BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1475491**
SUTTER BAY MEDICAL FOUNDATION **dba SUTTER EAST BAY MEDICAL FOUNDATION** **139 KIFER COURT** **SUNNYVALE, CA 94086** **Employer**	**DECISION**

Statement of the Case

Sutter Bay Medical Foundation, doing business as Sutter East Bay Medical Foundation, (Employer) is a health care provider. On May 18, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Spencer Wojcik, commenced an inspection of a work site located at 2500 Milvia Street in Berkeley, California (the facility).

On August 31, 2020, the Division cited Employer for failure to ensure that medical assistants used a respirator when transporting patients with known or suspected cases of COVID-19 within the facility.[1]

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification of the citation, and the reasonableness of the proposed penalty. Additionally, Employer asserted various affirmative defenses to the citation.[2]

This matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board). On April 19 and 20, 2022, August 25 and 26, 2022, November 15, 2022, February 22 and 23, 2023, and March 16 and 17, 2023, ALJ Lewis conducted the hearing from Sacramento County, California, with the parties and witnesses appearing remotely via the Zoom video platform. Lisa Prince, attorney with The Prince Firm, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. The matter was submitted on October 1, 2023.

[1] When COVID-19 is used herein, it is in reference to the disease caused by the SARS-CoV-2 virus, also commonly known as Coronavirus 2019.

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

Issues

1. Should the Division's post-hearing motion to amend the citation be granted to assert multiple theories of liability?

2. Did Employer fail to ensure that medical assistants used a respirator when present during the performance of procedures or services for a patient with, or suspected to have, an airborne infectious disease?

3. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?

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

5. Is the proposed penalty reasonable?

Findings of Fact

1. COVID-19 is transmitted through pathogens that are carried from the source to the recipient through droplets or smaller aerosols.

2. COVID-19 is a pathogen capable of causing serious human disease.

3. While there were other coronaviruses previously known by the medical community, SARS-CoV-2, the coronavirus that causes COVID-19, was unknown prior to early 2020.

4. In the early months of the COVID-19 pandemic, Employer's medical assistants (MAs) waited for COVID-19 or suspected COVID-19 pediatric patients outside a second-floor doorway, opened the door, and provided the patient with directions about how to get to the examination room just down the hallway. The MAs then followed the patient and guardian to the designated room, informed them that the doctor would be with them shortly, and closed the door to the examination room.

5. Opening the second-floor doorway, providing guidance to the examination room, informing patients that the doctor would be in shortly, and closing the door were the only services the MAs provided for the COVID-19 or suspected COVID-19

patients in the facility, as the rest of the patient rooming procedure was conducted via telephone.

6. The MAs wore surgical masks while greeting the COVID-19 or suspected COVID-19 patients at the doorway, guiding them down the hallway, informing them that the doctor would be with them shortly, and closing the examination room door.

7. A brief period when an MA was in contact with a COVID-19 patient could result in occupational exposure to the disease.

8. Studies demonstrated the virus is transmissible over distances greater distances than six feet.

9. Surgical masks do not protect the wearer from airborne infectious diseases because the aerosols that carry the pathogens are smaller than the masks are designed to protect against. Additionally, surgical masks do not have a tight seal around the edges, so even larger droplets can reach the wearer's mouth or nose through the gaps.

10. Patients who had just exerted energy climbing the stairs to reach the door being held open by the MAs would likely be expelling a larger quantity of infectious particles.

11. Thousands of people in the United States that contracted COVID-19 were either hospitalized or died as a result of the illness.

12. The penalty was calculated in accordance with the Division's policies and procedures.

Analysis

1. Should the Division's post-hearing motion to amend the citation be granted to assert multiple theories of liability?

California Code of Regulations, title 8, section 371.2, provides, in relevant part:[3]

(a) Amendment of a citation or appeal is permitted in the following circumstances so long as any party opposing the amendment has an opportunity to

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

demonstrate any prejudice that the requested amendment will create. In determining whether prejudice is shown by a party opposing an amendment, consideration shall be given to the specific evidence that the opponent of the amendment would be unable to present because of the timing of the request, if the amendment were granted.

(1) A request for an amendment that does not cause prejudice to any party may be made by a party or the Appeals Board at any time.

(2) A request for an amendment that causes prejudice to the opposing party shall be granted if one of the following circumstances apply:

[…]

(B) In the case of a request brought less than 20 days before the hearing or during a hearing:

(i) The amended citation or appeal arises out of the same general set of facts as the original citation or appeal such that the amended citation or appeal relates back to the original citation or appeal; and

(ii) The party seeking the amendment shows good cause for the failure to bring such request at least 20 days before the hearing; and

(iii) Any prejudice created by granting such amendment can be remedied by a continuance or other order of the Administrative Law Judge.

(b) Amendment of a citation or an appeal is not permitted when:

(1) The amendment concerns a general set of facts sufficiently different from the facts contained in the citation or appeal that the proposed amendment does not relate back to the original citation or appeal; and

(2) The violation alleged in the original citation occurred more than six months prior to the date of the request to amend the citation.

