19 policies and procedures with some of its employees, Employer's implementation and enforcement were inconsistent, which did not ensure that its oral and written communications were effective in enabling employees to identify and mitigate the hazard of COVID-19.
14. While some employees at the store understood and substantially complied with Employer's COVID-19 policies and instruction for recognizing and avoiding the hazard, the evidence does not establish that all employees had that understanding, nor that they obtained that understanding from Employer's oral and written communications.
15. The Division's evidence fails to establish that the actual hazard created by the absence of training, in this particular case, would result in a realistic possibility of serious injury or death.

REASONS FOR DECISION AFTER RECONSIDERATION

1. Did the Division establish, by a preponderance of the evidence, that Employer failed to provide effective safety and health training on the hazard of COVID-19?

Citation 2, Item 1, asserts a violation of section 3203, subdivision (a)(7). That section requires employers to "establish, implement and maintain an effective Injury and Illness Prevention Program" (IIPP) that does the following:

> (7) Provide training and instruction
>
> (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard; [and]
>
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard[.]

In the Alleged Violation Description for Citation 2, the Division alleged the following:

> Prior to and during the course of the inspection, including, but not limited to, on July 30, 2020, the employer failed to provide effective training and instruction regarding the new occupational hazard of COVID-19, including but not limited to, training and instruction on how the virus is spread, measures to avoid infection, signs and symptoms of infection, and how to safety use cleaners and disinfectants.

Here, there is no dispute that COVID-19 constituted a new or previously unrecognized hazard triggering Kroger's duty to provide training and instruction. The main issue is whether Employer provided effective training regarding the COVID-19 hazard. Resolving this issue requires the Board to examine the factual background in the context of relevant authority and precedent in significant detail.

A. Factual Background.

Kroger does not dispute that its employees were exposed to the hazard of COVID-19. Instead, Kroger argues that it provided effective training to employees on the hazard, in compliance with section 3203, subdivision (a)(7). In support, Kroger presented the testimony of four employees regarding the methods Kroger utilized, and the contents of Kroger's training program.

Steve Gasparyan (Gasparyan), store manager, testified that Kroger implemented several safety methods and policies to control the spread of COVID-19, including masking, social distancing, temperature checks, disinfection, and plexiglass barriers. Gasparyan also testified that he was responsible for communicating Kroger's COVID-19 policies and procedures to store employees. Kroger communicated these policies and procedures to store managers (like Gasparyan) and assistant managers beginning in March of 2020. Those individuals were then tasked with communicating that information to department managers during daily huddles.

Additionally, Gasparyan testified that he distributed print materials regarding COVID-19 safety to employees and gave department managers visual demonstrations of new COVID-19 procedures.

Gasparyan also testified that, to communicate and enforce its COVID-19 policies and procedures, Kroger utilized a combination of announcements over its in-store public address system, informal coaching and observation, and various postings all over the store. Kroger also used an online "feed" to communicate important COVID-19 information to employees. He testified that employees had access to the feed via computers at the store. The Decision also notes that employees were "encouraged" to view that online feed. (See Decision, pp. 7-8.)

Khiry Corely (Corely), a clerk, testified that he received a flyer regarding COVID-19 sometime "very early" during the pandemic, and that someone from management discussed it with him and other employees. He testified that Kroger explained the symptoms of COVID-19, detailed Kroger's policies for addressing COVID-19, and encouraged employees to ask questions.

Jose Santana (Santana), a meat cutter, testified that the "training" he received on COVID-19 was "just a flyer," but that he could ask managers questions if he had any. He also testified that Kroger required employees to wear masks and encouraged social distancing among coworkers but denied that Kroger provided any training on wearing masks. He denied that Kroger explained the signs and symptoms of COVID-19 to him but said that he gained an understanding of the hazards presented by COVID-19 from the news.

Mary Mueller-Reiche (Mueller-Reiche), a cashier, testified she received a one-page, double-sided flyer that covered handwashing, masking and social distancing. Mueller-Reiche also said she was required to sign an acknowledgement that she had read the flyer. Mueller-Reiche testified that she followed the news from the Centers for Disease Control (CDC) as well as Johns Hopkins University School of Medicine but said Employer did not discuss the CDC's COVID-19 guidelines with her.

