BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **CLASSIC RESIDENCE MANAGEMENT, LLC.** **dba VI AT LA JOLLA VILLAGE** **8515 COSTA VERDE BLVD.** **SAN DIEGO, CA 92122** **Employer**	Inspection No. **1273311** **DECISION**

Statement of the Case

Classic Residence Management LLC (Employer) operates a residential care facility with multiple kitchens preparing meals for residents. On October 26, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Michele Boswell (Boswell), commenced an inspection of Employer's facility located at 8515 Costa Verde Boulevard in San Diego, California (job site), after a report of an accident that occurred on July 14, 2017.

On January 9, 2018, the Division cited Employer for numerous alleged safety violations: failure to maintain records of inspections and training documentation; failure to effectively implement its Injury and Illness Prevention Program (IIPP); failure to designate particular employees to light fixed fired equipment; and failure to furnish extension lighting rods to light fixed fired equipment.

Employer filed timely appeals of the citations, contesting the existence of the violations, the classification of the violations, and the reasonableness of the proposed penalties. Employer also asserted numerous affirmative defenses.[1]

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, from West Covina, California. The parties and witnesses appeared remotely via the Zoom video platform on June 22 and 23, and November 17, 18, and 19, 2021. Alka Ramchandani-Raj and Krystal Weaver, attorneys at Littler Mendelson P.C., represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted on February 21, 2023.

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[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. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer maintain complete inspection and training records?

2. Was Employer's written IIPP complete and did Employer effectively implement the program?

3. Does Employer's kitchen range constitute "fixed fired equipment?"

4. Did Employer limit lighting of fixed fired equipment to designated employees?

5. Did Employer prominently display instructions for lighting of fixed fired equipment?

6. Did Employer provide extension lighting rods for lighting of fixed fired equipment?

7. Did an independent employee action cause Employer to not display lighting instructions?

8. Is Citation 1 a recordkeeping violation?

9. Did the absence of prominently displayed lighting instructions create a realistic possibility of serious physical harm?

10. Did Employer know that lighting instructions were not prominently displayed?

11. Are the proposed penalties reasonable?

Findings of Fact

1. Employer's inspection records did not document actions taken to correct identified unsafe conditions and work practices.

2. Employer's logo on training records does not indicate Employer was the training provider.

3. Employer's IIPP states that the Executive Director is responsible for overseeing the program.

4. The Safety Committee section of the IIPP sets forth a Safety Management Plan that provides for safety training during orientation, ongoing as issues are identified, when a new hazard is identified, and on an annual basis.

5. The Safety Committee section of the IIPP provides that Employer's safety policies and procedures are distributed, practiced, enforced on an ongoing basis, and reviewed at least every two years.

6. The IIPP states that policies regarding accident reporting and investigation are governed by Employer's Workers' Compensation Injury Management Program. Employer completed Workers' Compensation incident report forms for Garibaldo's accident.

7. The IIPP's Hazard Assessment Matrix and Supplemental Hazard Assessment Matrix contain procedures for correcting hazards.

8. Andrew Nowak was a sous chef. A sous chef's job duties include training employees. Sous chefs are responsible for employee safety.

9. Christian Garibaldo (Garibaldo) used a can of spray cooking oil for approximately two hours while cooking at the kitchen range. Garibaldo set the can near the kitchen range, where it became hot and exploded.

10. Employer uses its kitchen ranges and ovens in one location. The wheels on the oven and kitchen ranges are for ease of cleaning the appliances and the kitchen, not for moving the appliances for use in different locations.

11. Employer did not display instructions for lighting and relighting the stove burner pilots.

12. Employer provided extension lighting rods for employee use in the kitchens. The rods were stored in the Executive Chef's office.

13. Each of the burners on Employer's stove has a pilot underneath the burner. The burner could be hot and burn an employee lighting the pilot underneath the burner. An extension lighter enables an employee's hand to stay out of range of the burner.

14. An employee lighting a pilot can suffer burns from a flash of fire caused by adding the lighter flame to the fuel at the pilot. An extension lighter enables an employee's hand to have more distance from a flash of fire at the pilot.

15. Employer knowingly did not display lighting instructions for the stove pilot lights.

16. The Division calculated the proposed penalties for Citation 1 and Citation 3 in accordance with the penalty-setting regulations.

Analysis

1. Did Employer maintain complete inspection and training records?

California Code of Regulations, title 8, section 3203, subdivision (b),[2] provides that:

> (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.

In Citation 1, Item 1, the Division alleges:

> Prior to and during the course of the inspection, the employer did not keep records as required by this section as follows:
>
> Instance #1: Employer provided records of inspections to identify unsafe conditions and work practices. Employer's records did not include action taken to correct the identified unsafe conditions and work practices as required by (b)(1).
>
> Instance #2: Employer provided training documents which did not include the name of the training provider as required by (b)(2).