Labor Code section 6317, subdivision (e)(1), provides that "[a] citation or notice shall not be issued by the division more than six months after the occurrence of the violation." The Appeals Board has applied the "relation-back" doctrine to allow amendments to citations where the Division seeks to make changes to the original language on a citation issued more than six months before the proposed amendment. Where an amendment would not require proof of new facts and there is no prejudice to the employer, it may be allowed even if made after the six-

month limitations period. (*Webcor Builders, Inc.*, Cal/OSHA App. 06-3030, Denial of Petition for Reconsideration (Jan. 11, 2010).) But where the proposed amendment would require proof of new facts, it is barred unless made within the six-month statute of limitations period established in Labor Code section 6317. (*Id*.)

The Appeals Board recently granted a motion to amend a citation after the hearing had concluded. (See *L&S Framing, Inc*., Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 2, 2021) (*L&S*).) In *L&S*, the Division requested an amendment to allege a violation of an additional safety order as an alternate theory of liability. The Division did not request an amendment to the original AVD. The Appeals Board found that, because the parties had litigated the issue of whether the employee was injured in either a "floor opening" or "stairwell," the employer had not been prejudiced by the amendment.

> Absent proof of prejudice, "amendments may be permitted at any point during the course of litigation. See *Foman v. Davis* (1962) 371 U.S. 178, 181-182 ('in the interest of justice,' leave to amend may be necessary even at post-judgment stage)." (*Dole v. Arco Chemical Co.* (3rd. Cir. 1990) 921 F.2d 484, 488; § 371.2, subd. (a)(1).)

(*L&S, supra*, Cal/OSHA App. 1173183.)

When the employer in *L&*S filed a writ to Superior Court, and then filed an appeal of the Superior Court's ruling, the Appellate Court upheld the Appeals Board's granting of the requested amendment to change the cited regulation. The Appellate Court held that, "With regard to amending a pleading, '[i]f the same set of facts supports merely a different theory . . . no prejudice can result.' [Citation omitted.]" (*L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd*. (2023) 93 Cal.App.5th 995, 1012. (*L&S Framing* Appellate Case).)

The Appeals Board has consistently permitted amendments to the pleadings based on a review of whether there was prejudice to the opposing party. "'It is established . . . that if a case is actually tried on the theory which is later added by an amendment to the pleadings, the adverse party suffers no prejudice from the variance.'" (*Sierra Forest Products*, Cal/OSHA App. 09-3979, Decision After Reconsideration (Apr. 08, 2016), quoting *Conolley v. Bull* (1968) 258 Cal.App.2d 183, 193.) "While loss of evidence and loss of material witnesses may establish prejudice, generalized assertions of prejudice do not." (*L&S, supra*, Cal/OSHA App. 1173183.)

> Thus, absent a genuine showing of prejudice--e.g., that [the employer] was precluded from introducing relevant witnesses or other evidence--Employer cannot avoid liability under [an alternative theory] by merely complaining that this legal argument was not pleaded or raised too late in the process.

(*Walmart Associates, Inc., dba Walmart Fulfillment Center #8103*, Cal/OSHA App. 1461476, Decision After Reconsideration (July 22, 2022).)

In the instant matter, the Division seeks to amend the citation to allege alternative safety orders in addition to the originally-cited safety order. The Court in the *L&S Framing* Appellate Case approved of the use of alternative theories of liability:

> This is consistent with the modern practice in courts. (See *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402 ["When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations"].)

(*L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd.*, *supra*, 93 Cal.App.5th at p. 1010.)

During the pendency of the appeal, the Division sought to amend the citation on multiple occasions. The citation originally cited Employer for an alleged violation of section 5199, subdivision (g)(4)(H). The first motion to amend, filed on December 14, 2021, sought to add alternate theories of liability by adding alleged violations of section 5199, subdivisions (g)(4)(B) and (g)(4)(G), and to change the Alleged Violation Descriptions (AVD) for each alternative violation to use the word "escorting" instead of "transporting." Upon review, and before any evidentiary presentation at the hearing, the first motion to amend was granted.

On April 14, 2022, five days before the hearing commenced, the Division sought to amend the citation again to remove the originally-cited regulation [(g)(4)(H)] and AVD, and to make changes to the remaining AVDs for each of the alternative regulations [(g)(4)(B) and (g)(4)(G)] so that they more closely mirrored the additional cited regulations. The second motion to amend was granted during the hearing on April 19, 2022.

On May 12, 2022, after completing the first two days of testimony, the Division sought to amend the citation a third time, seeking to make significant changes to the two AVDs that had previously been amended twice. The changes to the AVD along the course of the various amendments had created the need for Employer to address entirely different factual allegations, including defending against assertions that Employer's alleged violation was based on two

documents that were not raised in the original citation. That is, the two AVDs for the alternative theories of liability relied on the contents of Employer's job description for its medical assistants and its Exposure Control Plan. On June 7, 2022, the Division's Third Motion to Amend was denied and prior orders amending the citation were rescinded because it had become apparent that the amendments did not relate back to the original AVD. Thus, the hearing proceeded based on the original allegations in the citation.