The Division also presented testimony from Associate Safety Engineer Hooman Borhani (Borhani). Borhani interviewed several store employees, including Corely, Santana, and Mueller-Reiche. According to Borhani, Corely stated that he "only received a paper to sign" for training. Similarly, Mueller-Reiche denied receiving any detailed training, and asserted that she "only received a piece of paper." Ramos said she "got some training" but not anything specific. Santana told Borhani that he "got outside information" regarding the COVID-19 hazard.

In total, the record demonstrates that Kroger's training program predominantly consisted of the above-described communications (i.e., handout of printed information, announcements over its in-store public address system, posters, and the use of an online feed), plus some limited and informal coaching and observation.

B. Legal Analysis.

The Board has long described training on workplace hazards as a "critical element and the touchstone of any effective IIPP." (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (March 26, 2002).) Under section 3203, subdivision (a)(7), the purpose of training "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to[.]" (*Timberworks Construction, Inc*., Cal/OSHA App.

1097751, Decision After Reconsideration (Mar. 12, 2019).) The safety order requires employers to provide appropriate and adequate training or instruction when a new or unrecognized hazard emerges in the workplace. (*Manpower, Inc.*, Cal/OSHA App. 78-533, Decision After Reconsideration (Jan. 8, 1981).) Additionally, training must "be of sufficient quality to make employees 'proficient or qualified' on the subject of the training." (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014); *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Jun. 6, 2002).) Thus, the Division may prove a violation by showing that the employer's implementation of required training was inadequate to make the employees proficient or qualified in recognizing and avoiding the hazard at issue. (*FedEx Freight, Inc*., Cal/OSHA App. 1099855, Decision After Reconsideration (Sept. 24, 2018).) Proof of adequate training may include training records and/or employee testimony. (*Bellingham Marine Industries, Inc*., *supra*, Cal/OSHA App. 12-3144; *Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008) (*Blue Diamond*).)

The issue the Board must address is whether Kroger's training program, which predominantly consisted of a handout of printed information, announcements over its in-store public address system, posters, and the use of an online feed, met its obligation to "provide training and instruction" for the new hazard presented by COVID-19. (§ 3203, subd. (a)(7).)

The Division takes the position that Employer's efforts amounted to communications, not training. The Division emphasizes the distinction between "communication" and "training," each of which are mandated by separate components of the safety order. Section 3203, subdivision (a)(3), requires an IIPP to "include an effective system for communicating with employees" on matters relating to occupational safety and health. (§ 3203, subd. (a)(3).) As the Division notes, subdivision (a)(3), provides that "[s]ubstantial compliance" with the safety order's communication requirement can be achieved through "meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees." (§ 3203, subd. (a)(3) [underline added].) In contrast, section 3203, subdivision (a)(7), requires an IIPP to provide effective "training and instruction" regarding workplace hazards. (§ 3203, subd. (a)(7).) The Division argues that Kroger's efforts constituted adequate communication methods as contemplated by section 3203, subdivision (a)(3), but not adequate training as contemplated by section 3203, subdivision (a)(7).

In short, the Division argues that the Board must not permit an employer to satisfy its training obligations merely by distributing communications about a particular hazard; something more is required to "train" an employee effectively. While "[n]ot all training needs to occur in a formal classroom setting," the Division argues, "training" implies "the allocation of employees' time and attention to instruction from a qualified person who is explaining the hazard or task at hand." (Petition, p. 15.) As the Division argues, "[o]ne single hand-out, signage in the store, an online feed, and store announcements directed at customers, all of which were not enforced upon employees, or required by Kroger, should NOT be conflated with training and instruction that imparts the knowledge and ability to recognize, understand and avoid the hazard of COVID 19 as required by section 3203(a)(7)." (Petition, p. 24 [emphasis in original].)

In contrast, as Kroger frames it, "[t]he sole issue here is whether non-classroom COVID-19 training and instruction . . . was effective" under section 3203(a)(7), i.e., whether it "provide[d] employees with the knowledge and ability to recognize, understand and avoid COVID-19 hazards in the workplace[.]" (Employer's Post-Hearing Brief, p. 2; Answer, p. 20.) According to Kroger, regardless of the means or methods it used to train its employees, they "knew how to avoid the COVID-19 hazard." (Answer, p. 20; see also Employer's Post-Hearing Brief, p. 17.) Hearing testimony demonstrated that Kroger employees knew what the virus is, knew the signs and symptoms of infection, and knew what measures to take to avoid infection. (Answer, p. 15.)

