BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1304393**
PET BROKERS, INC. **5880 DISTRICT BLVD., SUITE 11** **BAKERSFIELD, CA 93313** **Employer**	**DECISION**

Statement of the Case

Pet Brokers, Inc., (Employer) provides mice, rats, hamsters and guinea pigs to pet stores. Beginning on March 27, 2018, the Division of Occupational Safety and Health (the Division) through Junior Safety Engineer Blanca Manzo (Manzo) conducted a complaint inspection at a workplace maintained by Employer at 8524 Old River Road, Bakersfield, California (the site). On September 4, 2018, the Division issued one citation alleging eight violations of safety orders found in California Code of Regulations, title 8.[1] The citations allege that Employer failed to: establish, implement or maintain an Injury and Illness Prevention Program (IIPP); ensure that a stairway in the guinea pig barn had handrails or stair railings on each side; provide potable water in ample supply; keep toilet facilities clean and maintained in good working order; provide clean individual hand towels; provide adequate first-aid materials, approved by a consulting physician, readily available for employees; mount, locate, and identify portable fire extinguishers so that they are readily available to employees; and, ensure that portable fire extinguishers are maintained in a fully charged and operable condition.

Employer filed timely appeals of all the items cited under Citation 1. Employer contested the existence of the alleged violations. Employer also pleaded financial hardship at the hearing.

This appeal was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board in Bakersfield, California, on March 13, 2020. Greg Clark, Senior Safety Engineer, represented the Division. Charles Scharpenburg, Employer's owner, represented Employer.[2] This matter was submitted on January, March 13, 2020, immediately following the hearing.

[1] Unless otherwise indicated, all further references are to sections of California Code of Regulations, title 8.

[2] During the hearing, the Division withdrew Citation 1, item 7, in exchange for a waiver of its right to recover costs pursuant to Labor Code section 149.5 and California Code of Regulations, title 8, section 397. Good cause having been found, the settlement of Citation 1, item 7 is incorporated into this Decision by reference.

Issues

1. Did Employer fail to establish, implement or maintain an IIPP?

2. Did Employer fail to ensure that a stairway used by employees had handrails or stair railings on each side?

3. Did Employer fail to provide potable water in adequate supply?

4. Did Employer fail to keep its toilet facilities clean and maintained in good working order?

5. Did Employer fail to provide hand towels for employees to dry their hands?

6. Did Employer fail to ensure that adequate first-aid materials, approved by a consulting physician, were readily available for employees?

7. Did Employer fail to ensure that the fire extinguisher in the guinea pig barn was fully charged?

8. Is Employer entitled to penalty relief due to financial hardship?

Findings of Fact

1. Employer employed Michalene Howard (Ms. Howard) prior to and during the inspection. Ms. Howard's duties included feeding and sorting the animals and cleaning their cages.

2. Employer did not establish an IIPP prior to the inspection.

3. Ascending a stairway is required to reach the guinea pigs in the guinea pig barn. The stairway was not equipped with handrails or stair railings. Ms. Howard used the stairway to bring food to the guinea pigs.

4. Employer provided potable drinking water at the site via a well. The well water is adequate for human consumption.

5. Employer provided an outhouse as a restroom facility. Although the toilet seat is discolored, it is otherwise kept in a clean condition and maintained in good working order.

6. Employer did not provide a means for hand drying that was reasonably accessible to employees.

7. Employer did not provide first-aid materials that were approved by a consulting physician.

8. The fire extinguisher in the guinea pig barn, where employees work, was partially discharged at the time of the inspection.

9. Employer is operating at a financial loss and lacks the means to pay the total assessed penalties all at once.

Analysis

1. Did Employer fail to establish, implement or maintain an IIPP?

Section 3203 (Injury and Illness Prevention Program) of Group 1 (General Physical Conditions and Structures Orders) of Subchapter 7 (General Industry Safety Orders) (GSOs) of title 8 of the California Code of Regulations states, 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…."

Citation 1, Item 1, alleges:

> Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the Employer did not establish, implement and maintain an effective Injury and Illness Prevention Program.

