BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1487741**
BSF FITNESS II, LLC **dba BSF FITNESS LLC** **4580 MARKET ST. BLDG 2A** **VENTURA, CA 93003** **Employer**	**DECISION**

Statement of the Case

BSF Fitness II, LLC (Employer) operates a fitness gym. Beginning July 31, 2020, the Division of Occupational Safety and Health (the Division) through Compliance Officer Rami Delos Reyes (Delos Reyes) conducted an investigation at Employer's worksite located at 4580 Market Street, in Ventura, California (the site).

On January 29, 2021, the Division issued four citations to Employer for nine alleged violations of the California Code of Regulations, title 8.[1]

- Citation 1, Item 1, classified as General, alleges that Employer failed to establish, implement or maintain an effective Injury and Illness Prevention Program (IIPP).
- Citation 1, Item 2, classified as General, alleges that Employer failed to develop, maintain and implement an effective written Hazard Communication Program.
- Citation 1, Item 3, classified as General, alleges that Employer failed to maintain safety data sheets for each hazardous chemical in the workplace, specifically with respect to cleaning agents.
- Citation 1, Item 4, classified as General, alleges that Employer failed to provide and maintain a safe working space around electrical equipment.
- Citation 1, Item 5, classified as General, alleges that Employer failed to cover two electrical outlets.
- Citation 1, Item 6, classified as General, alleges that Employer failed to effectively close unused openings on a 110-volt electrical outlet junction box.
- Citation 2, Item 1, classified as Serious, alleges that Employer failed to provide an emergency eyewash station in work areas where employees' eyes may come into contact with corrosive bleach.

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

- Citation 3, Item 1, classified as Willful Serious, alleges that Employer failed to identify and evaluate the hazard of COVID-19[2] in the workplace or implement corrective measures related to said hazard; in the alternative, it alleges that Employer failed to implement engineering controls to prevent harmful employee exposures to COVID-19.
- Citation 4, Item 1, classified as Serious, alleges that Employer failed to provide effective training to its employees on the COVID-19 hazard.

Employer filed a timely appeal contesting the proposed penalty for each alleged violation. An appeal from a penalty puts at issue the classification of the violation, which the Division then has the burden to prove. (*Anderson, Clayton & Company, Oilseed Processing Division*, Cal/OSHA App. 79-131, Decision After Reconsideration (July 30, 1984); *Quang Trinh*, Cal/OSHA App. 93-1697 et. al., Decision After Reconsideration (June 25, 1998).) Employer also asserted affirmative defenses on its appeal forms, but neither expressly identified nor litigated any affirmative defenses during the pendency of this appeal; therefore, any such affirmative defenses are deemed waived pursuant to *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ), for the California Occupational Safety and Health Appeals Board (Appeals Board) in Los Angeles, California on July 6, 2022. ALJ Chernin conducted the video hearing with all participants appearing remotely via the Zoom video platform. Tuyet-Van Tran, Staff Counsel, represented the Division, and Tracy Marshall (Marshall), Employer's Operations Manager, represented Employer.

The matter was submitted on August 5, 2022.

Issues

1. Did the Division establish that Citation 1, Items 1 through 6, were properly classified as General?
2. Did the Division establish that Citations 2, 3, and 4 were properly classified as Serious?
3. Did Employer rebut the presumption that the violations alleged in Citations 2, 3, or 4 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?
4. Did the Division establish that Citation 3 was properly characterized as Willful?

