BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection Number
EMPLOYBRIDGE HOLDING COMPANY **dba SELECT STAFFING** **3829 Plaza Drive, Suite 602** **Oceanside, CA 92056** **Employer**	**1499137** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken Employer's Petition for Reconsideration (Petition) under submission, renders the following decision after reconsideration.

JURISDICTION

Employbridge Holding Company, doing business as Select Staffing (Employer), is a staffing company which provides temporary workers to other employers. In mid-2020 the California Division of Occupational Safety and Health (Division) began an inspection of a meal packaging facility in Lancaster, California, operated by Employer's client after receiving a complaint about worker exposure to coronavirus disease 2019 (COVID) at that facility. The Division cited that host employer, two other staffing companies, and Employer for exposing workers to COVID. Employer received two citations. Citation 1, Item 1, alleged a general violation of section 3203, subdivision (a)(5)[1] for failing to investigate workplace illness. Citation 2 alleged a serious violation of section 3203, subdivision (a)(4) and (a)(6) for failing to identify and correct a workplace hazard. Employer appealed. The matter was assigned to an Administrative Law Judge (ALJ) of the Board to conduct administrative proceedings, including a contested evidentiary hearing. After the hearing the ALJ issued a decision (Decision) upholding the citations, and Employer timely petitioned for reconsideration.

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

ISSUES

1. Did Employer perform an adequate investigation after COVID cases were reported?
2. Does the absence of one or more "reportable" COVID cases excuse Employer from investigating COVID cases at the host employer's facility?
3. Did Employer's lack of control over the host employer's facility relieve Employer from taking corrective action?

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

4. Does the record support a determination that Employer investigated the COVID cases as required?

FINDINGS OF FACT

We accept and adopt the following findings of fact made by the ALJ in her Decision.

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 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 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 guidance publications in the spring and summer of 2020 but did not update its September 2020 site evaluation form to include COVID 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 aerosols can travel around hanging panels.
14. Transmission of COVID is a realistic possibility if no inspection or correction of transmission hazards occur after an outbreak.
15. Employer took no steps to gather information about COVID transmission hazards from Client or Employees.

DECISION AFTER RECONSIDERATION

As noted earlier, Employer is a staffing company. In this matter Employer had assigned several of its employees ("associates") to temporary work at Harvest Farms, which packages meals for distribution to schools and prison facilities. That work was done by workers standing on both sides of a conveyor belt adding various items to the meal packages as the packages moved past. The evidence shows that the workers on each side of the conveyor were standing almost shoulder to shoulder, and in any event less than six feet apart. The evidence also shows that Harvest Farms had installed plexiglass barriers above and parallel to the conveyor, thus separating workers on opposite sides of the conveyor from each other. The evidence showed that those plexiglass barriers were inadequate to prevent the movement of COVID-containing aerosols or particles across the conveyor. There were no barriers between workers on each side of the conveyor. (Exhibits 30, 31, 37.)

Workers in Harvest Farm's Building B contracted COVID and exposed fellow workers there. Harvest Farms informed Employer that there was a COVID outbreak at the Harvest Farms facility. Employer's employees working in Harvest Farms's Building B at the worksite were exposed to COVID. The record is not clear that any of Employer's Employees contracted COVID, but the evidence suggests that one or more of them did so.

1. Citation 1, Item 1: Did Employer perform an adequate investigation after COVID cases were reported?

Section 3203, subdivision (a)(5), provides that an employer's IIPP "shall, at a minimum: [¶] Include a procedure to investigate occupational injury or illness." The regulation also requires that employers "implement" that procedure. (§ 3203, subd. (a).)

Employer's IIPP provides that upon notice of an occupational injury or illness, "[Employer] 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].

Harvest Farms notified both the Division and Employer of COVID transmissions at Building B and that workers who did not contract COVID were in close contact with those who did. Upon being notified by Harvest Farms of the COVID cases, Employer had knowledge of occupational illnesses in the workplace, triggering the section 3203, subdivision (a)(5) duty to investigate.

However, there is no reliable evidence that Employer conducted the required investigation. Employer argues, according to hearing testimony, that it interviewed its employees and performed contact tracing. The ALJ did not find this testimony credible. Employer admitted at the hearing that it did not document those actions until after the end of the exposure incident. Further, Employer did not introduce any records of the interviews or investigations into evidence. Accordingly, the ALJ gave the testimony little or no weight. (Decision, p. 6.) Doing so was consistent with Evidence Code section 412: "If weaker or less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (*Golden State Boring & Pipe Jacking, Inc*., Cal/OSHA App. 1308948, Decision After Reconsideration (July 24, 2020).)

