BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1461476**
WALMART ASSOCIATES, INC. **dba WALMART FULFILLMENT CENTER #8103** **601 N. Walton Blvd., MS0710-L28** **Bentonville, AR 72716** **Employer**	**DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Walmart, Inc. (Employer or Walmart) owns and operates a warehouse distribution center in Fontana, California (the Fontana warehouse). Walmart supplements its own workforce at the facility with workers supplied by a third-party staffing agency, EmployBridge Holding Company (EmployBridge). The laborers supplied by EmployBridge assist with the shipping of Walmart's goods from the Fontana warehouse.

One of the workers supplied to Walmart by EmployBridge, Mark Walter, was injured while operating an electric pallet jack at Walmart's Fontana warehouse on August 31, 2019. Mr. Walter sustained a compound fracture of his lower leg, which required surgery and hospitalization for two days. EmployBridge reported the injury to the Division. Walmart did not report the injury to the Division.

On September 16, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Mariaeva Garland (Garland), commenced an inspection of the Fontana warehouse as the result of the accident. On February 28, 2020, the Division cited Employer with three citations. The citations at issue included: Citation 1, Item 1 – an alleged failure to report a serious injury, alleged as a repeat violation; and Citation 2, Item 1 – an alleged failure to provide appropriate foot protection to employees operating electric pallet jacks.[1]

Walmart timely appealed the citations. On December 10, 2020, Administrative Law Judge Leslie E. Murad II (ALJ Murad) conducted a video hearing with all participants appearing

[1] The Division withdrew the third citation (Citation 3, Item 1) at the hearing.

remotely via the Zoom video platform. Attorney Matthew Gurvitz of Venable, LLP represented Walmart. Eric Compere, staff counsel, represented the Division. The matter was submitted on May 29, 2021. On July 16, 2021, ALJ Murad issued a Decision concluding that Walmart was a dual employer of Mr. Walter and, on that basis, upheld Citations 1 and 2.

Walmart timely petitioned for reconsideration of ALJ Murad's Decision. The Board took the petition under submission on September 13, 2021. In its Petition, Walmart argues that it was not a "dual employer" of Mr. Walter and, therefore, Walmart had no obligation to require any particular footwear, nor to report his injury.[2]

The Division filed an Answer on September 16, 2021. In its Answer, the Division argued that Walmart was properly found to be Mr. Walter's "dual employer." The Division also argued that Walmart was a "client employer" within the meaning of Labor Code section 2810.3, such that it was required to comply with the Occupational Safety and Health Act of 1973 (the Act) with regard to workers supplied by a labor contractor, even if Walmart were not Mr. Walter's "dual employer." On May 20, 2022, the Board ordered the parties to submit supplemental briefing regarding the applicability of Labor Code section 2810.3 to this matter. Walmart and the Division timely submitted supplemental briefs on June 17, 2022.

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties, including the supplemental briefing. The Board has taken no new evidence.

ISSUES

1. At the time of the injury, was Walmart the injured worker's employer under a "dual employer" theory?

2. Was Walmart a "client employer" under Labor Code section 2810.3, such that it was required to comply with the Act with regard to workers supplied by a labor contractor?

FINDINGS OF FACT

1. Walmart owns and operates a warehouse and distribution facility in Fontana, California.

2. Walmart employs its own workforce at the facility, and it supplemented that workforce through a contract with EmployBridge, a third-party staffing agency.

3. EmployBridge supplied workers to perform labor and assist with the shipping of Walmart's goods from Walmart's Fontana warehouse.

[2] In its initial appeal, Walmart had raised several other challenges to the Division's citations, including: (1) whether Citation 1 was properly classified as a "Repeat Violation"; (2) whether Walmart established the Independent Employee Action Defense for the violation alleged in Citation 2; (3) whether Citation 2 was properly classified as Serious; (4) whether the abatement requirements for Citation 2 were reasonable; and (5) whether the proposed penalties for Citation 1 and Citation 2 were reasonable. Walmart did not raise these issues in its Petition for Reconsideration, and is therefore deemed to have waived any such challenges. (Lab. Code, § 6618.)

4. Walmart had and exercised control over employees working in the Fontana warehouse under its contract with EmployBridge.