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

5. Did the Division propose reasonable penalties for each of the alleged violations?

Findings of Fact

1. Employer's failure to establish, implement or maintain an effective IIPP put employees at risk of not knowing how to safely conduct themselves in the workplace.
2. Employer's failure to develop, maintain and implement an effective written Hazard Communication Program put employees at risk of illness or injury while using hazardous chemicals such as corrosive bleach in the workplace.
3. Employer's failure to maintain safety data sheets for each hazardous chemical in the workplace, specifically with respect to cleaning agents, put employees at risk of not being able to recognize the hazards posed by the chemicals.
4. Employer's failure to provide and maintain a safe working space around electrical equipment creates the risk that employees will not be able to physically access the equipment in the event that they need to de-energize it.
5. Employer's failure to cover electrical outlets exposes employees to electrical shock should they come into contact with the exposed wiring.
6. Employer's failure to effectively close unused openings on a 110-volt electrical outlet junction box exposed employees to electrical shock should they come into contact with exposed wiring.
7. Employer's failure to provide an emergency eyewash exposed employees to the risk that they would suffer serious eye injuries, including blindness, from coming into contact with corrosive bleach and not be able to irrigate their eyes.
8. Employer's failure to identify, evaluate, and correct hazards associated with employee exposure to COVID-19 exposed employees to the risk that they could contract a life-threatening illness.
9. Employer's failure to provide effective training to its employees regarding the COVID-19 hazard made it more likely that employees would become infected and suffer a life-threatening illness.
10. Employer was aware of the COVID-19 hazard affecting its employees and, despite this knowledge, chose not to implement corrective measures to protect its employees from the risk of transmission of the disease. Employer did not enforce masking, social distancing, or provide physical barriers at the gym to prevent or reduce the spread of COVID-19.
11. The proposed penalties for Citation 1, Items 1 through 6, as well as for Citations 2, 3 and 4, were calculated in accordance with the Division's policies and procedures.

Analysis

1. Did the Division establish that Citation 1, Items 1 through 6, were properly classified as General?

Employer did not contest the existence of the violation. As such, the existence of the violation is established as a matter of law. The Appeals Board has held that an employer may not raise a violation's existence as an issue where it did not challenge the existence of the violation on its appeal form. (§ 361.3; *Pacific Cast Products, Inc*., Cal/OSHA App. 99-2855, Denial of Petition for Reconsideration (July 19, 2000).)

Here, Employer neither checked off the appeal form's "existence" box, nor moved to expand the grounds for its appeal. Thus, the issue of whether the violation exists is waived.

An appeal from a penalty puts at issue the classification of the violation, which the Division then has the burden to prove. (*Anderson, Clayton & Company, Oilseed Processing Division,* Cal/OSHA App. 79-131, Decision After Reconsideration (July 30, 1984); *Quang Trinh*, Cal/OSHA App. 93-1697 et. al., Decision After Reconsideration (June 25, 1998).) Thus, although Employer only appealed the reasonableness of the penalties, the Appeals Board has long held that "[t]he classification of a violation bears directly on the propriety of the penalty and must be considered." (*Anderson, Clayton & Company, Oilseed Processing Division, supra*, Cal/OSHA App. 79-131.)

The Division has the burden of proving the classification of a safety order by a preponderance of the evidence. (See *Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385 and 2386, Decision After Reconsideration (Oct. 7, 2016).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*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.)

Section 334, subdivision (b), states that a 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."

Citation 1, Item 1:

Section 3203, subdivision (a) provides 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….

Citation 1, Item 1 alleges:

Prior to and during the course of the inspection, including but not limited to, on August 3, 2020, the employer did not establish, implement and maintain a written, effective Injury and Illness Prevention Program in accordance with this regulation.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 1, and nothing in the record suggests that Employer complied with the cited safety order by establishing, implementing and maintaining an effective written IIPP.

Delos Reyes credibly testified that he classified this violation as General because it related to employee safety and health but was not serious in nature. Specifically, he testified that an IIPP tells the employer and its employees how to conduct work safely in the workplace. He further testified that not having an IIPP could result in an employee suffering an occupational injury or illness. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The failure to establish, implement and maintain an effective IIPP increases the risk that employees will become sick or injured in the workplace. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 1 was properly classified as General.

Citation 1, Item 2:

Section 5194, subdivision (e)(1) states:

(e) Written Hazard Communication Program.

(1) Employers shall develop, implement, and maintain at the workplace a written hazard communication program for their employees which at least describes how the criteria specified in sections 5194(f), (g), and (h) for labels and other forms of warning, safety data sheets, and employee information and training will be met, and which also includes the following:

(A) A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and

(B) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

Citation 1, Item 2 alleges:

Prior to and during the course of the inspection, including but not limited to, on August 3, 2020, the employer did not develop, implement and maintain a written hazard communication program. Employees used hazardous chemicals including but not limited to: Concentrated Clorox Germicidal Bleach, Colgate Palmolive Professional Ajax Oxygen Bleach Cleanser, Simple Green All-Purpose Cleaner/Degreaser, SC Johnson Professional Windex Glass Cleaner with Ammonia-D, Zogics Z1000 Wipes, Unstoppables Febreze Air Spray Fresh.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 2, and nothing in the record suggests that Employer complied with the cited safety order by developing, implementing and maintaining a written hazard communication program.

