BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1330829**
RANDSTAD NORTH AMERICA, INC. **dba RANDSTAD USA / RANDSTAD US, L.P** **4900 HOPYARD RD., #315** **PLEASANTON, CA 94588** **Employer**	**DECISION**

Statement of the Case

Randstad North America, Inc. (Appellant), provides employee staffing, payroll administration, and human resources administration services. On June 18, 2018, the Division of Occupational Safety and Health (the Division), through District Manager Ujitha Perera (Perera), commenced an accident investigation of a work site located at 8451 Calle Barcelona in Carlsbad, California (the job site).

On November 20, 2018, the Division cited Appellant for two violations of California Code of Regulations, title 8,[1] alleging: failure to maintain records; and failure to implement its Injury and Illness Prevention Program (IIPP).

Appellant filed timely appeals of the citations. Appellant contends it is not an employer. Appellant disputes the existence of the violations, the classifications of the citations, and the reasonableness of the penalties. Additionally, Appellant asserted a series of affirmative defenses to each citation.[2]

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board. On September 13 and 22, 2022, ALJ Grimm conducted the hearing from West Covina, California, with the parties and witnesses appearing remotely via the Zoom video platform. Benjamin D. Briggs and Daniel R. Birnbaum, attorneys with Seyfarth Shaw LLP, represented Appellant. Manuel Arambula, Staff Counsel, represented the Division. The matter was submitted on August 22, 2023.

[1] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[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. Did the Division cite the correct Randstad entity?

2. Was Appellant an employer (or "dual employer") of Hazel Reid?

3. Did Appellant maintain records as required by section 3203?

4. Did Appellant effectively implement its IIPP?

5. Is the failure to maintain records properly classified as a Regulatory violation?

6. Is the failure to implement its IIPP properly classified as a General violation?

7. Are the violations properly classified as Repeat violations?

8. Are the proposed penalties calculated in accordance with the penalty-setting regulations?

Findings of Fact

1. Appellant carried workers' compensation insurance coverage in California.

2. Appellant's workers' compensation insurance covered the employment of Hazel Reid (Reid).

3. Appellant is registered to transact business within California.

4. Appellant holds membership interests of 99.9 percent in Randstad Professionals US, LLC, and in Randstad HR Solutions of Delaware, LLC.

5. Four Randstad entities played a direct and indispensable role in Reid's employment.

6. Appellant had the contractual rights to hire, fire, assign, reassign, evaluate, discipline, and counsel Reid.

7. Appellant had discretion to hire, using its own hiring criteria, individuals referred by L'Oreal.

8. Appellant instructed Reid to notify it, not L'Oreal, regarding issues of workplace safety. Appellant instructed Reid to contact L'Oreal regarding issues of workplace

safety only in cases of immediate risk of harm, and then to notify Appellant as soon as possible.

9. Appellant had the right to control Reid's rate of pay.

10. Appellant instructed Reid to notify it if L'Oreal directed her to perform services other than the services communicated by Appellant.

11. Appellant instructed Reid to notify it, not L'Oreal, regarding issues of workplace discrimination, harassment, retaliation, and/or hostile work environment.

12. Appellant prohibited Reid from bringing or uploading the property, confidential information, and/or trade secrets of any prior employer or other third party to Appellant's or its clients' systems.

13. The termination of Reid's assignment with a client did not terminate her employment with Appellant.

14. The written agreement between Reid and Appellant purported to prohibit Reid from working for a client for six months after the termination of her assignment with the client.

15. On June 18, 2018, Reid died of natural causes while at the job site.

16. Appellant performed an accident investigation.

17. Reid received ongoing job training.

18. Appellant did not keep training records that included Reid's name or other identifier, training dates, type(s) of training, and training providers.

19. Appellant's IIPP states Appellant will perform inspections of client worksites.

20. Appellant did not perform inspections of client worksites.

21. Maintaining training records is a recordkeeping function.

22. Performing inspections of client worksites is related to occupational safety and health because it enables the identification and correction of workplace hazards.

23. Appellant is not the same employer that was cited in the citations issued pursuant to Division inspection number 1157627.

24. The penalties, as modified herein, are calculated in accordance with the penalty-setting regulations.

Analysis

1. Did the Division cite the correct Randstad entity?

The Division issued the citations in the name "Randstad North America Inc." The citations specify two fictitious business names: "Randstad USA" and "Randstad US L.P."