The IIPP also refers to appendices consisting of forms related to such an investigation, but the forms were not offered into evidence, either as blank exemplars or as actual reports of Employer's investigation of the exposure incident. Further, the IIPP requires Employer to keep records of its worksite investigations, and none was offered into evidence.

An employer which fails to implement one or more elements of its IIPP, even if the document itself is comprehensive, violates the requirements of section 3203, subdivision (a)(5). (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) An IIPP is not effectively implemented if there is a deficiency in practice or implementation of an element essential to the overall program. (*Hansford Industries, Inc., dba Viking Steel*, Cal/OSHA App. 1133550, Decision After Reconsideration (Aug. 12, 2021).) Accordingly, we affirm the holding that Employer violated section 3203, subdivision (a)(5), and the penalty assessment for the Citation.

2. Citation 2, Item 1: Does the absence of one or more "reportable" COVID cases excuse Employer from investigating COVID cases at the host employer's facility?

Citation 2 alleges a violation of both section 3203, subdivisions (a)(4) and (a)(6). Section 3203, subdivision (a), requires that an employer shall establish, implement, and maintain an IIPP. Section 3203, subdivision (a)(4), requires that the IIPP shall:

> Include procedures for identifying and evaluating workplace 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, 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 or previously unrecognized hazard.
>
> Similarly, section 3203, subdivision (a)(6) provides that the IIPP shall:
>
> (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.

Section 3203, subdivision (a)(4):

COVID, which arose in China in late 2019 and was recognized as having become present in the U.S. in January 2020 was acknowledged to be a new health hazard by all parties. Accordingly, it was a workplace hazard which had to be identified and evaluated by Employer. (§ 3203, subd. (a)(4)(B).)

The ALJ found that Employer's response to COVID was inadequate to satisfy its duties to identify and evaluate the new hazard under section 3203, subdivision (a)(4). (Decision, pp. 9-11.) We agree.

Employer had no record of inspections or hazard assessments of the Harvest Farms facility during the period at issue, and there was no evidence that Employer worked with Harvest Farms to perform inspections. As the ALJ noted, Employer's September 2020 annual site inspection evaluation form was identical to its 2017 and 2019 forms and was devoid of any updates addressing COVID.

Employer also did not insist on being allowed to conduct inspections when Harvest Farms denied it access to access and assess Employer's own personnel. (See *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014). [primary employer has duty to intervene to protect safety of employees assigned to client/secondary employers].) Employer conducted telephone interviews of its employees, but that did not satisfy the requirement to investigate and inspect the worksite. The evidence shows that the interviews were superficial and pro forma.

Section 3203, subdivision (a)(6):

Further, the evidence shows that Employer did not appropriately act to correct the hazard of exposure to COVID. Although Harvest Farms installed plexiglass barriers above and along the direction of the conveyor belt, separating workers on opposite sides, there were no barriers between workers on the same side of the conveyor. Those on each side were shown to be near each other, often less than 3 to 6 feet apart. In short, Employer also violated its duty to correct the hazard or remove its workers from the facility. (*Staffchex*, supra, Cal/OSHA App. 10-2456.) Although Employer has some latitude in fashioning corrective procedures and methods (section 3203 is a performance standard), the record demonstrates that Employer's efforts in this case were not sufficient in degree or scope to correct the hazard. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015); *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) Again, we affirm the violation and the associated penalty.

3. Did Employer's lack of control over the host employer's facility relieve Employer from taking corrective action?

As noted in the section immediately above, a primary employer such as Employbridge is obligated to protect employees it assigns to host or secondary employers, and cannot escape liability by simply delegating its responsibilities to the host employer. As the Board held in *National Distribution Center, LP, Tri-State Staffing, supra*, Cal/OSHA App. 12-0391:

> [E]ach employer remains ultimately responsible to ensure implementation as to all employees subject to the IIPP requirements, and employers cannot escape liability for a violation of their duties, or for a failure of implementation, by arguing that they contracted or delegated away, or otherwise reassigned, their statutory and regulatory responsibilities. (See e.g., *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001); *Staffchex*, *supra*, Cal/OSHA App. 10-2456, citing *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).)