5. Walmart engaged people, including workers supplied by EmployBridge, to perform services moving goods in the warehouse.

6. Walmart's contract with EmployBridge provided Walmart the right to terminate workers' services to Walmart.

7. The injured worker, Mark Walter (Mr. Walter), was a temporary employee, not engaged in his own distinct business. Mr. Walter's primary employer was EmployBridge, and his secondary employer was Walmart.

8. Mr. Walter was performing warehouse work that was the regular business of Walmart, and for the benefit of Walmart.

9. Employees working in the Fontana warehouse moved Walmart's boxes and merchandise by use of electric pallet jacks.

10. Walmart provided Walter with the equipment used to perform the warehouse work.

11. Walter was trained to perform his job duties in accordance with Walmart standards, using Walmart's training programs.

12. While operating an electric pallet jack at the Fontana warehouse, Walter sustained a compound fracture of his lower leg.

13. The injury required medical treatment with surgery and a hospital stay of two days.

14. EmployBridge reported Walter's injury to the Division.

15. Walmart knew of Walter's injury, but deliberately chose not to report the injury to the Division on the grounds that Walter was "not an employee of Walmart."

16. The Division previously cited Walmart for a violation of section 342, subdivision (a), in 2018. That citation was not timely appealed and became final by operation of law on January 9, 2019.

17. Walmart had a policy that foot protection was required to be worn in the warehouse but that policy was not properly enforced.

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

DISC USSION

1. At the time of the injury, was Walmart an employer (or "dual employer") of the injured worker?

The Board has long held that an employee may, in some instances, have two employers. "This is sometimes referred to as 'dual employment', with the 'primary employer' being the employer who loans or leases one or a number of employees to the 'secondary employer' (also referred to as 'general' and 'special' employer)." (*Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014), citing *Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684, 693-694 (*Sully-Miller*); *Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011).) Dual employment occurs when one employer sends an employee to work for another employer, and both have the right to exercise certain powers of control over the employee. (*Sully-Miller*, *supra*, 138 Cal. App.4th at 693 (citing *Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 209).) The employer in question need not exercise such rights to be treated as a dual employer; "it is the right to control and not the exercise of that right that is the test." (*Id*.)[3]

In "dual employer" circumstances, each employer is responsible for complying with California's workplace safety and health standards. (*Strategic Outsourcing Inc*., Cal/OSHA App. 10-0905 through 0914, Denial of Petition for Reconsideration (Sept. 16, 2011).) The Board has held that both primary and secondary employers have an obligation to report a serious injury under section 342, subdivision (a). (See *Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).)

Here, Walmart contracted with EmployBridge to provide Walmart with warehouse workers. Walmart argues that it cannot be a dual employer because it did not control and direct how the workers performed their tasks. (*See* Petition, pp. 5-15.) While Walmart's argument is not meritless—the evidence does not indicate that Walmart directed or controlled each detail as to how workers accomplished their assigned task—it discounts significant evidence demonstrating that Walmart did retain (and exercise) control over the workers, both directly and indirectly.

[3] The Board notes that this case arose prior to two significant changes to the California Labor Code, both of which took effect after the accident and investigation at issue here arose. On January 1, 2020, AB 5 (Lab. Code § 2750.3) went into effect. AB 5 was repealed and superseded by AB 2257 (Lab. Code §§ 2775-2787) as of September 4, 2020. Both AB 5 and AB 2257 codified the "ABC test" for employee status set forth in *Dynamex Operations West v. Superior Court* (2018) 4 Cal.5th 903 (*Dynamex*). Under the ABC test, a person providing labor or services for pay is considered an employee of the contracting business, unless: (A) the person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the person performs work that is outside the usual course of the hiring entity's business; and (C) the person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. (Lab. Code § 2775, subd. (b)(1).) If the ABC test were applicable here, Mr. Walter would likely be found to be Walmart's employee, because he did not perform work "outside the usual course" of Walmart's business, and was not "customarily engaged in an independently established trade, occupation, or business." However, because Labor Code section 2775, subdivision (b)(1), does not apply here, the Board engages in its typical "dual employer" analysis.

First, as a detailed review of the "Master Temporary Services Agreement" (MTSA) (Exhibit 6) shows, Walmart retained certain rights regarding the workers supplied by EmployBridge.