The parties do not dispute that Appellant is part of a corporate umbrella of various legal entities (collectively, Randstad). Appellant contends that each entity performs separate and distinct business services. Appellant further contends it did not have a relationship with Hazel Reid (Reid), and that one of the other Randstad entities had a relationship with her. As such, Appellant contends the Division cited the incorrect entity.

The Division has the burden of proving a violation, including the propriety of the cited entity, by a preponderance of the evidence. (*Howard J. White, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016); *Shimmick-Nicholson Construction, A Joint Venture*, Cal/OSHA App. 1021893, Decision After Reconsideration (Jul. 24, 2017).)

A. Randstad entities

Reid worked at the job site as a sales associate. The job site is a cosmetics store with different counters for different cosmetics manufacturers. Cosmetics manufacturers staff their own counters at the job site. Reid sold L'Oreal cosmetics at the job site.

Reid reported to work on June 15, 2018. Later that day, workers noticed that Reid was absent from her counter for an unusual length of time. The store manager found Reid unresponsive in the restroom. Authorities determined that Reid died of natural causes unrelated to work. There is no allegation that Appellant or any of the other Randstad entities bear responsibility for Reid's death.

Perera first visited the job site on June 18, 2018, to open an inspection resulting from a report of Reid's death. The store manager told Perera that Randstad employed Reid, and provided information for the Randstad representative, Colleen McLaurin (McLaurin).

Perera subsequently spoke to McLaurin by telephone. The Division issued a request for documents and received responsive documents approximately two weeks later. (Ex. 5.) Perera and McLaurin exchanged emails and telephone calls after the production of documents. (Ex. C.)

1. Appellant

As part of its investigation, the Division sought and received evidence of workers' compensation insurance coverage. (Ex. 5, p. 1.) Multiple documents identify Appellant as the insured entity: (a) Certificate of Liability Insurance dated September 29, 2017, (b) Additional Remarks Schedule, and (c) a letter dated November 9, 2017, regarding workers' compensation and experience modification factors. (*Id.* at 15-17.)

The Talent Assignment/Pay Acknowledgment Form identifies the workers' compensation insurance coverage for Reid's employment. (Ex. 8, p. 3.) It states the same insurance policy number found on the Certificate of Liability Insurance.

Perera testified that he researched whether Appellant is registered to transact business within California. He reviewed the California Secretary of State's online database and found that Appellant is registered. (Ex. F.)

2. Randstad Professionals US, LLC

Randstad and Reid entered into a written agreement. (Ex. 5, pp. 7-12.) The written agreement identifies Randstad Professionals US, LLC (RP LLC), as the entity contracting with Reid. Additionally, the Talent Assignment/Pay Acknowledgment Form identifies Reid's employer as Randstad Professionals US, LLC. (*Id.* at 1.)

3. Randstad Professionals US, LP

The Division requested and received a copy of Randstad's contract with L'Oreal. The contract identifies Randstad Professionals US, LP (RP LP), as the entity contracting with L'Oreal. (Ex. 6.)

4. Randstad HR Solutions DE, LLC

One itemized wage statement from Reid's employment identifies the entity paying her wages as Randstad HR Solutions DE, LLC (RHR LLC). (Ex. L.)

5. Randstad USA

McLaurin represented Randstad throughout the Division's investigation. Her email signature block refers to "Randstad USA." (Ex. 5, p. 3.) Because the name does not designate an entity type, it is found that "Randstad USA" is a fictitious business name.

6. Randstad US

The Division requested and received an IIPP that belongs to "Randstad US," without designating an entity type. It further states "Randstad US is a wholly owned subsidiary of Randstad Holding NV . . . ." (Ex. I, p. 3.)

Appellant submitted a chart showing the organizational structure of "Randstad U.S." (Ex. M.) The chart identifies, in relevant part, the following entities and fictitious business names: (i) Appellant, (ii) Randstad US, (iii) RP LLC, and (iv) RHR LLC. The chart does not show RP LP or Randstad Sourceright.

Because the name does not designate an entity type and because the name appears in the title of the organization chart, it is found that "Randstad US" is a fictitious business name.

