BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1477159**
GRIMMWAY ENTERPRISES, INC. **P.O. BOX 81498** **BAKERSFIELD, CA 93380** **Employer**	**DECISION**

Statement of the Case

Grimmway Enterprises, Inc. (Employer) is a vegetable farming and harvesting company. Beginning June 2, 2020, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido (Pulido), conducted an inspection at Employer's agricultural field, located at Highway 115 and Hoyt Road, in Holtville, California (the site).

On January 12, 2021, the Division issued two citations to Employer alleging violations of California Code of Regulations, title 8.[1] Citation 1 alleges a failure to implement and maintain an effective Injury and Illness Prevention Program (IIPP) in three instances. Citation 2 alleges a failure to provide effective training regarding the hazards of coronavirus disease 2019 (COVID-19). [2]

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties. Employer asserted various affirmative defenses as to both citations.[3]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) over the following nine days: May 25, 2021; April 4, 5, and 6, 2022; September 21 and 22, 2022; October 4 and 5, 2022; and November 22, 2022. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Manuel Melgoza of Donnell, Melgoza & Scates,

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[2] The Division must issue any citations within six months from the occurrence of a violation. (Lab. Code § 6317(e)(1).) However, there were three Executive Orders that extended the Division's deadline to issue citations during the COVID-19 pandemic: Executive Order N-63-20, Paragraph 9; Executive Order N-71-20, Paragraph 39; and Executive Order N-08-21, Paragraph 24. Thus, the citations are timely issued.
[3] Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

LLP, represented Employer. Tuyet-Van Tran (Tran), Staff Counsel, represented the Division. The matter was submitted on March 30, 2023.

Issues

1. Did Employer fail to provide effective training and instruction on COVID-19 hazards?

2. Did Employer fail to implement and maintain an effective IIPP?

3. Did the Division establish rebuttable presumptions that Citations 1 and 2 were properly classified as Serious?

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

5. Are the abatement requirements reasonable?

6. Are the proposed penalties reasonable?

Findings of Fact

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

2. By May 2020, COVID-19 infections had spread to California.

3. Cesar Valdez (Valdez) was a field supervisor for Employer who trained employees regarding COVID-19 and served as a foreman at the site between May 11 through May 17, 2020.

4. Martin Juaregui (Pirri)[4], Roberto Gallegos (Gallegos), Luis Alfonso Hernandez Rubio (Hernandez), Antonio Navarro (A. Navarro) and Pablo Navarro (P. Navarro) worked together in a cohort of at least seven coworkers who attended Valdez's COVID-19 trainings.

5. The Division published a COVID-19 prevention plan for agricultural employers on May 5, 2020, which identifies eight symptoms which may indicate a

[4] Pulido testified that Jauregui used the nickname "Pirri."

COVID-19 infection: frequent cough, fever, difficulty breathing, chills, muscle pain, headache, sore throat, or recent loss of taste or smell.

6. The Centers for Disease Control published COVID-19 guidance for businesses on May 6, 2020, which identifies 11 symptoms which may indicate a COVID-19 infection: fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and diarrhea.

7. On unknown dates, Employer distributed several COVID-19 training documents to employees which identified only three symptoms that may indicate a COVID-19 infection: fever, coughing, and shortness of breath.

8. Employer trained employees to recognize only three symptoms which may indicate a COVID-19 infection.

9. Employer produced its own COVID-19 written documents.

10. Employer's COVID-19 written documents are not dated, do not identify any health consequences that may develop from a COVID-19 infection, and lack procedures for reporting the illness when experienced or observed at a work site.

11. Employer did not permit Pulido to interview any foreman or supervisor who was at the site during the period of May 11 through May 15, 2020.

12. Employer developed written COVID-19 control measures which include distancing and separation.

13. Employer's foreman and supervisor worked together with the cohort of employees in the fields at the site.

14. On May 13, 2020, Valdez was aware that Pirri was unwell at work and allowed him to continue to work.

15. Pirri, Valdez, and A. Navarro saw Gallegos coughing and sneezing and appearing unwell at work on May 14 and 15, 2020. Gallegos was permitted to continue working at the site on both days.

16. On May 15, 2020, Pirri and Gallegos sat shoulder to shoulder inside a harvester cab that was four feet across.

17. During the week of May 11 through May 15, 2020, at least seven employees rode together in a 12-seat van to and from work.

18. The proposed penalties are calculated in accordance with Division policies and procedures.

Analysis

Two citations are at issue. Discussion of Citation 2 introduces information that will apply to the discussion of Citation 1. Thus, Citation 2 shall be discussed before Citation 1 to facilitate ease of reading.

1. Did Employer fail to provide effective training and instruction on COVID-19 hazards?

In Citation 2, the Division alleges Employer violated section 3203, subdivision (a)(7).

Section 3203, subdivision (a), requires:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> […]
> (7) Provide training and instruction:
> (A) When the program is first established;: [*sic*.] Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
> (B) To all new employees;
> (C) To all employees given new job assignments for which training has not previously been received;
> (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
> (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The Division alleges:

> Prior to and during the course of the Division's inspection, on May 13, 2020, the employer failed to provide effective training and instruction regarding the new occupational hazard of COVID-19 to its employees, 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 safely use cleaners and disinfectants, how and when to report symptoms and illness to management, and the employer's plan to control and prevent virus transmission.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)[5]

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective IIPP. Even when an employer has a comprehensive IIPP, the Division may still demonstrate a violation by showing that the employer failed to implement one or more elements. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) Thus, to establish an IIPP violation, the flaws in a program must amount to a failure to "establish," "implement," or "maintain" an "effective" program.