The Decision agreed with Employer. Under section 3203, subdivision (a)(7), ALJ Chernin found Kroger's so-called "passive" communication efforts constituted "comprehensive training and instruction on the COVID-19 hazard at the store." (Decision, p. 8.) As the Decision correctly notes, section 3203, subdivision (a)(7), "is a performance standard and does not prescribe the precise method by which an Employer must provide training to employees on known or newly discovered hazards." (Decision, p. 8.)

In parsing the various arguments and evidence, we think both the Division and Kroger are correct on some points and incorrect on others. We agree with Employer that nothing in section 3203, subdivision (a)(7), mandates a specific form of training or instruction, e.g., that training or instruction must be interactive, or "hands-on," or conducted in a classroom. Regardless of the means or method, training and instruction must "provide employees with the knowledge and ability to recognize, understand and avoid" workplace hazards. (*Timberworks Construction, Inc*., *supra*, Cal/OSHA App. 1097751.) Ultimately, however, in this specific instance we agree with the Division that a training program that relies exclusively on passive communications is unlikely to satisfy an employer's training obligations under section 3203, subdivision (a)(7). We reach this conclusion for several reasons. Our reasoning here is substantively the same as applied to our recent decision in *Amazon.com Services LLC, dba Amazon Warehouse LGB3*, Cal/OSHA App. 1473644, Decision after Reconsideration (Sep. 18, 2025) (*Amazon.com Services LLC*).

First, practical considerations caution against safety training done solely through passive communications. If an employer's training and instruction obligations can be satisfied with any simple form of passive communication, employers would have little no incentive to provide more functional, interactive training. Employers could simply rely on their communication efforts, e.g., workplace safety signage, posters, emails, and text messages. It is not difficult to imagine examples of how replacing hands-on training with passive communications would undermine workplace safety.

Additionally, if passive communications alone constitute training, this effectively delegates the burden of training to the employee. For example, if an employer merely places a poster or sign on the wall, or sends an email or text message, but the employee's reading of the sign is optional, untracked, and unenforced, the primary responsibility for acquiring the training falls upon the employee.

Labor Code section 6400, subdivision (a) provides, "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein." This non-delegable responsibility for ensuring safe working conditions lies on employers, not employees. (See Lab. Code, §§ 6400, 6401, 6402, 6403, 6404; *Hansford Industries, Inc. dba*

Viking Steel, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 13, 2021).) The Board has consistently rejected interpretations of safety orders that delegate the responsibility for compliance to employees. (*Papich Construction Company, Inc*., Cal/OSHA App. 1236440, Decision After Reconsideration (March 26, 2021).

A program that relies in whole or in major part on passive communications, therefore, is inadequate unless the employer takes action to ensure those communications are effective, i.e., that the training actually gives employees the knowledge and ability to recognize, understand and avoid the hazard in question. A program that merely distributes communications, without taking action to ensure their effectiveness, falls short of the requirements of section 3203, subdivision (a)(7).[2] Reliance on passive communications, without more, places the primary responsibility for acquiring necessary safety information on the employee. To the extent an employer relies on passive communications, the employer must take some affirmative action (e.g., monitoring or testing) to ensure that the passive communications, whether alone or in conjunction with other training, are in fact effective to make each employee proficient in identifying and avoiding the safety hazard.

The Board does not categorically state that passive communications can never qualify as part of training. Such communications may provide valuable reinforcement to an employee's ability to identify and avoid safety hazards. Some employees may even require written reminders, guides, posters and other signage to become effectively trained, making such communications a useful, or even necessary, component of effective training.

Moreover, if the Board were to limit, as a matter of general application, the training methods available to employers, the Board would arguably exceed its authority. The Board's "function is confined to interpreting and applying the safety orders adopted by the Standards Board. It may not go beyond that function and ignore or revise the requirements of a [safety] order." (*Superior Construction Inc.*, Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000).) In interpreting safety orders, the Board must neither insert what has been omitted, nor omit what has been inserted. (See *Estate of Cleveland* (1993) 17 Cal.App.4th 1700, 1709.) In short, the Board "cannot impose stricter or more detailed requirements than those set in a safety order promulgated by the Standards Board." (*Mobil Oil Corporation.*, Cal/OSHA App. 00-222, Decision After Reconsideration (Apr. 29, 2002).)