7. Randstad Sourceright

The name "Randstad Sourceright" appears on multiple documents. It is a fictitious business name for both RP LLC and RP LP. (Exs. 6, 8.) Additionally, it is identified as the legal name of Reid's employer on the Earned Sick Leave and Minimum Wage Notification Form. (Ex. 5, p. 6.)

Kim Dorn (Dorn) is Account Director for Randstad's account with L'Oreal. Dorn testified that she works for Randstad Sourceright and that RHR LLC, is a fictitious business name for Randstad Sourceright.

Dorn further testified that Randstad offers various services to clients. In some instances Randstad recruits employees and places them with a client, as in traditional staffing agency arrangements. Appellant characterizes these services as "staffing services."

In other instances Randstad does not recruit or place employees. Dorn testified that the client finds the worker on its own and "refers" the worker to Appellant. On behalf of the client, Appellant pays the worker's wages, furnishes itemized wage statements, obtains workers' compensation insurance coverage, and other services. Appellant calls this "payrolling services."

Dorn referred to Randstad as "the company," and testified it has a "division" for staffing services and a "division" for payrolling services. Dorn did not indicate that the staffing division is in a separate company or legal entity than the payrolling division.

B. Correct entities

The evidence establishes that four Randstad entities were engaged in the business operation related to Reid. Appellant characterizes the business as "payrolling services." In order for Reid to work, she had to be covered by workers' compensation insurance. Appellant secured the insurance for Reid's work. With respect to a formal relationship with Reid, RP LLC was the entity that entered into a written agreement with her. With respect to a formal relationship with the client where Reid was placed, RP LP was the entity that entered into a written agreement with L'Oreal. With respect to required itemized wage statements, RHR LLC fulfilled the role. Thus, this case is not limited to a single entity that is the "correct" entity. Rather, at least four entities played a direct and indispensable role in Reid's employment.

Appellant contends it cannot be the correct entity to cite because it does not have employees.[3] Although Appellant asserted it does not have employees, it did not introduce evidence supporting the assertion. To the contrary, the fact that Appellant carries workers' compensation insurance is evidence that it has employees. Moreover, Appellant's workers' compensation insurance covered Reid, which is a factor in determining Reid's employer or dual employers. (Ex. 5, pp. 15-17; Ex. 8, p. 3.) Therefore, this contention does not indicate Appellant was improperly cited.

Appellant further contends that the itemized wage statement reliably establishes the correct entity because California law (1) requires employers to furnish an itemized wage statement that accurately shows the name of the legal entity that is the employer, and (2) penalizes a failure to do so. This argument is not persuasive. First, the existence of a legal requirement and a corresponding penalty does not establish that employers comply with the requirement. Second, the evidence does not indicate Randstad was aware of this requirement and determined the correct entity in order to show such information on Reid's itemized wage statement. Third, it is unlikely that Randstad determined the correct entity in order to comply with wage statement requirements but identified incorrect entities on the other legal documents involved, e.g., the written contract with Reid, the Earned Sick Leave and Minimum Wage Notification Form, the Talent Assignment/Pay Acknowledgment Form, and the contract with L'Oreal. Inaccuracies in these legal documents may have penalties, benefits, and ramifications greater than a penalty for an itemized wage statement. In the present context, the itemized wage

[3] At the close of the Division's case-in-chief, Employer made an oral motion for dismissal of the citations on this ground.

statement does not deserve special weight and does not reliably prove the Division cited an incorrect entity.

Appellant further argues that the Division cited the wrong entity because multiple documents and the testimony of Dorn identified "Randstad Sourceright" as Reid's employer. This argument is not persuasive. The evidence establishes that "Randstad Sourceright" is a fictitious business name rather than the legal name of an entity. Moreover, it is a fictitious business name used by at least three entities involved here (RP LLC, RP LP, and RHR LLC). Notably, the parties did not squarely address at hearing whether Appellant uses the name "Randstad Sourceright." Accordingly, this argument does not indicate the Division cited an incorrect entity.

In sum, Appellant's argument that it is the incorrect entity to cite is not persuasive because Appellant played a direct and indispensable role in Reid's employment.