The Division has the burden of proving a violation, including the applicability of the safety order, 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 weighted 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. (*Lone Pine Nurseries,* Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.) Words within an administrative regulation are to be given their plain and commonsense meaning, and when the plain language of the regulation is clear, there is a presumption that the regulation means what it says. (*AC Transit*, Cal/OSHA App. 08-135, Decision After Reconsideration (June 12, 2013) (Internal citations omitted).)

a. Section 3203, subdivision (a), is applicable to Employer

It is well established law that California employers must establish an IIPP. The Appeals Board stated in *Labor Ready*, Cal/OSHA App. 13-0164, Decision After Reconsideration (Aug. 28, 2014):

> "Every employer shall furnish employment and a place of employment that is safe and healthful for the employees therein [and] every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees." (*Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14,

> 2001), Labor Code sections 6400, subdivision (a), and 6401; see also section 6400, subdivision (b). These mandates are given regulatory life in section 3203(a), which requires "every employer" to establish an effective IIPP.

An employer is defined as "every person including any public service corporation, which has any natural person in service." (Labor Code sections 3300 and 6304.) An employee is anyone who is "required and directed by any employer to engage in any employment to go to work or be at any time in any place of employment." (Labor Code section 6304.1, subd. (a).) Finally, employment includes "the carrying on of any trade, enterprise, project, industry, business, occupation, or work…in which any person is engaged or permitted to work for hire" except for household domestic services. (Labor Code section 6303, subd. (b).)

Employer supplies mice, rats, hamsters and guinea pigs to pet stores. Employer operates a farm, and the business is run out of three barns on the farm: the mouse barn, the guinea pig barn, and the rat barn. Manzo testified that during her inspection, Scharpenburg admitted to her that he had an employee named Michaelene Howard. Scharpenburg testified at hearing that he was unable to run his business alone at the time of the inspection because of injuries he had suffered in an assault several months previously, and he admitted that Ms. Howard came and performed work, including feeding animals kept and sold by the business, to keep the business going. He further testified that he paid Ms. Howard for her services with a combination of money and in-kind income including food and transportation. Thus, although Scharpenburg denied during the hearing that Employer had employees after January 2018, Scharpenburg's contradictory testimony and his prior inconsistent statements to Manzo support a finding that Employer had at least one employee at the time of the inspection. This finding is also supported by Ms. Howard's hearsay statements to Manzo. Manzo interviewed Ms. Howard in March and May 2018. During those interviews, Ms. Howard stated that she was still employed by Employer to feed and sort animals and clean their cages. Thus, section 3203, subdivision (a), applies to Employer.

b. Employer did not have an IIPP at the time of the inspection

Manzo testified that the Division issued Citation 1, Item 1, to Employer because when she asked to see Employer's IIPP during the inspection, Scharpenburg did not know what one was. Scharpenburg admitted during the hearing that Employer did not have an IIPP at the time of the inspection.

c. Employees were exposed to the violation

The Division bears the burden of proving employee exposure to a violative condition addressed by a safety order by a preponderance of the evidence. (*Benicia Foundry & Iron Works*, Inc., Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) The Appeals Board has articulated several tests for determining employee exposure. In *Dynamic Construction Services, Inc.*, Cal/OSHA Insp. 1005890, Decision After Reconsideration (Dec. 1, 2016), the Appeals Board stated:

> The Division may establish exposure in one of two ways. First, the Division may demonstrate employee exposure by showing that an employee was actually

exposed to the zone of danger or hazard created by a violative condition. (*Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) Actual exposure is established when the evidence preponderates to a finding that employees actually have been or are in the zone of danger created by the violative condition. (*Gilles & Cotting, Inc*., 3 O.S.H. Cas (BNA) 2002, 1975-76 O.S.H. Dec. (CCH) P 20448, 1976 OSAHRC LEXIS 705 (Feb. 20, 1976) fn 4.)

Alternatively, "the Division may establish the element of employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on evidence of reasonable predictability that employees while in the course of assigned work duties, pursuing personal activities during work, and normal means of ingress and egress would have access to the zone of danger." (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 002976, Decision After Reconsideration (April 24, 2003).) Stated another way, employee exposure may be established by showing the area of the hazard was "accessible" to employees such that it is reasonably predictable by operational necessity or otherwise, including inadvertence, that employees have been, are, or will be in the zone of danger. (*River Ranch Fresh Foods-Salinas, Inc.* Cal/OSHA App. 01-1977, Decision After Reconsideration (July 21, 2003); *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003).) Under this "access" exposure analysis, the Division may establish exposure by showing that it was reasonably predictable that during the course of their normally work duties employees "might be" in the zone of danger. (*Field & Associates, Inc*., 19 O.S.H. Cas (BNA) 1379, 2001 O.S.H. Dec. (CCH) P 32,330, 2001 OSAHRC LEXIS 19 (April 17, 2001).) "The zone of danger is that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc*., Cal/OSHA App. 00-2976, Decision After Reconsideration (April 24, 2003) [citations omitted].) The scope of the zone of danger is relative to the wording of the standard and the nature of the hazard at issue. (*Fabricated Metal Products, Inc*. 18 O.S.H. Cas (BNA) 1072, 1997 OSAHRC LEXIS 118 (Nov. 7, 1997).)

