**BEFORE THE**
**STATE OF CALIFORNIA**
**OCCUPATIONAL SAFETY AND HEALTH**
**APPEALS BOARD**

| In the Matter of the Appeal of: | Inspection No. **1300039** |
|---|---|
| **EMERICARE INC**<br>**dba BROOKDALE NORTHRIDGE**<br>**17650 DEVONSHIRE STREET**<br>**NORTHRIDGE, CA 91325**<br><br>**Employer** | **DECISION** |

## Statement of the Case

Emericare, Inc. (Employer) operates Brookdale Northridge, a Continuing Care Retirement Community. Beginning March 7, 2018, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer Michael Mendoza (Mendoza), commenced an inspection at 17650 Devonshire Street, Northridge, California (the site). On May 22, 2018, the Division cited Employer for failing to label electrical breakers, for failing to close unused openings in electrical panels, and for failing to effectively guard a garbage disposal.

Employer filed timely appeals of Citation 1, Items 1 and 2, on the ground that the proposed penalties were unreasonable. Employer filed a timely appeal of Citation 2, Item 1, on the ground that the classification is incorrect. On September 12, 2019, the appeal was amended to include the assertion that the safety orders were not violated for each of the citations and items. Employer also asserted numerous affirmative defenses.[1]

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board in West Covina, California, on September 17, 2019. Alka Ramchandani-Raj, an attorney for Littler Mendelson, P.C., represented Employer. Clara Hill-Williams, Staff Attorney, represented the Division. The matter was submitted for decision on December 10, 2019.

## Issues

1. Did the Division establish that Employer failed to properly label electrical breakers?

2. Did the Division establish that Employer failed to effectively close unused openings in electrical panels?

[1] 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. 10926000, Denial of Petition for Reconsideration (May 26, 2017).)

3. Did the Division establish that Employer failed to adequately guard the feed throat of a sink-mounted disposal unit?

4. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

5. Are the proposed penalties for Citation 1, Items 1 and 2, reasonable?

## Findings of Fact

1. Employer failed to label electrical panels at its Brookdale Northridge facility.

2. Employer failed to close unused openings in electrical panels at its Brookdale Northridge facility.

3. Employer operated a one horsepower disposal unit in a sink at its Brookdale Northridge facility.

4. The feed throat of the disposal unit was not guarded.

5. Amputations or other serious injuries could occur if an employee's hand was exposed to the moving parts of the disposal unit.

6. The penalties were calculated in accordance with the Division's policies and procedures.

## Analysis

**1. Did the Division establish that Employer failed to properly label electrical breakers?**

In Citation 1, Item 1, Employer was cited for a violation of section 2340.22, subdivision (a), which provides:

> (a) Motors and Appliances. Each disconnecting means required by this Safety Order for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident.

In the citation, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on 3-7-18, the electrical breakers inside the following electrical panels in the electrical room and kitchen, were not labeled to indicate each breaker's purpose:
>
> 1. Electrical panel (LSLA) in electrical room, and
> 2. Electrical panel (1KD) kitchen.

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "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." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) To establish a violation of section 2340.22, subdivision (a), the Division must show unmarked or illegibly marked "disconnecting means," such as an electrical breaker inside the electrical panel not being properly labeled.

The Division offered four exhibits to support a violation: Exhibits 2A, 2B, 2C and 2H. Mendoza testified that Exhibits 2A and 2B together show that Employer's electrical panel, which Employer labeled as "LSLA," shows circuit breakers that are not labeled. No markings are visible in either photo that would be considered a "label" which would identify the purpose of the breaker. Exhibits 2C and 2H together show a second electrical panel, labeled by Employer as "1KD," which likewise shows at least five unlabeled circuit breakers.

Having shown that electrical panels were not labeled, the Division next has the burden of proving that there was employee exposure to the violative condition addressed by section 2340.22, subdivision (a). (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) "To find 'exposure' there must be reliable proof that employees are endangered by an *existing* hazardous condition or circumstance." (*Id.*, emphasis in original.)

As Mendoza explained in his testimony, if employees are not able to determine what breaker turns off a certain piece of equipment, it becomes difficult to effectively de-energize the piece of machinery if needed to perform a lock-out/tag-out procedure. When asked by Mendoza if they knew where some of the unlabeled breakers "go," some employees told him they did not. Mendoza also testified that inadvertent activation of a breaker could lead to a short or electrocution. Therefore, if electrical panels or circuit breakers are not labeled at all or are not

labeled properly, the hazard created by the violative condition affects the entire workplace. It would not require an employee to be standing next to the breaker itself, as Employer infers. This testimony represents reliable proof that employees are endangered by the hazardous condition.