Employer operates a residential care facility. The facility includes two kitchens that prepare meals for residents. The kitchens are on different floors of the facility.

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

On July 14, 2017, Employer assigned Garibaldo to cook in the kitchen on the 21st floor. Garibaldo was assigned to perform grilling operations using the kitchen range. The kitchen range has six burners. Garibaldo was using a can of spray cooking oil ("Pam"). Garibaldo set the can of spray cooking oil near the stove. The can became heated and exploded. The explosion activated the kitchen's fire sprinkler system. Garibaldo was taken by ambulance to a hospital.

Boswell inspected the job site on October 26, 2017. The Division subsequently requested documents including Employer's training documentation, IIPP, and inspection records.

Instance 1

The safety order requires an employer to maintain inspection records that include "action taken to correct the identified unsafe conditions and work practices." (§3203, subd. (b)(1).)

The Division submitted into evidence three inspection records produced by Employer in response to a document request. While some of the comments on the inspection reports do not appear to be unsafe conditions, such as noting that a closet needed a new lightbulb, there are a few notations that do appear to be identification of hazards. For example, in June 2017 and October 2017, it was identified that the "America's Cup Bar" was missing bar mats and there was a notation of "slippery." (Exs. 5 and 6.) In March 2017, the inspection report notes a "loose outlet." (Ex. 4.) The inspection records do not indicate the actions taken to correct the hazards.

Because the safety order requires that inspection records include the actions taken to correct identified unsafe conditions and work practices, Employer's failure to include this information on the inspection records is a violation of section 3203, subdivision (b)(1).

Instance 2

The safety order requires that documentation of safety and health training include "training providers." (§3203, subd. (b)(1).)

The Division submitted into evidence training documentation produced by Employer in response to a document request. (Exs. 7-15.) The training sheets do not use language such as "trainer" or "training provider." Prior to the accident, the training sheets do not identify a person who trained employees. Shortly after the accident, Employer revised its training sheets to include blank spaces in which to name a "facilitator" along with the facilitator's job title. One of the training sheets identifies the facilitator as Jiomar Diaz and his job title as Executive Sous Chef. (Ex. 14.)

Employer contends its training sheets satisfy the safety order. Employer highlights its corporate logo at the top of each of the training sheets as documentation that Employer itself was the training provider.

Here, the training sheets do not indicate that the corporate logo is intended to identify the training provider. Rather, the corporate logo appears to be an instance of branding. The same logo appears at the top of other documents such as the employee incident form. (Ex. 21.) Thus, it is found that the corporate logo does not refer to the training provider and that Employer did not always document the training provider.[3]

Because the safety order requires that Employer document the training provider, Employer's failure to include this information on the training records is a violation of section 3203, subdivision (b)(2).

2. Was Employer's written IIPP complete and did Employer effectively implement the program?

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,

[3] Because Instance 2 is resolved on other grounds, the Decision does not address Employer's contention that a corporate entity can identify itself as the training provider as opposed to identifying the person who trained the employees.

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 2 alleges:

> Prior to and during the course of the inspection, the employer did not establish, implement and maintain an effective Injury and Illness Prevention Program (Program) as required by this section as follows:
>
> Instance 1: IIPP did not contain all required written elements as follows: (a)(1), (a)(2), (a)(3), (a)(5), (a)(6), and (a)(7) were not in the written program.
>
> Instance 2: IIPP was not effectively implemented for scheduled periodic inspections to identify safety hazards as required by (a)(4).
>
> Instance 3: IIPP was not effectively implemented for hazard correction as required by (a)(6).
>
> Instance 4: IIPP was not effectively implemented for employee training as required by (a)(7) for employees. Culinary department employees were not trained to keep pressurized containers away from hot surfaces. As a result, on or about 07/14/17, an employee set a pressurized can of spray cooking oil near and/or on the gas range where it became heated and burst open, spraying hot oil onto the employee who sustained serious burn injuries.

The Division has the burden of proving a violation 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 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. (*Nolte Sheet Metal, Inc*., Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

Instance 1

Subdivision (a)(1)

Section 3203, subdivision (a)(1), requires that an IIPP "[i]dentify the person or persons with authority and responsibility for implementing the Program." The Appeals Board has never interpreted section 3203, subdivision (a)(1), to require that an individual's name must be listed in the IIPP to satisfy this provision. Indeed, the Appeals Board indicated that there are several ways to comply with this subdivision when it found a violation because an IIPP did not identify "a

specific position, job title, or individual with ultimate responsibility…" (*West Coast Arborists*, Cal/OSHA App. 1180192, Decision After Reconsideration (Apr. 26, 2019).)

The Division cited Employer for a violation of section 3203, subdivision (a)(1), because Employer's IIPP does not provide the name of the person responsible for implementing the IIPP. However, the "Introduction: Responsibility and Oversight" page of Employer's IIPP states that the Executive Director is responsible for overseeing the program. (Ex. TT.)