After the hearing concluded, the Division made a motion to amend the citation in its post-hearing brief. The motion seeks to amend the citation to allege a violation of section 5199, subdivisions (g)(4)(B), (g)(4)(G), or (g)(4)(H), as alternate theories of liability, but it does not seek to amend the AVD.

During the hearing in this matter, there was substantial testimony and argument about the issues in the two alternative safety orders that the Division now seeks to add to its citation. Employer's post-hearing brief acknowledged that the Division would likely move to amend the citation again and included argument addressing the two safety orders the Division now seeks to add to the citation. Therefore, it is apparent that no prejudice will result from granting the requested amendment because Employer was able to, and did, present evidence and legal argument regarding both the original safety order and the proposed alternative safety orders. Accordingly, the Division's request to amend Citation 1 is granted.

Accordingly, Citation 1 is amended to allege a violation of either section 5199, subdivision (g)(4)(B), section 5199, subdivision (g)(4)(G), or section 5199, subdivision (g)(4)(B). The AVD from the original citation is not amended.

2. Did Employer fail to ensure that medical assistants used a respirator when present during the performance of procedures or services for a patient with, or suspected to have, an airborne infectious disease?

Section 5199 regulates healthcare facilities and other service operations that involve the risk of transmission of aerosol transmissible diseases (ATD). An ATD is a disease for which droplet or airborne precautions are required. (§ 5199, subd. (b).)

Section 5199, subdivision (g)(4)(B), provides:

(g) Respiratory Protection.

(4) The employer shall provide, and ensure that employees use, a respirator selected in accordance with subsection (g)(3) and Section 5144 when the employee:

[…]

(B) Is present during the performance of procedures or services for an AirID case or suspected case[.]

The citation alleges:

Prior to and during the course of the inspection, including but not limited to, on May 1, 2020, the employer failed to ensure that employees used a respirator when the employees transported patients with cases or suspect cases of airborne transmissible diseases such as COVID-19, within the facility when the patients are not masked.

a. Is COVID-19 an airborne infectious disease (AirID)?

The definition of an "airborne infectious disease," or "AirID," is:

Either: (1) an aerosol transmissible disease transmitted through dissemination of airborne droplet nuclei, small particle aerosols, or dust particles containing the disease agent for which AII [Airborne Infection Isolation] is recommended by the CDC [United States Center for Disease Control and Prevention] or CDPH [California Department of Public Health], as listed in Appendix A, or (2) the disease process caused by a novel or unknown pathogen for which there is no evidence to rule out with reasonable certainty the possibility that the pathogen is transmissible through dissemination of airborne droplet nuclei, small particle aerosols, or dust particles containing the novel or unknown pathogen.

(§ 5199, subd. (b).)

It is necessary to determine whether COVID-19 is an AirID, thus requiring airborne precautions and that healthcare workers wear a respirator when they are "present during the performance of procedures or services for an AirID case or suspected case." (§ 5199, subd. (g)(4)(B).)

The two possible bases for determining whether an ATD is an AirID are: (1) airborne infection isolation, or AII, is recommended by the CDC or CDPH , as listed in Appendix A to section 5199, or (2) the disease is caused by a novel or unknown pathogen with uncertainty about the precise mode of transmission.

(1) Airborne infection isolation recommended by CDC or CDPH

The first component of the definition of "AirID" is:

> [A]n aerosol transmissible disease transmitted through dissemination of airborne droplet nuclei, small particle aerosols, or dust particles containing the disease agent for which AII is recommended by the CDC or CDPH, as listed in Appendix A …

Appendix A to section 5199 is "a list of diseases and pathogens which are to be considered aerosol transmissible pathogens or diseases for the purpose of Section 5199." Appendix A is divided into two lists, one for "Diseases/Pathogens Requiring Airborne Infection Isolation" and the other for "Diseases/Pathogens Requiring Droplet Precautions."

Under the list of diseases requiring AII, Appendix A includes, in relevant part:

> […]
> - Novel or unknown pathogens
>
> […]
> - Any other disease for which public health guidelines recommend airborne infection isolation

The Division presented testimony from Dr. Lisa Brosseau, who was qualified as an expert in the areas of industrial hygiene, aerosol transmissible diseases, including their routes of transmission and risk of exposure, and appropriate respiratory protection. Dr. Brosseau testified that COVID-19 is transmitted through pathogens that are carried from the source to the recipient through droplets or smaller aerosols. Thus, COVID-19 is an ATD, which would, by definition, require either aerosol or droplet precautions to prevent infection.

There was a significant amount of testimony and argument regarding what the CDC and CDPH were reporting about COVID-19 during the early days of the pandemic, when information provided to the public and healthcare facilities was changing regularly. There was guidance from the agencies during the early months of 2020 that seemed to recommend droplet precautions rather than airborne precautions, so airborne infection isolation procedures were not recommended by the agencies at that time.[4]

[4] Testimony focused on the period from January through June of 2020 because Employer's MAs were given N95 respirators, which meet the respirator requirements in sections 5144 and 5199, by the end of June.