Delos Reyes credibly testified that he classified this violation as General because it related to employee safety and health but was not serious in nature. Specifically, he testified that during his investigation, he determined that employees were using, and thus were exposed to, hazardous chemicals, specifically corrosive germicidal bleach. According to Delos Reyes, employees could become sick or injured while using corrosive germicidal bleach. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The Division's evidence demonstrates that the failure to establish, implement and maintain a written Hazard Communication Program creates a risk that employees will use hazardous chemicals without knowing how to identify and safely handle them. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 2, was properly classified as General.

Citation 1, Item 3:

Section 5194, subdivision (g)(8) states:

(g) Safety Data Sheets.

. . .

(8) (8) The employer shall maintain copies of the required safety data sheets for each hazardous chemical in the workplace, and shall ensure that

they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access and other alternatives to maintaining paper copies of the safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)

Citation 1, Item 3 alleges:

Prior to and during the course of the inspection, including but not limited to, on August 3, 2020, the employer did not maintain copies of the required safety data sheets for each hazardous chemical in the workplace including, but not limited to, Concentrated Clorox Germicidal Bleach, Colgate Palmolive Professional Ajax Oxygen Bleach Cleanser, Simple Green All-Purpose Cleaner/Degreaser, SC Johnson Professional Windex Glass Cleaner with Ammonia-D, Zogics Z1000 Wipes, Unstoppables Febreze Air Spray Fresh, and did not ensure that they were readily accessible during each work shift to employees.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 3, and nothing in the record suggests that Employer complied with the cited safety order by maintaining required safety data sheets for each of the hazardous chemicals that the Division identified in the workplace.

Delos Reyes credibly testified that he classified this violation as General because it related to employee safety and health but was not serious in nature. Specifically, he testified that employees need to have access to safety data sheets for chemicals in the workplace so that employees will be able to recognize hazards, take appropriate precautions and render appropriate first aid in the event of an exposure. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The Division's evidence demonstrates that the failure to establish, implement and maintain a written Hazard Communication Program creates a risk that employees will use hazardous chemicals without knowing how to identify and safely handle them. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 3, was properly classified as General.

Citation 1, Item 4:

Section 2340.16, subdivision (a) states:

(a) Space about electric equipment.

Sufficient access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment.

Citation 1, Item 4 alleges:

> Prior to and during the course of the inspection, including, but not limited to, on August 3, 2020, electrical equipment located in the office area was blocked with plastic containers, roller, books, fluorescent bulbs, bucket and was not maintained with sufficient access and working space.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 4, and nothing in the record suggests that Employer complied with the cited safety order by both providing and maintaining sufficient access and working space about all electrical equipment.

Delos Reyes credibly testified that he classified this violation as General because it related to employee safety and health but was not serious in nature. Specifically, he testified that the failure to provide and maintain a safe working space around electrical equipment could result in someone not being able to physically access the equipment to de-energize it, which could result in an injury requiring first aid. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. Employees who are unable to access electrical equipment, such as electrical panels, to be able to de-energize them risk exposure to injury. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 4, was properly classified as General.

Citation 1, Item 5:

Section 2510.4 states:

> Fixtures, lampholders, lamps, rosettes, and receptacles shall have no live parts normally exposed to contact.

Citation 1, Item 5 alleges:

> Prior to and during the course of the inspection, including, but not limited to, on August 3, 2020, two electrical outlets were missing faceplate covers.
>
> Instance 1: 110-volt electrical outlet located in the gym area adjacent to main entryway.
>
> Instance 2: 110-volt electrical outlet located in the office area.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 5, and nothing in the record suggests that Employer complied with the cited safety order by ensuring that live parts were not normally exposed to contact.