2. Was Appellant an employer (or "dual employer") of Hazel Reid?

Appellant contends it was not Reid's employer. In Appellant's view, L'Oreal was Reid's employer and Appellant merely provided payrolling services on behalf of L'Oreal.

The Appeals Board has long held that an employee may, in some instances, have two employers. This is sometimes referred to as "dual employment." (*Walmart Associates, Inc.*, Cal/OSHA App. 1461476, Decision After Reconsideration (Jul. 22, 2022) (*Walmart*).)[4]

In determining whether dual employment exists, the principal consideration is whether both alleged employers have the right to control and direct the activities of the alleged employee. (*Employer Solutions Staffing Group II, LLC, Fastemps LLC.*, Cal/OSHA App. 12-3207, Decision After Reconsideration (Jan. 29, 2016) (*Fastemps*).) The right to control and direct the activities of the alleged employee or the manner and method in which the work is performed, whether exercised or not, gives rise to the employment relationship. The fact an employer does not exercise its right of control is not dispositive on the question of an employment relationship because it is the right to control and not the exercise of that right that is the test. In addition, it is settled that the right of control does not necessarily need to be complete for a dual employment to be found. Whether the right to control existed or was exercised is generally a question of fact to be resolved from the reasonable inferences to be drawn from the circumstances shown. (*Id.*)

[4] The Appeals Board's typical "dual employer" analysis applies because the investigation at issue here occurred before AB 5 and AB 2257 took effect on January 1, 2020, and September 4, 2020, respectively. (*Walmart*, *supra*, Cal/OSHA App. 1461476.)

A. Alter Ego liability

Because four Randstad entities participated in Reid's employment, it is important to determine which actions Appellant is responsible for. The actions attributable to Appellant will be analyzed regarding the right to control.

The Division argues that Appellant is liable under an "Alter Ego" theory. Under the "Alter Ego" doctrine a corporation or LLC and its owner(s) will be liable for each other's acts. (*840 The Strand, LLC*, Cal/OSHA App. 13-3353 (Sep. 25, 2014) citing *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) The two general requirements of the doctrine are "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." (*Id.*)

The first element concerns unity of interest and ownership among the entities. Appellant holds membership interests of 99.9 percent in at least two of the legal entities involved with Reid's employment: RP LLC and RHR LLC. (Ex. M.) Moreover, the remaining interests in RP LLC and in RHR LLC are held by Randstad General Partner (US), LLC, of which Appellant is the sole member. (*Id.*) Thus, Appellant effectively controls 100 percent of RP LLC and RHR LLC. Therefore, there is unity of interest and ownership among RP LLC, RHR LLC, and Appellant.

With respect to RP LP (the fourth entity involved), the parties did not present direct evidence of its ownership. However, RP LP's role in the business operation is significant in this regard. RP LP is party to the contract with L'Oreal. The contract is indispensable to RP LLC contracting with Reid, RHR LLC issuing paychecks to Reid, and Appellant providing workers' compensation insurance coverage for Reid. Therefore, the evidence supports an inference that RP LP has a unity of interest and ownership with the three other entities.

The second element of the Alter Ego doctrine analyzes whether an inequitable result will follow if the actions are treated as those of the subsidiary alone. In this regard, an inequitable result will follow because review of any of the entities in isolation provides an incomplete and misleading picture. The evidence establishes that a single business was operated through the utilization of multiple legal entities. Appellant characterizes the business as "payrolling services" for its clients. Each of the entities played an indispensable role, and each entity's activity makes sense only if seen as part of a unified whole. RP LLC's contract with Reid does not make sense without a client where Reid provides labor. RP LP's contract with L'Oreal does not make sense without individuals like Reid performing sales work. RHR LLC's issuance of an itemized wage statement to Reid does not make sense without Reid performing labor. Finally, L'Oreal cannot legally have Reid perform sales work unless she is covered by workers' compensation insurance,

which Appellant provided. Moreover, the fact that three of the entities use "Randstad Sourceright" as a fictitious business name indicates these entities are intended to be viewed as one business. Viewing each entity's actions as integral parts of a larger business shows that the larger business has a purposeful, coherent relationship with Reid. By contrast, isolating the actions of each entity shows an incoherent relationship with Reid and can lead to the conclusion that any one entity does not qualify as an "employer" under title 8.