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[2] We note that this approach coheres with the analogous federal standard. Analyzing the corresponding federal training regulation, the Occupational Safety and Health Review Commission (Commission) recognized that the standard "does not limit the employer in the method by which it may impart the necessary training.'" (*Capform, Inc.*, 2001 OSAHRC LEXIS 15, *7 (O.S.H.R.C. March 26, 2001).) Thus, for example, "company safety rules, policies, and instructions do not need to be written so long as they are clearly and effectively communicated to employees." (*Id*., at *2.) Likewise, if training is provided in the form of safety policies or other documents, the employer must ensure that employees read and understand those documents, or otherwise provide training as to their content. (*Compass Envtl., Inc.*, 2010 OSAHRC LEXIS 41, *10 (O.S.H.R.C. June 10, 2010) [affirming citation where employer distributed safety documents, but there was no evidence the employee "received any training on that safety plan or even read" the safety documents].) Thus, the Commission affirmed a violation where the employer "did not make certain, and had no record, that employees had actually read and understood the [safety training] mini-manual." (*McLeod Land Services, Inc.*, 2003 OSAHRC LEXIS 127, *8 (O.S.H.R.C.A.L.J. October 22, 2003); see also *Concrete Construction Co.*, 15 BNA OSHC 1614 (No. 89-2019, 1992) [affirming violation where employer provided no training other than distributing a safety booklet].)

Next, we disagree, in part, with the Division's assertion that only training which is, or can be, documented under section 3203, subdivision (b)(2), may satisfy the training requirements of section 3203, subdivision (a)(7).

The Board has long held that the absence of training records is not necessarily dispositive evidence that training did not occur. The Board has held, "The purpose of section 3203(b)(2) is to establish a means for employers to have readily accessible proof that they have complied with the [section 3203(a)(7)] training requirements." (*Los Angeles County Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (April 5, 2002).) The Board has never held that all information provided to employees must be documented to be considered training. The obligation to provide training and the obligation to document the provided training are separate regulatory requirements. Had the Standards Board wished a failure to document training, under section 3203, subdivision (b)(2), to automatically establish a failure to train, under section 3203, subdivision (a)(7), it would have written the safety orders to require that result.

A failure of documentation alone is thus "not dispositive" in establishing a violation of section 3203, subdivision (a)(7). (*Bellingham Marine Industries, Inc.*, *supra*, Cal/OSHA App. 12-3144.) In other words, Board precedent dictates that a lack of training records alone does not prove that an employer's training was inadequate or ineffective. A failure to document training in such a way to satisfy section 3202, section (b)(2), does not automatically establish a violation of section 3203, subdivision (a)(7).

However, we do not suggest that the absence of training records is irrelevant. Under the Board's longstanding approach, proof of adequate training may include training records and/or employee testimony. (*Bellingham Marine Industries, Inc*., *supra*, Cal/OSHA App. 12-3144; *Blue Diamond*, *supra*, Cal/OSHA App. 02-1268.) Just as the existence of training records may support a conclusion that training occurred, a "lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference that no such training was provided." (*Blue Diamond*, *supra*, Cal/OSHA App. 02-1268.) An employer may rebut or counter this finding.

Based on the foregoing, the Board held, in *Amazon.com Services LLC*, *supra*, Cal/OSHA App. 1473644, that effective, adequate, and appropriate training under section 3203, subdivision (a)(7), requires an employer to satisfy the following elements:

> (1) The training must provide the information necessary to enable employees to recognize, understand, and avoid the subject hazard; and
>
> (2) The employer may not delegate to the employee the primary responsibility for acquiring the information necessary to become able to recognize, understand, and avoid the subject hazard.

Having set forth the appropriate analysis on this question, the Board now turns to the application of this analysis to the facts in this case.

In the Decision, ALJ Chernin found that "certain aspects of Employer's training program could have likely been improved," but that "the evidence as a whole supports a conclusion that

Employer provided overall effective training, and any deficiencies were immaterial and incidental to the overall effective training provided." (Decision, p. 9.) The Board disagrees with this conclusion. We find that Employer relied primarily on passive communications, without taking sufficient action (e.g., monitoring or testing) to ensure that those communications were actually "effective," thereby delegating to employees the primary responsibility for becoming proficient in identifying and mitigating the hazard of COVID-19.

Kroger argues that it provided employees with informational documents regarding COVID-19, and that employees understood all the important information that such documents were intended to convey. Indeed, some Kroger employees appeared to testify that they knew how to identify and avoid the COVID-19 hazard. (See Tr. 1, at 32:13-19.) However, while some employees testified that Kroger's COVID-19 documents informed them about relevant information (e.g., masking and social distancing), others testified that they came to such knowledge independently, not from any training or information received from Kroger. (Tr. 1, 44:19-45:3, 62:11-63:5.)