Accordingly, Employer's IIPP satisfies the requirements of section 3203, subdivision (a)(1), by identifying the specific position and job title of the person responsible for implementing the IIPP.

Subdivision (a)(2)

Section 3203, subdivision (a)(2), requires that an employer's IIPP contain "a system for ensuring that employees comply with safe and healthy work practices." The subdivision specifically sets forth the ways that an employer can comply with the requirements therein. An employer substantially complies with subdivision (a)(2) through: (1) recognition of employees for good safety habits; or, (2) safety training and re-training programs for employees; or, (3) disciplinary actions for employees who violate safety rules; or, (4) "any other such means that ensures employee compliance." (*DPR Construction, Inc., et al dba DPR Construction*, Cal/OSHA App. 1206788, Decision After Reconsideration (Feb. 19, 2021).)

In order to show a violation of section 3203, subdivision (a)(2), the Division must demonstrate that the employer did not comply with any of the listed methods. To rebut the Division's showing, the employer may demonstrate compliance by establishing that it implemented any one of the four listed methods. (*Coast Waste Management, Inc.,* Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016).) The Appeals Board has previously found that compliance with "at least one of the four listed methods" was sufficient to rebut the Division's showing. (*Id.*)

Boswell testified that the Division cited Employer for a violation of section 3203, subdivision (a)(2), because the IIPP did not provide for recognition or discipline of employees based on safety performance. However, the IIPP contains several references to safety training. The Safety Committee section sets forth a Safety Management Plan that provides for safety training during orientation, ongoing as issues are identified, and on an annual basis. (Ex. UU, p. 5.)

Accordingly, Employer's IIPP complies with the subdivision because providing safety training is one of the methods listed in section 3203, subdivision (a)(2).

Subdivision (a)(3)

Section 3203, subdivision (a)(3), requires employers to ensure that their IIPP includes communication about the safety program with their employees. As with subdivision (a)(2), the safety order provides examples of what constitutes substantial compliance: "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."

Boswell testified that Employer violated section 3203, subdivision (a)(3), because Employer's IIPP does not document how Employer communicates safety practices in the workplace. However, the IIPP contains several references to communication of the safety program to the employees. The IIPP provides that safety communication is handled through the Safety Committee. (Ex. SS-1, p. 3.) The Safety Committee section of the IIPP provides that Employer's "safety policies and procedures are distributed, practiced, enforced on an ongoing basis and reviewed as frequently as necessary, but at least every two years." (Ex. UU, p. 5.) Additionally, as set forth above, the IIPP provides for safety training during orientation, ongoing as issues are identified, and on an annual basis. (Ex. UU, p. 5.)

Accordingly, Employer's IIPP satisfies the subdivision because it includes provisions for training programs, written materials, and a safety committee, all of which ensure health and safety communications with the employees.

Subdivision (a)(5)

Section 3203, subdivision (a)(5), requires that an employer's IIPP include a procedure to investigate an occupational injury or occupational illness.

Boswell testified that she did not find any information regarding injury or illness investigation procedures in Employer's IIPP. However, Employer's IIPP indicates that policies regarding accident reporting and investigation are governed by its Workers' Compensation Injury Management Program. (Ex. SS-1, p. 3.) There were forms for Employer's management to complete when investigating an occupational injury, and such forms were completed for the accident that led to the citations in the instant appeal. (Ex. 21.) Additionally, the Safety Committee documentation provides that the Safety Officer collaborates with Department Managers or other personnel to facilitate investigation, conclusions, recommendations, actions, and follow up to reports of injury. (Ex. UU, p. 4.)

Accordingly, Employer's IIPP complies with the requirements of section 3203, subdivision (a)(5).

Subdivision (a)(6)

Section 3203, subdivision (a)(6), requires that an Employer's IIPP include methods or procedures for timely correcting unsafe or unhealthy conditions, work practices and work procedures.

Boswell testified that she did not find any information in her review of Employer's IIPP related to the procedure for correction of identified hazards. However, Employer's IIPP contains a Hazard Assessment Matrix that identifies various hazards associated with relevant jobs or tasks. (Ex. SS-1, p. 6.) Next to the identified hazards in the Hazard Assessment Matrix are references to other documents that contain procedures for correcting the hazards listed. Additionally, Employer's IIPP contains a Supplemental Hazard Assessment Form that enables Employer to identify newly recognized hazards and address them through the Hazard Assessment Matrix. (Ex. SS-1, p. 7.)

Accordingly, the Division did not establish that Employer's IIPP failed to include methods or procedures for timely correcting unsafe or unhealthy conditions, work practices and work procedures.

Subdivision (a)(7)

Section 3203, subdivision (a)(7), requires that an employer's IIPP contain a written plan for providing training to employees at various points in the employment relationship: at the time of hiring, when an assignment is new, when a new procedure or equipment is introduced, and when a new hazard is identified.