An IIPP can be found not effectively established, maintained, or implemented on the ground of one deficiency, if that deficiency is shown to be essential to the overall program. (*Hansford Industries, Inc. DBA Viking Steel*, Cal/OSHA, App. 1133550, Decision after Reconsideration (Aug. 12, 2021).) Training is essential to an overall workplace safety program. (*Mountain Cascade*, Cal/OSHA App. 01-3561, Decision after Reconsideration (Oct. 17, 2003).)

Applicability

Section 3203, subdivision (a), provides the minimum requirements for an IIPP. Section 3203, subdivision (a)(7) in particular, requires employers to provide necessary training to their employees to ensure they can safely perform their jobs. There is no dispute that Employer employed approximately eight employees at the site and was required to comply with section 3203, subdivision (a).

[5] All evidence will be weighted according to the foundation laid, relevance, testimony of witnesses, corroboration of hearsay, etc., and findings of fact will be based on the record.

The Division offered Mary Kochie (Kochie), a Nurse Consultant III with the Division for the past 22 years, to testify as an expert witness on COVID-19 based on her knowledge and professional experience. She testified that by February 2020, it was known the virus was highly transmissible and caused severe disease in some people; by March 2020, New York had severe cases; and by April 2020, COVID-19 had reached California and businesses were being shut all over the country. She testified that by May 2020, it was well established that the illness was an aerosol transmissible disease that could affect breathing and compromise the ability to oxygenate the blood. Kochie explained that a COVID-19 infection can lead to development of severe illness, organ damage, and death. She testified that some infections lead to hospitalization for treatments such as medication or ventilation. As such, the Division demonstrated that COVID-19 infection presented a hazard. Therefore, the safety order applies.

Violation

For training to be considered effective, the evidence must show that employees are proficient or qualified to implement the safety rules and requirements that the training was intended to convey. (*Olam West Coast, Inc. dba Olam Spices and Vegetable Ingredients*, Cal/OSHA App. 1334740, Decision After Reconsideration (Feb. 17, 2022).) The fact that an employee signs an attendance sheet for training does not, by itself, support an inference that the training was effective, or of sufficient quality to make the employees proficient or qualified on the particular subject of the training. (*Pacific Coast Roofing Corp.*, Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).)

The Appeals Board has repeatedly found that the purpose of section 3203, subdivision (a)(7), "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to […] through 'training and instruction.'" (*Timberworks Construction*, Inc., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) Thus, to establish a violation, the Division must show that Employer did not provide employees the knowledge and ability to recognize, understand, and avoid the hazards of COVID-19.

a. Recognition of the Hazard: Signs and Symptoms of COVID-19

The Division alleges Employer's training was deficient because it failed to instruct employees how to recognize the signs and symptoms of a COVID-19 infection.

i. In-person Training

Both parties introduced the same in-person training attendance records for employees. (Exhibits 8 and A.) The attendance records show that Pirri, Gallegos, Hernandez, and several

others attended two COVID-19 trainings which occurred on April 2, 2020 and May 6, 2020, respectively. They show that Valdez was the trainer on both days. Employer's Safety Director, David Flores (Flores), testified and confirmed that the attendance records also name Valdez as the foreman on those days. The April 2, 2020, topic of training is annotated, "COVID-19 Syntoms [*sic*]," and the May 6, 2020, record is annotated "COVID-19 Refresh Course."

Hernandez testified that he attended these trainings and that they were conducted in person at the site. He testified that Employer sometimes did and sometimes did not provide employees "something on paper." He testified that those papers were not discussed at the training, rather, they were something to take home. He also testified that information about COVID-19 and the pandemic arrived with employees' checks.

ii. Written Training Materials

Both parties examined the COVID-19 informational documents that Employer provided to employees. (Exhibits 8, 9, and A.) Employer provided no evidence to identify when or how employees received the documents. These documents do not bear any dates of printing or distribution. It is unclear whether they were included with their paychecks, handed out in person at a training, or delivered in some other manner.

Although these numerous memoranda and notices bearing infographics are grouped together, they do not appear to comprise one document. Variations of format, font, content, and foreign language text in successive alternations indicate that they are separate documents. Exhibit A contains at least one dozen COVID-19 training documents and Exhibit 9 contains at least eight such documents. It is unlikely that these numerous documents were distributed all at once, nor is it likely that their distribution was divided between two in-person training events. There is no indication of which, if in fact any, written documents were distributed at the two in-person COVID-19 trainings occurring on April 2 and May 6, 2020.

Employer identifies three COVID-19 symptoms throughout its various training documents. In Exhibit 9, Employer identifies three symptoms of COVID-19 twice, once on page two and again on page four.[6] Page two is a letter from Employer to all Employees entitled "Coronavirus (COVID-19)." The document is not dated but appears to have been produced earlier during the pandemic because it states, "As of the date of this writing, no cases in Kern County have been identified [….] There is not widespread circulation in most communities in the United States." This document instructs:

> **Know the symptoms**. The symptoms of COVID-19 are, as follows:
> a. Fever

[6] Page one is the cover sheet of Exhibit 9 and is enumerated as "Page 1 of 14."

b. Cough
c. Shortness of breath

Page four appears to be a separate training document, unrelated to the prior document discussing Kern County. The document addresses an escalation of the pandemic's impact, "Consequently, Grimmway is adopting the following policy on a temporary basis during the pendency of the crisis…." Page four instructs:

> If you experience any of the following symptoms of COVID-19, you should contact Employee Relations (or your Contract Labor Company's HR Department):
> - fever (100.4 □ / 38 □ or higher)
> - cough
> - shortness of breath.

