BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1486257**
THE KROGER COMPANY **dba RALPHS GROCERY COMPANY** **1100 W. ARTESIA BOULEVARD** **COMPTON, CA 90220** **Employer**	**DECISION**

Statement of the Case

The Kroger Company, dba Ralphs Grocery Company (Employer), operates grocery stores. Beginning July 30, 2020, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Hooman Borhani (Borhani), conducted a complaint investigation at Employer's worksite, which is a grocery store located at 4760 West Pico Boulevard, in Los Angeles, California (the store).

On January 26, 2021, the Division issued two citations to Employer for three alleged violations of the California Code of Regulations, title 8.[1] Citation 2, Item 1, classified as Serious, alleges that Employer failed to provide effective safety and health training on the hazard of COVID-19. Employer did not appeal Citation 1, Items 1 and 2.

Employer filed a timely appeal contesting the classification of Citation 2, Item 1, and raised affirmative defenses. In addition, Employer raised numerous affirmative defenses, including, but not limited to, the Independent Employee Action Defense (IEAD). On April 19, 2022, Employer was granted leave to amend its appeal to also raise the grounds that the alleged violation did not occur, and that the proposed penalty was unreasonable, and to raise additional affirmative defenses.

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California, on July 21, 2022, and November 16 and 17, 2022. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. Melissa Viramontes, Esq., represented the Division, and Eric Compere, Esq., and Krystal Weaver, Esq., represented Employer.[2]

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[2] Third Party status was granted on June 30, 2021 to United Food and Commercial Workers, Local 770, through its counsel of record Daniel E. Curry, Esq., but neither the union nor its attorney participated in the hearing.

The matter was submitted on January 31, 2023.

Issue

1. Did Employer fail to provide effective safety and health training on the hazard of COVID-19?

Findings of Fact

1. At the time of the inspection, the store employed approximately 110 employees and managers, scheduled across three full-time shifts and one part time shift.

2. In early 2020, COVID-19 emerged as a global health crisis, and constituted a new hazard to which Employer's employees were exposed by the time of the Division's inspection.[3]

3. In response to the emergence of the COVID-19 hazard, Employer instituted a series of measures designed to address the hazard. These measures included training elements as well as operational changes intended to impede the spread of COVID-19 between employees at the store.

4. Employer trained its employees on the COVID-19 hazard, as well as how to avoid the hazard.

5. Employer trained its employees to wear masks, practice social distancing, undergo temperature checks, disinfect frequently touched surfaces, and utilize plexiglass barriers as methods to control the spread of COVID-19.

6. Employer communicated its COVID-19 policies and procedures orally and in writing to employees, and utilized informal coaching and observation to implement and enforce the training.

7. Employees at the store understood and substantially complied with Employer's COVID-19 training and instruction for recognizing and avoiding the hazard.

[3] As used in this Decision, "COVID-19" refers to SARS-CoV-2, the virus that causes a respiratory disease called coronavirus disease 2019 (COVID-19).

Analysis

1. Did Employer fail to provide effective safety and health training on the hazard of COVID-19?

Section 3203, subdivision (a)(7), provides:

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

Citation 2, Item 1, alleges:

> Prior to and during the course of the inspection, including, but not limited to, on July 30, 2020, the employer failed to provide effective training and instruction regarding the new occupational hazard of COVID-19, including but not limited to, training and instruction on how the virus is spread, measures to avoid infection, signs and symptoms of infection, and how to safety use cleaners and disinfectants.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385 and 2386, Decision After Reconsideration (Oct. 7, 2016).) "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. (*United Parcel Service*, Cal/OSHA App. 1158285, Decision

After Reconsideration (Nov. 15, 2018); *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

Applicability

Section 3203, subdivision (a), provides the minimum requirements for employer Injury and Illness Prevention Programs (IIPP). One requirement is that every employer is required to provide necessary training to its employees to ensure they can safely perform their jobs. There is no dispute that Employer employed approximately 110 employees at the store on the date of the inspection and was required to comply with section 3203, subdivision (a). Furthermore, it is undisputed that by March 2020, a COVID-19 hazard existed in workplaces throughout California, including the store. Therefore, the safety order applies.