In sum, Appellant satisfies the elements of the Alter Ego doctrine. Accordingly, Appellant is responsible for the actions of the three other Randstad entities involved with Reid.

B. Control

Appellant's written agreement with Reid addresses a broad array of fundamental employment issues. The contract provides, in part:

- Your pay rate is subject to change by Randstad for any reason, including, but not limited to, a change imposed by Customer that reduces Randstad's bill rate or margin for any Contract Assignment (Ex. 5, p. 7);
- Randstad will describe the services to be performed by you during the assignment (the 'Contract Assignment'), and you agree to notify Randstad if the Customer asks you to perform other or different services (*Id.*);
- The end of your Contract Assignment does not necessarily terminate your employment with Randstad (*Id.*);
- For a period of 6 months after the End Date of a Contract Assignment, you agree that you will not provide to Customer, either directly (including as its employee, consultant, independent contractor or other provider) or indirectly (including through another staffing firm, vendor or other entity), services that are the same as, or similar to, the services you provided to Customer on behalf of Randstad during the Contract Assignment (*Id.* at 10);
- While you should look to Customer for day-to-day direction . . . you acknowledge that Randstad is your employer. As your employer Randstad is responsible for hiring, firing, assigning, reassigning, evaluation, disciplining, and counseling you . . . ; and addressing any issues concerning . . . any discrimination, harassment or retaliation at the workplace, and/or an unsafe or hostile work environment. You should only raise such issues directly with Customer in cases of immediate risk of harm to you or to any other person or property, and then subsequently notify Randstad as soon as possible (*Id.* at 7);

- Randstad prohibits you from bringing with you, uploading to Randstad's or its Customers' systems, disclosing, or utilizing the property, confidential information and/or trade secrets of any prior employer or other third party (*Id.* at 8).

These provisions show a broad range of control from matters of public policy to matters within the freedom of contract. It is especially significant that Appellant instructed Reid regarding issues of workplace safety. Appellant required Reid to notify it rather than L'Oreal regarding an "unsafe" work environment. In cases of immediate risk of harm, Appellant permitted Reid to notify L'Oreal provided that Reid notify Appellant as soon as possible thereafter. Appellant even investigated Reid's death. (*Id.* at 2.) Notably, some of the contract provisions conflict with L'Oreal's interests, particularly, the provision that purports to prohibit Reid from working for L'Oreal for a period of six months after the assignment ends. If Appellant were providing ministerial services only, then it would have no interest in whether Reid worked for L'Oreal under a different arrangement within the next six months. In these circumstances any worker would believe that Appellant is her employer and that she is subject to its control.

Appellant argues that the Appeals Board has repeatedly held that "paperwork" is insufficient to establish an employer-employee relationship. However, the present case is not limited to a superficial use of terms such as "employer" and "employee" by individuals untrained in their legal implications. Appellant is a sophisticated party that entered multiple written agreements to secure and clarify its rights and responsibilities. Its written agreements with Reid and L'Oreal are not disregarded or discounted.

Appellant contends it performed ministerial functions while L'Oreal controlled and directed Reid. Appellant highlights its Staffing Vendor Agreement with L'Oreal (Ex. 6.) as well as the testimony of Dorn. This evidence indicates Appellant did not perform all of the tasks that a primary employer sometimes performs, such as recruiting employees and monitoring the secondary employer's worksite. Additionally, Dorn testified that Randstad would not exercise its power to discharge Reid except in circumstances such as fraud, intoxication, violence, etc., and not without performing an investigation. However, it is often the case that a primary employer does not have control over the secondary employer's worksite. This factor does not preclude a dual-employer relationship. The right of control in a dual employment arrangement does not have to be complete. (*Fastemps, supra*, Cal/OSHA App. 12-3207.) Moreover, Appellant does not need to interact with Reid on a daily basis because her contract provides direction on a broad range of anticipated issues. Finally, even the Staffing Vendor Agreement provides Appellant with a significant level of control. It states: "Subject to [Appellant's] hiring criteria, [Appellant] may directly hire . . . individuals referred by [L'Oreal]." (Ex. 6, p. 1.) Thus, it does not require Appellant to provide services to an individual referred by L'Oreal. Appellant may exercise its

discretion based on its own hiring criteria. This does not indicate the performance of ministerial functions.