Although Employer did not have control over the Harvest Farms facility, at the very least it could have instructed its employees not to report to work there in light of the hazard of COVID exposure which was not adequately addressed at the facility. The *Staffchex* decision cited above is Board precedent establishing that obligation. The record shows that Employer did not fulfill its obligations in that respect.

4. Does the record support a determination that Employer investigated the COVID cases as required?

Also as noted earlier, Employer's assertion that it did investigate the hazards at Harvest Farms is to be viewed with distrust since it failed to produce any records of such investigations. (Evid. Code § 412.) Accordingly, the Board affirms the Decision in this respect as well.

DECISION

The violations alleged in the Citations are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 02/25/2025

APPENDIX

Timeline and Excerpts of Guidance Documents Issued by CDPH, Cal/OSHA and CDC

On February 10, 2020, the CDPH issued an All Facilities Letter (AFL) referring to CDC interim guidance issued February 8, 2020 and stating the following: "The HCP exposure risk factors described in the CDC interim guidance include, but are not limited to, the following: [¶] The duration of exposure (e.g., longer exposure time likely increase exposure risk) [¶] Whether the patient was wearing a facemask (which can efficiently block respiratory secretions from contaminating others and the environment [¶] Whether an aerosol generating procedure was performed [¶] The types of [PPE] used by HCP[.]" Employer's MAs were exposed for limited times, as noted, while they and patients (with few exceptions) were wearing surgical masks. (Ex. 33.)

On February 12, 2020, the CDC issued COVID-related guidance entitled "Interim Prevention and Control Recommendations for Patients with Confirmed 2019 Novel Coronavirus (2019-nCoV) or Persons Under Investigation for [COVID] in Healthcare Settings." (Ex. 112.) The guidance "is based on the currently limited information available on 2019-nCoV related to disease severity, transmission efficiency and shedding duration." The CDC stated, "For the purpose of this guidance, HCP refers to all persons, paid and unpaid, working in healthcare settings engaged in patient care activities, including: patient assessment for triage, entering examination rooms or patient rooms to provide care, . . . obtaining clinical specimens[.]" (Ex. 112, p. 1.) The guidance recommended separating infected persons by six feet from others. It also calls for HCP to use N95 masks or equivalents when entering the room where a patient is to be examined or treated. (Ex. 112, p. 3.)

On February 28, 2020, the CDPH issued "Outpatient Healthcare Facility Infection Control Recommendations for Suspect COVID-19 Patients." (Ex. 35.) It recommended that outpatient facilities be prepared to evaluate COVID patients by, among other items, "Ensuring that N95 respirators . . . are available." It further recommended that "Prior to interacting with patient inside or outside the facility, staff should don PPE [personal protective equipment]" including N95 masks. The document's recommendations for facilities without an airborne infection isolation room, such as the Milvia facility, included asking the patient to call after arrival but before entering the facility, having the patient wear a surgical mask or using other practical means of source control such as a blanket placed loosely over a child's head, bypassing waiting areas, immediately placing the patient in a private room, and allowing only essential staff to be in the room. (Ex. 35, pp. 1, 2.) Employer established those procedures except for having MAs wear N95 masks while meeting and escorting patients to the treatment rooms.

On March 3, 2020, the CDPH published AFL 20-17, "Guidance for Healthcare Facilities on Preparing for Corona Disease (COVID-19)," which provided "new and updated" guidance. (Ex. 32.) Apparently in recognition and response to N95 respirator shortages, this AFL noted that the CDC advised that certain N95 respirators past manufacturer-designated shelf life can be considered when responding to COVID. And it refers to Cal/OSHA's own "interim guidance" regarding use of respirator supplies "to ensure compliance with [section 5199]."

On March 28, 2020, Cal/OSHA published a document entitled "Interim Guidance for Health Care Facilities: Severe Respirator Supply Shortages," which states:

> In non-emergency conditions, covered employers must provide and ensure use of [N95 respirators] to all employees occupationally exposed to novel pathogens such as COVID. [¶] However, for the current COVID-19 crisis, covered employers must provide surgical masks when the respirator supply is insufficient for anticipated surges or when efforts to optimize the efficient use of respirators does not resolve the respirator shortage. Surgical masks can only be used for lower hazard tasks involving patient contact.