Much of Kroger's COVID-19 safety training consisted of (i) emails and conference calls to managers regarding COVID-19 safety; (ii) posters and signage posted at the front of the store; and (iii) various other "information that was to be communicated to employees." (Answer to Petition, pp. 13-14.) Kroger does not allege that its shift managers and department heads communicated all the information to all employees. Rather, information from emails and conference calls was "passed on to the department heads *who had instructions to pass on information to employees*." (*Id*., p. 14 [listing documents "with COVID-19 information that was to be communicated to employees"].)

As employee Santana testified, Kroger distributed a flyer about the signs and symptoms of COVID-19, but did not confirm that employees understood the flyer. (Tr.1, 42:23-43:21.) Santana said he knew about the signs and symptoms of COVID-19. While he knew that information was on Kroger's flyer, he testified that he may have gotten that information from watching the news. (*Id.* at 62:11-63:5.) He further testified that Kroger never did anything "to fully make everybody aware" of the relevant details. (*Id*.) Similarly, employee Corley testified generally that Kroger distributed a flyer regarding COVID-19 symptoms, and that Kroger even reviewed some of the information on it during meetings. (Tr. 1, at 102:11-24.) She also testified that Kroger talked to employees about proper mask usage. (*Id*., 134:12-135:3.) However, Corley also testified that she learned many of the important details on identifying and avoiding COVID-19 by "watching the news and things of that nature," not through discussions or meetings provided by Employer. (*Id*., 108:12-109:14.) Kroger talked to employees about asymptomatic spread of COVID-19, but only vaguely. (*Ibid*.) Kroger provided the relevant information on a single flyer, but there was no follow-up meeting or other confirmation to ensure that employees understood the details. "It was never like okay we're going to . . . have a 30-minute class or nothing like that"; the COVID-19 information "was just on that paper . . . we never had a big meeting about it." (*Id*., 127:1-128:2.)

Kroger also produced evidence of a substantial number of informational documents distributed to employees concerning COVID-19, including extensive documentation regarding new cleaning protocols, safe attendance guidelines, and general information about the spread of COVID-19. (Exhibits Q-Z, AB, AC.) To be sure, the Board does not wish to discourage the distribution of such informational documents, which may be a useful or even necessary supplement

to other training. However, Store Manager Gasparyan did not know which employees actually read the various handouts, and Kroger did not otherwise track employees' receipt of them, much less their practical understanding of their content. (Tr. 4, 70:12-76.1.) Perhaps most significantly, employees were not even required to review the informational handouts. As Gasparyan testified, "it was totally voluntary, but I encouraged them to do it." (*Id*., 61:5-17.)

Kroger argues that Gasparyan "used observation as a tool to ensure employees received the information – he would observe if employees were properly using masks, distancing, following cleaning procedures, and would spend a minute or two of his day talking with employees to see if they were exhibiting symptoms." (Tr. 4, at 23:6-21.) Gasparyan testified that he would also coach employees who violated the rules and procedures. (Tr. 4, at 24:21-23.) However, employee Mary Mueller testified that Kroger was not actually enforcing its social distancing rules, and when she brought this up with several managers and supervisors, they showed no interest in addressing the issue. (Tr. 1, at 159:1-160:25.) Contrary to Gasparyan's claim that he "used observation" to ensure employee training, Mueller testified that other employees did not know they should stay home if they had COVID-19 symptoms; the only posting on that issue was near the time clock, and that poster told employees only to "talk to management" if they had COVID-19 symptoms. (Tr. 1, 182:25-183:12; 204:7-12.)

Moreover, even if Kroger's employees knew how to identify and avoid the hazard of COVID-19, at least some of them obtained this information from other sources, at some unspecified time. Thus, instead of taking steps to ensure its training was effective, Kroger relied on employees getting this information elsewhere. In other words, Kroger essentially delegated the responsibility for becoming proficient at identifying and avoiding COVID-19 to its employees. Kroger's delegation cannot be construed as providing effective training to all employees.