In sum, the evidence shows Appellant retained broad and fundamental rights of control over Reid's employment. Moreover, Appellant actually exercised control by instructing Reid how to handle various employment matters. Accordingly, Appellant was an employer of Reid for purposes of title 8.

3. Did Appellant maintain records as required by section 3203?

Section 3203, subdivision (b), requires an employer to document the steps taken to implement its IIPP:

> (b) Records of the steps taken to implement and maintain the Program shall include:
>
> (1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year; and […]
>
> (2) Documentation of safety and health training required by subsection (a)(7) for each employee, including employee name or other identifier, training dates, type(s) of training, and training providers. This documentation shall be maintained for at least one (1) year.

Citation 1, Item 1, alleges:

> Prior to and during the course of the inspection, including, but not limited to, on June 18, 2018, the Employer did not record the steps taken to implement and maintain the employers Injury Illness prevention Program.
>
> Instance 1: The employer did not maintain records of training provided to employees by secondary employer on tasks required to be performed at the secondary employer's work site.
>
> Instance 3 [sic]: The employer did not maintain records of secondary employer's reviewed IIPP.

In order to prove a violation, the Division need only demonstrate that one of the instances charged by the citation is violative of the safety order. (*Gateway Pacific Contractors, Inc.*, Cal/OSHA App. 10-1502 (Oct. 4, 2016).)

First Instance

The safety order requires an employer to keep specified records of the steps taken to implement and maintain its IIPP. One type of record that must be kept is training records that include the employee's name, training dates, type of training, and training providers. (§3203, subd. (b)(2).)

Appellant's IIPP states: "New internal and external talent will receive initial training upon being hired by Randstad." (Ex. I, p. 10.) Appellant does not dispute that Reid received training.

The Division requested Reid's training records. (Ex. 5, p. 1.) Appellant produced records that it characterized as training records: (i) Employee Guidebook, and (ii) Safety in the Workplace. (*Id.* at 2.) However, these documents do not comply with the safety order because they do not include the employee's name, training dates, types of training, and training provider. Additionally, Appellant sought to obtain Reid's training records from Jael Nava (Nava), Sales and Training Coordinator for L'Oreal. Nava implied that such records did not exist: "As one of the most seasoned members of the team, Hazel did not participate in any formal training. Hazel and I had ongoing interactions via email, phone, and in person regarding new product training, promotions, and during in store events." (Ex. G, p. 1.) Thus, the evidence establishes that Reid received training and Appellant did not keep compliant records of it. Therefore, the Division proved the first violation instance.

Second Instance

The second violation instance alleges Appellant "did not maintain records of secondary employer's reviewed IIPP."

The Division did not address this allegation with specific evidence. Perera testified that Appellant "didn't do what they said they would do." However, this testimony is not sufficient because it does not identify the statements made by Appellant, and it does not indicate how the Division determined Appellant did not fulfill its statements. Notably, the IIPP states Appellant will: "Perform a documented on-site inspection of the client's working environment, which includes review of the client's IIPP or any other form of safety program." (Ex. I, p. 6.) Contrary to the IIPP, Appellant stated in response to Division questions: "We currently do not conduct onsite inspection at the retail stores." (Ex. C, pp. 5-6.) Although this evidence establishes

Appellant did not perform on-site inspections, it does not squarely address the allegation that Appellant failed to maintain records of secondary employers reviewed IIPP. Thus, the Division did not prove the allegation by a preponderance of the evidence. Thus, the Division did not prove the second alleged violation instance.

In sum, the Division proved one of the two violation instances alleged in Citation 1, Item 1. This is sufficient to establish a violation of section 3203, subdivision (b)(2).

4. Did Appellant effectively implement its IIPP?

Section 3203, subdivision (a), provides, in relevant part:

> 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:
>
> (1) Identify the person or persons with authority and responsibility for implementing the Program.
> (2) Include a system for ensuring that employees comply with safe and healthy work practices. Substantial compliance with this provision includes recognition of employees who follow safe and healthful work practices, training and retraining programs, disciplinary actions, or any other such means that ensures employee compliance with safe and healthful work practices.
> (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.
> […]
> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> (A) When the Program is first established;
> […]

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

(5) Include a procedure to investigate occupational injury or occupational illness.

(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.