As discussed above, Employer had at least one employee at the time of the inspection. Manzo credibly testified that Scharpenburg informed her during her initial visit to the site that Ms. Howard had worked there that morning. The evidence therefore supports a finding that Employer exposed its employee to the hazard of not having an IIPP.

For all of the foregoing reasons, the Division established a violation of section 3203, subdivision (a), by a preponderance of the evidence. Citation 1, Item 1, shall be affirmed and its proposed penalty shall be assessed against Employer.

2. Did Employer fail to ensure that a stairway used by employees had handrails or stair railings on each side?

Section 3214, (Stair Rails and Handrails) subdivision (a), of Article 2 (Standard Specifications) of Group 1 (General Physical Conditions and Structures) the GISO's, provides:

> Stairways shall have handrails or stair railings on each side, and every stairway required to be more than 88 inches in width shall be provided with not less than one intermediate stair railing for each 88 inches of required width. Intermediate stair railings shall be spaced approximately equal within the entire width of the stairway.

Citation 1, Item 2, alleges:

> Prior to and during the course of the inspection, including, but not limited to, March 27, 2018, the employer did not ensure the stairway located in the shipping barn has handrails or stair railings on each side.

a. The safety order applies to Employer.

The safety order is part of the General Industry Safety Orders (GISO's) that apply to all employers. Manzo testified that she observed a stairway in the guinea pig barn. (See Exhibit 4.). During the inspection, Employer acknowledged that employees work in the guinea pig barn. Thus, the safety order applies to Employer.

b. Employer did not provide handrails or stair railings on each side of the stairway.

Manzo testified that the Division issued Citation 1, Item 2 because the stairway in the guinea pig barn was not equipped with handrails or stair railings. (See Exhibit 4.) Employer did not offer any evidence showing that handrails or stair railings were provided. The Division's evidence is sufficient to find that Employer did not provide handrails or stair railings on each side of the stairway in the guinea pig barn.

c. Employer's Employee uses the stairway.

Manzo testified that Employer admitted during the inspection that Ms. Howard uses the stairway to reach the guinea pigs in order to feed them. Although Scharpenburg denied during the hearing that employees use the stairs, his testimony was inconsistent with his admission during hearing that Ms. Howard helps feed the animals, and is inconsistent with his earlier statement to Manzo during the inspection. (See Evid. Code § 1235.) The undersigned finds that Manzo's testimony was more credible than Scharpenburg's. Thus, it is found that Employer exposed its employee to the hazard of a stairway that was not equipped with handrails or stair railings.

For all of the foregoing reasons, the Division established a violation of section 3214, subdivision (a), by a preponderance of the evidence. Citation 1, Item 2, will therefore be affirmed, and its proposed penalty shall be assessed against Employer.

3. Did Employer fail to provide potable water in ample supply?

Section 3363 (Water Supply), subdivision (a), of Subchapter 7 (General Industry Safety Orders), provides in relevant part:

> Potable water in adequate supply shall be provided in all places of employment for drinking and washing and, where required by the employer of these orders, for bathing, cooking, washing of food, washing of cooking and eating utensils, washing of food preparation or processing premises, and personal service rooms.

Citation 1, Item 3, alleges:

> Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the employer did not provide potable drinking water to employees at the work site.

"Potable water" is defined by section 3361 as "water which is satisfactory for drinking, culinary and domestic purposes and meets the requirements of the health authority having jurisdiction. (Title 22, California Code of Regulations, Division 4, Chapter 15.)" To establish a violation, the Division must show Employer did not provide potable water to employees at the worksite.

a. The safety order applies to Employer.

Scharpenburg did not deny during the hearing that employees drank water out of the well. He testified, however, that after the inspection, he purchased bottled water to comply with the safety order. Scharpenburg's testimony leads to the inference that, prior to the inspection, Employer was providing drinking water to its employees via the well.