Employer clearly prepared this document for employees at a later stage during the pandemic but its time of publication is otherwise unknown.

Training materials specifically identified as those belonging to Gallegos (Exhibit A), show that his written COVID-19 materials also list only the same three symptoms. The first training document in Exhibit A is not contained in Exhibit 9. This document also appears to be a separate publication because its formatting is altogether different, the text is framed within a border, and florid bullet points organize information. It identifies the following:

[♦] COVID-19 – Signs and Symptoms:
- Fever
- Cough
- Shortness of Breath

Like the other written training materials discussed above, Gallegos' documents bear no dates of printing. Gallegos' materials also fail to indicate the means or dates of their distribution. On cross examination, Employer asked Gallegos' widow, Alicia Gallegos (A. Gallegos), whether she was aware that Employer provided COVID-19 information or attachments with each paycheck. She testified that she had seen his paystubs and never saw any additional paperwork that came with his paychecks. Thus there is no evidence to determine when or how he received any particular training document.

The Division presented documentary and testimonial evidence to propose standards against which to compare the sufficiency of Employer's training content. The Division provided a publication from the Centers for Disease Control (CDC), dated May 6, 2020, entitled, "Interim Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19), May 2020." (Exhibit 16.) It shows that COVID-19 presents numerous symptoms and instructs:

Watch for symptoms
People with COVID-19 have had a wide range of symptoms reported – ranging from mild symptoms to severe illness. […] People with these symptoms may have COVID-19:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Additionally, the Division presented a State of California publication from the Division's own Publication Unit entitled, "Safety and Health Guidance: COVID-19 Infection Prevention for Agricultural Employers and Employees," dated May 5, 2020. (Exhibit 19.) It also identifies numerous symptoms of COVID-19:

> Agricultural employers must provide training in a way that is readily understandable by all employees. Employees should be trained on the following topics:
>
> […]
>
> - The importance of not coming to work if they have a frequent cough, fever, difficulty breathing, chills, muscle pain, headache, sore throat, or recent loss of taste or smell, or if they live with or have had close contact with someone who has been diagnosed with COVID-19.

The Division also offered testimonial evidence in support of its contention that Employer's training was deficient. Kochie testified that the signs and symptoms of COVID-19 vary and include:

> Fever to 100.4 or greater, headache, runny nose, sneezing, coughing, chest pain, weakness, muscle aches [….] some people have nausea, some people have diarrhea. More severe symptoms include difficulty breathing, the inability to oxygenate your blood and keep your blood oxygen level up, and difficulty staying awake, confusion, organ failure, and death. [… Other symptoms include the] loss of taste or smell.

Employer's written training documents are numerous and Employer identifies COVID-19 with the same three symptoms throughout. In contrast, the Federal and State agency publications,

and testimony from the expert witness illustrate that the illness may develop a much more complex profile of symptoms. The Federal and State agency publications are clearly dated but Employer's documents bear no dates to determine whether Employer provided them before or after the increased range of symptoms became established. The documents in Employer's Exhibit A are not collated with the in-person training attendance sheets to suggest which documents, if any, were provided at those events. The testimonies of Hernandez and A. Gallegos do not identify the dates or manner of distribution, and no other testimony was available.

If Employer provided any of the documents after May 5 or May 6, 2020, its list of three symptoms is incomplete. If Employer provided all the training documents prior to those dates, listing merely three symptoms might accurately reflect the knowledge available at the time. In both scenarios, Employer fails to provide any updated training document to reflect the wider range of symptoms that may identify and thus recognize a COVID-19 infection.

b. Understanding the Hazard: Significance of COVID-19

The training materials do not discuss the significance of contracting COVID-19. As discussed above, Kochie testified that infection with COVID-19 may lead to severe outcomes, including hospitalization or death. Employer's written training materials fail to identify these serious impacts to health and life.

c. Avoiding the Hazard: Reporting and Controlling COVID-19

The materials instruct employees to remain home if experiencing or exposed to COVID-19 symptoms. The second training document discussed above which references school closures instructs:

> You feel sick with COVID-19 symptoms:
>
> If you feel experience any of the following symptoms of COVID-19, you should contact Employee Relations (or your Contract Labor Company's HR Department):
>
> - fever (100.4 □ / 38 □ or higher)
> - cough
> - Shortness of breath.
>
> Seek medical care as appropriate. **Consistent with EEOC guidelines, the Company reserves the right to screen and remove any persons on its property that it believes may pose a risk to spread COVID-19.**

(Emphasis in the original.)

Other training documents instruct employees to self-report to Employer's Employee Relations by telephone and to stay home if they experience symptoms. They also warn employees that they are

subject to removal from a site if an infection is suspected. However, no training materials instruct employees how to report or otherwise proceed if they feel sick at work or observe others with symptoms at work.

Where the Division presents evidence which would support an adverse finding if unchallenged, the burden shifts to the employer to produce convincing evidence to avoid such a finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004); *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.) In determining what inferences to draw from the evidence in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by its testimony such evidence or facts in the case against it, or its willful suppression of evidence relating thereto, if such be the case. (Evid. Code § 413.)

Employer produced several pages of undated written information about COVID-19 for its employees. Employer apparently distributed COVID-19 information with paychecks, but there is no corresponding paycheck or paystub to show when Employer prepared or delivered any particular written training document. Employer held two in-person training sessions, but there is no indication that Employer prepared or distributed any of these written documents at those trainings. Many of the documents are printed on Employer's letterhead and refer to the company and its management. Employer produced the documents. Yet, Employer provided no reason why it did not or could not provide evidence to show when Employer developed and distributed each document. It thus cannot be inferred that the documents listing only three symptoms reflect the knowledge that was current at the time.