Under Paragraph 4 of the MTSA, Walmart required EmployBridge to comply with employment laws, and train its employees and managers regarding discrimination and harassment. (Exh. 6, pp. 1-2.) Under Paragraphs 4 and 5 of the MTSA, Walmart retained the right to audit EmployBridge in several respects, including: EmployBridge's compliance with wage and hour laws; EmployBridge's satisfaction of mandatory discrimination and EEO training rules; EmployBridge's training on "OSHA and Department of Transportation compliance standards and safety plans," "the maintenance of workplace safety," and the "securement of valid worker's compensation insurance." (*Id*., pp. 1-3.)

In Paragraph 7 of the MTSA, under the heading "Remedy for Unsatisfactory Service," Walmart retained "the right to refuse, in its sole discretion, any individual whom Agency [i.e. EmployBridge] proposes to perform work under this Agreement for any lawful reason." (Exh. 6, pp. 3-4.) Walmart also retains the right to "refuse" or "remove" any employees who "are not performing satisfactorily, who are acting contrary to Wal-Mart's best interest or for any other lawful reason. Wal-Mart is the sole determiner of its own best interests." (*Id*.) In the dual employment context, "[a]n indicia of control is the right of the employer to terminate the relation without liability." (*In-Home Supportive Servs. v. Workers' Comp. Appeals Bd.* (1984) 152 Cal. App. 3d 720, 731. *See also Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal. App. 5th 1208, 1222 [the ability "to discharge for disobedience or misconduct is strong evidence of control."].)

Walmart argues that Paragraph 7 "does not give Walmart the right to terminate EmployBridge employees." (Petition, p. 10.) In practical effect, there is little difference between (1) the right to terminate a Walmart employee (with or without cause), and (2) the right to permanently remove someone working for Walmart at a Walmart facility. The worker is in the same position in either situation: they can no longer perform the work, which Walmart trained them to perform, for remuneration. (*See Medina v. Equilon Enters.* (2021) 68 Cal. App. 5th 868, 880 [the "contractual ability to remove employees from a particular station" supported finding of employer status for secondary employer].)

Under Paragraph 12 of the MTSA ("Wal-Mart's Obligations"), Walmart agreed to provide its temporary workers with "(i) a suitable workplace within its facilities which complies with all applicable fair employment and safety and health standards, statutes, and ordinances, (ii) all necessary information and training materials and (iii) adequate instructions and assistance to perform the services requested of them." (Exh. 6, p. 6.) The MTSA further requires EmployBridge to ensure that employees receive other "Wal-Mart specific training . . . prior to reporting for work at a Wal-Mart facility." (*Id*., p. 13.)

Under the MTSA, Walmart also retains detailed rights to monitor and test workers supplied by EmployBridge. Specifically, the MTSA incorporates Walmart's "Alcohol and Drug Testing Procedures Guide," and sets forth "the procedures for drug and/or alcohol screening and testing of Temporary Service Workers or Non-Wal*Mart [sic] associates assigned to work in Wal-Mart facilities." (Exh. 6, p.14.) This policy explicitly applies to third-party employees, who "must abide

by certain workplace rules and policies, including the Wal-Mart Corporate prohibition against drugs and alcohol in the workplace." (*Id*.) As the document further explains:

- Any "Third Party Employee" must "submit to urinalysis and/or saliva, blood and/or breath tests or hair analysis" to detect various substances prior to "beginning an assignment at a Wal-Mart facility" (*Id*.);
- "Third Party Employees who fail the drug test will have their assignment with Wal-Mart rescinded and said employee may not be allowed to return to the premises" (*Id*., p. 16);
- When "circumstances warrant," Walmart may demand that "Third Party Employees" submit to drug testing (*Id*.);
- "Any Third Party Employee being considered for a position with Wal-Mart must immediately - upon request by Wal-Mart - submit to a drug test." If they refuse, "the offer of employment will be rescinded" and if the drug test is positive, "the offer of employment will be terminated" (*Id*.);
- If a "Third Party Employee" is involved in an accident, they "must be required by Agency to provide a urine specimen to be tested for the use of prohibited substances immediately" (*Id*.)