Delos Reyes credibly testified that he classified this violation as General because it related to employee safety and health but was not serious in nature. Specifically, he testified that the failure to cover two electrical outlets with faceplates exposed employees to the risk of injury from electrical shock from coming into contact with exposed 120-volt wiring. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The failure to cover electrical outlets increases the risk that employees will come into contact with the outlet's wires and will suffer an injury from electrical shock. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 5, was properly classified as General.

Citation 1, Item 6:

Section 2340.12, subdivision (a) states:

> (a) Unused openings in boxes, raceways, auxiliary gutters, cabinets, equipment cases, or housings shall be effectively closed to afford protection substantially equivalent to the wall of the equipment.

Citation 1, Item 6 alleges:

> Prior to and during the course of the inspection, including, but not limited to, on August 3, 2020, the employer failed to effectively close unused openings on a 110-volt electrical outlet junction box.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 1, Item 6, and nothing in the record suggests that Employer complied with the cited safety order by ensuring that it had effectively closed unused openings on a 110-volt electrical outlet junction box.

Delos Reyes credibly testified that he classified this violation as General because it related to employee safety and health but was not serious in nature. Specifically, he testified that the failure to effectively close unused openings on a 110-volt electrical outlet junction box exposes employees to the risk of electrical shock should they come into contact with exposed electrical wiring. Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. The failure to effectively close unused openings on a 110-volt electrical outlet junction box increases the risk that employees will be exposed to injury from electrical shock. The Division's evidence is credited, and it supports a conclusion that Citation 1, Item 6, was properly classified as General.

For all of the foregoing reasons, the Division established by a preponderance of the evidence that it correctly classified Citation 1, Items 1 through 6, as General.

2. Did the Division establish that Citations 2, 3, and 4 were properly classified as Serious?

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

> 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 that have been adopted or are in use.

"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).)

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*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Citation 2, Item 1:

Section 5162, subdivision (a), states:

> (a) Plumbed or self-contained eyewash or eye/facewash equipment which meets the requirements of sections 5, 7, or 9 of ANSI Z358.1-1981, Emergency

> Eyewash and Shower Equipment, incorporated herein by this reference, shall be provided at all work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption. Water hoses, sink faucets, or showers are not acceptable eyewash facilities. Personal eyewash units or drench hoses which meet the requirements of section 6 or 8 of ANSI Z358.1-1981, hereby incorporated by reference, may support plumbed or self-contained units but shall not be used in lieu of them.

Citation 2, Item 1 alleges:

> Prior to and during the course of the inspection, including, but not limited to, on August 3, 2020, the employer failed to provide plumbed or self-contained eyewash equipment at all work areas where, during routine operations, the eyes of an employee may come into contact with substances including but not limited to: bleach (corrosive).

As noted above, Employer did not challenge the existence of the violation alleged in Citation 2, Item 1, and nothing in the record suggests that Employer complied with the cited safety order by ensuring that it had effectively closed unused openings on a 110-volt electrical outlet junction box.

Delos Reyes is an Associate Safety Engineer who has been employed by the Division in various capacities for approximately 22 years. He has been an Associate Safety Engineer since 2005. Delos Reyes holds a Master's degree in Environmental Occupational Health and Safety from California State University, Northridge. He testified that he is current in his mandated Division training and has received approximately 18 to 20 trainings regarding chemical safety. Based on the foregoing, Delos Reyes is deemed competent to offer testimony to establish each element of the Serious classification pursuant to Labor Code section 6432, subdivision (g).

Delos Reyes credibly testified that he classified this violation as Serious because there is a realistic possibility that germicidal bleach could cause a serious eye injury, including blindness, if an employee's eyes come into contact with this chemical. The Division introduced the safety data sheet for the germicidal bleach kept and used at Employer's worksite, and the safety data sheet corroborates Delos Reyes's testimony. (Exhibit 30) Specifically, the safety data sheet indicates that contact with the germicidal bleach can cause burns to the eyes, skin and mucous membranes, and can cause irreversible eye damage.

Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. Employees who have access to and are exposed to corrosive germicidal bleach have an increased risk of getting the bleach in their eyes, and the

lack of an emergency eyewash increases the chance that employees will suffer permanent eye injury. The Division's evidence is credited, and it supports a conclusion that Citation 2, Item 1, was properly classified as Serious.