Employer's training records show that it held in-person COVID-19 trainings but did not identify the content of the trainings. The records show that Valdez conducted both the April 2, 2020, and May 6, 2020, COVID-19 trainings for employees. When the Division's attorney (Tran) asked Flores about the May 6, 2020, training, he replied that Valdez was the appropriate person to ask about the trainings:

Tran: Mr. Flores, were you present for this training?
Flores: No.
Tran: And this training, do you know who it was conducted by?
Flores: It says Cesar Valdez,
Tran: […] the topic is "COVID-19 Refresh Course," is that correct?
Flores: That's what it says there.
Tran: What does that mean, a "Refresh Course"?
Flores: You would have to ask Cesar.
Tran: Do you know what topics were discussed at this training?
Flores: You would have to ask Cesar.
Tran: Do you know how the training was presented?
Flores: You would have to ask Cesar.

Tran: Do you know if there was a quiz given?
Flores: You would have to ask Cesar.

However, Valdez was not offered as a witness and thus provided no testimony as to the content of his two COVID-19 training events. Pulido testified that Employer did not allow him to speak with Valdez during the inspection. Employer did not offer any other evidence to show the content of the two trainings.

While Employer established that some form of COVID-19 trainings occurred, it did not describe the content of the training or explain why its trainer could not testify. Employer's written training materials are the only evidence showing the content of any COVID-19 information it provided to employees. Thus, it is inferred that Valdez's trainings were consistent with Employer's written materials.

The incautious manner in which employees managed their illnesses and their coworkers' illnesses during the week of May 11 through May 15, 2020, illustrates the deficiencies of Employer's COVID-19 training. Four employee health developments that occurred that week are examined in great detail in the next section concerning Citation 1, but they also relate to the sufficiency of Employer's training here in Citation 2. Thus, those four developments are briefly introduced and evaluated below.

Pulido testified that Pirri stayed home sick on May 12, 2020, but his coworkers and relatives telephoned him to return to work despite knowing he was unwell. The next day, Pirri was still sick but went to work. Pulido and A. Gallegos testified that Gallegos was severely ill by the evening of May 14, 2020. A. Gallegos testified that she insisted that he stay home that night as well as insisting again the next morning. However, he decided to go to work on May 15, 2020. Gallegos' coworkers observed his illness at work, but none made any report.

The insistence of Pirri's coworkers and relatives that he return to work despite being ill demonstrates that they did not understand the risks of an infection or know how to avoid transmission. The decision of Pirri and Gallegos to return to work despite sickness demonstrates that they did not recognize that they may have had COVID-19 or understand the risks of a COVID-19 infection. The failure of Gallegos' coworkers to report his visible illness at work demonstrates that they did not recognize the illness, understand its risks, or know how to avoid transmission. These failures all highlight the ineffectiveness of Employer's training to recognize the symptoms, understand the risks, and avoid the hazards of COVID-19.

Employer's list of symptoms contains fewer than half of those listed in the Division's guidance, and an even smaller fraction of those listed in the CDC guidance. The omission of more than half of the other possible symptoms is misleading for employees who rely on the training to stay safe at work. A partial list does not equip employees to recognize COVID-19. Application of

the inference that the content of Valdez's trainings was consistent with the deficient content of Employer's written materials supports the conclusion that Employer did not effectively train its employees to recognize the hazard.

Having the ability to recognize the symptoms of COVID-19 does not mean that employees have the knowledge to understand the significance of this illness. Employer's written training materials do not identify the serious health outcomes of a COVID-19 infection. Employees able to recognize the illness, but not appreciate the life-threatening risks of COVID-19, are not equipped to protect themselves from its hazards. The inference that both of Valdez's in-person trainings suffered from the same omissions in the written materials is again applied. It is thus found that Employer did not effectively train its employees to understand the significance of the hazard.

Finally, employees who can recognize and understand the significance of a hazard still need a plan of action to avoid the hazard. Employer does not provide procedures by which employees may report any on-site sickness they may observe. Employer does not provide procedures by which unwell employees may be properly isolated. Without reporting or controlling processes, employees already at the site who experience or observe COVID-19 symptoms do not have the means to protect themselves or others. The inference that Valdez's trainings were consistent with the written materials supports the conclusion that Employer did not effectively train its employees to report or control the hazard.

Training is essential to an overall workplace safety program. Lack of training on new work hazards thus affects the effectiveness of the IIPP. The evidence supports a finding that Employer's training did not provide employees the knowledge to recognize, understand, and avoid the hazard of COVID-19, and was thus ineffective. Therefore, Citation 2 is affirmed.

2. Did Employer fail to implement and maintain an effective IIPP?

The Division cited Employer for an alleged Serious violation of section 3203, subdivision (a)(6). This section requires:

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

In Citation, 1, the Division alleges:

Prior to and during the course of the inspection, including, but not limited to, May 13, 2020, the employer failed to implement and maintain an effective Injury and Illness Prevention Program (IIPP) in that it did not implement methods or procedures to correct unhealthy conditions or work practices relating to COVID-19 that affected its employees who were working outside harvesting carrots, including but not limited to:

Instance 1: The lack of physical distancing among employees, including, but not limited to the following locations:

b. Inside the cab of the carrot harvester where two employees were working within six feet of each other, and
c. Inside the work van that transported employees to and from the workplace where employees were seated within six feet of each other;

Instance 2: Permitting employees who were potentially ill and/or were infected with SARS-CoV-2 (the virus that causes COVID-19) to enter the workplace; and

Instance 3: Permitting employees who complained of and exhibited signs and symptoms of COVID-19 to enter and remain at the workplace.