Additionally, for there to be an existing hazard, the breakers arguably must have been energized. As proof that both "LSLA" and "1KD" were energized at the time of the inspection, the Division offered the statements of Mendoza, who testified that he personally tested the electrical panel with an electrical tester and that all of the breakers were energized at the time of inspection.

The Division also offered the statements of Employer's director of maintenance Mr. Donato (Donato). Mendoza testified that Donato told him that the electrical panels were energized and were at that time in use. Employer objected at hearing on the ground of hearsay. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Section 376.2.) Mendoza's testimony above corroborated Donato's statements. Employer's objection on the grounds of hearsay is therefore overruled.

The electrical breaker panel LSLA was not labeled. The Division also proved that electrical panel 1KD was not labeled. Thus, the Division has by a preponderance of the evidence met its burden of showing a violation of section 2340.22, subdivision (a).

**2. Did the Division establish that Employer failed to effectively close unused openings in electrical panels?**

In Citation 1, Item 2, Employer was cited for an alleged violation of section 2473.1, subdivision (b), which provides:

> (b) Unused openings in cabinets, boxes, and fittings shall be effectively closed.

In the citation, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on 3-7-18, the electrical breakers inside the following electrical panels in the electrical room, had unused openings in the electrical panels that were not closed:
>
> 1. Electrical panel (1PA), and
> 2. Electrical panel (RG).

To establish a violation of section 2473.1, the Division must show there were unused openings that were not effectively closed at the site. At hearing, the Division introduced exhibits and testimony from Mendoza showing electrical panels that were not effectively closed or covered.

As above, the Division must show employee exposure to the violative condition. (*Benicia Foundry & Iron Works, Inc., supra,* Cal/OSHA App. 00-2976.) Employee exposure may be proven by showing that it is "reasonably predictable by operational necessity or otherwise…that employees have been, are, or will be in the zone of danger." (*Id.*) It is reasonably predictable that electrical panels and the breakers inside them require employees to access the breakers in the panel. At the very least, for example, employees would need to access the breakers to perform periodic maintenance. It is reasonably predictable therefore that employees will enter the area where the electrical panels are located. By a preponderance of the evidence, the Division has established a violation of section 2473.1, subdivision (b), and that employees were exposed to the violative condition.

**3. Did the Division establish that Employer failed to adequately guard the feed throat of a sink-mounted disposal unit?**

In Citation 2, Item 1, Employer was cited for an alleged violation of section 4559, subdivision (a), which provides:

> (a) All freestanding, counter, or sink mounted disposal units shall have the feed throat guarded so that an employee's hand cannot contact the moving parts. (This does not apply to household type garbage disposals of less than one horsepower.) This shall be accomplished by:
>
> (1) The installation of a hood, grate, shield or offset feed throat which will prevent the employee from reaching directly into the shredding chamber, or
>
> (2) Providing that the distance from the floor or work level up over the counter and down into the point of hazard in the grinder is not less than 88 inches, or
>
> (3) The use of an indirect method of feeding the grinder, such as a water wash or a properly guarded mechanical conveyor, or
>
> (4) By the use of other methods which will prevent employees hands from contacting moving parts.

In the citation, the Division alleges:

> Prior to and during the course of the inspection, including but not limited to, on 3-7-18, employees operated the Salvajor garbage disposal in the main kitchen without having the feed throat guarded so that an employees [*sic*] hand cannot contact the moving parts.

To establish a violation of section 4559, subdivision (a), the Division must show that Employer's disposal unit had a feed throat that was not guarded by one of the methods above, and that the disposal unit was one horsepower or greater. Mendoza testified that the disposal unit at issue in Citation 2, Item 1, is one horsepower, as indicated on its label. His testimony is supported by the Division's Exhibit 3, the user manual for this disposal unit. The testimony is credible that the disposal unit referenced in the citation is one horsepower. Therefore, the only question remaining is whether the feed throat was guarded by one of the four methods section 4559 prescribes.

*Hood, Grate, Shield or Offset Feed Throat*

Mendoza testified that an employee working as a dishwasher showed Mendoza how the employee works the disposal. With the sink full of debris and water, the employee placed a stainless steel pan on top of the disposal. The employee then turned on the disposal by depressing a green button. The disposal began to grind the debris in the sink and the water started to subside. As the water subsided, the employee lifted the pan and the debris was pushed into the middle of the sink by gravity. The employee then turned on water from the faucet, which pushed some debris into the disposal. On cross examination, Mendoza admitted that the employee's hands never came into contact with the moving parts of the grinder during that demonstration.