Violation

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

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

The Appeals Board has repeatedly found that the purpose of section 3203, subdivision (a)(7), "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through 'training and instruction.'" (*Timberworks Construction*, Inc., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) The Division may prove a violation of the regulation by showing that the employer did not implement adequate training. (*Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014); *National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) The training provided by the employer must be of sufficient quality to make employees "proficient or qualified" on the subject of the training. (*Ibid*.) Although the existence of training records may support a conclusion that training occurred, "lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference

that no such training was provided." (*Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).)

Dr. Paul Papanek, a medical doctor employed by the Division in its medical unit, testified as an expert witness that use of masks, social distancing, and good ventilation could reduce the transmission of COVID-19. In addition, Dr. Papanek stated that initially, it was believed that disinfecting surfaces was an effective measure to prevent the spread of COVID-19.

Associate Safety Engineer Borhani testified that he interviewed four employees: Rosa Ramos (Ramos), Khiry Corely (Corely), and Jose Santana (Santana), and Mary Mueller-Reiche (Mueller-Reiche). According to Borhani, these employees had "some knowledge" regarding the COVID-19 hazard, but he "was not sure" that they received effective training, particularly in light of the fact that during the inspection, Employer informed him that it was not conducting safety meetings.

Borhani testified that the employees he interviewed provided responses to questions that led him to believe that they were not effectively trained on the COVID-19 hazard. Borhani testified that Corely stated that he "only received a paper to sign," Ramos said she "got some training," Santana "said he "got outside information," and Mueller-Reiche denied receiving detailed training, and asserted that she "only received a piece of paper."

However, Borhani's inspection notes (Exhibit 5) contradict his testimony. He testified he took contemporaneous notes during the employee interviews.[4] In his notes, Borhani recorded that Rosas told him that she received COVID-19 training; that she cleans the register every five to ten minutes; that she and her fellow employees wear masks and gloves "all of the time"; that masks are provided to customers as needed; that employees practice social distancing; and, that she was aware of the symptoms of COVID-19.

Similarly Borhani's interview notes with Corley reflect that Corely told him that cash registers are cleaned every five to ten minutes; social distancing is practiced; employees wash their hands every half hour or hour, although this was not enforced by management; Employer provides gloves and masks to employees, although "sometimes" there are not enough gloves; he received COVID-19 training and was aware of the symptoms of COVID-19; and, he was required to inform his management team if he learned that he became infected with COVID-19. Nonetheless, Borhani testified that he "wasn't one-hundred percent sure" that Corely received

[4] Borhani asserted that the discrepancies between his notes and his testimony resulted from English not being his first language. The undersigned notes for the record, however, that during the hearing Borhani exhibited linguistic competence in the English language and testified without the aid of a language interpreter. The undersigned found that Borhani was overall very easy to understand during hearing, relative to other witnesses and participants in this appeal, as well as the approximately 150 appeals that the undersigned has heard as an Administrative Law Judge. Additionally, Borhani conducted his interviews in English, and nothing in the record suggests that interviewees misunderstood Borhani, or that Borhani misunderstood interviewees, due to a language barrier.

effective training, in part because he did not ask Corely whether it was Employer or an outside source that informed Corely of his duty to inform his managers if he became infected with COVID-19.

Corely, a courtesy clerk, testified that he "vaguely recalled" the interview with Borhani. Corely admitted that he received a flyer regarding COVID-19 "very early" during the pandemic, in approximately March 2020, and testified that "someone from management" discussed it with employees. Corely testified that Employer explained the symptoms of COVID-19; encouraged frequent handwashing every 20 to 30 minutes; required employees to wipe down baskets and pin pads with disinfectant, and clean the registers every 30 minutes; required masks be worn; instructed employees to maintain six feet of social distancing; and encouraged employees to ask questions. Corely's testimony is consistent with Borhani's interview notes, and is credited.