Droplet precautions prevent infection from pathogens carried in larger droplets, with the use of personal protective equipment (PPE) such as gowns, gloves, a face shield, and a surgical mask. These precautions are designed to protect healthcare workers from contacting the contaminated droplets or inhaling the larger-sized droplets into the nose or mouth.

Airborne precautions prevent infection from pathogens carried in smaller aerosols that are breathed in and deposited in the respiratory system directly. A respirator such as an N95 or a powered air-purifying respirator (PAPR) is required to protect the healthcare worker from airborne pathogens, as N95s and PAPRs provide a higher level of protection from smaller particles than the protections for larger droplets.

Employer argued that it was following the CDPH and CDC guidelines regarding droplet precautions by allowing its MAs to wear a surgical mask, rather than a respirator, when interacting with COVID-19 positive or PUI pediatric patients and their guardians.[5] For example, in April 2020, the CDC advised that "person to person transmission most commonly happens during close exposure to a person infected with COVID-19, primarily via respiratory droplets produced when the infected person coughs, sneezes, or talks." (Ex. 106.) Similarly, in its COVID-19 Health Care System Mitigation Playbook (Mitigation Playbook), the CDPH advised that the primary mode of transmission was reported to be infectious droplets that could spread up to six feet. (Ex. 45.)

The way the Appendix A component of the AirID definition is written, it means that the CDC and CDPH have designated certain diseases and pathogens as requiring AII and it includes an "any other disease" item that allows for public health guidelines to impact the list by adding to it. However, it is not reasonable to assume that the list could be disregarded if CDC or CDPH released different or ambiguous guidelines about one of the diseases currently included on the list. Thus, if a particular disease or pathogen is included as one of the specifically-identified items on the list, the current CDC or CDPH guidelines would not alter a healthcare provider's obligations to adhere to the safety order.

Additionally, the CDC and CDPH guidelines cannot supersede the provisions of the Division's ATD safety orders. In their COVID-19 guidance, the CDC and CDPH expressly advised employers that they were required to comply with the provisions of section 5199 or, for non-healthcare employers, the Division's Emergency Temporary Standards implemented for COVID-19 protections. (See, e.g., Ex. 31, 34, and 109.)

[5] A patient suspected to have COVID-19 is referred to as a "PUI" or "patient under investigation." The audio recording from the hearing in this matter was erroneously transcribed to say "APY" at various points throughout the transcript (e.g., "…our PPE for working with APY would require…")._

The Division did not allege that COVID-19 was an AirID under the "any other disease" item in Appendix A and did not rely on CDC or CDPH guidelines as the basis for its assertions. Rather, the Division argued that COVID-19 is an AirID because the disease was caused by a novel pathogen, the SARS-CoV-2 virus. Notably, the novel or unknown pathogen categorization is specifically listed in Appendix A, which satisfies the first definition of an AirID, and is also the second definition of AirID.

(2) Novel or unknown pathogen

The second possible definition of an AirID is:

> [T]he disease process caused by a novel or unknown pathogen for which there is no evidence to rule out with reasonable certainty the possibility that the pathogen is transmissible through dissemination of airborne droplet nuclei, small particle aerosols, or dust particles containing the novel or unknown pathogen.

Thus, in order to establish whether COVID-19 is an AirID pursuant to the second definition of AirID, the Division must establish that (1) SARS-CoV-2 was a novel or unknown pathogen, and (2) there was no evidence to rule out with reasonable certainty that the pathogen was transmissible via airborne dissemination.

A "novel or unknown pathogen" is:

> A pathogen capable of causing serious human disease meeting the following criteria:
>
> (1) There is credible evidence that the pathogen is transmissible to humans by aerosols; and
>
> (2) The disease agent is:
>
> (a) A newly recognized pathogen, or
>
> (b) A newly recognized variant of a known pathogen and there is reason to believe that the variant differs significantly from the known pathogen in virulence or transmissibility, or
>
> (c) A recognized pathogen that has been recently introduced into the human population, or
>
> (d) A not yet identified pathogen.

(§ 5199, subd. (b).)

Dr. Brosseau testified extensively about the research that was done regarding the transmissibility of COVID-19. In order to analyze whether the SARS-CoV-2 virus met the definition of a novel or unknown pathogen, Dr. Brosseau testified about each of the criteria. First, she testified that SARS-CoV-2 was a pathogen shown to cause serious illness in humans and many people died as a result of COVID-19, the disease that results from the infection.

i. Credible evidence that the pathogen is transmissible to humans by aerosols

Dr. Brosseau testified that, early in the COVID-19 pandemic, there was evidence that SARS-CoV-2 was transmitted from person to person in shared spaces, with outbreaks in situations where people were standing near a person who was infected, and that published studies showed that the pathogen was capable of staying viable in the air. Additionally, Dr. Brosseau testified that an indication that the pathogen is transmissible by aerosols is that sampling studies showed that there were aerosol particles containing SARS-CoV-2 in hospital rooms with COVID-19 patients. Finally, Dr. Brosseau testified that the receptors, the cells that SARS-CoV-2 target to cause infection, are located throughout the human respiratory system. Dr. Brosseau testified that this study suggested that the virus was transmitted through aerosols rather than droplets, which would fall to the ground more rapidly. (Hrg. Transcript, Aug. 25, 2022, pp. 50-51.)