Therefore, section 3363, subdivision (a), applies to Employer.

b. The Division did not prove that the water in the well was not potable.

Manzo testified that the Division issued Citation 1, Item 3, because Scharpenburg told her during the inspection that employees are instructed to bring their own water or to drink water from the well. A photograph of the well at the site is depicted in Exhibit 5. Manzo further testified that as part of her inspection, she requested a copy of a water testing report from the local water agency. (See Exhibit 6.) Manzo asserted during testimony that Employer did not provide a copy, and therefore, did not prove that the water was potable. Manzo admitted during her testimony, however, that she had no evidence to show that the water was non-potable. Furthermore, Scharpenburg testified that the water from the well was tested annually by the local water authority. He relied on the local water authority who informed him that the water was not contaminated and was therefore safe to drink.

The Division bears the burden of proving a violation by a preponderance of the evidence. Here, it was the Division's burden to show that the water from the well was not fit for drinking. It was not Employer's burden to demonstrate that the water was potable. Because the Division did not meet its burden, Citation 1, Item 3, and its associated penalty shall be vacated.

4. Did Employer fail to keep its toilet facilities clean and maintained in good working order?

Section 3364 (Sanitary Facilities), subdivision (b), of the GISO's provides:
Toilet facilities shall be kept clean, maintained in good working order and be accessible to the employees at all times. Where practicable, toilet facilities should be within 200 feet of locations at which workers are regularly employed and should not be more than one floor-to-floor flight of stairs from working areas.

Citation 1, Item 4, alleges:

Prior to and during the course of the inspection, including, but not limited to, March 27, 2018, the employer did not provide suitable toilet facilities to employees at the worksite.

To establish a violation the Division must show that Employer did not provide suitable toilet facilities at the worksite.

a. The safety order applies to Employer.

Employer testified that there was an outhouse at the site that was used by employees. (See Exhibit 7.) There is no dispute that the outhouse is a toilet facility. Therefore, the safety order applies to Employer.

b. The Division did not prove that the outhouse was not kept clean and in good working order.

Manzo testified that the Division issued Citation 1, Item 4, to Employer because Employer did not provide a suitable toilet facility. She further testified that during her inspection, she observed that the wooden toilet seat in the outhouse was porous and had visible stains. On cross-examination by Employer, Manzo stated that the toilet seat appeared wet, but admitted that she did not determine what the stains on the toilet seat were from. She admitted that the Division did not conduct any testing on the toilet seat. Scharpenburg testified that the toilet seat is made of cedar wood and is porous, but denied that it was not kept clean.

Here, the Division did not meet its burden of showing that the outhouse was not kept clean. The Division cited Employer for the condition of the toilet seat, but did not provide sufficient evidence to find that the toilet seat was soiled. Although Manzo testified that the seat appeared to be wet, she admitted that she did not test the seat. The photograph taken at the time of the inspection does not show enough detail to establish the seat was wet, or show what made it appear wet. (See Exhibit 7.)

For all of the foregoing reasons, therefore, the Division did not establish a violation of section 3364, subdivision (b), by a preponderance of the evidence. Because the Division did not meet its burden, Citation 1, Item 4, and its associated penalty shall be vacated.

5. Did Employer fail to provide hand towels for employees to dry their hands?

Section 3366, (Washing Facilities), subdivision (e), of the GISO's provides: Clean individual hand towels, or sections thereof, of cloth or paper or warm-air blowers convenient to the lavatories shall be provided.

Citation 1, Item 5, alleges:

Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the employer did not provide clean individual hand towels, or sections thereof, of cloth or paper or warm-air blowers convenient to the lavatories.

To prove a violation, the Division must show that Employer failed to provide a means for hand drying in the form of paper or cloth hand towels (or sections thereof) or warm air blowers, placed convenient to the toileting facility.

a. The safety order is applicable to Employer.

Employer provides an outhouse at the site for employees to use for toileting (Exhibit 7) and a hand washing station (Exhibit 8) for use after toileting. Section 3366, subdivision (e) therefore applies to Employer.

b. Employer did not provide a means for employees to dry their hands.