Additionally, Borhani's notes of his interview with Santana reflect that Santana told him that employees received COVID-19 training, and that he rated communication from Employer a "nine out of ten." Santana informed Borhani that Employer enforced social distancing, and he acknowledged that Employer also provided masks and gloves. Finally, Santana informed Borhani that he was aware of the symptoms of COVID-19.

Santana, a meat cutter, testified that the training that he received on COVID-19 was "just a flyer," but he admitted that he was aware that he could ask managers questions if he had any. Santana did not recall whether he told Borhani that he received training, but admitted that managers brought back information to share with team members following regular "huddle" meetings. He also admitted that Employer provided cleaning products and masks. Although Santana said he had received previous training on cleaning, he denied that Employer provided training and instruction to wear a mask, saying that "some of us did on our own." However, Santana admitted that "at some point" prior to the inspection Employer began requiring employees to wear masks. Santana also admitted that social distancing and hand washing were encouraged by Employer to slow the spread of COVID-19, and that management "spread stuff apart" in the break room. Santana testified that most of the safety protocols utilized by Employer to prevent the spread of COVID-19 were in place by the time of the inspection, but stated that at the beginning of the pandemic, plexiglass barriers and stickers on the floor to aid in social distancing were not all in place. Although he denied that Employer explained the signs and symptoms of COVID-19 to him, Santana testified that he understood how dangerous COVID-19 was from the news, and said that he received information from the news about the infection as well as prevention methods such as social distancing. Santana's testimony was less credible than Corely's, as it was less consistent with Borhani's interview notes.

Finally, Borhani's notes of his interview with Mueller-Reiche reflect that Mueller-Reiche told him that "we don't get manager support for social distancing." Mueller-Reiche denied that

Employer conducted temperature screenings, and stated that she received "just a piece of paper" that, in her opinion, did not provide her with enough knowledge about how to protect herself from COVID-19.

Mueller-Reiche, a cashier, testified and admitted to receiving handouts from Employer no more than two months after the start of the COVID-19 pandemic. She testified that she received a one page, double-sided flyer, covering handwashing, masking and social distancing, and she believed that it was made available in both English and Spanish. Mueller-Reiche was required to sign an acknowledgement that she had read the flyer. Mueller-Reiche further testified that she followed news from the Centers for Disease Control (CDC) as well as Johns Hopkins, but said Employer did not discuss the CDC's COVID-19 guidelines with her. Mueller-Reiche confirmed that employees were given cleaning supplies and told to clean surfaces such as the check stand, and Reiche admitted to receiving hazardous materials training that would have covered how to safely use the cleaning supplies. Although Mueller-Reiche testified that Employer initially screened employee temperatures, she testified that "for sure" they were not doing temperature checks by July 2020. Mueller-Reiche also admitted that Employer provided announcements about social distancing and masking over the store's public address system, and that Employer enforced social distancing, including in the break room, but did not stagger check stands to maintain social distancing. Finally, Mueller-Reiche testified that Employer installed plexiglass barriers at check stands sometime between April and July 2020. Mueller-Reiche's testimony, overall, is consistent with Borhani's notes, and is therefore viewed as credible.