As such, Dr. Brosseau's testimony established that SARS-CoV-2 was transmissible to humans by aerosols.

ii. Disease agent is a newly recognized pathogen

Dr. Brosseau testified that there had been "no literature, no reports, no public health reports, no medical reports that described SARS-CoV-2…" prior to January 2020. (Hrg. Transcript, Aug. 25, 2022, p. 52.) While there were other coronaviruses known by the medical community, this particular coronavirus was unknown in early 2020. (*Id.*)

The CDPH Mitigation Playbook, on which many of Employer's arguments were based, refers to SARS-CoV-2 as "Novel Coronavirus." (Ex. 45.) In January 2020, CDPH distributed an "All Facilities Letter" advising health care employers about the "novel coronavirus" that had recently been identified. (Ex. 31.) The CDPH stated:

> As healthcare employers, facilities are required to follow recommendations under the California Occupational Safety Health Administration's (Cal/OSHA) Aerosol Transmissible Diseases (ATD) Standard … *Because 2019-nCoV meets the criteria for a novel aerosol transmissible pathogen (ATP) under the ATD*…

(Ex. 31. Emphasis added.)

Additionally, the various CDC and CDPH materials on which Employer based its decision to implement droplet precautions indicated that there was uncertainty or not enough research to definitively state whether SARS-CoV-2 was transmitted through aerosols or droplets. The CDC stated that "[t]he contribution of small respirable particles, sometimes called aerosols or droplet nuclei, to close proximity transmission is currently uncertain." (Ex. 106.) Additionally, the CDC admitted that "[w]e do not yet know how long SARS-CoV-2 remains infectious in the air." (Ex. FF.)

The various health agencies' references to the unknown nature of the virus, in addition to Dr. Brosseau's testimony, established that the disease agent was a newly recognized pathogen.

Based on Dr. Brosseau's expert testimony about the SARS-CoV-2 virus, it is found that the virus was a novel pathogen as defined by section 5199. As set forth above, "novel or unknown pathogens" are listed on Appendix A as requiring airborne infection isolation and are also specifically called out in the definition of AirID as requiring airborne precautions.

As such, healthcare employers were required to implement airborne precautions rather than droplet precautions for the activities specified in section 5199, subdivision (g).

b. Were MAs present during procedures or services for patients with, or suspected to have, COVID-19?

Section 5199 sets forth various situations where healthcare workers are required to wear a respirator such as an N95 or PAPR. Section 5199, subdivision (g)(4)(B), requires that employees use a respirator when they are "present during the performance of procedures or services for an AirID case or suspected case." Thus, in order to establish a violation of section 5199, subdivision (g)(4)(B), the Division must prove that the MAs were performing, or present during the performance of, procedures or services for COVID-19 patients or PUIs.

After the onset of the COVID-19 pandemic, Employer modified its procedures in the pediatric unit to reduce employee interaction with patients who had, or were suspected to have, COVID-19. Prior to the pandemic, MAs typically asked patients or their guardians a series of initial questions pertaining to symptoms, medical history, insurance, and other things, when an MA brought a patient into an examination room. However, Employer modified this procedure to have those initial questions asked via telephone while the pediatric patient and guardian waited in the guardian's car. Patients over the age of five were typically examined in the guardian's car, while younger patients were brought into designated rooms through a side door. The MA called the guardian on the phone and instructed the guardian to bring the patient to a set of stairs on the side of the building, where the guardian and patient ascended to the second floor. The MA waited for them outside the second-floor doorway, opened the door, and provided the guardian

and the patient with directions about how to get to the examination room just down the hallway. The MA followed the patient and guardian to the designated room, informed them that the doctor would be with them shortly, and closed the door to the examination room. The guardians were always masked during this process and the pediatric patients were required to wear a mask if they were over two years of age.

Thus, the inquiry is whether the task the MAs were performing in guiding the patients and guardians to the appropriate room constitutes a presence "during a procedure or service."

The term "services" is not specifically defined in the safety orders. Where a statutory (or regulatory) term is not defined, "it can be assumed that the Legislature was referring to the conventional definition of that term." (*OC Communications, Inc*., Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016), citing to *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 82.) "The rules of statutory and regulatory interpretation require that terms be given their ordinary meaning if not specially defined otherwise." (*California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).) To obtain the ordinary meaning of a word, the Appeals Board may refer to its dictionary definition. (*Fedex Freight, Inc*., Cal/OSHA App. 317247211, Decision After Reconsideration (Dec. 14, 2016).)