Manzo testified that during the inspection, she visited the handwashing station at the site and observed that there was no means provided for drying hands. She further testified that Employer did not show her any hand towels during the inspection. Scharpenburg testified that he could not recall if paper towels were available at the handwashing station, which he said was approximately 20 feet away from the outhouse. Employer had the opportunity to provide stronger evidence during the inspection and at hearing to demonstrate that it supplied a means for convenient hand drying, but did not. Manzo's testimony, corroborated by Exhibit 8, is sufficient to make a finding that on the date of the inspection, Employer failed to provide cloth or paper towels or warm-air blowers convenient to the outhouse for hand drying.

c. Employees were exposed to the hazard of no available means to dry their hands.

As noted above, Manzo testified that Employer informed her that an employee, Ms. Howard, had been working that morning at the site prior to Manzo's arrival. The outhouse and the handwashing station were accessible to Ms. Howard for use that morning. It is reasonable to anticipate that Ms. Howard would use the handwashing station at some point during her shift. (See *Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 002976, Decision After Reconsideration (April 24, 2003).) After washing her hands, Ms. Howard would not have been able to dry her hands, because no means was provided by Employer. The evidence, particularly Manzo's testimony, as well as Exhibits 7 and 8, and the lack of contrary evidence from

Employer, is sufficient to make a finding that Ms. Howard was exposed to the hazard of no available means for hand drying.

For all of the foregoing reasons, therefore, the Division established a violation of section 3366, subdivision (e), by a preponderance of the evidence. Citation 1, Item 5, will therefore be affirmed, and its proposed penalty shall be assessed against Employer.

6. Did Employer fail to ensure that adequate first-aid materials, approved by a consulting physician, were readily available for employees?

Section 3400 (Medical Services and First Aid), subdivision (c) of the GISO's states:

> There shall be adequate first-aid materials, approved by the consulting physician, readily available for employees on every job. Such materials shall be kept in a sanitary and usable condition. A frequent inspection shall be made of all first-aid materials, which shall be replenished as necessary.

Citation 1, Item 6, alleges:

> Prior to and during the course of the inspection, including, but not limited to, March 27, 2018, the employer did not have first-aid materials readily available for employees on every job.

The safety order requires that there shall be adequate first-aid materials approved by the consulting physician.

a. The safety order applies to Employer.

There is no dispute that Employer operates a business that involves employees feeding and handling live animals. Employees performing such tasks are susceptible to injuries. For instance, Scharpenburg acknowledged at hearing that animals can bite or scratch employees. Thus, the safety order applies to Employer.

b. Employer did not make adequate first-aid materials readily available that were approved by a consulting physician.

Manzo testified that the Division issued Citation 1, Item 6, to Employer because Employer had no first-aid kit. She further testified that during the inspection, Employer only showed her a bottle of hydrogen peroxide. Scharpenburg testified that he had first-aid supplies in the "rat barn", consisting of Band-Aid's, alcohol swabs, antibiotic ointment, and hydrogen peroxide. The Division did not request a fist aid kit approval letter (see Exhibit 6). Scharpenburg, however, testified that he did not provide a first aid kit to Manzo during the inspection, and stated that Manzo wanted Employer to have a first-aid kit that was "doctor certified." The undersigned finds this is an admission that Employer did not have a first-aid kit that was approved by a consulting physician. In particular, Employer had the opportunity to provide evidence that it was in compliance with the safety order by showing during the inspection and

during the hearing that it had a first-aid kit at the time of the inspection that was approved by a consulting physician. Employer did not, and coupled with Manzo's testimony that the only first aid supplies Employer showed her was a bottle of hydrogen peroxide, the undersigned finds that Employer did not have first aid supplies that were physician-approved.

c. Employees were exposed to the hazard.

Ms. Howard's work put her at risk of getting scratched or bitten by live animals, and if that were to occur, she would need to use first-aid supplies to treat her wounds. Thus, Ms. Howard was exposed to the hazard created by not having physician-approved first-aid materials readily available at the site.

For all of the foregoing reasons, therefore, the Division established a violation of section 3400, subdivision (c), by a preponderance of the evidence. Citation 1, Item 6, will therefore be affirmed, and its proposed penalty shall be assessed against Employer.

7. Did Employer fail to ensure that the fire extinguisher in the guinea pig barn was fully charged?

Section 6151 (Portable Fire Extinguishers), subdivision (c)(4), (General Requirements) states:

> The employer shall assure that portable fire extinguishers are maintained in a fully charged and operable condition and kept in their designated places at all times except during use.

Citation 1, Item 8, alleges:

Prior to and during the course of the inspection, including, but not limited to, on March 27, 2018, the employer did not insure the portable fire extinguisher was maintained in a fully charged and operable condition and kept in its designated place at all times.

a. The safety order applies to Employer.

