BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1391266**
DAVE & BUSTERS OF CALIFORNIA, INC. **2481 MANANA DR.** **DALLAS, TX 75220** **Employer**	**DECISION**

Statement of the Case

Dave & Busters of California, Inc. (Employer) is a restaurant chain. Beginning March 29, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Arsen Sanasaryan (Sanasaryan), conducted an inspection arising from an injury at Employer's restaurant at 6081 Central Drive, Suite 118, in Los Angeles, California (the site).[1]

On August 15, 2019, the Division issued two citations to Employer alleging three violations of California Code of Regulations, title 8.[2] Citation 1 alleges that Employer failed to verify that a required hazard assessment took place. Citation 2 alleges two instances: failure to provide effective job-specific safety training; and failure to effectively identify and evaluate hazards.

Employer filed timely appeals of the citations, contesting the existence of the violations, their classifications, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties. Employer asserted the affirmative defense of independent employee action as to both citations.[3]

This matter was heard by Rheeah Yoo Avelar, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) on May 24, 2022, and June 15, 2022. ALJ Avelar conducted the hearing with the parties and witnesses appearing remotely via the Zoom video platform. Darren Harrington of Kane Russell Coleman Logan, P.C., represented Employer. Manuel Arambula, Staff Counsel, represented the Division. The matter was submitted on October 30, 2022.

[1] The spellings of Employer's name and the site's street name on the citations were not raised as issues.
[2] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.
[3] Except as otherwise noted in the Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer fail to properly certify workplace hazard assessments?

2. Did Employer fail to provide effective job-specific training?

3. Did the Division properly classify Citation 1 as General?

4. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

5. Did Employer rebut the presumption that the violation was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

6. Is Citation 2 properly characterized as "Accident-Related?"

7. Are the abatement requirements for Citation 1 and Citation 2 reasonable?

8. Are the proposed penalties reasonable?

Findings of Fact

1. Employer's workplace hazard assessments did not include written language on the documents identifying them as certifications of hazard assessment.

2. Juan Reyes (Reyes) was Employer's employee and was working at the site at the time of his injury.

3. Employer provides training through video modules and on-the-job training.

4. Employer keeps records of employees' completed video module trainings.

5. Reyes completed Employer's "Vent & Hood Cleaning" training video module (the Video.)

6. The Video shows how to clean the vent and hood above a grill station.

7. Grill station and fry station hood cleaning procedures differ significantly.

8. Employer provides five days of on-the-job training, which includes fry station vent and hood cleaning.

9. Employer does not keep records of on-the-job training.

10. Reyes did not know the fryer rolled on wheels, or that ladders were available.

11. Reyes did not receive on-the-job training specific to cleaning the fry station vent and hood.

12. Written certification of hazard assessment is related to health and safety.

13. Immersion of Reyes's foot in hot oil at the fry station resulted in skin graft procedures and hospitalization for three weeks.

14. Kitchen managers usually left the site prior to cleaning and closing at night.

15. Kitchen managers who were occasionally present at the site through the end of closing performed administrative work and did not observe kitchen cleaning.

16. Cleaning the fry station at closing occurs openly in the kitchen and takes at least 15 minutes.

17. Reyes received burn injures at the fry station because Employer did not train him how to clean the hood above the fry station.

18. The abatement requirements are reasonable.

19. The proposed penalties are calculated in accordance with Division policies and procedures.

Analysis

1. Did Employer fail to properly certify workplace hazard assessments?

Citation 1 alleges a General violation of section 3380, subdivision (f)(2), which requires:

The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the

hazard assessment, and, which identifies the document as a certification of hazard assessment.

In Citation, 1, the Division alleges:

> Prior to and during the course of the inspection, including, but not limited to March 29, 2019 the employer did not verify that the required workplace hazard assessment have been performed through written certification.

In *Lion Farms, LLC*, Cal/OSHA App. 1070258, Denial of Petition for Reconsideration (Jun. 30, 2017), the Appeals Board determined:

> The language of section 3380, subdivision (f)(2) is clear. The regulation requires a written certification, and that the written certification include the name of the individual who can attest that the evaluation was performed, the date that the assessment occurred, and language on the document identifying it as a certification of hazard assessment.