Together, the above evidence establishes that Kroger improperly delegated too much responsibility onto employees for becoming proficient in identifying and mitigating the hazard of COVID-19. Kroger argues, "COVID-19 hazard awareness and understanding is not technical like fall protection and common sense dictates the awareness to avoid the hazard of COVID-19 can be accomplished through reading a pamphlet, observation, and coaching." (Answer to Petition, p. 21.) However, while the documents distributed by Kroger may have contained sufficient information on the hazard of COVID-19, Kroger failed to take sufficient action to ensure that all employees received, read, and understood those communications, i.e., that its communications were effective to "train" employees. Kroger made no consistent store-wide effort to ensure employees obtained the necessary information conveyed in the documents it distributed and did not track the efforts it characterizes as training that it made. Again, where an employer relies on passive communications, it must take some affirmative action (e.g., monitoring or testing) to ensure the communications are in fact effective to make each employee proficient in identifying and avoiding the safety hazard. Kroger failed to do so in any consistent or effective manner.

In summary, the Board finds that Kroger's approach to training on the COVID-19 hazard improperly delegated to the employee the primary responsibility of acquiring relevant information and ensuring that the training is "effective." Accordingly, we find the Division met its burden of establishing a violation of section 3203, subdivision (a)(7). Therefore, we reverse the ALJ's Decision, and affirm Citation 2, Item 1.

2. Did the Division establish a "Serious" violation of Section 3203, subdivision (a)(7)?

The Division classified Citation 2 as a "Serious" violation. In the underlying Decision, the ALJ vacated Citation 2, and therefore did not reach the issue of the citation's proper classification. Because we reverse the ALJ's Decision as to Citation 2, we address that issue for the first time.

In determining whether a citation is properly classified as Serious, the Board applies a burden-shifting analysis. (Lab. Code, § 6432.) At the first stage of this analysis, the Division bears an initial burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a).) Thereafter, the burden shifts to the employer.

> (c) If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious 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. The employer may accomplish this by demonstrating both of the following:
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> > (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).
> >
> > (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(Lab. Code, § 6432, subd. (c).)

In the underlying proceeding, Employer challenged the Serious classification, arguing that the Division failed to meet its burden of demonstrating that serious injury or death would result from a specific "actual hazard" at the worksite. (Kroger Post-Hearing Brief, pp. 19-21.) Employer argued that the Division's expert, Dr. Papenak, "spoke in generalities" regarding the hazard of COVID-19 infection, but "did not even 'conduct an analysis in this particular case.'" (*Id*., p. 20 [citing Tr. at 24:1-7.) Employer also argued that, notwithstanding any *training* failures, its employees *in fact* knew how to recognize and avoid the hazard of COVID-19. (*Id.*, pp. 21-22.) Moreover, Employer did implement several other "safeguards" against infection, such as employee screening, masking, physical distancing, cleaning and disinfection, and the use of hand sanitizer. (*Id*., p. 21.) In response to the Petition, Employer reiterated these arguments. (Answer to Petition, pp. 22-23.)

In support of the Serious classification, the Division stated at the hearing that it "provided testimony from Mr. Borhani who is deemed competent to testify on Covid-19 [sic] citations and Doctor Papanek, M.D. who has vast experience in infectious diseases and expert knowledge about Covid-19 and has been deemed a medical expert in this matter." (Division Post-Hearing Brief, pp. 17-18.) However, the Division did not cite this testimony, or otherwise explain how that testimony established a presumption of seriousness. The Division then argued, without evidentiary citations, that COVID-19 "is a very serious virus and can lead to serious illness, hospitalization and death" and that Employer's store employees "are exposed to the general public and other employees, some of who may be asymptomatic." (*Ibid*.) According to the Division, "[t]he hazard of not training . . . is that employees would not know how to protect themselves and other employees form [sic] infection or the spread of the virus and could suffer serious illness and possibly death." (*Ibid*.)

The Board does not disagree with the general thrust of the Division's position, namely, that COVID-19 represents a serious hazard. However, the "actual hazard" in this case was the absence of appropriate training. The Division fails to provide sufficient evidence to establish a presumption that serious injury or death would result from a specific "actual hazard" created by Employer's training failure. The Division cannot meet "its burden unless it introduces some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MBD Management, Inc*., Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).) The Board "will not assume facts that are not in evidence or take official notice on its own initiative in order to satisfy the Division's initial burden of proof on a serious violation." (*Id*.) Moreover, the Division does not address Employer's argument that its employees knew (whether due to training or not) how to identify and mitigate the hazard of COVID-19. Perhaps most significantly, the Division's Petition does not raise or address the Serious classification at all, suggesting the issue is thereby waived. (See Lab. Code, § 6618.) In either case, the Board finds that the Division failed to meet its burden of establishing "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (c).)[3]

In conclusion, the Board finds that the Division failed to establish grounds for classifying Citation 2 as Serious. Accordingly, the classification of Citation 2 is reduced to General.