In addition to being subject to the Walmart policies and rules above, Mr. Walter also received Walmart-specific training. Walmart argues that it "did not provide training to EmployBridge Employees" because "Mr. Walter received his training from Frank Bassoco, an EmployBridge supervisor." (Petition, p. 11.) Walmart's argument is unpersuasive. While it is true that Bassoco testified that he provided *some* of Mr. Walter's training, that training was mandated by Walmart, utilized Walmart's training system, and was provided using Walmart's proprietary training and testing documents. (Exh. 6, p. 12; Exh. 7.)[4] Moreover, Walmart produced nine separate forms, all on "Walmart" or "Walmart Logistics" stationary, documenting the training provided to Mr. Walter. These forms are worth reviewing in some detail.

The first form, "Power Equipment Certification/Re-Certification," lists the training mandated by Walmart for power equipment certification. It is signed by Mr. Walter, his EmployBridge supervisor, Bassoco, and Walmart's Asset Protection associate, Manuel Ordonez. (Exh. 7.)

The second and third Walmart forms concern Mr. Walter's training on the proper operation of "Crown PE 4000 Rider Pallet Trucks," i.e., the Walmart-supplied pallet truck that Mr. Walter was driving when the injury occurred. (Exh. 7.) At the end of the third form, Mr. Walter signed an

[4] Several of Mr. Walter's training tests appear to have been administered directly by Walmart's Environmental Health and Safety Operations Manager, Christopher Barton. (Exh. 7, p. 10-13.) At the hearing, Barton denied that he administered Walter's training tests. However, the documents appear to indicate "C. Barton" in the space for "Test Administrator." (*Id*.) However, because it is unnecessary for the Board's decision, it does not enter a factual finding on this issue.

"Acknowledgement of Training" indicating he had "successfully completed the required training per the Walmart Logistics Power Equipment Licensing program." (*Id*.)

The fourth Walmart form is a safety compliance and training checklist for "Temporary Contracted Employees." (Exh. 7.) Notably, this form identifies five specific courses — DOT General/Security Awareness for HazMat; HazMat Spill Clean-up Procedures; HazMat Loading/HazMat Unloading; Packaging LQ Hazardous Material; and Packaging & Shipping Lithium Batteries — that "may be facilitated by the Temporary Staffing Agency" and "must be provided" before the temporary contracted employee works at the Walmart facility. (*Id*.) Except for those five training modules, Exhibit 7 specifies that "the Walmart Logistics Facility will be responsible for facilitating the training." (*Id*.)

The fifth Walmart form is entitled "Heat Related Illness Manager/Associate Training," and is "required for associates in California." (Exh. 7.) Mr. Walter signed the form and indicated that the training was provided to him by Walmart. (*Id*.)

The sixth Walmart form is entitled "Area Orientation Checklist – New Hires Only." (Exh. 7.) The form reflects Mr. Walter's training on 17 additional Walmart safety policies, and indicates that it is to be placed "in the associate's OSHA Training File."

The seventh Walmart form is a test regarding lithium battery shipments. (Exh. 7.) At the end of this training, the document contains a certification stating: "Walmart, Inc. certifies that the Associate has received DOT training and testing as it pertains to their job duties pursuant to 49 CFR 172.704." (*Id*.)

Finally, the eighth and ninth Walmart forms are tests for "General Awareness Training" and "Security Awareness Training," respectively. (Exh. 7, pp. 11-13.) (Once again, these forms appear to be signed by a "Test Administrator" identified as "C. Barton.")

Taken together, the Walmart policy and training documents above indicate extensive control over many facets of Mr. Walter's employment. In addition, the ALJ noted that the record evidence established that:

- Walmart owns and controls the Fontana warehouse;
- Walmart provided all necessary equipment to employees in its warehouse, including the pallet jack Walter was operating at the time of his injury;
- Warehouse work is part of Walmart's regular business, and Walter performed work in the course of regular warehouse operations; and
- Walter was not engaged in his own distinct business.

Walmart does not challenge any of the above facts, which further support a finding of dual employment. (*See Treasure Island Media, Inc.*, Cal/OSHA App. 10-1093 through 1095, Decision After Reconsideration (Aug. 13, 2015) [citing *S.G. Borello & Sons, Inc. v Department of Industrial*

Relations (1989) 48 Cal.3d 341 (*Borello*)].)[5] On balance, it appears that the ALJ appropriately found sufficient evidence to conclude that Walmart was a dual employer of Mr. Walter.