There are numerous definitions of "service" in the dictionary, most of which are inapplicable to the instant scenario. However, in its common use, a relevant definition could be any of the following:

> 2.a.: the work performed by one that serves
> *good service*
> 2.b.: HELP, USE, BENEFIT
> *glad to be of service*
> […]
> 4.: the act of serving: such as
> a.: a helpful act
> *did him a service*
> […]
> c: SERVE [to be a servant to: ATTEND; to answer the needs of; to provide services that benefit or help]

(www.merriam-webster.com <accessed September 2, 2023>.)

The MAs were performing a helpful act, or "service," for the pediatric patients by opening a door, providing them with directions to guide them to the correct examination room, informing them of what would happen next (i.e., the doctor would be coming in shortly), and closing the door behind them. As such, the MAs were "present during the performance of services for an AirID case or suspected case." (§ 5199, subd. (g)(4)(B).)

c. Did the Division establish that Employer's MAs were exposed to the hazard created by the violation?

In order to establish a violation of a safety order, the Division has the burden to prove that there was employee exposure to the hazard addressed by the safety order. (*Ja-Con Construction Systems, Inc., dba Ja-Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006).) The hazard addressed by section 5199 is infection with aerosol transmissible diseases in the healthcare industry. Section 5199, subdivision (g)(4)(B), specifically addresses the hazard of contracting a disease transmitted through small aerosols when an employee is performing services for patients who have, or are suspected to have, an AirID, including COVID-19.

> The Division may establish exposure by showing an employee was actually exposed to the zone of danger created by the violative condition, i.e. that the employees have been or are in the zone of danger. Alternatively, the Division may establish exposure by "showing the area of the hazard was 'accessible' to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger." [Citation omitted.] "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." [Citation omitted.]

(*Papich Construction Company, Inc.*, Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021), citing to *Dynamic Construction Services, Inc.*, Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).)

The Division's expert witnesses testified about the risk of exposure to the SARS-CoV-2 virus and whether the services provided by the MAs would put them at risk if they were not using appropriate respiratory protection. Dr. Brosseau testified that the commonly-referenced guidance regarding staying "six feet apart" from other people "does not govern airborne transmission." (Hrg. Transcript, Aug. 25, 2022, p. 161.)

> [K]eeping six feet apart, maybe that will protect you from the cough particles that are going to come straight at you in terms of droplet transmission. But that six-foot distance isn't going to do any good with respect to exposure to particles that are in the air that you can inhale that remain there for a long time.

(Hrg. Transcript, Aug. 25, 2022, p. 161.)

The MAs were a few feet from the patients who were suspected to have COVID-19 as they held the door open for the patients and their guardians going into the hallway, followed them down the hallway to the examination room, and closed the door to the room. Dr. Brosseau testified that "the science for that distance is actually -- it suggests that cough particles, even large ones, can travel 20 feet." (Hrg. Transcript, Aug. 25, 2022, p. 161.) Additionally, Dr. Brosseau testified about case studies where dozens of people in a church choir were infected by one member during choir practice or where a contagious individual in a restaurant infected patrons at other tables. Dr. Brosseau explained that these studies demonstrated the transmissibility of the virus over greater distances than six feet. (Hrg. Transcript, Aug. 25, 2022, pp. 161-163.)

The Division presented testimony from James Seward, M.D., who was deemed an expert in employee exposure to, and transmission of, ATDs and to provide testimony regarding the Serious classification of the citation. Dr. Seward's testimony was in agreement with Dr. Brosseau's regarding the distance that COVID-19 particles can infect others. With regard to the six-foot threshold for exposure for a particular duration, Dr. Seward testified:

> Q. So […] the criteria for what is a close contact for contact tracing was exposure for 10 minutes at a period less than six feet, does that have any relevance whatsoever about potential exposure in this scenario?
>
> A. Well, as you know, those criteria were used to identify people who are at high enough risk that they should be either quarantined or, yeah, usually quarantined for a time period. So that's a very elevated level of risk. The relevance in this situation is pretty limited. It doesn't define the question of exposure adequately. It's a more narrow subset of people who are potentially exposed.

(Hrg. Transcript, Feb. 22, 2023, p. 59.)

The MAs were not typically in proximity of the COVID-19 positive or PUI pediatric patients for more than two or three minutes. With respect to the amount of time that a person needed to spend in proximity with an infected source patient, Dr. Brosseau testified:

> The CDC proposed actually 15 minutes per contact tracing. If you look at their early guidance they said one to two minutes could result in an infectious dose or an exposure that would result in infection.
>
> But that 15 minutes has no science behind it. It simply was developed for the purpose of making contact tracing a little easier since there were so many people who needed to be traced.
>
> In fact, there are data in published studies. I'm thinking of the National Football League which did an exemplary job of following every single person every minute of their exposure and found contacts of just a few minutes that resulted in infection.
>
> So it's a more complex problem than just minutes, and ten minutes, 15 minutes, whatever.

(Hrg. Transcript, Aug. 25, 2022, pp. 171-172.)

Dr. Seward also testified that a brief period when an MA was in contact with a COVID-19 patient could result in occupational exposure to the disease.