3. What is the appropriate recalculated penalty for Citation 2?

To calculate civil penalties, the Division must (1) determine the appropriate Base Penalty; (2) determine the Gravity-Based Penalty by assessing the Gravity-based factors (Severity, Extent and Likelihood); (3) determine the Adjusted Penalty, by applying appropriate reductions due to Good Faith, Size, and History; and then (4) determine the final Proposed Penalty by applying an abatement credit, if appropriate. (See §§ 333-336.)

[3] Because we find that the Division failed to meet its initial burden, the Board need not address Employer's secondary argument, i.e., that even if the Division established a presumption of Seriousness, Employer rebutted that presumption. (Answer to Petition, p. 24.) We also note that the Division did not address this issue in its Petition, thereby waiving the issue. (See Lab. Code, § 6618.)

Here, the Division first classified Citation 2 as "Serious" (which requires Severity of HIGH), then rated Citation 2 as HIGH for Extent (increasing the penalty by $4,500) and MODERATE for Likelihood (with no increase), for a Gravity-Based Penalty of $22,500. (§ 335, subds. (a)(1)-(2).) The Division assessed no reduction due to Good Faith, Size, or History, so the Adjusted Penalty was also $22,500. Finally, the Division applied a 50% Abatement Credit, reducing the Proposed Penalty to $11,250. (§ 336, subd. (e)(2).)

However, as noted, we are reclassifying Citation 2 from Serious to General. As a result, we must re-calculate the penalties in accordance with penalty-setting regulations.[4]

C. Base Penalty

First, the Base Penalty from which all other adjustments are made must be determined. (§ 336.) While the Base Penalty for a Serious violation is $18,000, the Base Penalty of a General violation is determined by its Severity. (*Ibid*.) The criteria for evaluating Severity change depending on whether the violation "pertains to employee illness or disease." (§ 335, subd. (a); § 336, subd. (b).) Here, we find that the application of section 3203, subdivision (a)(7), "pertains to employee illness," so Severity must be "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 which could result from the violation." (§ 335, subd. (a)(1)(A).) The regulation describes each rating as follows:

> LOW-- No time loss from work or normal activity; or minimum discomfort.
>
> MEDIUM-- Loss of part or all of a day from work or normal activity including time for medical attention; or moderate temporary discomfort.
>
> HIGH-- Loss of more than one day from regular work or normal activity including time for medical attention; or considerable temporary discomfort.

(§ 335, subd. (a)(1)(A)(i).) Papanek testified that if infected with COVID-19 (i.e., the "illness or disease which could result from the violation"), a person can suffer severe illness, be hospitalized, or die. Indeed, Employer alleges that it instructed employees to stay home from work if they or someone they lived with had COVID-19 or symptoms of COVID-19. (Answer to Petition, pp. 9-10.) Accordingly, the Board finds the Severity of Citation 2 to be HIGH, resulting in a Base Penalty of $2,000. (§ 336, subd. (b).)

[4] In its amended appeal, Employer challenged the reasonableness of Division's proposed penalties for Citation 2. However, in its Post-Hearing Brief and Answer to the Petition, Employer did not address the Division's penalty calculation, thereby waiving the right to challenge the Division's penalty calculation. (Lab. Code, § 6618.)

D. Gravity-Based Penalty Adjustments

Having established the Base Penalty and a Severity of HIGH, we must evaluate the violation's Extent and Likelihood.

Extent

"Extent" is based on the number of employees exposed to the violation. (§ 335, subd. (a)(2)(i) [defining "LOW" as 1-5 employees, "MEDIUM" as 6-25 employees, and "HIGH" as 26 or more employees].) Here, Borhani testified that the Division rated Extent as HIGH, based on his assessment that over 50% of employees received ineffective training regarding COVID-19. Again, Employer waived any specific challenge the Division's penalty assessment. (Lab. Code, § 6618.) Regardless, the Division's assessment is consistent with our ruling that Employer's COVID-19 training was a *general* failure, and not just a failure for a particular subset of employees. Thus, we find that Employer's size, with upwards of 130 employees, is sufficient to establish a HIGH Extent for Citation 2. (§ 335, subd. (a)(2)(ii).) Accordingly, the Base Penalty is adjusted upwards by 25%, for a total of $2,500. (§ 336, subd. (b).)