(7) Provide training and instruction:

(A) When the program is first established;

[…]

(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.

Citation 1, Item 2, alleges:

Prior to and during the course of the inspection, including, but not limited to, on June 18, 2018, Randstad North America, a temporary labor supplier, failed to implement the steps of the employers written IIPP.

Instance 1—Primary employer failed to review and ensure that the secondary employer had an effective, written IIPP prior to sending workers to work at the secondary employer's worksite located at 8451 Calle Barcelona, Carlsbad CA 92009 as required by this subsection.

Instance 2—The primary employer failed to conduct scheduled and periodic inspections to identify unsafe conditions and work practices, where their employees may be exposed at the secondary employer's work site as required per primary employer's written IIPP.

Implementation of an IIPP is a question of fact. (*Papich Construction Company Inc*., Cal/OSHA App. 1236440, Decision After Reconsideration (Mar. 26, 2021).)

First Instance

The first violation instance alleges Appellant failed to review and ensure that the secondary employer had an effective, written IIPP prior to sending workers to work at the secondary employer's worksite.

The Division did not address this allegation with specific evidence. Perera testified that Appellant "didn't do what they said they would do." However, this testimony is not sufficient because it does not identify the statements made by Appellant, and it does not indicate how the Division determined Appellant did not fulfill its statements. Notably, the IIPP states Appellant will: "Perform a documented on-site inspection of the client's working environment, which includes review of the client's IIPP or any other form of safety program." (Ex. I, p. 6.) Contrary to the IIPP, Appellant stated in response to Division questions: "We currently do not conduct onsite inspection at the retail stores." (Ex. C, pp. 5-6.) Although this evidence establishes Appellant did not perform on-site inspections, it does not squarely address the allegation that Appellant failed to review and ensure that the secondary employer had an effective, written IIPP. Thus, the Division did not prove the first alleged violation instance.

Second Instance

This instance alleges Appellant "failed to conduct scheduled and periodic inspections . . . at the secondary employer's work site as required per primary employer's written IIPP." The IIPP states Appellant will: "Perform a documented on-site inspection of the client's working environment, which includes review of the client's IIPP or any other form of safety program." (Ex. I, p. 6.) In response to the Division's questions regarding inspections, Appellant repeatedly stated: "We currently do not conduct onsite inspection at the retail stores." (Ex. C, pp. 5-6.) Appellant does not argue that it performed inspections pursuant to its IIPP. Thus, the evidence establishes Appellant does not perform the inspections outlined in its IIPP. Therefore, the Division proved the second violation instance.

In sum, the Division proved one of the two violation instances alleged in Citation 1, Item 2. This is sufficient to establish a violation of section 3203, subdivision (a)(4).

5. Is the failure to maintain records properly classified as a Regulatory violation?

The Division classified Citation 1, Item 1, as a Regulatory violation. Section 334, subdivision (a), defines a Regulatory violation as follows:

> Regulatory Violation - is a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.

The violation in Citation 1, Item 1, is that Appellant did not keep compliant training records for Reid. Thus, the violation pertains to recordkeeping, which is one part of the definition of the Regulatory classification. The second part of the Regulatory classification is that the violation be other than a Serious or a General violation. Neither party argues the violation is a Serious or a General violation. Accordingly, Citation 1, Item 1, is properly classified as a Regulatory violation.

6. Is the failure to implement its IIPP properly classified as a General violation?

The Division classified Citation 1, Item 2, as a General violation. Section 334, subdivision (b), defines a General violation as follows:

> General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.

The violation in Citation 1, Item 2, is that Appellant failed to implement its IIPP procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. In particular, Appellant stopped performing on-site inspections of its clients' working environments. Without inspections to identify unsafe conditions and work practices, employees are more likely to be injured or suffer increased severity of harm. Thus, the violation has a relationship to occupational safety and health of employees. Additionally, neither party argues the violation is a Serious violation. Accordingly, Citation 1, Item 2, is properly classified as a General violation.

7. Are the violations properly classified as Repeat violations?

The Division classified both Citation 1, Item 1, and Citation 1, Item 2, as Repeat violations. Section 334, subdivision (b), defines a Repeat violation as follows:

> Repeat Violation - is a violation where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon a later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest of: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law. For violations other than those classified as repeat regulatory, the subsequent violation must involve essentially similar conditions or hazards.

