

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

In the Matter of the Appeal of:

**EMERICARE INC.  
dba BROOKDALE NORTHRIDGE  
17650 Devonshire Street  
Northridge, CA 91325**

**Employer**

Inspection No.

**1300039**

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the Petition for Reconsideration filed by Emericare Inc. doing business as Brookdale Northridge (Employer) under submission issues the following Decision After Reconsideration.

**JURISDICTION**

The California Division of Occupational Safety and Health (Division) issued two citations to Employer alleging three violations of occupational safety and health standards codified in California Code of Regulations, title 8.<sup>1</sup> Employer timely appealed. Administrative proceedings followed. On January 8, 2020, an administrative law judge (ALJ) of the Board issued a Decision (Decision) that upheld the alleged violations and imposed penalties.

Employer timely filed a Petition for Reconsideration.

The Division did not file an answer to the petition.

**ISSUES**

1. Did the Division prove that Employer had failed to label electrical circuit breakers as alleged in Citation 1, Item 1?
2. Did the Division prove that Employer failed to close unused openings in electrical panels as alleged in Citation 1, Item 2?
3. Did the Division prove that Employer had violated the requirements of section 4559, subdivision (a) as alleged in Citation 2, Item 1?

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<sup>1</sup> References are to California Code of Regulations, title 8 unless specified otherwise.

## **FINDINGS OF FACT**

1. A Division inspector conducted a programmed inspection of Employer's facility beginning on March 7, 2018.
2. Two electrical panels at Employer's facility, one in the electrical room designated "LSLA" and one in the kitchen designated 1KD, contained circuit breakers which were not labeled.
3. At least some of Employer's employees did not know which circuits or devices were controlled by the unlabeled circuit breakers.
4. Unlabeled circuit breakers expose employees to the hazard de-energizing the wrong circuit or device and the hazard of causing a delay in de-energizing a circuit when necessary.
5. One of the electrical panels was designated by Employer as "1PA" and the other not labeled, so the inspector called it "RG" for ease of reference. Both were energized at the time of the inspection.
6. Electrical panels 1PA and RG had unused slots or openings for circuit breakers which were not protected or covered.
7. The unused slots or openings exposed Employer's employees to the risk of contact with energized electrical conductors.
8. One of Employer's employees used an indirect method of feeding debris into a sink mounted disposal unit. The employee's hands were not exposed to contact with the disposal unit's moving parts.
9. The disposal unit had a rating of 1 or more horsepower.

## **DISCUSSION**

1. Did the Division prove that Employer had failed to label electrical circuit breakers as alleged in Citation 1, Item 1?

Employer was cited for a General violation of section 2340.22, subdivision (a), which states: "Motors and Appliances. Each disconnecting means required by this Safety Order for motors and appliances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident." Section 2340.22 is part of the "Low-Voltage Electrical Safety Orders" in the California Code of Regulations, title 8, starting with section 2299. Section 2300, subdivision (b), sets forth definitions of various terms used in the low voltage safety orders. The following definitions applicable here are informative. "Circuit breaker" in pertinent part is defined as "A device designed to open and close a circuit by non-automatic means and to open the circuit automatically on a predetermined overcurrent without damage to itself when properly applied within its rating." "Disconnecting means" is defined as "A device, or group of devices, or other means by which the conductors of a circuit can be disconnected from their

source of supply[,]” i.e. of electric energy. “Energized” means “Electrically connected to a source of potential difference[,]” that is, electric energy.

Section 2340.22, subdivision (a), by its plain terms requires that the “disconnecting means [i.e. circuit breakers] . . . shall be legibly marked[.]” The photographs admitted into evidence of circuit breaker panels LSLA and 1KD show that various breakers were not labeled to indicate their purpose. (Exhibits 2A, 2B, 2C, and 2H.) Further, the Division inspector testified that when he asked employees about those circuit breakers, the employees did not know what equipment connected to them. Therefore, should the Division establish exposure, evidence in the record supports a violation of cited regulation.

As the ALJ recognized, another element of the alleged violation is proof that one or more employees were exposed to the hazard. (Decision, pp. 3, 4.) We agree with the ALJ that the evidence in the record established employee exposure. Another element is proof that the panels in question were energized at the time.