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

Implementation of an IIPP is a question fact. (*Wal-Mart Stores Inc. Store #1692*, Cal/OSHA App. 1195264, Decision After Reconsideration, (Nov. 4, 2019) citing *Ironworks Unlimited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996).) An employer's IIPP may be satisfactory as written, but still result in a violation of section 3203, subdivision (a)(6), if the IIPP is not implemented, or through failure to correct known hazards. (*Wal-Mart Stores Inc Store #1692, supra,* Cal/OSHA App 1195264, citing *Contra Costa Electric, Inc.*, Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) A violation of this section may be found where an employer does not have methods or procedures to correct unsafe or unhealthy conditions; or fails to implement methods or procedures to respond appropriately to such conditions in a timely manner. (*Wal-Mart Stores Inc Store #1692, supra,*

Cal/OSHA App 1195264, citing *BHC Fremont Hospital, Inc., supra*, Cal/OSHA App. 13-0204.) "The safety order requires employers to… take appropriate corrective action to abate the hazards." (*Ibid.*)

The Division must therefore demonstrate that Employer failed to implement its IIPP by failing to identify and correct a hazard. (*MCM Construction, Inc.* Cal/OSHA App. 13-3581, Decision after Reconsideration (Feb. 22, 2016).) Here, the Division did not cite Employer for a failure to have a written IIPP, or for omitting required provisions in its IIPP. Rather, Employer was cited for failure to implement the safety provisions of the IIPP to correct the hazard of COVID-19 infection.

The Division cited three instances in which Employer allegedly failed to implement methods or procedures to correct unhealthy conditions or work practices related to COVID-19. When a citation alleges more than one instance of a violation of a safety order, the Division need only establish one instance of a violation of a safety order to sustain the violation. (*Shimmick Construction Company, Inc.*, Cal/OHSA App. 1059365, Decision After Reconsideration (Jul. 5, 2019), *Petersen Builders Inc*., Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) While the evidence points to violations in all the three instances, Instance 3 requires particular attention because it illustrates the underlying strategies of distance and separation as control measures against transmission that all three instances share. A broader discussion of the evidence relevant to Instances 1 and 2 will follow the analysis of Instance 3.

a. Instance 3

In Instance 3, the Division alleges Employer failed to correct unhealthy conditions when observed or discovered:

> Instance 3: Permitting employees who complained of and exhibited signs and symptoms of COVID-19 to enter and remain at the workplace.

Pulido testified that the Division identified the third instance of the citation because Employer failed to exclude employees who exhibited signs and symptoms of COVID-19 from the site.

Here, the hazard at issue is the transmission of COVID-19. During his testimony at the hearing in this matter, Employer asked Flores to discuss Employer's written control measures for this hazard. (Exhibit B.) Flores testified that Employer developed its written control measures based on CDC and public health department guidelines to evaluate sites companywide and then to devise practices and measures to prevent the spread of COVID-19. Specifically, Employer's written control measures identify the following practices:

Control Measure [*sic.*] **– Administrative** 1. Encourage workers to stay home if sick […] 5. Provide workers with up-to-date education and training on COVID-19 risk factors and protective behaviors. Posters, communications in paychecks. 6. Train workers who need PPE **Control Measure** [*sic.*] **– Safe Work Practices** 1. Provide resources that promote personal hygiene a. Restrooms with soap and water b. Sanitation stations prior to entering the work area […] d. Hand sanitizer (depending on availability) 2. Require regular handwashing or use of sanitizer 3. Post handwashing signs/ posters	**Control Measures – PPE** […] 2. Masks/Bandannas […] **Control Measures –Training** 1. General COVID-19 2. Handwashing 3. PPE 4. Social Distancing **Control Measures – Miscellaneous** […] 3. Limit contact between truck drivers and Grimmway personnel […] 5. PPE required when interacting with truck drivers, contractors, etc. […] 8. Geographic separation **Comments**: Members of a specific crew are cohort in that they travel, work and live together and are kept separate from other crews.

(Ellipses denote measures that Employer did not select or deemed inapplicable.)

As discussed in the section above, COVID-19 may cause various symptoms to develop, including fever, cough, body ache, headache, and runny nose. Kochie testified that someone with COVID-19 symptoms should be screened and quarantined. She testified that if it was unclear whether COVID-19 or another illness caused a symptom, the correct practice is to isolate individuals who exhibit COVID-19 symptoms to prevent them from infecting other employees, while further health inquiry and observation may take place. Her testimony is consistent with Employer's control measures designed to separate employees from other employees, particularly the following provisions:

Control Measure [*sic.*] **– Administrative**
1. Encourage workers to stay home if sick
[…]

Control Measures – Miscellaneous
[…]
8. Geographic separation

Comments: Members of a specific crew are cohort in that they travel, work and live together and are kept separate from other crews.

These provisions demonstrate Employer's recognition that distance and separation help prevent the transmission of COVID-19.

Flores testified that Valdez held the titles of both supervisor and foreman at the site. He testified that during the week of May 11 through 17, 2020, Valdez served as a foreman of the cohort at issue.

The Division offered Pulido's testimony to support its contention that Valdez was aware of employees exhibiting COVID-19 symptoms at work yet allowed them to continue working with others at the site.