Section 6151, subdivision (c)(4), is part of the General Industry Safety Orders, which apply to all employers. Section 6151, subdivision (a), provides that:

> Where extinguishers are provided but are not intended for employee use and the employer has an emergency action plan and a fire prevention plan which meet the requirements of Sections 3220 and 3221 then only the requirements of Sections (e) and (f) of this Section apply.

Employer did not dispute during the hearing that it was required to provide fire extinguishers at the site. Furthermore, nothing in the record suggests that Employer had an emergency action plan and a fire prevention plan meeting the requirements of sections 3220 and 3221. Therefore, the safety order applies to Employer.

b. Employer did not ensure that a fire extinguisher in the guinea pig barn was fully charged.

Manzo testified that the Division issued Citation 1, Item 8 to Employer because during the inspection, she observed that the fire extinguisher kept in the guinea pig barn, one of the places where Employer operates, was partially discharged. (See Exhibit 9.) Scharpenburg conceded during his testimony that the fire extinguisher was partially discharged. Thus, the Division established that the fire extinguisher in the guinea pig barn was not fully charged.

c. An employee was exposed to the hazard created by the violation.

Although Employer disputed whether employees used the stairway in the guinea pig barn, Employer did not dispute that Ms. Howard worked in the guinea pig barn. Scharpenburg testified that there was no sprinkler system in the barn, and that he preferred to use a hose and water to put out fires, rather than a fire extinguisher, out of concern for the animals. However, Employer was required to provide fire extinguishers for employee use in the absence of an emergency action plan and a fire prevention plan meeting regulatory requirements. Because Employer provided a fire extinguisher, it is reasonable to anticipate that an employee working in the guinea pig barn would try to use the fire extinguisher to put out a fire if one were to occur. That employee would be exposed to the hazard created by the fire extinguisher not being fully charged: specifically, the hazard of not being able to fully extinguish a fire threatening physical illness and injury to the employee. Thus, the Division established employee exposure by a preponderance of the evidence.

For all of the foregoing reasons, therefore, the Division established a violation of section 6151, subdivision (c)(4), by a preponderance of the evidence. Citation 1, Item 8, will therefore be affirmed, and its proposed penalty shall be assessed against Employer.

8. Is Employer entitled to penalty relief due to financial hardship?

In *A.B.S. Manufacturers, Inc*., Cal/OSHA App. 14-9075, Denial of Petition for Reconsideration (Aug. 27, 2014), the Board held that the employer has the burden to prove financial hardship by credible and convincing evidence under Board case law, citing *Paige Cleaners*, Cal/OSHA App. 96-1144, Decision After Reconsideration (Oct. 15, 1997).

The Appeals Board most recently addressed financial hardship in *Maria de Los Angeles Colunga dba Merced Farm Labor*, (hereinafter *Merced Farm Labor*) Cal/OSHA App. 08-3093-3098, Decision After Reconsideration (Feb. 26, 2015). There, the Board held that to establish financial hardship, Employer must show that granting financial hardship relief would (1) benefit worker safety and (2) not diminish the deterrent effect of civil penalties on other employers.

In *Merced Farm Labor*, the Appeals Board held that the employer was not entitled to financial hardship relief, despite a showing of financial distress, inability to obtain gainful employment, and family health issues, because the employer failed to prove that a reduction in civil penalties would further the purposes of the Occupational Safety and Health Act (the Act).

The Appeals Board stated:

> Penalty relief is not warranted merely because Employer lost her business due to failure to comply with the Act, and suffered concomitant financial hardship. A reduction in penalties under such circumstances does nothing to protect employees or to make workplaces safer.
>
> In order to promote the purposes of the Act, "the Division, like other public agencies, including its federal counterpart, justifiably relies on the deterrent effect of monetary penalties as a means to compel compliance with safety standards." (Citations omitted.) [. . . .]
>
> The grant of financial hardship relief in the present circumstances, **given the lack of any showing that it would benefit worker safety**, would diminish the deterrent effect of civil penalties. (Emphasis added.)