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) "'Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that[,] when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

In response to a document request from the Division at the time of the inspection, Employer provided three site safety inspection records. Sanasaryan testified that he issued the citation because "[t]here's no certification that a hazard assessment was done."

Daniel Sanchez (Sanchez), testified that he was a kitchen manager at the time of the injury. He testified that a manager or a shift lead performs site safety inspections by logging into an application program on a tablet and answering prompts for safety concerns around the site. The three printed hazard assessments have identical formatting, differing only with regard to a few fields. As a reference, the January 12, 2019, inspection bears Employer's logo, is titled "Summary," and is formatted as follows:

Basic Info	**Location Info**
Name: Safety Maniacs	Address: [Blank]
Group: #75 Westchester	Latitude: 33.9 [*13 more digits*]
User: KM[underscore]75	Longitude -118.3 [*13 more digits*]

Completed ID: *8592049775*

Dates/ Time	**Scoring**
Start Time: *1/12/2019 11:04 PM*	Points Earned: *162*
End Time: *1/12/2019 11:04 PM*	Points Possible: *163*
	Score *99.39%*

[Italicized fields indicate variations between the three inspection reports.]

The inspections are in written form and dated as the regulation requires. The forms also identify the workplace evaluated, providing the company logo and geographic coordinates, rather than an address. Sanchez explained that the name, "Safety Maniacs" was an alternative name for "safety inspection" to keep the monthly hazard assessment "fun." He testified that the person who completes an inspection signs the last page of the inspection. The signatures at the end of each of the three inspections are illegible. The identity of "KM_75" is not provided and was not discussed.

While Employer's form appears to meet many of the requirements, the regulation also requires language on the document identifying it as a certification of hazard assessment. No written language identifies any of the three documents as a certification of hazard assessment. Additionally, the name of the person certifying the performance of the evaluation is not specified. The various illegible signatures and a cryptic user name do not provide identification.

Accordingly, the Division established a violation of the safety order. Citation 1 is affirmed.

2. Did Employer fail to provide effective job-specific training related to cleaning the exhaust hood above the fryer?

The Division cited Employer for an alleged Serious violation under section 3203, subdivision (a). Citation 2 alleges two instances.

With regard to Instance 1, section 3203, subdivision (a), requires, in relevant part:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
>
> […]
>
> (7) Provide training and instruction:
>
> (A) When the program is first established;: [*sic.*] Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
>
> (B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;
(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

In Instance 1, the Division alleges:

Prior to and during the course of the investigation, an employee/cook was not given effective job specific safety training related to cleaning the kitchen exhaust hood. Employee was using the top cap of the "Frymaster" Model – SCFHD450GNC fryer as a platform for cleaning the exhaust hood. As a result on February 18, 2019 the employee/Cook sustained an occupational injury when his foot slipped and went into the deep fryer filled with hot oil. [*Sic.*]

In Instance 2, the Division alleges:

Prior to and during the course of the investigation, including but not limited to, on February 18, 2019, the employer did not implement an effective safety program in that: 1) The employer did not effectively identify and evaluate all hazards related to cleaning exhaust hood of the Frymaster" Model – SCFHD450GNC fryer, employees have to climb and use the 35" high, Top Cap of the fryer as a platform to clean the exhaust hood. [*Sic.*]

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

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

The Appeals Board has repeatedly found that the purpose of section 3203, subdivision (a)(7), "is to provide employees with the knowledge and ability to recognize, understand and avoid the hazards they may be exposed to by a new work assignment through 'training and instruction.'" (*Timberworks Construction*, Inc., Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).) Although the existence of training records may support a conclusion that training occurred, "lack of records, coupled with employee testimony indicating that no training was provided, may lead to a reasonable inference that no such training was provided." (*Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).)

Reyes, a fry station cook assigned to the last shift of the night, described how his injury occurred. He testified that cleaning the fry station and its overhead vent and hood are part of his closing duties. He testified, "There's a refrigerator next to the fryer and I went up above the refrigerator, walking all the way around the edge of the refrigerator to be able to then clean up [the hood] above." [4] His foot then slipped from the fryer counter into hot cooking oil. The Division cited Employer for failing to provide training for vent and hood cleaning specific to the fry station.