However, that the employee's hands did not come into contact with the moving parts of the grinder during "normal" operation is not entirely the point of the safety order. Section 4559 is intended to guard against any *possible* contact, whether it be intentional (as in normal operation) or accidental.

According to Mendoza's testimony, the disposal opening measured six inches in diameter. Mendoza testified that the opening is big enough that an employee could "easily" fit a hand inside. He further testified that an employee could inadvertently put a hand down into the grinding operation of the disposal.

The normal operation demonstrated by the employee and described by Mendoza does not depict an operation that includes a hood, grate, shield, or offset feed throat. Nothing would prevent an employee's hand from coming into contact with the moving parts of the disposal.

*Distance to Point of Hazard*

The Appeals Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing. (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016), citing *Mechanical Asbestos Removal, Inc.*, Cal/OSHA App. 86-362, Decision After Reconsideration (Oct. 13, 1987).) Although there was no evidence presented regarding the specific distance from the work level up over the counter and down into the point of hazard in the grinder, a reasonable inference can be drawn from other evidence. Mendoza testified that the employee showed him how the employee works the disposal. That operation is described in detail above. If an employee is required to bend over to place and remove a stainless steel pan directly over the mouth of the disposal, then it is reasonable to infer that the employee can reach the mouth of the grinder. If the employee's hands are that close, it is reasonable to further infer that "the distance from the floor or work level up over the counter and down into the point of hazard in the grinder" is less than 88 inches.

*Indirect Method of Feeding*

Employer argues that the faucet for the sink serves as a "water wash," washing the debris into the disposal as an "indirect method of feeding." The Division incorrectly argues that the faucet is not a water wash. A faucet *can* be a water wash. But such a water wash is only an effective guard if, when operated, an employees' hands are prevented from contacting the moving parts. Section 4559, subdivision (a), requires that the feed throat of a disposal be guarded against contact – intentional or accidental – between an employee's hands and the moving parts of the unit. One way the safety order allows employers to comply with that requirement is to allow water washes to push debris into the unit instead of human hands. But the purpose remains – "so that an employee's hand cannot contact the moving parts." Here, as Mendoza testified, the water wash would not prevent an employee's hands from contacting the moving parts of the grinder.

*Other Methods*

Employer has the burden of proving that an "other method" of guarding the feed throat was used. Employer neither asserted nor argued that any other methods were used. Therefore, it is found that no other methods of guarding were in place at the time the citation was issued.

Having proven by a preponderance of the evidence that the feed throat of the disposal unit was not guarded by one of the four methods required by section 4559, subdivision (a), the Division has established the violation.

**4. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?**

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

> (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

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

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.

Mendoza testified that he is current on his division-mandated training. Mendoza explained in his testimony that the purpose of a disposal unit is to grind food into smaller parts or debris. He went on to testify that there is a realistic possibility of serious injury to a human finger, including amputation, if one were to come into contact with the grinding mechanism of the disposal unit. Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious. Employer presented no evidence that would rebut the presumption of the Serious classification. Accordingly, the Division is found to have properly classified the violation as Serious.

**5. Are the proposed penalties for Citation 1, Items 1 and 2, reasonable?**

Penalties calculated in accordance with the penalty setting regulations set forth in section 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 reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The Division submitted into evidence the Proposed Penalty Worksheet and Mendoza testified about the calculations used to establish the proposed penalty for the citations. Employer did not present any evidence or argument to rebut the presumption that the penalties were calculated in accordance with the Division's policies and procedures. Accordingly, the penalties of $185 for Citation 1, Items 1 and 2, are reasonable.

## Conclusion

The evidence supports a finding that Employer violated section 2340.22, subdivision (a), by failing to properly label electrical breakers. The penalty is reasonable.

The evidence supports a finding that Employer violated section 2473.1, subdivision (b), by failing to effectively close unused openings in electrical panels. The penalty is reasonable.

The evidence supports a finding that Employer violated section 4559, subdivision (a), by failing to adequately guard the feed throat of a sink-mounted disposal unit. The Division established the Serious classification. The penalty is reasonable.

## ORDER

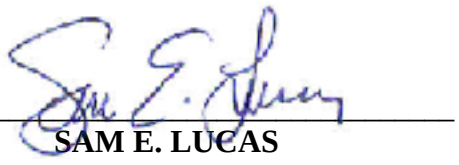
It is hereby ordered that Citation 1, Item 1, is sustained and the penalty of $185 is affirmed.

It is hereby ordered that Citation 1, Item 2, is sustained and the penalty of $185 is affirmed.

It is hereby ordered that Citation 2, Item 1, is sustained and a penalty of $3,375 is affirmed.

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

Dated: 01/08/2020



**SAM E. LUCAS**
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.**