Citation 3, Item 1:

Section 3203 (a)(4) states that all written IIPP's shall:

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A) When the Program is first established;

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Citation 3, Item 1 alleged, in the alternative, a violation of section 5141, subdivision (a), which states:

(a) Engineering Controls. Harmful exposures shall be prevented by engineering controls whenever feasible.

Citation 3, Item 1 alleges:

Prior to and during the course of the inspection, including, but not limited to, on July 31, 2020, and August 3, 2020, the employer failed to effectively establish, implement and maintain procedures to correct unhealthy conditions related to COVID-19, that affected its employees and contract employees, including, but not limited to, the following instances:

Instance 1: The employer failed to effectively identify or evaluate workplace hazards relating to COVID-19 including, but not limited to:

a) Employer failed to effectively identify or evaluate the workplace hazards presented by the lack of physical distancing of at least six feet in all

directions between and among persons including, but not limited to, at the front counter, entry lobby area, in hallways, main office and in the exercise areas of the facility;

b) Employer failed to effectively identify or evaluate the workplace hazards presented by individuals in the workplace, including employees and visitors, who did not use face coverings to limit the release of infectious particles into the air.

c) Employer failed to effectively identify or evaluate the workplace hazards presented by front counter employees working without physical barriers, such as plexiglass screens, to separate them from visitors.

(3203, subd. (a)(4))

Instance 2: The employer failed to effectively implement methods or procedures to correct unhealthy conditions or work practices relating to COVID-19, including, but not limited to:

a) Employer's written "Minimum Standard Health Protocols" was ineffective and failed to adequately address the hazards relating [to] COVID-19;

b) Employer did not establish or enforce an effective policy for physical distancing of at least six feet in all directions between and among persons including but not limited to at the front counter, entry lobby area, in hallways, main office and in the exercise area of the facility;

c) Employer failed to ensure the use of face coverings by employees and visitors to limit the release of infectious particles into the air by individuals in the workplace;

d) Employer failed to install physical barriers such as plexiglass screens or other physical barriers at the front counter to separate employees from visitors as visitors were checking in.

(3203, subd. (a)(6))

Or, in the alternative to instances 2(c) and (d):

Prior to and during the course of the inspection, including, but not limited to, on July 31, 2020 and August 3, 2020, the employer failed to prevent harmful exposures of employees to infectious or potentially infectious airborne particles released when a person breathes, speaks, coughs, or sneezes by ensuring the use of engineering controls to prevent the spread of COVID-19, including, but not limited to the following:

1) Employer failed to install physical barriers such as plexiglass screens or other physical barriers at the front counter to separate employees from visitors as visitors were checking in;

2) Employer failed to ensure the use of face coverings by its employees and visitors.

(5141, subd. (a))

As noted above, Employer did not challenge the existence of the violation alleged in Citation 3, Item 1, and nothing in the record suggests that Employer complied with either cited safety order by identifying or evaluating the identified hazards relating to COVID-19, or by implementing feasible engineering controls to prevent exposure to COVID-19 at Employer's site.

Delos Reyes credibly testified that he classified this violation as Serious because he believed that there was a realistic possibility that an employee could suffer a serious physical illness or could potentially die from exposure to COVID-19 due to the lack of face coverings, physical barriers or social distancing in the workplace. Specifically, he testified that employees could contract COVID-19 through inhalation of airborne particles due to not having masks or physical distancing or physical barriers implemented and enforced at the workplace. According to Delos Reyes, customers routinely come to Employer's gym. Employer's former receptionist George Manriquez (Manriquez) credibly testified that masks were optional at the gym for both employees and customers, and physical distancing was not required.

Mary Kochie, a Nurse Consultant 3 with the Division for the past 22 years, testified to her education and experience, which includes decades of experience in occupational healthcare in both public and private settings. Kochie is a Registered Nurse, public health nurse, and a certified occupational health nurse. She earned a Master's degree in nursing from California State University, Los Angeles. Kochie testified that she is involved in professional organizations in her field and has completed coursework and independent research relating to COVID-19.