Employer argues in its Petition for Reconsideration that the only evidence about the energized status of the panels was hearsay. We disagree, as explained next.

The evidence regarding whether the panels were energized was of two kinds.

First, Employer’s director of maintenance told the inspector during the inspection that the electrical panels were energized and in use at the time. This was an intrinsically reliable and credible statement, since a power outage would have been notably unusual and an obvious point to raise as an excuse or explanation. Moreover, Evidence Code section 1222 provides that a hearsay statement is admissible in evidence as an authorized admission if made by a person with authority to make such statements. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012) (writ denied, 4<sup>th</sup> DCA, Dec. 2014).) Employer’s director of maintenance is someone who is and is supposed to be knowledgeable about the operational status of electrical equipment and to have the authority to speak about them. Mr. Rodriguez, the director of maintenance, was authorized by Employer’s executive director to accompany the inspector during the inspection. The inspector testified that the executive director said of Mr. Rodriguez, “He knows pretty much the whole facility.”

Second, the inspector testified that he used an electrical testing device to determine if the panels were energized, and found they were. Employer objected because the inspector had not personally calibrated the testing device, arguing that therefore evidence of its proper calibration and functioning was hearsay. The inspector testified that another Division employee had calibrated the device. We find this acceptable under Evidence Code section 664, which presumes that an “official duty has been regularly performed.” Further, the inspector testified that he changed the batteries in the testing device. We find, therefore, that the evidence of the energized status of the panels was admissible and reliable.

In addition, Employer’s Petition for Reconsideration admits that at least one employee was exposed to the electrical hazard. (Petition, p. 14.)

Therefore, the Board finds the Division established employee exposure to the electrical panels. The Board upholds Citation 1, Item 1.

2. Did the Division prove that Employer failed to close unused openings in an electrical panel as alleged in Citation 1, Item 2?

Employer was cited for a General violation of section 2473.1, subdivision (b). To put this allegation in context we start with subdivision (a): “Conductors entering cutout boxes, cabinets, or fittings shall be protected from abrasion, and opening through which conductors enter shall be effectively closed. (b) Unused openings in cabinets, boxes and fittings shall be effectively closed.”<sup>2</sup> The evidence established that there were unoccupied openings for circuit breakers in electrical panels 1PA and RG at Employer’s facility, proving a violation of the safety order. As with Citation 1, Item 1, to establish a violation the Division must also show that there was employee exposure and that the panels were energized. We agree with the ALJ that the record established both elements. (Decision, p. 4 [energized], p. 5 [exposure].) Our analysis of Employer’s hearsay objection, addressed in the discussion of Citation 1, Item 1, is incorporated here.

3. Did the Division prove that Employer had violated the requirements of section 4559, subdivision (a) as alleged in Citation 2, Item 1?

Employer was cited with a violation of section 4559, subdivision (a), which states:

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

During the inspection, one of Employer’s employees demonstrated how he used the disposal. In a sink which was full of debris and water, he placed a stainless steel pan over the mouth of the disposal and turned it on, and, after the water and debris level in the sink had decreased, removed the pan. The employee also used water from the faucet to move debris into the disposal.

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<sup>2</sup> Section 2300, subdivision (b) defines “cabinet” as “An enclosure designed either for surface or flush mounting and provided with a frame, mat, or trim in which a swinging door or doors are or can be hung.”

Section 4559, subdivision (a) presents employers with four alternatives they may use to prevent an employee's hands from contacting the moving parts of a disposal. Because the alternatives are presented in the disjunctive, only one need be used to be in compliance. (*E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) At the request of the inspector, the employee demonstrated a means of indirect feeding as permitted by section 4559, subdivision (a)(3). The Decision held that the demonstrated method was not compliant with section 4559 because Employer did not establish that by using it an employee's hands "cannot" contact the moving parts, although it is not disputed they did not in the demonstration.

"Cannot" is a contraction of can not, meaning the opposite or negative of "can." "Can" as a verb means to "be physically or mentally able to," or "to indicate possibility." (Merriam-Webster Online Dictionary, July 17, 2020.)<sup>3</sup> The ALJ held that the evidence did not show that the employee, using the demonstrated water wash technique, would not be physically able to extend his hand into the disposal far enough to contact the moving parts. Given the language of section 4559, we agree on this point.