All of Employer's witnesses testified that Employer provides two types of training: video training and on-the-job training. Employer presented records of video training. Employer did not present records of on-the-job training because it does not keep records of on-the-job training.

Video training

Sanchez testified that the video training program automatically records the training date and time upon a trainee's completion of a module.

Reyes agreed that he received some training, but claimed that he received no training specific to the hood cleaning process. He testified that he never watched any training video during his entire employment with Employer. However, Reyes's training records show completion of 15 video modules. Two modules that appear relevant are named "Station Test-Fry (En Espanol)," dated June 18, 2018, and "Vent & Hood Cleaning," dated May 10, 2017. The parties discussed only the "Vent & Hood Cleaning" video (the Video).

[4] Employer provided an uncertified transcript of Sanasaryan's audio recording of his inspection interview with Reyes. It shows Reyes providing a different account of how he got hurt. Reyes describes placing towels on the fryer, then climbing on the fryer counter to stand and clean the hood. He explains he was reaching to clean the other side of the hood when his foot stepped on a towel, and his foot slipped along with the towel. His foot then landed in a deep fryer filled with hot oil. He confirms that he never received instruction to put aluminum covers on top of the fryer. He confirms it is routine for everyone to jump up to a table then go to stand on top of the fryer, not to use a ladder, and that he did so since he started working.

After viewing the Video on the record during the hearing, Reyes testified that he never saw the Video before. The Video prohibits standing on grill surfaces. Vents are located above the grill surface, inside the hood overhead. Vents are flat, rectangular segments framed by the hood, which runs the length of the cooking surface. Vents detach from the hood for washing. It shows using a ladder to reach the vents above a grill for their removal by hand. It also displays a reaching tool that allows vent retrieval without a ladder. The Video then shows wiping down the grill's wall and hood with an improvised mop.

The Video shows vent and hood cleaning at a grill station, not at a fry station. For reasons discussed in great detail below, these two stations differ significantly. Employer had the power to select any of its videos, but it did not present a video showing vent and hood cleaning at a fry station. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evid. Code, § 412.) Thus, it is inferred that Employer provides no such video training. Therefore, even if Reyes did indeed watch the Video as his training record indicates, he did not receive hood cleaning training specific to the fry station via video training.

On-the-job training

Thaniel Juarez (Juarez), a line cook, testified that he provides in-person trainings for new staff nation-wide, but did not train Reyes because they worked different shifts. Juarez said that new employees watch an orientation video and then watch additional specialized video training modules like the Video. He testified that a kitchen manager then provides a tour, and thereafter introduces the trainee to a person responsible for on-the-job training. After this hand-off, the on-the-job training lasts five days and includes how to clean the vent and hood above the fryer. Justin Huff (Huff), the general manager at the site at the time of the injury, testified that on-the-job training consists of five days of a trainee shadowing someone.

Juarez testified that the Video does not show the additional steps required to clean the vents and hood above a fryer. Juarez testified that at the end of the day, the fryer is first turned off and surfaces are cleaned, allowing time for the frying oil to cool. In the interim, a ladder, towels, and a bucket with soap and water are retrieved. After approximately 15 minutes, the fryer is pulled away from the wall. Unlike the stationary grill in the Video, the fryer can roll on built-in wheels. Moving the fryer allows for the required daily cleaning of the wall behind the fryer, as well as creating space for ladder placement to clean overhead. A ladder was located within a few seconds' walk from the fry station at the site. Sanchez confirmed several ladders were on site. Juarez then said that surfaces are cleaned and dried with towels. Finally, the fryer is pushed back with a towel. Juarez testified that the fryer hood needs once-monthly cleaning and the vents need once-weekly cleaning. Huff testified that the wall behind the fry station wall needs daily cleaning.

Reyes said that he learned to clean the cooking area by asking the other cooks. Reyes testified that he did not know the fryer rolled or that ladders were available. When asked how he cleaned, he said, "Supposedly, I would have to go up on top of the where the fryer is and clean the hood." He saw other employees clean the grill in the same fashion. He said he cleaned the fryer vent and hood five times each week, approximately 100 times in total. His testimony is credited.