Pulido testified that he saw Pirri's timecard indicating that he did not go to work on May 12, 2020. Pulido interviewed Pirri who described falling sick early in the week of May 11, 2020. Pirri did not go to work on Tuesday, May 12, 2020, because he had a fever and a headache. While he was at home, Pirri received several phone calls from coworkers, who were also his relatives, regarding his attendance at work the next day. He felt that they called to pressure him into returning to work. Thus, on Wednesday, May 13, 2020, despite feeling unwell, Pirri went to work. On that day at the site, he was laying his head on a steering wheel when Valdez came to him and asked if he was okay. Pirri replied he did not feel well and had a headache. Valdez asked Pirri if he could continue to work, and Pirri replied that he could work. He then continued to work.

Pulido testified Employer issued a written warning to Pirri for his absence. Pirri explained he was reprimanded for failing to inform his supervisor directly that he was not coming to work. Pirri could not call Employer directly because his phone was not charged. Pirri thus asked a coworker to notify Employer he was staying home sick. Pirri informed Pulido that he told his coworkers about the reprimand. In Pulido's interview with A. Navarro, A. Navarro also indicated that he was aware Pirri received a written warning regarding his absence.

Pirri informed Pulido of another employee who exhibited symptoms of COVID-19 at the site but was not quarantined. Pirri shared that later that same week, on May 15, 2020, he and Gallegos worked together inside the cab of a carrot harvester vehicle. While Pirri and Gallegos were putting diesel in their vehicle, Valdez was three to four feet away. Pirri saw Gallegos was unwell, coughing and sneezing while they were fueling. Valdez's proximity to Gallegos led Pirri to believe that Valdez was aware that Gallegos was ill.

Pulido testified that he interviewed another member of the work team who also saw employees sick at work. A. Navarro informed Pulido that he observed both Pirri and Gallegos sick at work. Navarro recalled Pirri being sick approximately one week prior to Gallegos being sick. A. Navarro vanpooled with Gallegos during the week of May 11 through May 15, 2020, and recalled seeing Gallegos sneezing, coughing, and appearing to be sick on May 15, 2020.

Hernandez testified that he "saw nothing strange" when asked whether Gallegos appeared ill during the week of May 11, 2020. However, A. Gallegos testified otherwise. She testified that her husband called on May 14, 2020, to say he was feeling ill, with a runny nose, backache, high fever, and feeling like he had the flu. She asked him to stay home from work, but he insisted on going because he was afraid of receiving a reprimand from Employer. He explained to her that, a few days before, Pirri was sick and was given a warning for being absent from work.

A. Gallegos testified that when they spoke again on May 15, 2020, her husband no longer had a runny nose, but still had a backache, and that his fever reached 104 degrees. She testified that she again asked him to stay home from work. He responded that he could not be absent, as it was his last day at the site, and he would receive warnings if he missed work. On May 15, 2020, at the end of the day, he and she took separate cars to return from Mexicali to Bakersfield. Upon arrival at their destination, she saw that he was feeling very ill. She could not recall the date, but that Monday, he took a COVID-19 test and found out on Thursday that he was positive.

As discussed previously, in determining what inferences to draw from the evidence in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by its testimony such evidence or facts in the case against it, or its willful suppression of evidence relating thereto, if such be the case. (Evid. Code § 413.)

Pulido interviewed employees who claimed that they saw Employer permit sick coworkers to continue working on the site. Pulido testified that Employer did not permit him to interview any supervisors. He testified that Employer did not permit him to interview the foreman of the crew, Diaz, or the field supervisor, Valdez, or any other supervisor in the field working with the employees at the site during the period between May 11 through May 15, 2020. Employer did not present Diaz, Valdez, or any other supervisor or foreman as a witness to testify during the hearing.

Employer did produce a written warning that it issued to Pirri. (Exhibit U.) Flores confirmed that it was not a warning for being sick with COVID-19. However, the warning is dated July 5, 2020, and annotated with an entirely different address than that of the site. The content of the warning is handwritten in another language for which no translation was provided. Flores testified that there might be another written warning for Pirri related to being absent, but not for having COVID-19. This other warning was not produced.

The preponderance of the evidence supports a finding that Valdez was aware that Pirri and Gallegos were sick and exhibiting COVID-19 symptoms while at work and yet allowed them to continue working with others. It is also found that Employer took no steps to isolate them from others at the site as indicated in its written control measures.[7]

b. Instance 2

In Instance 2, the Division alleges that Employer was:

> Instance 2: Permitting employees who were potentially ill and/or were infected with SARS-CoV-2 (the virus that causes COVID-19) to enter the workplace

Pulido testified that screening employees prevents them coming into work and spreading COVID-19 to their coworkers. He testified that the actual hazard of failing to screen employees for COVID-19 prior to entering the workplace was the transmission of the illness.

Pulido testified that he interviewed Flores. Flores informed him that Employer took COVID-19 precautions for employees at that site by providing: training, masks, sanitation of their vanpool prior to transportation, and informational documents. Flores informed him that Employer held temperature checks at their fixed locations like packing houses, but not in the fields. Pulido testified that Employer held temperature checks after June 3, 2020. Pulido testified Employer did not verbally ask employees if they experienced any symptoms prior to entering the vanpool or the field. Employer provided no contradictory evidence. Employer created and implemented its own policies and procedures, thus, it was aware of the lack of temperature, verbal, or other screening of employees prior to entering the van or the field.

c. Instance 1

In Instance 1, the Division alleges that Employer did not correct the following hazards:

> Instance 1: The lack of physical distancing among employees, including, but not limited to the following locations:
> a. Inside the cab of the carrot harvester where two employees were working within six feet of each other, and
> b. Inside the work van that transported employees to and from the workplace where employees were seated within six feet of each other;

[7] Employer's note on cohorts at the end of its written control measures dovetails with the multiple failures to isolate sick individuals in a manner to suggest that Employer may have been implementing its control measures in the intended manner.