Note: This guidance was issued 24 days after Governor Newsom declared a state of emergency in California due to the COVID pandemic. Even as late as June 2020, Cal/OSHA published guidance allowing use of surgical masks when other respiratory protection options were exhausted. (Ex. 39, Cal/OSHA guidance 6/12/2020.)

On March 10, 2020, the CDC updated COVID guidance. (Ex. 111.) The guidance stated, "[F]acemasks are an acceptable alternative when the supply chain of respirators cannot meet the demand. During this time available respirators should be prioritized for procedures that are likely to generate respiratory aerosols, which would pose the highest risk to HCP." (Ex. 111, p. 1.) Further, the guidance states: "Early reports suggest person-to-person transmission most commonly happens during close exposure to the person infected with [COVID], primarily via respiratory droplets[. . .] The contribution of small respirable particles, sometimes called aerosols or droplet nuclei, to close proximity transmission is currently uncertain. However, airborne transmission from person-to-person over long distances is unlikely. . . [¶s] In times of shortages, alternatives to N95s should be considered[.] Special care should be taken to ensure that respirators are reserved for situations where respiratory protection is most important[.]" (Ex. 111, p.2.) The guidance also stated, "N95 [or equivalent or more protective] respirators should be used when performing or present for an aerosol generating procedure." (Ex. 111, p.5.)

On March 2020, the CDPH published "COVID-19 Health Care System Mitigation Playbook." (Ex. 45.) Regarding "Mode of Transmission" it states, "Evidence is building. Systems should ensure appropriate PPE is available for the most critical patients where procedures occur frequently. Reports from around the world indicate most infections have occurred when a contagious person has close contact with family, colleagues, or healthcare workers due to droplets which can spread up to 6 feet. [. . .] Similarly, there are some concerns about airborne transmission, but more data is needed on this." (p. 3.) The Playbook recommends re-use of N95 respirators and surgical masks to "conserve PPE supplies[.]" (p. 14.) And "Those escorting patients with respiratory symptoms or suspected to have COVID-19 do not need to wear a mask, if the patient is masked. If the patient is unable to wear a mask, staff must put on a mask while escorting. Staff must wear full PPE if in direct contact (touching or providing care) with patients during transport." (p. 15.) "Staff need not wear mask or other PPE if patient is wearing mask during transport." (p. 16.)

On April 1, 2020, the CDC issued guidance that included among its "key concepts" the need for "prioritiz[ing] respirators . . . for aerosol-generating procedures [and] implement[ing] PPE

optimization strategies to extend supplies." (Ex. 106, p. 1.) It further stated: "This interim guidance has been updated based on currently available information on [COVID], and the current situation in the United States which includes cases of reports of community transmission . . . and shortages of facemasks [and] N95 [respirators][.]" (Id.) Its "mode of transmission" section restates the information in the March 10, 2020, guidance quoted above. (Ex. 106, pp. 1, 2.) This CDC guidance also says, "Special care should be taken to ensure that respirators are reserved for situations where respiratory protection is most important, such as performance of aerosol-generating procedures on suspected or confirmed COVID-19 patients or provision of care to patients with other infections for which respiratory protection is strongly indicated (e.g., tuberculosis, measles, varicella)." It also includes, on page 5, two illustrations of PPE for HCP, which notes that "facemasks are an acceptable alternative" to N95 respirators. (Ex. 106, p. 2.)

On May 18, 2020, the CDC again updated its guidance. (Ex. 113.) In that update it repeated the information regarding the mode of transmission quoted from March 10, 2020, above. It also repeated that N95 respirators should be reserved for close contact with patients and for use by HCP conducting procedures which are likely to generate respiratory aerosols. It further republished the illustration used in the April 1, 2020, guidance stating that "facemasks are an acceptable alternative to" N95 respirators. The same illustration is published in the CDC's updated guidance dated June 19, 2020.

On October 5, 2020, the CDC published a report titled "How COVID-19 Spreads." It stated, "COVID-19 is thought to spread mainly through close contact from person-to-person, including between people who are physically near each other (within about 6 feet) . . . We are still learning about how the virus spreads[.]" Notably, this guidance was issued approximately five months after the violations at issue. It further stated, COVID "can sometimes spread by airborne transmission." This was approximately five months after the occurrence of the violations at issue and indicates continuing the medical/scientific uncertainty regarding how COVID is spread.