Finally, Steve Gasparyan (Gasparyan) testified that he was the store director at the store from October 8, 2019 through January 9, 2022, and was responsible for overall operations and safety for the approximately 110 employees who worked across three shifts. Gasparyan credibly testified regarding Employer's policies and procedures implemented during the COVID-19 pandemic. According to Gasparyan, Employer implemented masking, social distancing, temperature checks, disinfection, and plexiglass barriers as methods to control the spread of COVID-19. In addition, Gasparyan credibly testified that he was responsible for communicating Employer's COVID-19 policies and procedures to employees at the store. Employer communicated these policies and procedures to store managers and assistant managers over conference calls held at least twice per day beginning in March of 2020. Information from the conference calls was then communicated by Gasparyan to department managers during daily huddles. During these huddles, Gasparyan would also provide printed materials e-mailed from corporate to distribute to employees, gave visual demonstrations of new procedures, and asked if the department managers had any questions.

Gasparyan credibly testified to the way in which training was provided and enforced at the store. Gasparyan personally passed out printed information that he received from his corporate management to the day shift employees at the store, and he directed store leads to pass

out the information to the other shifts' employees and ask if they had any questions. (See Exhibits S, T, U, V, W, and AB) Additionally, Gasparyan testified that Employer utilized announcements over its in-store public address system, informal coaching, observation and various postings all over the store (see Exhibit Q) in order to communicate and enforce its COVID-19 policies and procedures. Finally, Gasparyan described the online "feed" (see Exhibit AC) that Employer used to communicate important COVID-19 information to employees, and testified that employees had access to the feed via computers at the store and were encouraged to view the feed. Gasparyan's testimony, which is consistent with the documentary evidence produced at hearing, is credited. A review of the various training materials reveals that Employer provided its employees with effective training regarding the COVID-19 hazard and how to avoid it.

As previously mentioned, section 3203, subdivision (a)(7), requires employers to effectively train employees whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard ((a)(7)(C)); as well as whenever the employer is made aware of a new or previously unrecognized hazard ((a)(7)(D)). For training to be effective, it must empower employees to know how to recognize and avoid the hazard.

Here, when viewing the evidence as a whole, it is found that Employer provided effective training to its employees (both new hires and existing employees) on the COVID-19 hazard. This finding is based on the credible testimony of Gasparyan, which is credited, and which is corroborated by the documentary evidence submitted during the hearing. Gasparyan's testimony is also largely corroborated by employee testimony received during the hearing. This evidence supports a finding that Employer took reasonably quick action to institute comprehensive training and instruction on the COVID-19 hazard at the store. Gasparyan testified to the overall effectiveness of the training in communicating the hazard to employees as well as how to avoid it through such measures as masking, social distancing, hand washing and workstation sanitizing. Gasparyan testified to the various elements of Employer's COVID-19 training program as well as how Employer implemented and enforced its training through observation, coaching and auditing.

Borhani took exception with the manner in which Employer trained its employees. He stated that "only a piece of paper" is not sufficient, and was critical of Employer for not training employees together in a room, and for not documenting all of the training provided.[5] Section 3203, subdivision (a)(7), however, is a performance standard and does not prescribe the precise method by which an Employer must provide training to employees on known or newly discovered hazards. (*BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).)

[5] The Division did not cite Employer for failing to document training, which is a separate regulatory requirement found in section 3203, subdivision (b)(2).

The only requirement is that the training be effective to permit employees to recognize and avoid the hazard. Therefore, an employer is given latitude to provide training in various ways and through various channels. Here, Employer utilized numerous methods to train its employees on the COVID-19 hazard and enforced the training through various means as well. Although certain aspects of Employer's training program could have likely been improved, the evidence as a whole supports a conclusion that Employer provided overall effective training, and any deficiencies were immaterial and incidental to the overall effective training provided.

For all of the foregoing reasons, therefore, the Division did not meet its burden of establishing a violation of section 3203, subdivision (a)(7). Citation 2, Item 1, is vacated, and its associated penalty is set aside.

Conclusion

The evidence supports a finding that Employer did not violate section 3203, subdivision (a)(7), by failing to instruct employees on recognizing and avoiding the hazard of COVID-19 at the store.

Order

Citation 2, Item 1, is vacated and the associated penalty is set aside as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 02/02/2023

Howard I. Chernin
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.**