Pulido testified that Pirri informed him that on May 15, 2020, he rode with Gallegos inside the cab of a harvester. Gallegos was filling in for the regular operator and needed help driving the vehicle. Pirri and Gallegos sat shoulder to shoulder inside the cab, which was four feet wide, as he helped Gallegos drive the harvester.

Pulido also testified that he interviewed employees who reported seven to eight employees at the riding together inside the 12-passenger vehicle vanpool to and from the field. He testified that it was possible to have six feet of separation between vanpool occupants with one additional van and reduction of passengers in each van. Hernandez testified that he always sat in the last row which was designed for four passengers, but fit three. He testified he usually sat alone, or with another passenger at the other end of the row. He testified that everyone inside the van wore masks. Pulido testified that the foreman and supervisor worked with employees. Thus, the occupancy of the van, as well as Gallegos and Pirri in the harvester cab, were readily visible to Valdez or anyone else at the site.

As stated above, the Division did not cite Employer for a failure to have a written IIPP, or for omitting required provisions in its IIPP. Rather, Employer was cited for failure to implement the safety provisions of the IIPP to correct the hazard of COVID-19 infection. Employer developed written control measures against the hazard of COVID-19 that required distancing the sick from others.

Employer was aware of at sick employees at work but took no steps to observe them further or isolate them from other employees. Employer did not screen employees or require social distancing. Employer's failure to implement its controls against COVID-19 transmission deprived its deficiently trained employees of their principal measure against transmission at work. The Division thus established a violation of section 3203, subdivision (a)(6), by showing that Employer failed to effectively implement and maintain its plan to control the spread of COVID-19.

The evidence supports a finding of a violation of Instance 3. Accordingly, the Division established a violation of the safety order. Citation 1 is affirmed.

3. Did the Division establish rebuttable presumptions that Citations 1 and 2 were properly classified as Serious?

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

> 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, means, methods, operations, or processes that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

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

(Lab. Code, § 6432, subd. (e).)

Labor Code section 6432, subdivision (g), provides:

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

When determining whether a citation is properly classified as Serious, Labor Code section 6432 requires application of a burden shifting analysis. The Division holds the 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).) The Division's initial burden has two parts. First, the Division must demonstrate the existence of an "actual hazard created by the violation." Second, the Division must demonstrate a "realistic possibility" that death or serious physical harm could result from that actual hazard. (*Shimmick Construction Company*, Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022).) In addition to an inspector's

testimony, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification. (*Id.*.)

A citation, and accordingly its classification, may be upheld on the basis of a single instance, provided the Division meets its evidentiary burden on that instance. (*Golden State Boring & Pipe Jacking, Inc.*, Cal/OSHA App. 1308948, Decision After Reconsideration (Jul. 24, 2020).)

Citation 1

Pulido testified that he was current on his Division-mandated training at the time of the hearing. As such, he was competent to offer testimony regarding the classification of the citation as Serious. He testified that COVID-19 is an aerosol transmissible illness and that failure to quarantine infected persons exposes others to the illness.

Kochie also testified that COVID-19 is an aerosol transmissible disease, describing such an illness is transmitted through inhalation of the exhaled breath of an infected person. She also testified that transmission may occur when the virus lands on or transfers to mucus membranes. Kochie testified that the virus may survive on numerous kinds of surfaces or remain adrift in the air as fine aerosols for up to three days.

Thus, the actual hazard of failing to implement and maintain control measures against COVID-19 is the transmission of the illness.

Pulido testified that contracting COVID-19 may lead to hospitalization or death. He testified that that, at the time of the hearing, the illness caused over 900,000 fatalities in this country. Additionally, Kochie testified that the virus may infect the lungs or cause severe disease with symptoms such as difficulty breathing or the inability to oxygenate the blood, which could lead to organ damage and death, despite supportive medical treatment such as ventilation. She testified that comorbidities such as other health conditions may cause higher susceptibility and more severe development of the illness.

The Division thus established the realistic possibility that serious physical harm and death could result from failure to isolate employees exhibiting COVID-19 symptoms while working on site.

Citation 2

Pulido testified that ineffective training on COVID-19 during the pandemic could lead to the spread of COVID-19 in the workplace. He explained that ineffectively trained employees would not recognize symptoms of COVID-19 and would be unaware of the severity of COVID-

19, and thus may enter the workplace unaware they had COVID-19. Pulido also testified that ineffective training could also lead to difficulty identifying coworkers with COVID-19 symptoms. Pulido explained that the ability of an employee to recognize the symptoms of COVID-19 in a coworker allows the observing employee to report the unwell employee to a supervisor, preventing further spread of COVID-19 among others.

Kochie explained that an employee trained to recognize an incomplete list of COVID-19 symptoms, and who has symptoms of COVID-19 not on the list, may not identify a potential COVID-19 infection. If symptoms are not recognized as being related to COVID-19, a person who is unaware of a COVID-19 infection could then fail to self-screen or may respond inaccurately to questions about COVID-19. She concluded that such a person could then unknowingly enter the workplace and spread the infection.

Therefore, the actual hazard of failing to effectively train employees about COVID-19, is the transmission of the illness. As discussed above, a COVID-19 infection may lead to hospitalization and death.

The Division thus established the realistic possibility that serious physical harm and death could result from the providing employees an incomplete list of COVID-19 symptoms, failing to train them about the risks an infection, and failing to provide procedures for how to report a sick coworker on site.