The ALJ also held that it was Employer's burden to prove that it was in compliance with one or more of the other alternatives, particularly section 4559, subdivision (a)(2), that the distance from the floor and over the edge of the sink down into the disposal to the point of hazard was at least 88 inches. To the contrary, it is the Division's burden to show Employer was not in compliance with that alternative, nor can the Division leave it to the ALJ to infer that the distance was less than 88 inches. (*Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999) [Division's burden]; see Decision, p. 7.)

We cannot assume facts not in evidence. (*Environmental Construction Group*, Cal/OSHA App. 1129260, Decision After Reconsideration (May 16, 2019), (writ denied Los Angeles superior court July 2020).) Although when, at the inspector's request, the employee demonstrated how he used the grinder, that one demonstration does not prove that the grinder was not at least 88 inches from the floor as allowed by section 4559, subdivision (a)(2). Since the Division did not prove that Employer had failed to use any of the alternative means of compliance permitted in the safety order, it did not prove the violation. (*Ibid.*, *Delta Excavating, supra.*) We grant Employer's appeal of Citation 2, Item 1, and accordingly need not discuss whether the violation was correctly classified.

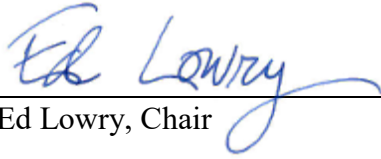
## DECISION

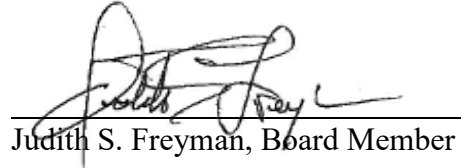
For the reasons stated above, the Decision is affirmed as to Citation 1, Items 1 and 2, and reversed as to Citation 2. The penalties in the Decision are adjusted to eliminate those assessed for Citation 2.

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<sup>3</sup> When a term is not defined in a statute or regulation, courts may use dictionaries to determine its ordinary meaning. (*In re Marriage of Bonds* (2000) 24 Cal. 4<sup>th</sup> 1, 16.)

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

  
Ed Lowry, Chair

  
Judith S. Freyman, Board Member

  
Marvin P. Kropke, Board Member



FILED ON: **08/07/2020**

# SUMMARY TABLE

## OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: <b>EMERICARE INC dba BROOKDALE NORTHRIDGE</b>	Inspection No. <b>1300039</b>
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Citation Issuance Date: **05/22/2018**

C I T A T I O N	I T E M	SECTION	T Y P E	CITATION/ITEM RESOLUTION	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED
1	1	2340.22 (a)	G	ALJ affirmed citation and penalty.	A		\$185.00	<b>\$185.00</b>
1	2	2473.1 (b)	G	ALJ affirmed citation and penalty.	A		\$185.00	<b>\$185.00</b>
2	1	4559 (a)	S	DAR Issued. ALJ Decision reversed.		V	\$3,375.00	<b>\$ 0.00</b>
<b>Sub-Total</b>							<b>\$3,745.00</b>	<b>\$370.00</b>

**Total Amount Due\*** **\$370.00**

*\*You may owe more than this amount if you did not appeal one or more citations or items containing penalties.  
Please call (415) 703-4291 if you have any questions.*

### PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:  
**Department of Industrial Relations**

2. Write the **Inspection No.** on your payment

3. If sending via US Mail:  
 CAL-OSHA Penalties  
 PO Box 516547  
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:  
 US Bank Wholesale Lockbox  
 c/o 516547 CAL-OSHA Penalties  
 16420 Valley View Ave.  
 La Mirada, CA 90638-5821

*Online Payments can also be made by logging on to [http://www.dir.ca.gov/dosh/CalOSHA\\_PaymentOption.html](http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html)*

**-DO NOT** send payments to the California Occupational Safety and Health Appeals Board-

**Abbreviation Key:**

G=General	R=Regulatory	Er=Employer
S=Serious	W=Willful	Ee=Employee
RG=Repeat General	RR=Repeat Regulatory	RS=Repeat Serious
		A/R=Accident Related