> Q. So if a medical assistant were to escort or transport a suspect patient into a room and the amount of time that they spent with the patient was somewhere in the vicinity of two to five minutes would there still be potential exposure for that period of time?
>
> A. Yes. There would be potential exposure. I would consider that person to be occupationally exposed.

(Hrg. Transcript, Feb. 22, 2023, p. 58.)

The MAs were provided with surgical masks for the services that are the subject of the citation. Dr. Brosseau testified at length about the efficacy of surgical masks at preventing the spread of disease in general, and of COVID-19 in particular. Additionally, Dr. Brosseau testified about whether surgical masks protect the person wearing them. To both issues, Dr. Brosseau provided testimony about research and case studies that found that surgical masks do not protect

the wearer from airborne infectious diseases because the aerosols that carry the pathogens are smaller than the masks are designed to protect against. Additionally, surgical masks do not have a tight seal around the edges, so even larger droplets could reach the wearer's mouth or nose through the gaps.

As such, Dr. Brosseau opined that the surgical masks worn by the MAs were not only a violation of the ATD safety orders requiring respirators, but they simply would not provide protection from the small aerosols carrying COVID-19.

> But my answer would be they don't protect, the only thing that surgical masks offer in terms of personal protection is perhaps preventing sprays or splashes of large -- you know, large particles or liquid onto the face, onto the nose and mouth.

(Hrg. Transcript, Aug. 26, 2022, p. 89.)

Additionally, Dr. Seward opined that the patients who had just exerted energy climbing the stairs to reach the door being held open by the MAs would likely be expelling a larger quantity of infectious particles than someone at rest: "It would affect their respiratory rate and the depth of respiration. Both of those factors would tend to increase the number of viral particles that are expired." (Hrg. Transcript, Feb. 22, 2023, p. 54.)

Accordingly, the Division met its burden to prove that the MAs were exposed to the hazard addressed by section 5199, subdivision (g)(4)(B). Having established that MAs were not provided with respirators while performing services for AirID or suspected AirID patients, the Division established the violation by a preponderance of the evidence.

d. Did the Division's use of the term "transporting" in the AVD provide Employer with notice of the allegation against it?

Employer asserted that the original citation, which alleged a violation of section 5199, subdivision (g)(4)(H), involving "transporting" unmasked patients, was inapplicable because the tasks the MAs were performing did not involve transporting patients. There was a significant amount of testimony about what "transporting" means in the healthcare industry. Based on the testimony and documents submitted during the hearing, it appears that the industry meaning of "transport" typically involves actively moving a patient from one place to another using a gurney, wheelchair, or vehicle. These types of activities involve close physical contact with patients and, as a result, require particular precautions when the patient has an AirID.

In contrast to these types of physical conveyance from one place to another, the activity that was the subject of the alleged violation in this case did not involve close physical contact or actively relocating a patient via some method of delivery. Rather, the MAs were not in direct physical contact with the patients and were generally providing guidance and giving instructions to the patients as they walked to the examination room. Employer argued that this activity did not meet the definition of transport, so the safety order was inapplicable.

However, as set forth above, the citation was amended post-hearing, and the section found herein to have been violated does not include the word "transport." The AVD was not amended, so the issue becomes whether Employer had sufficient notice of the allegations against it in order to satisfy the California and United States Constitutions' due process requirements that a party is not deprived of notice and opportunity to be heard.

The AVD states:

> Prior to and during the course of the inspection, including but not limited to, on May 1, 2020, the employer failed to ensure that employees used a respirator when the employees transported patients with cases or suspect cases of airborne transmissible diseases such as COVID-19, within the facility when the patients are not masked.

Administrative citations are not bound by strict rules of pleading. The Appeals Board has repeatedly held that the citation must only ensure that the employer is informed of the substance of a violation. (*Bigge Group dba Bigge Crane and Rigging Co.*, Cal/OSHA App. 317230191, Decision After Reconsideration (Mar. 15, 2019).) That is, even if there are technical flaws, the citation needs to be merely sufficiently clear to give the employer fair notice and the ability to prepare a defense. (*Id.*)

> Additionally, an employer must show prejudice in order to prevail on its complaint that a citation was not sufficiently particularized. (*DSS Engineering Contractors, Inc*., Cal/OSHA App. 86-1023, Decision After Reconsideration (June 3, 2002).) Employer here has provided no evidence of prejudice. Employer did not claim any confusion as to the charges at hearing. […] In *Structural Shotcrete System*, Cal/OSHA App. 03-0986, Decision After Reconsideration (June 10, 2010), an employer also argued that it was unfairly prejudiced by the alleged vagueness of a citation. Employer in that case did not demonstrate that it was either unaware of the nature of the conduct that was the subject of the citation, or that it was unable to prepare its defense due to that lack of knowledge, and the Board found that the Employer was not unfairly prejudiced by the alleged

vagueness. (See also, *Alderman, Inc*., Cal/OSHA App. 05-3513, Decision After Reconsideration (November 22, 2011).)

(*Bigge Group dba Bigge Crane and Rigging Co., supra*, Cal/OSHA App. 317230191.)