Kochie credibly testified that, based on her knowledge and her professional experience as a nurse, COVID-19 is an airborne transmissible disease that can transmit from person to person via aerosols, splashes or sprays. According to Kochie, respiratory aerosols are particles that linger in the air after a person exhales. Kochie testified that transmission is highest when people are within three to six feet of each other for more than 15 minutes. She further testified that exposure controls such as masking, maintaining six or more feet of physical distancing, and installing physical barriers, all serve to reduce and prevent transmission of COVID-19. Kochie testified that someone infected with COVID-19 could be asymptomatic, while others may be exposed to mild or severe symptoms. Symptoms of COVID-19 include headache, runny nose, cough, breathing difficulty, chest pain, fever, nausea, diarrhea, muscle aches, weakness, clotting disorders, and the inability to oxygenate blood, which can ultimately lead to organ failure, and death. Kochie further testified that there is no cure for COVID-19, and at the time of the citations no vaccination existed. Kochie's testimony is deemed credible and is credited.

Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. It is therefore found that the failure to identify and evaluate the COVID-19 hazard at Employer's workplace and implement corrective measures to limit employee exposure to the hazard, increased the risk to employees that they would contract this potentially deadly disease. This finding is based on the credited testimony of Delos Reyes and Kochie which, when weighed against the complete lack of contradictory evidence from Employer, weighs heavily in support of such a finding. (See Evid. Code, § 412.) Therefore, for all of the foregoing reasons, it is determined that the Division correctly classified Citation 3, Item 1, as Serious.

Citation 4, Item 1:

Section 3203, subdivision (a)(7) states that all written IIPP's shall:

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
>
> (A) When the Program is first established;
>
> Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.
>
> (B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and
>
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

Citation 4, Item 1 alleges:

> Prior to and during the course of the Division's inspection, the employer failed to provide effective training and instruction to its own employees and contract employees regarding the new occupational hazard of COVID-19, including but not limited to, training and instruction on how the virus is spread and measures to avoid infection, signs and symptoms of infection, and how to safely use cleaners and disinfectants.

As noted above, Employer did not challenge the existence of the violation alleged in Citation 4, Item 1, and nothing in the record suggests that Employer provided effective training and instruction to its employees regarding the hazard presented by COVID-19 at Employer's site.

Delos Reyes credibly testified that he classified this violation as Serious because he believed that there was a realistic possibility that an employee who is not effectively trained regarding the COVID-19 hazard is exposed to an increased risk that the employee will become infected with COVID-19 and could suffer serious illness or death as a result of infection. Kochie also testified that employees who are trained in COVID-19 transmission, as well as control methods, is much more likely to comply with such measures and thereby reduce the risk of becoming exposed. As discussed above, Delos Reyes is deemed competent under Labor Code section 6432, subdivision (g), and Kochie's credibility is established through her education and professional experience. Accordingly, both Delos Reyes' and Kochie's testimony is deemed credible and is credited.

Employer offered no testimony or other evidence to counter the Division's evidence, although it was given the opportunity to do so. It is therefore found that the failure to effectively train employees regarding the COVID-19 hazard at Employer's workplace increased the risk that employees who are not knowledgeable about the risks associated with COVID-19 and the means and methods to prevent or reduce transmission would be less likely to comply with such means and methods and would be more likely to contract this potentially deadly disease. This finding is based on the credited testimony of Delos Reyes and Kochie which, when weighed against the complete lack of contradictory evidence from Employer, weighs heavily in support of such a finding. Therefore, for all of the foregoing reasons, it is determined that the Division correctly classified Citation 4, Item 1, as Serious.

For all of the foregoing reasons, therefore, it is determined that the Division met its burden of proof of establishing that Citations 2, 3, and 4 were properly classified as Serious.[3]

3. Did Employer rebut the presumption that the violations alleged in Citations 2, 3, or 4 were Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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.