Walmart stresses that it had no right to supervise or control the work of EmployBridge's employees. (Petition, pp. 6-12.) Walmart emphasizes the open-ended nature of the Statement of Work (SOW) for the MTSA, which states: "The staffing services workers assigned to Wal-Mart shall perform tasks and responsibilities generally described as follows: General Labor, Equipment Operator & Working Lead." (Exh. J, ¶ 4.) What this meant in practice is not particularly clear from the record. However, there is no record evidence that Walmart directly controlled the details of how work assigned to EmployBridge's employees was performed. As Walmart explains in its Petition, Walmart would "inform EmployBridge of the general task required (i.e., *x* units need to be processed by end of day)" and EmployBridge "would independently determine the number of workers and hours needed and the means of accomplishing the general task." (Petition, p. 12.) While this account is not particularly informative, Walmart did produce uncontradicted testimonial evidence to support claims that it did not set the workers' individual schedules, control the number of EmployBridge employees working on a given day, directly control EmployBridge employees' rates of pay, or directly issue their paychecks. The Division made little effort to cross-examine Walmart's sole witness, and otherwise failed to generate evidence to rebut these assertions.

However, the record evidence nonetheless indicates that Walmart was Mr. Walter's secondary employer. EmployBridge hired Mr. Walter specifically to perform work for Walmart. He was trained on and expected to comply with Walmart policies, and could be removed (and, in effect, terminated) by Walmart in its sole discretion, for any reason. Mr. Walter performed work in the course of Walmart's usual business, using equipment provided by Walmart, in a warehouse owned, maintained, and operated by Walmart. While Walmart did not *directly* pay Mr. Walter, he was paid under an agreement that effectively *limit* the EmployBridge workers' rates of pay; under the MTSA, Walmart paid a fixed rate per hour worked by the EmployBridge workers. (*See* Exh. J [SOW], at ¶ 4.) Further, as set forth above, Walmart controlled many relevant aspects of his employment, including the applicable safety policies and physical conditions of the worksite.

In this context, Board precedent and public policy counsel in favor of holding Walmart responsible as an employer. The terms of the Cal/OSHA Act "are to be given a liberal interpretation for the purpose of achieving a safe working environment." (*Dept. of Industrial Relations v. Occupational Safety and Health Appeals Board* (2018) 26 Cal.App.5th 93, citing

[5] In *Borello*, the court set forth a multi-factor test for determining whether a relationship was one of employer-employee or independent contractor status. (*Borello*, *supra*, 48 Cal.3d. at 350-51.) In addition to control over the manner and means of work, the *Borello* court identified several other factors, including (i) The right to discharge at will; (ii) whether the worker is engaged in a distinct occupation or business; (iii) the skill required in the particular occupation; (iv) whether the principal supplies the instrumentalities, tools, and the place of work; (v) the length of the job assignment; (vi) the method of payment (i.e., hourly rate or completion of the job); (vii) whether the work is part of the regular business of the principal; and (viii) the parties' beliefs regarding the relationship. (*Id*.) Like the holding in *Dynamex*, the test in *Borello* is limited to employee versus independent contractor status. However, while *Borello* does not directly apply, the Board has found the *Borello* factors informative when determining "dual employment" status. (*See Strategic Outsourcing Inc*., *supra*, Cal/OSHA App. 10-0905 through 0914, Denial of Petition for Reconsideration (Sept. 16, 2011) [citing *Borello* and noting that "Our determination [regarding dual employment] here is further informed by the analysis the California Supreme Court used"].)

Carmona v. Division of Industrial Safety (1975) 13 Cal.3d 303.) Walmart should not be permitted to control so many aspects of the workplace (including the location, environment, equipment, training, and assigned tasks) without maintaining responsibility for worker safety. Accordingly, the Board affirms the ALJ's conclusion that Walmart was a "dual-employer" under the Act.

2. Was Walmart a "client employer" under Labor Code section 2810.3, such that it was required to comply with the Act with regard to workers supplied by a labor contractor?