Reyes testified he reported to kitchen managers Sanchez, "Pablo," and Maria Sanchez (M. Sanchez). Sanchez testified that he was responsible for training and other operations. He confirmed that on-the-job training takes one week and described the training that Reyes would have received. Sanchez testified he hired Reyes, but did not claim he trained him, or identify anyone who did.[5]

In determining what inferences to draw from the evidence in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by its testimony such evidence or facts in the case against it, or its willful suppression of evidence relating thereto, if such be the case. (Evid. Code § 413.) Employer offered testimony that Reyes *would have received* on-the-job training, but not any showing that he *did*. While Employer established that on-the-job trainings occur, it did not explain why the individual who provided Reyes's on-the-job training could not be identified or actually testify. Thus, it is inferred that Reyes did not receive training specific to fry station hood cleaning. This inference, in conjunction with Reyes's denial of receiving training and the lack of on-the-job training records, supports the conclusion that Reyes did not receive on-the-job training for fry station hood cleaning.

Training is essential to an overall workplace safety program. Lack of training on a regular work duty thus affects the effectiveness of the IIPP. The Division established that Employer failed to provide hood cleaning training specific to the fry station. When a citation alleges more than one instance of a violation of a safety order, it is enough to sustain a violation if just one instance is proven. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) Here, the evidence supports a finding of a violation of Instance I, the first of the two alleged violations of section 3203, subdivision (a). Accordingly, Citation 2, Item 1, is affirmed.

3. Is Citation 1 properly classified as General?

Section 334, subdivision (b), provides, "General Violation - is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees."

[5] No other kitchen managers were presented as witnesses. In Sanasaryan's audio recording of his inspection interview with M. Sanchez, as well as Employer's uncertified transcript of the audio recording, she states that she provides on-the-job training to staff. She is not directly asked if she trained Reyes.

Here, Sanasaryan testified that the citation was classified as General because it has a relationship to health and safety but was not serious in nature. The Division determined that this violation was not of a "serious nature," and Employer did not address the issue in argument or post-hearing briefing. Therefore, the General classification is affirmed.

4. Did the Division establish a rebuttable presumption that the Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

> There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.)

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code, § 6432, subd. (e).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed

competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

When determining whether a citation is properly classified as Serious, Labor Code section 6432 requires application of a burden shifting analysis. The Division holds the initial burden to establish "a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation." (Lab. Code, § 6432, subd. (a).) The Division's initial burden has two parts. First, the Division must demonstrate the existence of an "actual hazard created by the violation." Second, the Division must demonstrate a "realistic possibility" that death or serious physical harm could result from that actual hazard. (*Shimmick Construction Company*, Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022).) In addition to an inspector's testimony, circumstantial and direct evidence, as well as common knowledge and human experience, may also support the serious classification. (*Id.*, at p. 11.)

Here, hot oil caused serious burn injuries to Reyes's foot. He testified that he was descending from cleaning the fry station hood, lowering himself from the refrigerator, when his foot slipped and went into one of the fryers. He testified that he then received skin grafts and was hospitalized for three weeks.

Sanasaryan testified that over-reaching, falling into, or getting splashed by hot cooking oil are specific hazards of the fryer. Severe burning is the actual hazard caused by Employer's failure to provide training specific to cleaning the fry station hood, and instruction to first cool the oil. There is no dispute that hot oil presents a realistic possibility of serious physical harm, and in fact did cause serious physical harm in the form of burn injuries requiring skin grafts. There is also no dispute that Reyes's injury meets the definition of serious physical harm.

For the foregoing reasons, the Serious classification is established.