Both citations premise the Repeat classification on prior citations issued pursuant to the Division's inspection number 1157627. The citations in that appeal were issued to Randstad US L.P. (Ex. 9.)

The Division contends Appellant is a successor or alter ego of Randstad US L.P. for several reasons. First, McLaurin had a role in the earlier appeal that is similar to her role in this appeal. McLaurin was Regional Safety Manager and the company's representative for the Division's investigation. (Ex. 9, p. 12.) McLaurin signed the abatement forms for the citations issued to Randstad US L.P. (*Id.* at 15.) The Division further argues that a "parent" company should be responsible for its subsidiary.

Stacey Christian (Christian) testified that she was the Division's compliance officer in the earlier case. Christian further testified that, in the investigation of the earlier case, she spoke to McLaurin and three employees. Christian determined that Randstad US L.P. provided general orientation and training to employees before assigning them to clients. The client in the earlier case was not L'Oreal and not in the cosmetics or retail industries.

In response to leading questions regarding the earlier investigation, Christian affirmed that she saw the name "Randstad Sourceright" in documents and on the California Secretary of State's online database of registered businesses. However, there is no documentary evidence that "Randstad Sourceright" is a name involved in the earlier case. Moreover, Christian did not seem to understand the significance of the questions, or to recognize a difference between the names "Randstad" and "Randstad Sourceright." She seemed surprised and confused that she was being asked such questions. Throughout her testimony, Christian did not distinguish among any Randstad entities. On cross-examination, Christian testified that the earlier case did not involve

confusion regarding the correct entity. Based on observations of the witness, the leading questions in her direct testimony, and her testimony during cross-examination, it is found that Christian's testimony that "Randstad Sourceright" appeared in the earlier case is not credible.

Despite McLaurin's similar roles in the earlier matter and the present matter, there are significant differences. There is no indication that Appellant was involved in the earlier case. There is no evidence regarding Randstad US L.P.'s ownership or its relation to any of the entities involved in the employment of Reid—i.e., Appellant, RP LLC, RP LP, and RHR LLC. Additionally, the nature of the businesses appear to be different. Randstad US L.P. trained employees and provided general orientation before assigning them to clients, which is not the case for the Randstad business involved with L'Oreal and Reid. Thus, the evidence does not establish that Appellant is a successor or alter ego of Randstad US L.P.

Accordingly, the Division did not establish the Repeat classifications of Citation 1, Items 1 and 2, because Appellant is not the employer from the earlier case.

8. Are the proposed penalties calculated in accordance with the penalty-setting regulations?

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).)

Section 336, subdivision (g), provides for penalties in cases of Repeat violations: "If a Regulatory, General, or Serious violation is repeated . . . the Proposed Penalty is adjusted upward as follows: 1st repeat -- the Proposed Penalty is multiplied by two."

The Division submitted its Proposed Penalty Worksheet showing the penalty calculations. (Ex. 2.) Perera testified to the calculation of the penalties. In particular, Perera testified that the penalty for Citation 1, Item 1, was $500 before being doubled as a result of the Repeat classification. The proposed penalty was $1,000. (*Id.*) Perera testified that the penalty for Citation 1, Item 2, was $2,000 before being doubled as a result of the Repeat classification. The proposed penalty was $4,000. (*Id.*)

Appellant does not dispute the calculation of the penalties except insofar as it disputes the Repeat classifications of the violations. Since the evidence does not support the Repeat

classifications, the doubling of the penalties is not supported. Accordingly, the penalty for Citation 1, Item 1, is $500 and the penalty for Citation 1, Item 2, is $2,000.

Conclusions

The evidence supports a finding that Appellant violated section 3203, subdivision (b), for failure to maintain training records. The violation was properly classified as Regulatory. The penalty, as modified herein, is reasonable.

The evidence supports a finding that Appellant violated section 3203, subdivision (a), for failure to implement its IIPP. The violation was properly classified as General. The penalty, as modified herein, is reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is modified to $500 as set forth herein.

It is hereby ordered that Citation 1, Item 2, is affirmed and the penalty is modified to $2,000 as set forth herein.

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

Dated: 09/19/2023

Mario L. Grimm
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.**