As set forth above, the IIPP provides for safety training during new hire orientation, ongoing as issues are identified, when a new hazard is identified, and on an annual basis. (Ex. UU, p. 5; Ex. SS-1, pp. 6-7.)

The Division did not establish that Employer's written IIPP was lacking in any of the six areas that were cited in Instance 1 of Citation 2.

Instance 2

As set forth above, section 3203, subdivision (a)(4), requires that an IIPP "[i]nclude procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices."

The citation alleges that Employer failed to implement its IIPP through regular scheduled inspections to identify hazards. Boswell testified that this allegation was based on the inspection reports that Employer produced in response to the Division's document request. (Ex. 4, 5, and 6.) Employer's IIPP provides that inspections "are to be carried out at least once a month." (Ex. 4, 5, and 6.) The Division received three inspection reports dated March 17, 2017, June 23, 2017, and October 27, 2017. Based on these limited records, the Division concluded that Employer was not conducting inspections at the frequency set forth in its IIPP.

Employer's former Executive Chef, Jim Smith (Smith), testified that he was a member of Employer's Safety Committee, which conducted inspections monthly to identify conditions that need improvement and other potential safety hazards. Additionally, Smith testified that he conducted daily inspections of Employer's two kitchens and pantry areas. Finally, Smith met with his various chefs regularly to discuss safety trainings and identify any safety concerns that they or their kitchen staff were having.

Here, the testimony of Smith is credible and directly on point for the contention that Employer conducted monthly inspections. With respect to the inspection records, although they are probative of the occurrence of inspections, they do not directly state whether Employer conducted monthly inspections. The fact that inspections for some months are missing might support a recordkeeping violation, but it does not outweigh Smith's credible, direct testimony.

The Division did not establish that Employer failed to conduct regular inspections to identify and evaluate hazards in violation of section 3203, subdivision (a)(4).

Instance 3

As set forth above, section 3203, subdivision (a)(6), pertains to the correction of unsafe or unhealthy conditions, practices, or procedures at the workplace. Instance 3 involves the implementation of the IIPP to actually correct such identified hazards.

Boswell referenced two bases for this citation. The first basis relates to Employer's inspection records. The Division concluded that Employer did not correct hazards identified during inspections because the inspection records did not document corrective measures. However, Instance 3 is not a recordkeeping violation and subdivision (a)(6) does not require written notation of the corrective measures. Rather, it requires that Employers implement their written program to correct unsafe conditions or practices when identified. The evidence does not establish that Employer failed to correct the hazards identified in the inspection records.

The second basis for this citation is that Employer failed to correct the hazard of the can of spray cooking oil that Garibaldo placed near the kitchen range. Notably, there was no

testimony regarding how long the pressurized can of cooking oil was in a hazardous position prior to the accident.

The Division introduced written statements obtained by Employer after the accident. (Ex. 21.) Employer objected, on hearsay grounds, to the truth of the matter asserted within the written statements. However, two statements indicate they are from Andrew Nowak (Nowak). (Ex. 21 pp. 3-4, 6). Nowak completed the "Supervisor's statement of incident" on a form titled Worker's Compensation Incident Investigation and signed in the space provided for supervisors. (*Id.* at pp. 3-4.) Nowak completed a separate Witness Statement form, on which he signed in both the space for witness and the space for supervisor. Smith testified that Nowak was a sous chef, that he was not sure if Nowak "still" supervised Garibaldo at the time of the accident, and that he had no reason to believe that Nowak was not Garibaldo's supervisor at the time of the accident. Tellez testified that his duties as a sous chef include "train[ing] the staff." Boswell further testified that John Quigley, Human Resources Manager, told her that sous chefs train employees to move spray cooking oil away from the fire, as documented in her field notes. (Ex. V, p. 5.) For these reasons, it is found that Nowak was a supervisor with responsibility for employee safety. Therefore, Nowak's statements are Employer admissions exempt from hearsay.

Nowak's statements indicate that he was present in the kitchen at the time of the accident. (Ex. 21, p. 3.) Nowak indicates that Garibaldo had been using a bottle of spray cooking oil, but does not indicate how long Garibaldo used the spray oil. Garibaldo's written statement can be used to explain Nowak's statement. (Section 376.2.) Garibaldo's written statement indicates he used the spray oil for about two hours. (Ex. 21, p. 2.) Employer obtained this evidence shortly after the accident, and the evidence is undisputed. Therefore, it is credited.

Despite the length of time that Garibaldo was using the spray oil, the evidence does not establish how long the spray cooking oil was in a dangerous position. Employer typically keeps spray cooking oil away in a container away from the stove. (Ex. 26.) Therefore, the evidence does not establish that Nowak should have seen and corrected the hazardous condition prior to the accident.