5. Did Employer rebut the presumption of a Serious classification?

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

In order to satisfactorily rebut the presumption, an employer must demonstrate both:

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

of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

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

Factors included in Labor Code section 6432, subdivision (b), referenced in subdivision (c)(1) above, include:

(1) Before issuing a citation alleging that a violation is serious, the division shall make a reasonable effort to determine and consider, among other things, all of the following:
  (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards.
  (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards.
  (C) Supervision of employees exposed or potentially exposed to the hazard.
  (D) Procedures for communicating to employees about the employer's health and safety rules and programs.
  (E) […]

Employer established that its video training validates module completion. Huff testified that an on-the-job trainer validates trainee performance during the course of the training. However, Employer provided no discussion or proof of whether any validation of the correctness, completeness, completion, or effectiveness of any on-the-job training occurs.

In Employer's uncertified transcript of Sanasaryan's audio recording of his July 15, 2019, inspection interview with Reyes, Sanasaryan inquires whether Reyes received instruction to turn off the fryers to allow the oil to cool before cleaning the hood. Reyes responds "no," stating he was never advised to do so. He continues, "you have to start cleaning up before closing time, otherwise you get behind," suggesting general haste and a likelihood that no cooling occurs.

Reyes testified that he cooked at the fry station on the last shift at night. The restaurant closes between 11:00 p.m. and 1:00 a.m.[6] Reyes testified he cleaned his station every day between 9:00 p.m. and midnight. Reyes testified that removing the vents takes approximately 15 minutes.[7] As discussed above, the cleaning schedule requires daily wall cleaning, weekly vent cleaning, and monthly hood cleaning; and Reyes testified that he cleaned the vent and hood five times per week.

[6] Juarez estimated that the restaurant closed between 12:00 a.m. and 1:00 a.m. Huff estimated closure between 11:00 p.m. and 12:00 a.m.

[7] Juarez and Sanchez said that waiting for the fry station oil to cool takes approximately 15 minutes. Juarez testified that pulling the fry station forward takes 30 seconds. Sanchez testified that cleaning the hood and vent above the fry station takes 15 minutes.

He performed a 15-minute task incorrectly five times per week, at least 100 times. Yet, Sanchez testified that he worked with Reyes two or three nights each week and never disciplined him for any safety breach. According to Sanchez, Reyes never received any safety-related discipline.

Several witnesses testified that kitchen managers provide correction to hazardous practices, but Employer did not require kitchen managers to be on site at closing time. Huff testified that fryer cleaning occurs at the end of day. Huff and Juarez both testified that kitchen managers generally are not in the building at cleaning and closing time. Huff testified that any kitchen manager present that late would be attending to their own duties, not concurrently monitoring kitchen employees. He noted that kitchen managers perform administrative duties in their office or at a workstation adjacent to the kitchen.

Employer took pains to demonstrate that the office and workstation do not have sightlines to the fry station. Huff and Sanchez testified that the office does not allow a view of the kitchen. They testified that a pass-through window for plated food between the workstation and kitchen permits a limited view because the fryer counter is lower than the window frame. Thus, anyone at the workstation could not determine whether someone cleaning the hood was standing on a ladder or the fryer counter.

Employer's on-the-job training requires cooling the fryer oil prior to moving the fryer and then mounting a ladder. Employer thus recognizes the severity of the harm that hot oil could cause. While Employer painstakingly established the lack of passive lines of sight, the kitchen was still accessible and kitchen mangers occasionally worked through the end of the last shift. A reasonable and responsible employer would anticipate the likelihood of rushed activity at closing. A reasonable and responsible employer in a like position would direct kitchen managers to perform kitchen walk-throughs during closing. Periodic or spot monitoring of discrete, repetitive, and predictable closing procedures is entirely feasible. Such observation would reveal deficiencies in any on-the-job training while in progress; as well as to identify ineffective on-the-job training thereafter.

For these reasons, Employer offered insufficient evidence to rebut the presumption that Citation 2 was properly classified as Serious. Accordingly, the Serious classification is affirmed.

6. Is Citation 2 properly characterized as "Accident-Related?"

The Division characterized Citation 2 as Accident-Related. The Appeals Board has interpreted the regulations to require a showing of a "causal nexus between the violation and the serious injury" to sustain an Accident-Related characterization. (*HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015).) The violation need not be the only cause of the accident, but the Division must make a showing that the violation more likely than

not was a cause of the injury. (*MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The violation in Citation 2 occurred because Employer failed to provide effective training specific to fry station hood cleaning. Reyes did not receive instruction to allow the fryer oil to cool before cleaning above the station. He did not know the fry station rolled forward or that ladders were available, and he thus climbed and stood on the fryer to clean the hood. Therefore, the violation is found to have been a cause of the injury. The Accident-Related characterization is thus affirmed.