Likelihood

"Likelihood" is "the probability that injury, illness or disease will occur as a result of the violation." (§ 335, subd. (a)(3).) Likelihood must be rated LOW, MODERATE, or HIGH, based on "(i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records." (*Ibid*.) Here, Borhani testified that he rated Citation 2's Likelihood as MODERATE because "they did have some knowledge, but they did not have enough knowledge, so I didn't cite them high because again, they had some knowledge." The Board finds this testimony inadequate. Nothing in section 335, subdivision (a)(3), indicates that the Division may assess Likelihood based on whether employees "have enough knowledge," and certainly not without addressing the two enumerated factors. Accordingly, the Board finds that the Likelihood factor must be rated as LOW, with a corresponding reduction of 25% of the Base Penalty. (§ 335, subd. (a)(3).)

As a result, the Gravity-Based Penalty for Citation 2 is $2,000. (§ 336, subd. (d).)

E. Adjusted Penalty

The Gravity-Based Penalty in most cases is subject to further adjustment for Good Faith, Size, and History, resulting in the "Adjusted Penalty." (§ 335, subd. (b), (c), and (d); § 336, subd. (d).)

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provides for the following reductions to the Gravity-based penalty based on Size:

10 or fewer employees -- 40% of the Gravity-based Penalty shall be subtracted.
11-25 employees -- 30% of the Gravity-based Penalty shall be subtracted.
26-60 employees -- 20% of the Gravity-based Penalty shall be subtracted.
61-100 employees -- 10% of the Gravity-based Penalty shall be subtracted.
More than 100 employees -- No adjustment shall be made.

Here, it is undisputed that Employer had more than 100 employees. Therefore, no further adjustment was warranted for Size.

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide further penalty modifications based upon the employer's history of compliance, determined by examining and evaluating the employer's records in the Division's files. Depending on such records, the History of Previous Violations is rated as:

> GOOD-- Within the last three years, no Serious, Repeat, or Willful violations and less than one General or Regulatory violation per 100 employees at the establishment.
>
> FAIR-- Within the last three years, no Serious, Repeat, or Willful violations and less than 20 General or Regulatory violations per 100 employees at the establishment.
>
> POOR-- Within the last three years, a Serious, Repeat, or Willful violation or more than 20 General or Regulatory violations per 100 employees at the establishment.

(§ 335, subd. (c).) Section 336, subdivision (d)(3), provides that for a rating of "GOOD," 10 percent of the Gravity-based penalty shall be subtracted; for a rating of "FAIR," 5 percent of the Gravity-based penalty shall be subtracted; and for a rating of "POOR," no adjustment shall be made.

Here, the Division assigned Employer a GOOD rating for History. (Division Post-Hearing Brief, p. 18.) Employer does not dispute this rating, and we find no reason to disturb it. Thus, the Gravity-Based Penalty is reduced due to Employer's GOOD History by 10%, for a total of $1,800.

Good Faith

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as:
> GOOD—Effective safety program;
> FAIR—Average safety program;
> POOR—No effective safety program.

Section 336, subdivision (d)(2), allows a downward adjustment of 30 percent for a "GOOD" rating and 15 percent for a "FAIR" rating.

According to the Division, "No Good faith credit was given because this is a Serious citation and the IIPP is considered ineffective." (Division's Post-Hearing Brief, p. 18.) The Division's position, which is effectively a POOR rating with no resulting penalty reduction, is not otherwise supported. Because the Division did not adequately justify its Good Faith calculation, the Board applies maximum adjustments resulting in a further 30 percent reduction to the penalty. As a result, an additional 30 percent is subtracted from the $2,000 Gravity-Based Penalty. (§ 336, subd. (d)(2).) Combined with the 10% reduction for History, this results in an Adjusted Penalty of $1,200 ($2,000 Gravity-Based Penalty – 40% [10% History, 30% Good Faith] = $1,200).

F. Abatement

Section 336, subdivision (e)(2), provides for a 50 percent reduction of the Adjusted Penalty if an employer abates an alleged violation within specified time parameters. The Division applied the abatement credit in its initial calculations, and we see no reason not to apply that credit here. Therefore, Employer is entitled to the full 50 percent reduction for Citation 2.

Consequently, the Adjusted Penalty of $1,500 is reduced by 50 percent, for a total penalty of $750.

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DECISION

The Board reverses the Decision of the ALJ. Citation 2, Item 1, is hereby affirmed, and reclassified to a General violation. Employer's penalty for Citation 2 is $750.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 10/23/2025