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

| In the Matter of the Appeal of: | **Inspection No.** **1488312** |
|---|---|
| **THE INDIANA FINISH LINE, INC.**<br>**dba THE FINISH LINE, INC.**<br>**3308 North Mitthoeffer Road**<br>**Indianapolis, IN 46235**<br><br>**Employer** | **DECISION AFTER RECONSIDERATION** |

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby issues the following Decision After Reconsideration resolving the petition for reconsideration (Petition) filed in the above-entitled matter by the California Division of Occupational Safety and Health (Division).

## JURISDICTION

On August 13, 2020, the Division started an inspection of a place of employment in Bakerfield, California, maintained by The Indiana Finish Line, Inc., dba The Finish Line, Inc. (Employer). On April 16, 2021, the Division issued one citation to Employer alleging one Serious violation of occupational safety and health standards codified in California Code of Regulations, title 8.[1] Employer timely appealed.

The matter was assigned to an administrative law judge (ALJ) of the Board for appeal proceedings. The proceeding before the ALJ culminated in a contested evidentiary hearing and a decision by the ALJ issued on March 23, 2023, (Decision) which granted Employer's appeal and dismissed the citation.

The Division timely filed its Petition. The Board took the Division's Petition under submission on May 22, 2023.

Employer filed an answer to the Petition.

## ISSUE

Did the Division prove the alleged violation of section 3203, subdivision (a)(4) and (a)(6)?

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

## REASONS FOR DECISION AFTER RECONSIDERATION

The Board has fully reviewed the record in this case, including the arguments presented in the Petition and Employer's answer. We have taken no new evidence.

As we explain below, we affirm the ALJ's Decision and adopt it as our own, with a clarification.

## FINDING OF FACT

We adopt and incorporate by reference the Decision's findings of fact.

## DISCUSSION

The Division alleged, in part, that Employer failed to identify the workplace hazard posed by COVID-19, in violation of section 3203, subdivision (a)(4), which states:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain and effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> (4) Include procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

The ALJ's finding of fact number 4 correctly stated that Employer had identified the hazard posed by COVID-19 to its employees as required by section 3203, subdivision (a)(4). The record supports that finding.

We do clarify, however, that there were occasions where the the ALJ's analysis of section 3203, subdivision (a)(4), unnecessarily addressed items that were more relevant to the analysis of section 3203, subdivision (a)(6). In particular, there were occasions where the Decision discussed corrective efforts utilized by Employer—generally evaluated under subdivision (a)(6)—when discussing whether Employer identified and evaluated workplace hazards under subdivision (a)(4). While these various subdivisions all have a degree of interrelatedness, we clarify that some caution should be taken to ensure that the analysis directly pertains to the particular subdivision cited.

Our clarification of the ALJ's analysis is intended to make clear that the Decision's emphasis and detailed summary of the protective measures taken by Employer should not obscure her finding that Employer did identify the COVID-19 hazard as required.

Nevertheless, the evidence supports the ALJ's determination that Employer identified and evaluated the hazard. First, Employer's witness Sindy Rousseau testified that Employer took several steps to establish procedures and protective measures during the mandatory closure of most businesses, including Employer's, from March into May 2020. At the very least Employer's taking such steps raises the inference that it was aware of the hazard presented by COVID-19. Second, the evidence established that Employer did take several steps to mitigate the COVID-19 hazard in the location at issue, demonstrating that it had identified and evaluated the hazard, at least by inference, and contrary to the Division's allegation that Employer had not done so.

Separately, the Division also alleged that Employer failed to correct the hazard, as required by section 3203, subdivision (a)(6). Again, the record shows that Employer timely took several appropriate measures to address the hazard, as was explained in detail in the Decision.