Further, in *Merced Farm Labor*, *supra*, Cal/OSHA App. 08-3093, the Board held that affirming the ALJ's decision to grant a financial hardship reduction could inappropriately provide employers "an economic incentive to avoid a penalty [or have a penalty significantly reduced] by going out of business, and, perhaps reincorporating under a different name" without due regard for worker safety. (*Delta Transportation, Inc*., Cal/OSHA App. 08-4999, Decision After Reconsideration (Aug. 15, 2012), citing, *Reich v. Occupational Safety and Health Com'n (OSHRC)* (11th Cir. 1997) 102 F.3d 1200, 1203.)

Here, Scharpenburg pleaded financial hardship during the hearing. Although he did not bring financial records to the hearing, Scharpenburg credibly testified that he is self-employed and has unspecified housing expenses. He further testified that he receives approximately $2,000 per month in income, and denied receiving any public assistance such as food stamps or county general relief aid. Scharpenburg testified credibly that, based on his current financial situation, he is not “cash positive” in that he spends more per month than he receives in income. Scharpenburg also testified credibly that he owes approximately $200,000 to the Internal Revenue Service and approximately $35,000 to the Employment Development Department.

While certainly sobering, the evidence of the Scharpenburg’s personal situation is not directly relevant to the issue of whether Employer is entitled to further penalty relief. Employer’s evidence does not clearly establish how further reduction of the assessed penalties would benefit worker safety. There is limited evidence that Scharpenburg has spent, or plans to spend, money to improve worker safety by buying water bottles, paper towels and printing and putting a copy of the Division’s sample IIPP into a binder.

There is no evidence in the record to show that granting the requested relief would not reduce the deterrent effect of civil penalties on other employers. Granting further reduction may

in fact incentivize employers to assume the risks of administrative penalties against greater expenses of safety order compliance.

Employer's evidence does not show how worker safety and health would be improved as a result of further reduction in the proposed penalties, and there is no evidence that reducing the penalties further would not diminish the deterrent effect of penalties. In sum, the evidence establishes that Employer lacks the means to pay the penalties all at once.

Under the circumstances of this case, and consistent with the applicable statutory authority and the Appeals Board's decisional law, Employer's request for further reduction of the penalties beyond what the parties previously agreed to as part of their settlement of Citation 1, Item 7 is denied. However, the undersigned does retain jurisdiction to assess a reasonable payment plan, in order to ensure that Employer has the means and the time needed to make full payment of the agreed penalty amount to the Division. In consideration of the Employer's cooperation with the Division throughout this process and in light of Scharpenburg's current financial situation, it is appropriate that the payment plan be extended to seven years (84 months). (See *Maria de Los Angeles Colunga dba Merced Farm Labor, supra*, Cal/OSHA App. 08-3093-3098, [Noting that this decision does not affect the ALJ's order allowing installment payments.].)

In order to further the intent of the Occupational Safety and Health Act, as well as the parties' prehearing settlement, the undersigned finds that an 84-month payment plan is justified. (See *Joseph Peralta*, Cal/OSHA Insp. No. 1071914, Decision After Reconsideration (June 17, 2019).) Employer shall make a first payment of $13.75, on or before June 1, 2020, followed by monthly payments of $13.75 per month each month until the full amount of $1,155 is paid in full. By accepting this payment plan, Employer shall waive the statute of limitations for commencement of the collection of any civil penalty pursuant to Labor Code section 6651, subdivision (a).

Conclusions

Employer failed to establish, implement or maintain an IIPP; failed to ensure that a stairway used by employees had handrails or stair railings on each side; failed to provide hand towels for employees to dry their hands; failed to ensure that adequate first-aid materials, approved by a consulting physician, were readily available for employees; and, failed to ensure that the fire extinguisher in the guinea pig barn was fully charged.

The Division did not meet its burden of proving that Employer failed to provide potable water in adequate supply; or, that Employer failed to keep its toilet facilities clean and maintained in good working order.

Employer did not establish that it is entitled to further penalty relief, but is entitled to an 84-month payment plan, commencing on June 1, 2020, in the amount of $13.75 per month, conditioned on waiver of the statute of limitations for commencement of recovery of civil penalties pursuant to Labor Code section 6651, subdivision (a).

Orders

Citation 1, Items 1, 2, 5, 6, and 8 are affirmed as set forth in this Decision. Citation 1, Items 3 and 4, are dismissed as set forth in this Decision. Citation 1, Item 7 is dismissed pursuant to the parties' agreement, in exchange for a waiver of costs. Total penalties of $1,155 are affirmed as set forth in the attached Summary Table.

Howard I. Chernin

Dated: 04/10/2020

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.**