Finally, Smith testified that he had personally corrected employees who inappropriately placed spray cans near the flame "a couple times" in his 14 years working as the Executive Chef and his expectation was that supervisors would immediately correct the employee if this behavior was observed.

The Division did not establish that Employer failed to correct the unsafe conditions alleged in Instance 3 of Citation 2, Item 1.

Instance 4

"The purpose of [section] 3203(a)(7) is to provide employees with the knowledge and ability to recognize and avoid the hazards they may be exposed to by a new work assignment." (*Hill Crane Service, Inc.*, Cal/OSHA App. 12-2475, Decision After Reconsideration (Dec. 23, 2013).) The occurrence of an accident, by itself, is not sufficient proof that an employer's overall training program is deficient. (*Michigan-California Lumber Company*, Cal/OSHA App 91-759, Decision After Reconsideration (May 20, 1993).) The Division asserted that Employer's employees were not trained to keep pressurized containers, such as the spray cooking oil involved in the accident, away from the hot surface of the gas range.

Boswell testified that Instance 4 was based on a lack of information in the training documents related to this particular issue. That is, the documentation produced by Employer did not specify that keeping pressurized containers away from flame was a topic of any training programs. Boswell further testified that this allegation is based on written employee statements, (Ex. 21), and her interview with Garibaldo.

Sous Chef Mario Tellez (Tellez) testified about the training he and another sous chef provided to the employees they supervised. Tellez explained that there are multiple weeks of training for newly hired cooks, with additional training when the cook is promoted to another position. Tellez testified that he trains employees to put the spray cooking oil in a tray pan away from the stove and that part of his training involves explaining to employees that the pressurized can may heat up and potentially explode if left near the flame. Smith also testified that the line cooks are trained to put the pressurized spray can in a particular location away from the flame and heat. Smith testified that he specifically heard Tellez tell employees not to put pressurized cans of oil near a heat source during training. Photographs of the kitchen show that Employer has a tray pan away with various bottles and cans. (Ex. 26.)

Here, the testimony of Tellez and Smith are directly on point, and supplemented by photographs. With respect to the written employee statements, none of them actually say that the employees were not trained on this issue.[4] Neither Garibaldo nor any other employee testified that they did not receive the training. Finally, the fact that the accident happened, by itself, is not sufficient proof to establish that a training program is deficient. (*Michigan-California Lumber Company, supra*, Cal/OSHA App 91-759.) Thus, the evidence does not establish that Employer did not train employees to keep pressurized spray containers away from the gas range surface. Accordingly, the Division did not establish a violation of section 3203, subdivision (a)(7).

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[4] Employer objected to the use of the employees' hearsay statements. As set forth in greater detail below, those statements are insufficient to support a finding of fact on this issue because they do not supplement or explain any admissible evidence relevant to the issue.

3. Does Employer's kitchen range constitute "fixed fired equipment?"

Citation 3 and Citation 4 allege violations of Section 3311. Employer contends that Section 3311 is not applicable because the kitchen range at issue is not "fixed fired equipment." Section 3311, subdivision (a), provides, in relevant part:

> (a) To provide greater safety in lighting and relighting fixed fired equipment, the employer shall designate one or more employees who shall be trained in the safe lighting and relighting of the equipment. It shall be the responsibility of the employer to limit lighting and relighting of the equipment to employees so designated. It shall be the responsibility of the employees to follow the instructions given them. Copies of the instructions shall be prominently displayed at a location near the equipment.

Citation 3 alleges:

> Prior to and during the course of the inspection, where employees may light fixed fired equipment (gas stove burners) at the workplace, the employer did not comply with this subsection as follows:
>
> Instance 1: The employer did not limit lighting and relighting of equipment to designated employees. The employer did not provide training records to show that one Culinary department employee that utilized the fixed fired equipment (gas stove burners) had been trained in the instructions that indicate which employees are designated to operate the equipment.
>
> Instance 2: Copies of the instructions were not prominently displayed at a location near the equipment.

As set forth above, the Division has the burden of proving a violation by a preponderance of the evidence. (*Howard J. White, Inc*., *supra*, Cal/OSHA App. 78-741.)

Section 3311 applies to "fixed fired equipment," a phrase that is not specifically defined in the safety orders. The parties dispute whether section 3311 applies to the kitchen range involved in the accident. The key issue is whether the kitchen range was "fixed."

The Appeals Board has repeatedly held that "when there is more than one possible interpretation of a safety order, our directive is to adopt an interpretation that is most protective of workers." (*Walsh/Shea Corridor Constructors*, Cal/OSHA App. 1093606, Decision After

Reconsideration (Feb. 9, 2018), citing *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303.)

Numerous safety orders reference “fixed” equipment and appliances. For example, section 3277 defines a “fixed ladder” as “a ladder permanently attached to a structure, building, or equipment.” Fixed ladders stand in contrast to “portable ladders,” which are governed by section 3276.