[3] Labor Code section 6432, subdivision (b)(1) requires the Division, prior to issuing a citation classified as Serious to first "make a reasonable attempt to determine and consider" certain enumerated information. Under subdivision (b)(2), the Division meets its obligation if, "not less than 15 days prior to issuing a citation for a serious violation, the division delivers to the employer a standardized form containing the alleged violation descriptions ("AVD") it intends to cite as serious and clearly soliciting the information specified in this subdivision." Here, the Division's Exhibits 31, 32 and 33 (1BY's) and 34 (proof of mailing and delivery of 1BY's) demonstrate that the Division did what is required under section 6432, subdivision (b), and Employer did not offer any evidence suggesting that the Division failed to comply with this statutory obligation.

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

> (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.

Here, Employer offered no evidence to rebut the Serious classifications. In particular, Marshall testified that there had been no cases of COVID-19 at the gym, and that Employer "did not force employees to be there" is irrelevant and insufficient as a matter of law to rebut the Division's evidence regarding the classifications of Citations 2, 3, and 4. In fact, this statement by Marshall further supports a conclusion that Employer had knowledge of the COVID-19 hazard.

Employer had the opportunity to provide evidence of the steps that it took to anticipate and prevent the cited violations, and to eliminate employee exposure as soon as the violation was discovered. Despite having the opportunity to present such evidence, Employer did not. Employer's failure to offer any such evidence, when weighed against the Division's evidence supporting the classifications, supports a finding that Employer did not take any steps to anticipate, prevent or eliminate exposure to the hazards identified in Citations 2, 3, and 4.

Therefore, Employer did not rebut the Serious classifications of these citations.

4. Did the Division establish that Citation 3 was properly characterized as Willful?

Section 334, subdivision (e) provides that a willful violation "is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition."

The Division has two alternate means of proving the willfulness of an employer's conduct under section 334, subdivision (e). It could prove either (1) that the employer knew the provisions of the cited safety order and intentionally violated them ("intentionally violated a safety law"), or, (2) that the employer knew "that an unsafe or hazardous condition existed and

made no reasonable effort to eliminate the condition." (*Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034, and *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668 through 1670, Decision After Reconsideration (Oct. 14, 1987).)

Delos Reyes credibly testified that during the inspection, he interviewed owner Josh Cohn (Cohn), who identified himself to Delos Reyes as Employer's co-owner, and informed Delos Reyes that "he didn't believe in COVID", admitted to not requiring masks, and opined that COVID-19 was "a joke." Employer offered no evidence to contradict Cohn's status as co-owner. Cohn is Employer's co-owner, thus statements attributed to him out of court may be treated as authorized admissions pursuant to Evidence Code section 1220. Moreover, Cohn's statements are corroborated by other evidence introduced by the Division.

The Division introduced evidence of two closure orders issued by the County of Ventura, Department of Public Health. The first order, dated May 19, 2020, ordered Employer's gym closed through May 31, 2020. The second order, dated July 21, 2020, ordered Employer's gym closed until such time as the County's health officer rescinded the order, or the Governor rescinded the "State of California Stay at Home Order", whichever were to occur first. Both orders cite the "serious threat to public health and safety" created by the gym operating during the COVID-19 pandemic, as the basis for the closure orders. Employer offered no evidence suggesting that the orders presented by the Division were not genuine, or that Employer did not receive them on or about the dates they were executed. The undersigned therefore finds that Employer did receive these closure orders on or about the dates they were executed. Despite receiving two closure orders from the County of Ventura, Department of Public Health, Employer continued to operate.

Sometime after the start of the COVID-19 pandemic, Employer created a document titled "Minimum Standard Health Protocols." (The document's first paragraph refers to "a documented death rate nearing less than 1% (<u>below that of the seasonal flu</u>)" (emphasis in the original), and asserts that it is a violation of Employer's constitutional rights to "prevent the use of health facilities when the proper health standards are being put in place." The third paragraph of the document is in red, and acknowledges that COVID-19 can cause people to "become seriously ill or even die," and encourages "everyone" to "rigorously follow the practices specified in these protocols." The bottom of the document lists "health protocols for members" (i.e. customers), such as cleaning equipment after every use; limiting members to using one machine at a time to enforce cleanliness and social distancing; requiring the use of hand sanitizer when entering or exiting the gym; maintaining at least 6 feet of social distancing; and, not coming to the gym if a member felt sick or may have had or been exposed to COVID-19 within the prior 3 day period. Manriquez, who described the form as a "waiver," credibly testified that both customers and employees had to sign it, and employees "walked members through" the health protocols, but that the protocols were not actually enforced.