As noted, the Board finds that the ALJ properly concluded that Walmart was Mr. Walter's "dual employer." However, even if Walmart were not Mr. Walter's dual employer, the administrative record in this matter supports the conclusion that Walmart was a "client employer" under Labor Code section 2810.3, such that it was required to comply with the Act.

Legislative History of Section 2810.3

In 2014, the California Legislature noted "an increase in the number of employers who are moving away from a traditional employment model towards a business model that utilizes 'subcontracted' or 'contingent' workers." (*Johnson v. Serenity Transp., Inc.* (2018) 2018 U.S. Dist. LEXIS 129241, *56 (quoting California Bill Analysis, A.B. 1897 Assem., 5/7/2014).) "In a traditional employment relationship, an employer directly hires its own workers, pays their wages and provides their benefits, and controls their day-to-day work." (*Id*. (citing California Bill Analysis, A.B. 1897 Sen., 8/14/2014).) However, the Legislature noted, "a variety of other employment models have developed over the years," including "contingent work, nonstandard work, contractual work, seasonal work, freelance work, 'just-in-time' or 'temp employment,' or 'permatemps.'" (*Ibid*.) Such arrangements not only contribute to wage and hour violations, but also to workplace injuries. Indeed, "temporary" workers in California "face a 50 percent greater risk of getting injured on the job than permanent employees," and that disparity is "even greater for serious accidents." (*Ibid*. (citing California Bill Analysis, A.B. 1897 Sen., 6/11/2014).)

To address these issues, the legislature added section 2810.3 to the Labor Code. Section 2810.3 creates shared responsibility, between a "client employer" and a "labor contractor" for certain duties and liabilities that arise in such "non-traditional" employment arrangements. Relevant to this matter, section 2810.3, subdivision (c), provides a "client employer shall not shift to the labor contractor any legal duties or liabilities under Division 5 (commencing with Section 6300) with respect to workers supplied by the labor contractor."[6] Section 2810.3, subdivision (f), provides that this provision "is in addition to, and shall be supplemental of, any other theories of liability or requirement established by statute or common law."

The applicability of Section 2810.3 was not addressed in the ALJ's decision, and only briefly discussed by the Division in its response to Walmart's Petition. On May 20, 2022, the Board

[6] Section 2810.3 is not limited to worker safety concerns. For example, under section 2810.3, subdivision (b), a labor contractor and client employer share civil liability for the payment of wages for all workers supplied by the labor contractor.

ordered the parties to submit additional briefing regarding the applicability of Section 2810.3 to this matter.

Walmart's Allegations of Prejudice

Walmart argues that "the belated addition of an entirely new basis for liability is unfairly prejudicial to Walmart, and it violates Walmart's due process rights." (Employer's Supplemental Brief, p. 3.) Walmart's argument fails.

We are aware of no requirement for the Division to specify in the citation that it is pursuing a legal theory of liability under section 2810.3. Further, while this is not strictly a pleading issue, we are also mindful, as the Board has previously noted, that "administrative proceedings are not bound by strict rules of pleading." (*Barrett Business Services, Inc*., Cal/OSHA App. 315526582, Decision After Reconsideration (Dec. 14, 2016).) "As long as an employer is informed of the substance of a violation and the citation is sufficiently clear to give fair notice and to enable it to prepare a defense, the employer cannot complain of technical flaws." (*Id*.)

Further, even assuming there were a requirement for the Division's citation or pleading to specify a legal theory under section 2810.3, the Board liberally permits amendments, and would do so here. Absent a showing of prejudice, the Board has permitted the Division to amend citations to address new legal arguments to "conform to proof" submitted at the hearing. (*See L&S Framing*, Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 2, 2021) [citing cases].) Here, no prejudice exists. "While loss of evidence and loss of material witnesses may establish prejudice, generalized assertions of prejudice do not." (*Id*.) Thus, absent a genuine showing of prejudice—e.g., that Walmart was precluded from introducing relevant witnesses or other evidence—Employer cannot avoid liability under Section 2810.3 by merely complaining that this legal argument was not pleaded or raised too late in the process.