Similarly, section 6150 defines a “fixed extinguishing system” as a “permanently installed system that either extinguishes or controls a fire at the location of the system.” Fixed extinguishing systems stand in contrast to “portable fire extinguishers,” which are referenced in sections 6150 and 6151.

The Electrical Safety Orders contain multiple references to fixed and portable appliances and equipment. Section 2300 defines a “fixed” appliance as an “appliance which is fastened or otherwise secured at a specific location.” A fixed appliance stands in contrast to a portable appliance, which is defined as an “appliance which is actually moved or can easily be moved from one place to another in normal use.”

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

The Merriam-Webster Dictionary defines “fixed” as “securely placed or fastened: stationary.” (www.m-w.com <accessed Jan. 24, 2023.>)

Here, Smith testified that all of the “hot equipment” in the kitchen—grill, griddle, and six-burner stove—was on wheels. The reason for the wheels was to make it “easier to clean the kitchen” each night. Smith did not indicate that the wheels are intended for moving the equipment for use in different locations. Smith further testified that the range is equipped with a “quick connect” system for easy disconnect from the wall. This testimony supports inferences that, after cleaning, the kitchen range returns to the same location and connects to the same wall.

The kitchen range here is similar to the fixed equipment and fixed appliances referenced in title 8 in that it is used in one location. The fact that the range has wheels merely assists in cleaning the range and the kitchen. The evidence does not indicate the kitchen range is easily moved from one place to another for use, which is a defining characteristic of the portable equipment in title 8.

Additionally, the evidence supports an inference that the kitchen range is "securely placed" because it operates in the same location each day and connects to a gas supply on the wall. There is no evidence indicating the kitchen range is not secure. Therefore, the kitchen range meets the definition of "fixed" in the Merriam-Webster Dictionary.

Employer asserts that *California Prune Packing Company*[5] interpreted the phrase "fixed fired equipment" to include heaters, furnaces, reactors, incinerators, vaporizers, steam generators, boilers and other process equipment for which the heat input is derived from fuel combustion. (Cal/OSHA App. 01-1626, Decision (Sept. 10, 2003).) However, that Decision was addressing the "fired" aspect of the term "fixed fired equipment," not the "fixed" aspect of the term. It referenced McGraw-Hill Dictionary of Scientific and Technical Terms for a definition of "fired process equipment." This latter term does not define "fixed" equipment.

Employer further contends that section 3311 does not apply in this matter because the kitchen range at issue does not contain a fire box or a combustion chamber. Smith testified that, and the Division did not dispute, the kitchen range does not contain a fire box or combustion chamber. Employer draws on subdivision (b) of section 3311, which states: "In addition to the [requirements of subdivision (a)] fire boxes or combustion chambers shall be purged or allowed sufficient time to vent themselves before a source of ignition is introduced into them." From subdivision (b), Employer argues that fixed fired equipment must contain a fire box or a combustion chamber. Because the kitchen range here did not have a fire box or a combustion chamber, Employer asserts that it cannot be fixed fired equipment. However, the touchstone of fixed fired equipment is that it be fixed and fired. The kitchen range here is both fixed and fired. Subdivision (b) is a separate requirement that applies to the types of fixed fired equipment that have a fire box or a combustion chamber.

Finally, Employer highlights the title of section 3311—"Flarebacks"—and argues that the kitchen range is not capable of flarebacks, therefore, section 3311 is not applicable. However, the Appeals Board has repeatedly held that section headings do not control the positive provisions of the safety orders. (*Hood Corporation*, Cal/OSHA App. 85-672, Decision After Reconsideration (Dec. 2, 1987).) Here, the kitchen range is fixed fired equipment. Therefore, it falls within the scope of section 3311, subdivision (a).

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[5] Decisions are not precedential or binding authorities. However, *California Prune Company* is addressed here as an instance of persuasive authority.

4. **Did Employer limit lighting of fixed fired equipment to designated employees?**

Citation 3 alleges two violation instances under section 3311, subdivision (a). The first violation instance alleges:

> Instance 1: The employer did not limit lighting and relighting of equipment to designated employees. The employer did not provide training records to show that one Culinary department employee that utilized the fixed fired equipment (gas stove burners) had been trained in the instructions that indicate which employees are designated to operate the equipment.

The Division argues that Employer did not limit lighting of fixed fired equipment because Garibaldo was permitted to relight the stove burners without the required training. Boswell testified that Garibaldo told her that pilot lights for burners on the kitchen range were out sometimes and that extension lighters were not always available. He sometimes lit a burner by turning on a different burner and then using a pressurized bottle of cooking oil spray to transfer the fire from one burner to another. Employer did not have an opportunity to examine Garibaldo regarding these out of court statements. There is no indication that Employer was aware of these statements until after it received the citation and after it received Boswell's field notes.