Here, it is found that Employer knew that an unsafe or hazardous condition existed. Employer did not dispute during the hearing that it was aware of the COVID-19 threat affecting its gym, or the serious threat posed by COVID-19 to employees of the gym. This finding is based on the two closure orders issued by the County of Ventura, Department of Public Health, as well as Employer's "Minimum Standard Health Protocols," which acknowledges the existence of COVID-19 and the risk of serious illness or death posed by the virus.

It is also found that, despite substantial evidence that Employer was actually aware of the COVID-19 hazard exposure at its gym, Employer made no reasonable effort to eliminate the condition. This finding is based on Cohn's statement to Delos Reyes that he thought COVID-19 was "a joke" and his admission that he did not require masks at the gym, and is corroborated by Manriquez's testimony that masks and social distancing were not required, as well as the lack of any evidence in the record suggesting that Employer installed barriers to reduce or eliminate transmission of COVID-19 in the workplace. It is also based on Employer's "Minimum Standard Health Protocols," which contains statements tending to show that Employer did not take COVID-19 seriously. Finally, it is based on Marshall's testimony during hearing, in particular her testimony that Employer "didn't force employees to be there."

In *Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1038, the Division cited an employer for an accident involving a journeyman electrician who sustained serious injuries from electrical shock while working on an energized electrical cable without prior training or protective clothing. The Appeals Board determined that the violation was properly characterized as willful, and the Court of Appeal affirmed. (*Id*., p. 1040.) Specifically, the Court of Appeal relied on substantial evidence that the employer "knew working on an energized line created a hazard", but nonetheless directed the employee "to work on those cables without taking any action to eliminate the hazardous condition they presented." (*Id*., p. 1039.)

The present situation bears resemblance to the facts in *Rick's Electric, Inc*., *supra*. Here, Employer knew that working at a membership gym during the COVID-19 global pandemic created a workplace hazard to which its employees were exposed. In spite of this knowledge, Employer continued directing its employees to work inside the gym without taking reasonable actions to eliminate the COVID-19 hazard to which they were exposed. Evidence received during the hearing demonstrates that COVID-19 is an airborne transmissible disease. Employer could have required masking and social distancing, and could have installed plexiglass barriers in order to prevent employee exposure, but Employer instead decided the COVID-19 hazard was "a joke" and took unreasonable actions that placed Employer's business interests ahead of its employees' safety. Taken together, the evidence summarized above demonstrates that Employer

failed to address the serious health risks associated with COVID-19, and did not take reasonable efforts to reduce or eliminate employee exposure to COVID-19.

For all of the foregoing reasons, therefore, it is determined that the Division correctly characterized Citation 3 as Willful.

5. Did the Division propose reasonable penalties for each of the alleged violations?

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. (*RNR Construction, Inc*., Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

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. (*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).)

Here, the Division presented its proposed penalty worksheet (Exhibit 29), and Delos Reyes credibly testified as to the manner in which he calculated the penalties for each of the citations. Employer offered no evidence that the Division miscalculated the penalties, or that Delos Reyes improperly applied the penalty regulations, or that the totality of the circumstances warrants a penalty reduction. Accordingly, it is determined that the Division proposed reasonable penalties for each of the violations.

CONCLUSION

The evidence supports a determination that the Division properly classified Citation 1, Items 1 through 6, as General. The evidence further supports a determination that the Division correctly classified Citations 2, 3, and 4 as Serious. The evidence also supports a determination that the Division correctly characterized the violation identified in Citation 3 as Willful. Finally, evidence supports a determination that the penalties were reasonably calculated.

ORDER

Citation 1, Items 1 through 6, are affirmed as General violations, and their associated penalties are affirmed and assessed as set forth in the attached Summary Table.

Citation 2, Item 1, is affirmed as a Serious violation, and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Citation 3, Item 1, is affirmed as a Willful Serious violation, and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Citation 4, Item 1, is affirmed as a Serious violation, and the associated penalty is affirmed and assessed as set forth in the attached Summary Table.

Dated: 08/16/2022

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.**