Walmart has failed to demonstrate any prejudice or denial of due process here. First, Walmart does not argue that it was prevented from submitting, or responding to, any particular evidence or witness testimony; it merely states that the issue was not raised early enough. Second, Walmart does not (and cannot) argue that it was denied an opportunity to address the legal theory of liability under Section 2810.30. As noted, the Board ordered the parties to submit further briefing on that specific issue, and has considered Walmart's submission in reaching this decision.

In short, Walmart has not shown any prejudice regarding what facts or evidence it could present, nor any legal argument as to its liability as an employer under Labor Code section 2810.3. Accordingly, the Board now addresses that issue on the merits.

Was Walmart a "Client Employer" Under Labor Code Section 2810.3?

Section 2810.3, subdivision (a)(1)(A), defines "client employer" as "a business entity, regardless of its form, that obtains or is provided workers to perform labor within its usual course of business from a labor contractor." This definition appears plainly to apply to Walmart here. There is no doubt that Walmart is "a business entity," and no dispute that Walmart obtained (or was provided) "workers" from EmployBridge to perform labor. (*See* Petition, at pp. 2-3.)

Walmart argues that the evidence cannot support a finding that it is a "client employer." Under Labor Code section 2810.3, subdivision (a)(1)(B), a "client employer" does not include entities with "five or fewer workers supplied by a labor contractor at any given time." (Employer's Supplemental Brief, p. 4.) While Walmart does not explicitly deny it, Walmart asserts that "there is no evidence in the record that EmployBridge . . . supplied or made available more than five workers at any given time." (*Id*.) In support, Walmart cites to two witnesses' testimonies on this issue, where both denied knowing (or inquiring into) the specific number of EmployBridge employees supplied on any given day. (*Id*.)

However, the record includes evidence showing that EmployBridge typically supplied 50-55 workers over two sets of shifts (35 employees for the Friday-Sunday shifts, and approximately 16-20 employees for the Monday through Thursday shifts). (Exh. E, p. 2.) Walmart has produced no evidence to the contrary. Moreover, Walmart repeatedly asserts that EmployBridge has its own on-site supervisors and managers for the workers it supplies. From such assertions, it is reasonable to infer that EmployBridge supplies more than five workers.

Thus, the Board finds that Walmart was a "client employer" as long as the source of those supplemental workers (EmployBridge) was a "labor contractor."

Was EmployBridge a "Labor Contractor" Under Labor Code Section 2810.3?

Section 2810.3, subdivision (a)(3), defines "labor contractor" as "an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business." Labor Code section 2810.3, subdivision (a)(6), defines "usual course of business" as "the regular and customary work of a business, performed within or upon the premises or worksite of the client employer." Walmart argues that there is insufficient evidence to show that workers supplied by EmployBridge were operating in Walmart's "usual course of business." (Employer Supplemental Brief, p. 5.)

According to Walmart, it takes a "considerable work force" to operate its Fontana warehouse, with multiple buildings and over 500,000 square feet of space. (Walmart's Closing Brief, p. 2.) For that reason, Walmart supplements its existing workforce outside labor contractors like EmployBridge. (*Id*.) Under a written contract, EmployBridge supplied Walmart with workers (including Mr. Walter) to perform shipping and warehousing services for Walmart's goods at Walmart's Fontana warehouse and distribution facility. (*See* Petition, at pp. 2-3.) On its face, such an arrangement falls squarely within the scope of section 2810.3, subdivision (a)(6). Walmart does not point to any contrary evidence, or even attempt to explain how such work falls outside of its "usual course of business."

Accordingly, the Board finds that EmployBridge is a "labor contractor" within the meaning of Labor Code section 2810.3, subdivision (a)(3).

Was Walmart Responsible, Under Labor Code Section 2810.3, For The Occupational Safety and Health of Employees Supplied by EmployBridge?

As noted, Section 2810.3, subdivision (c), provides that "a client employer shall not shift to the labor contractor any legal duties or liabilities under Division 5 (commencing with Section 6300) with respect to workers supplied by the labor contractor."[7] Here, Walmart's Environmental Health and Safety Operations Manager admitted that Walmart knew of Mr. Walton's injury, but chose not to report the injury to the Division specifically because Mr. Walter was "not an employee of Walmart." Indeed, the entire basis of Walmart's Petition is the claim that EmployBridge, and not Walmart, was the employer. Thus, it appears that Walmart sought to do what Section 2810.3, subdivision (c), expressly forbids, namely, to "shift to [EmployBridge] any legal duties or liabilities under [the Act] with respect to workers supplied by [EmployBridge]."