Smith and Tellez testified that Employer trains cooks to relight pilot lights for the kitchen range burners. Tellez further testified that he instructed cooks to retrieve an extension lighter and relight a pilot light that went out.

It is significant that neither Garibaldo nor any other cook testified that they were not trained in the safe lighting and relighting of the equipment. The testimony of Smith and Tellez was uncontroverted. Although Employer did not produce a training record that explicitly references lighting pilot lights, this evidence does not outweigh the testimony of Smith and Tellez. Therefore, the evidence does not establish that Garibaldo relit burners without being trained in the safe manner of doing so. Accordingly, the Division did not establish that Employer failed to limit lighting and relighting to designated employees trained in the safe lighting and relighting of the equipment.

5. **Did Employer prominently display instructions for lighting of fixed fired equipment?**

The second violation instance of Citation 3 alleges:

Instance 2: Copies of the instructions were not prominently displayed at a location near the equipment.

Smith and Tellez testified that each of the burners on the stove has its own pilot underneath the burner. Boswell testified that she did not see lighting instructions posted at the time of her inspection. The kitchen photographs introduced by the parties do not show lighting instructions displayed in the kitchen.

Employer submitted a photograph of instructions for lighting a pilot light. (Ex. VV.) Employer did not authenticate the exhibit. However, Smith testified that he believed the instructions were for the pilot light of the oven, in contrast to the pilot lights for the stove burners. Smith testified that such instructions often appear inside an oven door or behind the lower panel on an oven.

Here, Boswell's testimony and the kitchen photographs support an inference that Employer did not have lighting instructions prominently displayed. The instructions in Exhibit VV do not establish otherwise. They were not prominent, given that they were small and inside an oven or an oven panel. They were not authenticated as instructions for an appliance Employer operated at the time of the inspection. Finally, Smith's testimony indicates the instructions concern an oven pilot light, not stove pilot lights.

Moreover, the exhibit was not lodged prior to the start of the hearing, as ordered in the Order After Prehearing Conference. The exhibit was lodged five months after the start of the hearing. The Division contends that the photograph was not produced during discovery, and Employer did not contend otherwise. These facts indicate that Employer itself was unaware of the instructions, which further supports the inference that the instructions were not prominently displayed.

Therefore, it is found that Employer did not prominently display instructions for lighting and relighting the kitchen range. Accordingly, Instance 2 of Citation 3 is affirmed.

6. Did Employer provide extension lighting rods for lighting of fixed fired equipment?

Section 3311, subdivision (c), provides:

(c) Provision shall be made, for the furnishing of extension lighting rods, where their use is indicated. Valves and other controls shall be so located as to avoid placing the employee in an unsafe position if a flareback occurs.

Citation 4 alleges:

> Prior to and during the course of the inspection, where employees light and/or relight fixed fired equipment (gas range burners) at the workplace, the employer did not always furnish an extension lighting rod in order to light the burners.

Boswell testified that Citation 4 was based on her observations and her interview with injured employee Garibaldo. Garibaldo told Boswell that he used the can of spray cooking oil to relight the gas burners because extension lighting rods were not always available to him. Garibaldo was a line cook and not in a supervisory or management position. The Division did not ask Employer about its extension lighters during the investigation. The photographic exhibits do not show extension lighters in the kitchen.

Employer raised a hearsay objection to Boswell's testimony relying on the statement of Garibaldo. California Evidence Code section 1200, subdivision (a), defines hearsay evidence as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." The Appeals Board's evidence rules, found in section 376.2, provide, in part:

> 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.

Smith testified that extension lighters were located at both ends of "the line" in the 21 Kitchen, meaning the range, griddle, and grill. Smith also explained that if an employee needed another extension lighter, extras were stored in a cabinet in the Executive Chef's office, which was approximately 30 steps away from the line where the cooks would be using the lighters.

Sous Chef Tellez testified that there are always 10 to 20 extension lighters available between Employer's two kitchens. In particular, he testified that there were approximately 10 lighters in the kitchen where Garibaldo was working at the time of the accident.

Here, Garibaldo's out of court statement receives little weight. Although it supplements the kitchen photographs that do not show extension lighters in the kitchen, the statement is vague and Employer did not have an opportunity to examine Garibaldo regarding the statement. It does not establish when or why extension lighters were not available to him.

Although Boswell is credited as testifying truthfully, her testimony does not outweigh that of Smith and Tellez. If the Division had asked Employer about the extension lighters during

the investigation, Employer might have produced them or directly addressed them. The testimony of Smith and Tellez are given the most weight because their testimony is directly on point. Therefore, it is found that extension lighters were available in the chef's office.

Ultimately, the Division did not establish by a preponderance of the evidence that Employer failed to furnish extension lighting rods for use by the kitchen employees. Accordingly, Citation 4 is vacated.