7. Are the abatement requirements for Citation 1 and Citation 2 reasonable?

In order to establish that abatement requirements are unreasonable, an employer must show that abatement is not feasible or is impractical or unreasonably expensive. (See *The Daily Californian/Calgraphics*, Cal OSHA/App. 90-929, Decision After Reconsideration (Aug. 28, 1991).)

Employer appealed the reasonableness of abatement requirements of Citation 1 and Citation 2. Employer presented no evidence to establish that abatement of the citations was unfeasible, impractical, or unreasonably expensive. Employer did not offer any evidence to suggest that it would not be able to include written language identifying its hazard assessment as a certification of hazard assessment. Employer also offered no evidence that Citation 2 could not be abated. Employer failed to provide effective training specific to cleaning a fry station hood. Employer did not provide any evidence that it would be unfeasible, impractical, or unreasonably expensive to observe on-the-job training or closing procedures that occur at closing.

Thus, for all of the foregoing reasons, Employer did not establish that abatement requirements for Citation 1 or Citation 2 are unreasonable.

8. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932.)

Generally, the Division, by introducing its proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, will be found to have met its burden of showing the penalties were calculated correctly. (*Ontario*

Refrigeration Service, Inc., Cal/OSHA App 1327187, Decision After Reconsideration, citing *M1 Construction, Inc.*, Cal/OSHA App. 12-0222, Decision After Reconsideration (Jul. 31, 2014).) The Appeals Board has held that maximum credits and the minimum penalty allowed under the regulations are to be assessed when the Division fails to indicate the basis of its adjustments and credits. (*Armour Steel Co.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

Sanasaryan testified that penalties were calculated in accordance with the Division's policies and procedures.

Citation 1

The Division, by introducing the proposed penalty worksheet and testifying to the calculations being completed in accordance with the appropriate penalties and procedures, met its burden to show the penalties were calculated correctly. Sanasaryan testified he rated the severity as high, establishing the base penalty of this General citation as $2,000.00. He did not apply any reduction for Extent or Likelihood. He applied a 15 percent reduction for Good Faith and a 10 percent reduction for History. Sanasaryan testified Employer had more than 100 employees, so no Size reduction applied.

Employer failed to rebut the Division's evidence through cross-examination or introduction of evidence that would demonstrate that the penalty was not calculated correctly. A 25 percent reduction of $2,000.00 is $500.00, reducing the penalty to $1500.00. A 50 percent abatement credit applied to $1500.00 results in a reduction to $750.00. The proposed penalty of $750.00 is thus found reasonable and is affirmed.

Citation 2

The initial base penalty for a Serious violation is $18,000. (§ 336, subd. (c)(1).) As set forth above, the Serious classification is affirmed. Due to the Accident-Related characterization, Employer is entitled to no reductions except for Size. (§ 336, subds. (c)(2) and (d)(7).)

As discussed above, no Size reduction applies. The proposed penalty of $18,000.00 is thus found reasonable and is affirmed.

Conclusion

The evidence supports a finding that Employer violated section 3380, subdivision (f)(2), by failing to identify a hazard assessment as a certification of hazard assessment. Employer failed to include written language on its workplace hazard assessment that identifies it as a certification

of hazard assessment. The citation is properly classified as General, and the abatement requirements and the proposed penalty are reasonable.

The evidence supports a finding that Employer violated section 3203, subdivision (a), by failing to provide effective training. Employer failed to provide effective job-specific training to clean the hood above the fry station. The citation is properly classified as Serious and Accident-related, and the abatement requirements and the proposed penalty are reasonable.

Order

It is hereby ordered that Citation 1 and Citation 2 are affirmed, and their associated penalties and assessed as set forth in the attached Summary Table.

Dated: 11/09/2022

Rheeah Yoo Avelar
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.**