For the foregoing reasons, the Division established the presumptions that the citations were properly classified as Serious.

4. Did Employer rebut the presumptions that the violations in Citations 1 or 2 were Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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. It requires an employer to demonstrate both of the following:

> (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.

Factors included in Labor Code section 6432, subdivision (b), referenced in subdivision (c)(1) above, include:

(1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable effort to determine and consider, among other things, all of the following:
  (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
  (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
  (C) Supervision of employees exposed or potentially exposed to the hazard.
  (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
  (E) […]

A failure to establish, implement, and maintain a written IIPP is the responsibility of Employer's managerial and supervisorial employees, whose knowledge thereof is imputed to Employer. (*Ontario Refrigeration Service, Inc*., Cal/OSHA App. 1327187, Decision After Reconsideration (Mar. 22, 2022).) A supervisor's violation of a safety rule is attributed to an employer and such a violation supports the conclusion that an employer has failed to enforce its safety program. (*Shimmick Construction Company, Inc.* Cal/OSHA App. 1192534, Decision After Reconsideration, (Aug. 26, 2022) citing, *PDM Steel Service Centers, Inc*., Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (Jun. 10, 2015).)

Citation 1

As discussed above, although Employer developed written control measures in response to the hazard of COVID-19, it did not provide or implement procedures for correcting for the hazard of COVID-19 transmission once employees were onsite.

Valdez was a field supervisor and served as a foreman from May 11 through May 17, 2020, when he observed two employees exhibiting COVID-19 symptoms at work. On May 13, 2020, Valdez asked Pirri, whose head was on a steering wheel, whether he felt all right. Pirri – who had stayed home sick the day prior, got calls from coworkers about his absence, and received a reprimand from Employer for the manner of notification of his absence – responded that he had a headache but could work. On May 15, 2020, Valdez was within close proximity to Gallegos who was coughing and sneezing while fueling a vehicle.

Employer provided no evidence to show that Valdez or any other supervisor did not know and could not, with the exercise of reasonable diligence, have known of the health conditions of these employees. Employer provided no evidence to show that it took any steps to correct the hazard of COVID-19 transmission by sending sick employees home or isolating them for further observation of their conditions. Employer thus presented insufficient evidence to rebut the presumption that Citation 1 was properly classified as Serious. Accordingly, the Serious classification is affirmed.

Citation 2

As discussed above, Employer did not implement effective training for employees relevant to preventing employee exposure to COVID-19.

Employer developed and distributed written training materials to employees. Employer knew that its list of COVID-19 symptoms omitted several symptoms that were available through Federal and State publications and argued that identifying more symptoms of COVID-19 would confuse employees because heat illness shared some of the same symptoms. Employer confirmed it knew Valdez provided at least two COVID-19 trainings, but provided no evidence to show that his trainings provided any information to compensate for the deficiencies of the written materials.

Employer provided no evidence to establish that that it did not know and could not, with the exercise of reasonable diligence, have known of its deficient training materials, nor did it establish that it took all appropriate actions to compensate for the omission of information. For these reasons, Employer failed to rebut the presumption that Citation 2 was properly classified as Serious. Accordingly, the Serious classification is affirmed.

5. Are the abatement requirements reasonable?

In order to establish that abatement requirements are unreasonable, an employer must show that abatement is not feasible or is impractical or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).) Employer appealed the reasonableness of abatement requirements of Citations 1 and 2.

Citation 1

Employer offered no evidence that Citation 1 could not be abated. Employer did not provide any evidence that it would be unfeasible, impractical, or unreasonably expensive to send employees home, or provide further observation of their health condition when they exhibit COVID-19 symptoms at work.

Citation 2

Employer offered insufficient evidence to establish that abatement of Citation 2 was unfeasible, impractical, or unreasonably expensive. Employer argued that including more symptoms as a part of COVID-19 training would confuse employees. However, Employer did not offer any evidence to suggest that it would not be able to include additional symptoms or any more information regarding COVID-19 in its written training materials.

Thus, for all of the foregoing reasons, Employer did not establish that abatement requirements for Citations 1 or 2 are unreasonable.

6. Are the proposed penalties reasonable?

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

Generally, the Division, by introducing its Proposed Penalty Worksheet and testifying to the calculations being completed in accordance with the appropriate policies and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*Ontario Refrigeration Service, Inc.*, *supra,* Cal/OSHA App 1327187, citing *M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).)

The Division presented its Proposed Penalty Worksheet and Pulido testified about the calculations used to establish the proposed penalties for Citations 1 and 2. Employer did not present evidence or argument that the penalties were not calculated in accordance with the penalty-setting regulations.

Accordingly, the penalties for Citations 1 and 2 are found to be reasonable and are affirmed.

Conclusions

The evidence supports a finding that Employer violated section 3203, subdivision (a)(6), by failing to implement and maintain an effective IIPP. Employer failed to isolate employees who exhibited COVID-19 symptoms at the worksite. The citation is properly classified as Serious, and the abatement requirements and the proposed penalty are reasonable.

The evidence supports a finding that Employer violated section 3203, subdivision (a)(7), by failing to provide effective training. Employer omitted several COVID-19 symptoms, risks of COVID-19, and procedures for reporting employees who exhibit COVID-19 symptoms while at work. The citation is properly classified as Serious, and the abatement requirements and the proposed penalty are reasonable.

Orders

It is hereby ordered that Citations 1 and 2 are affirmed, and their associated penalties are assessed as set forth in the attached Summary Table.

Dated: 04/28/2023

Rheeah Yoo Avelar
Administrative Law Judge

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