7. Did an independent employee action cause Employer to not display lighting instructions?

Employer raises the Independent Employee Action Defense (IEAD) to the violation of section 3311. The IEAD relieves an employer of responsibility for a violation. There are five elements to this affirmative defense, all of which must be proved by an employer in order for the defense to succeed: 1) the employee was experienced in the job being performed; 2) the employer has a well-devised safety program that includes training in matters of safety respective to their particular job assignments; 3) the employer effectively enforces the safety program; 4) the employer has a policy of sanctions which it enforces against those employees who violate its safety program; and 5) the employee caused a safety infraction which he knew was contra to the employer's safety requirements. (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

With respect to Instance 2 of Citation 2, Employer contends that Garibaldo caused a safety infraction which he knew was contrary to Employer's safety requirements. However, the violation is that Employer did not prominently display lighting instructions at a location near the equipment. It is undisputed that Garibaldo did not cause Employer to not display the lighting instructions. Accordingly, the IEAD does not relieve Employer of responsibility for this violation.

8. Is Citation 1 a recordkeeping violation?

The Division classified Citation 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.

Boswell testified that both instances of Citation 1 relate to recordkeeping requirements. Instance 1 concerns a record of corrections implemented. Instance 2 concerns documentation of training information. The parties did not introduce evidence that Citation 1 was a Serious or a General violation. Accordingly, Citation 1 is properly classified as a Regulatory violation.

9. Did the absence of prominently displayed lighting instructions create a realistic possibility of serious physical harm?

Labor Code section 6432, subdivision (a), defines a Serious violation as follows:

> 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 any 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).)

The Division classified the failure to display lighting instructions as a Serious violation. Boswell testified that the hazard created by the violation is that employees can suffer burns. She testified this can happen because the fuel to the pilot can build up when the pilot is extinguished. Along with oxygen in the air, the addition of the lighter flame can cause a flash of fire that can burn an employee's extremities. Boswell further testified that the use of an extension lighter enables an employee to maintain greater distance from the pilot.

Smith testified that the stove uses safety pilots that govern the flow of gas to the pilot. He further testified that he had not seen or heard of a flareback during his tenure with Employer.

Aside from the hazard of a flash of fire, Smith identified the stove burner as a hazard that can burn an employee attempting to relight a pilot. He testified that each of the six stove burners has its own pilot underneath the burner:

> The burner also would get hot if it was on. We don't want people trying to put a match with their fingers and getting burned or using some other method. We bought the [extension] lighters so that they were more safe. You could stick it down inside where the gas is.

(Tr., vol. 4, 97:9-14.) With respect to flarebacks, although Smith's testimony on this point is credited as truthful, he did not testify that the safety pilots eliminate the possibility of a flareback. Additionally, flarebacks are not the only hazard created by the violation. As identified by Smith, a hot stove burner can burn an employee reaching underneath the burner to light the pilot.

Accordingly, the Division met its burden of establishing that there was a realistic possibility of serious physical harm as a result of the violation. This creates a rebuttable presumption that Citation 3 was properly classified as a Serious violation.

10. Did Employer know that lighting instructions were not prominently displayed?

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

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm

occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).

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

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (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; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Here, Employer did not display lighting and relighting instructions for the stove pilot lights. Therefore, Employer did not take 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. Accordingly, Employer did not rebut the presumption that Citation 3 was properly classified as a Serious violation.

11. 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).)

The Division submitted into evidence its Proposed Penalty Worksheet (Ex. 2) and Boswell testified about the calculations used to establish the proposed penalties for Citation 1 and Citation 3. Employer did not present evidence or argument that the penalties were not calculated in accordance with the penalty-setting regulations.

Accordingly, the penalty for Citation 1 and the penalty for Citation 3 are both reasonable.

Conclusions

The evidence supports a finding that Employer violated section 3203, subdivision (b), because Employer's inspection records did not include the actions taken to correct identified unsafe conditions and work practices. The proposed penalty was reasonable.

The evidence does not support a finding that Employer violated section 3203, subdivision (a).

The evidence supports a finding that Employer violated section 3311, subdivision (a), because Employer did not prominently display copies of lighting and relighting instructions. The proposed penalty was reasonable.

The evidence does not support a finding that Employer violated section 3311, subdivision (c).

Order

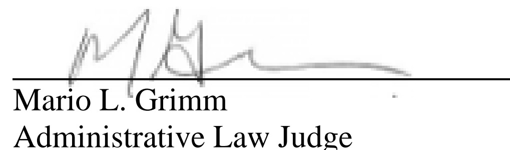
It is hereby ordered that Citation 1 is affirmed and the penalty of $375 is sustained.

It is hereby ordered that Citation 2 and its penalty are vacated.

It is hereby ordered that Citation 3 is affirmed and the penalty of $13,500 is sustained.

It is hereby ordered that Citation 4 and its penalty are vacated.

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



Dated: 03/10/2023

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.**