Walmart argues that it does not seek to "shift to [EmployBridge] any legal duties or liabilities" because Walmart "did not have any legal duties to employees of EmployBridge under the Act." (Employer's Supplemental Brief, p. 6.) In support, Walmart contrasts this provision with Labor Code section 2810.3, subdivision (b), which states that a "client employer shall share with a labor contractor all civil legal responsibility and civil liability" for wage payments and workers compensation insurance. (*Id*.) Since Labor Code section 2810.3, subdivision (c), contains no similar language, Walmart argues, that means the Legislature did not authorize the Division to cite a "client employer" for safety violations unless they are also liable under the dual employer or multi-employer doctrines. (*Id*., p. 7.)

The Board disagrees.

First, under section 2810.3, subdivision (f), "the provisions of subdivisions (b) and (c) are in addition to, and shall be supplemental of, any other theories of liability or requirement established by statute or common law." (Lab. Code § 2810.3, subd. (f).) If Walmart's interpretation were correct, Labor Code section 2810.3, subdivision (c), could not be "in addition to" or "supplemental" of dual employer or multi-employer doctrines (or any other statutory or common law theory of liability). This construction would render Labor Code section 2810.3, subdivision (f), meaningless. (*People v. Arias* (2008) 45 Cal. 4th 169, 180 [noting "fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary"].) In the absence of specific language to the contrary, the Board declines to interpret Labor Code section 2810.3, subdivisions (c) and (f), in this limited fashion.

Second, Walmart argues that Labor Code section 2810.3, subdivision (b), "demonstrates that the legislature unmistakably understood how to impose complete joint responsibility upon a labor contractor and a client employer." (Employer's Supplemental Brief, p. 7.) As noted, the construction urged by Walmart would render Labor Code section 2810.3, subdivision (f), meaningless. Moreover, from (1) the fact that the Legislature stated the "client employer *shall share* [liability] with a labor contractor," it does not follow that (2) the legislature chose *not* to impose liability on a client employer for safety violations pertaining to workers supplied by a labor contractor. In fact, the Legislature was quite clear where Labor Code section 2810.3 did *not* impose

[7] The provisions of The California Occupational Safety and Health Act of 1973 are encompassed in Division 5 of the Labor Code, commencing with Section 6300.

liability. (*See* Lab. Code § 2810.3, subds. (n)-(p) [identifying eight separate instances where section 2810.3 "does not impose liability"].)

Third, the legislative history does not support Walmart's reading of Section 2810.3. When enacting Section 2810.3, the Legislature noted that California workers "provided by labor suppliers face greater risks of workplace illness, injury, and death." (California Bill Analysis, A.B. 1897 Sen., 6/11/2014).) Such workers "face a 50 percent greater risk of getting injured on the job than permanent employees," and that disparity is "even greater for serious accidents." (*Id*.) Quoting a report, the legislature noted that employers are "blithely ignoring codes mean to ensure their [employees'] health and safety . . . by *shifting* responsibility for worker protections to subcontractors." (*Id*. [quoting Martelle, Scott. "Confronting the Gloves-Off Economy: America's Broken Labor Standards and How To Fix Them." (July 2009) (emphasis added)].) In short, the legislative history indicates that the Legislature sought to expand worker safety protections by precluding client employers from avoiding liability for workplace safety violations to client employers, irrespective of "any other theories of liability." (Lab. Code § 2810.3, subd. (f).)

It is well-settled that the provisions of the Labor Code are to be liberally construed to favor the protection of employees. (*See Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 262.) Indeed, when faced with two possible interpretations of a statute, the California Supreme Court has directed the Board to favor the more liberal interpretation that is more protective of worker safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313; *Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 106-107.) With that background in mind, the Board concludes that under Labor Code section 2810.3, subdivision (c), Walmart was a client employer, and could not avoid liability for workplace safety violations by shifting such responsibility to EmployBridge, its labor supplier.

DECISION

For the reasons stated above, the Decision of the ALJ is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chair
/s/ Judith S. Freyman, Board Member
/s/ Marvin P. Kropke, Board Member

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