Here, there can be no argument that Employer was unclear about the services its MAs were performing that were the subject of the Division's citation. Employer presented a robust defense during a nine-day hearing, held over the course of 11 months. While much of the defense was regarding the inapplicability of the cited safety order, there was also a substantial presentation of evidence regarding the propriety of the surgical masks the MAs were wearing while they performed the services of escorting and directing the COVID-19 or PUI patients to the examination rooms.

The AVD refers to transporting unmasked COVID-19 or PUI patients "within the facility." Based on the testimony and documentary evidence presented during the hearing, the only tasks the MAs were performing that involved exposure to these patients within the facility was the procedure discussed above where the MAs were opening the outer door for them, providing directions to get to the assigned examination room, following the patient and guardian down the hall to the room, informing them that the doctor would be with them shortly, and closing the door to the room. The rest of the services or procedures involving COVID-19 or PUI patients were completed either by telephone or by a clinician rather than the MAs.

As such, the Division's use of the word "transported" in the AVD did not prejudice Employer and there was sufficient notice of the alleged violation.

Finding a violation of one of the Division's alternative theories of liability obviates the need for analysis of the other two theories. The Appeals Board has held that a citation may be upheld on the basis of a single instance when multiple violations are alleged on the citation. (*Chevron U.S.A. Inc*., Cal/OSHA App. 13-0655, Decision After Reconsideration (Oct 20, 2015).) As such, because the Division established violation of section 5199, subdivision (g)(4)(B), Citation 1 is affirmed.

3. Did the Division establish a rebuttable presumption that the citation was properly classified as Serious?

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

(a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual

> hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).) "Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

Dr. Seward, the Division's expert retained for the purpose of testifying about the Serious classification, testified that COVID-19 may result in hospitalization or death:

> I think that part of the definition of serious physical harm that's most likely to be met in this situation would be an injury requiring hospitalization or treatment and that's a very realistic possibility in this case. […] I say that because if the evidence is shown that there've been many thousands of healthcare workers in the US that have contracted COVID in the course of their employment. Some greater than 3,000, probably many more have died as a result and those folks have required hospitalization and treatment.
>
> At the serious end of the spectrum a person might develop a pneumonia and require a respiratory ventilation and ultimately die from the infection from respiratory failure or other organ failure. At the less severe end a person might develop a very mild infection such as a cold and not require special treatment or hospitalization.

(Hrg. Transcript, Feb. 22, 2023, pp. 61-62.)

Accordingly, the Division met its burden to establish a rebuttable presumption that the violation cited in Citation 1 was properly classified as Serious.

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

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

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

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

As set forth in Labor Code section 6432, subdivision (b), the burden is on the employer to rebut the presumption that the citation was properly classified as Serious. The violation for which Employer was cited is the failure to ensure that MAs wore a respirator when they were providing services for pediatric patients who either had COVID-19 or were suspected to have it.

There is no dispute that MAs were provided surgical masks instead of respirators for their interactions with these patients as they directed them to the examination room, advised that the doctor would arrive shortly, and closed the door to the room. Thus, not having knowledge of the violation would necessarily mean that Employer did not know that respirators were required, which required that Employer did not know COVID-19 was an AirID. Employer's explanation for why it provided masks instead of respirators was based on its reliance on the frequently changing guidance provided by the CDC and CDPH during the early months of the COVID-19 pandemic.

The fact that the guidance being provided by the various health agencies in the early stages of the pandemic changed as new information came to light about the previously-unknown disease is precisely why COVID-19 so accurately met the definition of "novel or unknown pathogen" set forth in section 5199. The CDC and CDPH were uncertain about some critical aspects of transmission of the disease: "The contribution of small respirable particles, sometimes

called aerosols or droplet nuclei, to close proximity transmission is currently uncertain." (Ex. 106.) "We do not yet know how long SARS-CoV-2 remains infectious in the air." (Ex. FF.)

Because COVID-19 was a "novel or unknown pathogen," Employer knew or should have known by the plain language of the safety order that it was required to use airborne precautions to protect its employees. Employer did not do so.

Accordingly, Employer did not take all steps a reasonable and responsible employer should have taken to protect its MAs. Employer did not rebut the presumption that the citation was properly classified as Serious.

5. Is the proposed penalty reasonable?

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

Associate Safety Engineer Spencer Wojcik testified as to the basis for the penalty for Citation 1 and the calculations were in accordance with the Division's penalty-setting regulations. Employer did not provide any evidence that the Division's calculations were incorrect. Accordingly, the penalty of $6,750 is found to be reasonable.

Conclusions

The Division established a violation of section 5199, subdivision (g)(4)(B). The citation was properly classified as Serious and the proposed penalty was reasonable.

Order

Citation 1 is amended to reflect the Division's multiple theories of liability: section 5199, subdivisions (g)(4)(B), (g)(4)(G), and (g)(4)(H). The citation is affirmed with regard to section 5199, subdivision (g)(4)(B), only. The penalty of $6,750 is sustained.

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

Dated: 10/09/2023

Kerry Lewis
Presiding Administrative Law Judge

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