## DECISION

For the reasons stated above, the Division's Petition is denied. The Decision is affirmed as clarified/amended.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 08/14/2026

**BEFORE THE**
**STATE OF CALIFORNIA**
**OCCUPATIONAL SAFETY AND HEALTH**
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| In the Matter of the Appeal of: | Inspection No. **1488312** |
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| **THE INDIANA FINISH LINE, INC.**<br>**dba THE FINISH LINE, INC.**<br>**3308 NORTH MITTHOEFFER ROAD**<br>**INDIANAPOLIS, IN 46235**<br><br>**Employer** | **DECISION** |

## Statement of the Case

The Indiana Finish Line, Inc. (Employer), sells athletic footwear and apparel. Beginning on August 13, 2020, the Division of Occupational Safety and Health (Division), through Assistant Safety Engineer Blanca Manzo (Manzo), inspected Employer's work site at 2701 Ming Avenue, Bakersfield, California (the store).

On April 16, 2021, the Division issued a Modified Citation[1] to Employer for one Serious alleged violation of the California Code of Regulations, title 8.[2] The citation alleges that Employer failed to implement and maintain an effective Injury and Illness Prevention Program (IIPP) relating to COVID-19[3] that affected its employees. The citation alternatively alleges that Employer failed to use engineering controls to prevent harmful exposure of its employees to infectious or potentially infectious airborne particles to prevent the spread of COVID-19.

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, and the proposed penalty is unreasonable. Employer asserted numerous affirmative defenses.

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, on June 30, 2022, and August 9 and 10, 2022, and October 18 and 19, 2022. ALJ Jones conducted the video hearing with all participants appearing remotely via the Zoom video platform. Keith Mackenzie, Staff Counsel, represented the Division. Dale R. Kuykendall and Sierra Vierra, both attorneys at Jackson Lewis P.C., represented Employer. The matter was submitted for decision on February 22, 2023.

[1] On April 4, 2021, the Division issued a Citation which was thereafter superseded by the Modified Citation.
[2] Unless otherwise specified, all references are to California Code of Regulations, title 8.
[3] As used in this Decision, "COVID-19" refers to SARS-CoV-2, the virus that causes a respiratory disease called Coronavirus disease (COVID-19).

## Issues

1. Did the Division establish a violation of section 3203, subdivision (a)(4)?

2. Did the Division establish a violation of section 3203, subdivision (a)(6)?

3. Did the Division establish a violation of section 5141, subdivision(a)?

## Findings of Fact

1. At the time of the inspection, the store employed approximately 22 employees.

2. In early 2020, COVID-19 emerged as a global health crisis which constituted a new hazard.

3. The store was shut down from March 19, 2020, through May 23, 2020, after issuance of Executive Order N-33-20, and it reopened after issuance of Executive Order N-60-20.[4]

4. Before re-opening to the public, Employer conducted a hazard assessment in accordance with guidance from the Centers for Disease Control and Prevention (CDC), the Division, and the California Department of Public Health (CDPH).

5. Prior to the store re-opening to the public on May 23, 2020, Employer implemented numerous measures recommended by the CDC, the Division, the CDPH, and the cities and counties where its store was located.

6. Prior to the store re-opening to the public on May 23, 2020, Employer implemented a "Social Distancing Implementation Pack."

7. Prior to the store re-opening to the public on May 23, 2020, employees were required to complete a COVID-19 training course entitled "Returning to Retail."

8. From June 21, 2020, through June 26, 2020, the store received reports that three employees at Employer's facility tested positive for COVID-19.

[4] The Division requested Official Notice of Executive Order N-33-20 wherein on March 4, 2020, Governor Gavin Newsom proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19. The Division also requested Official Notice of Executive Order N-60-20 wherein, the Governor allowed a partial re-opening of lower-risk businesses and spaces to be followed by the reopening of higher-risk businesses and spaces to allow Californians to gradually resume various activities while continuing to preserve public health in the face of COVID-19. The undersigned takes Official Notice of Executive Order N-33-20 and Executive Order N-60-20,

9. The store closed from July 25, 2020, through August 31, 2020, in compliance with the State's second shutdown order.

10. Employer effectively established, implemented, and maintained an effective IIPP by conducting a hazard assessment, training employees on ways to reduce hazards, creating a daily COVID-19 Compliance Checklist, increasing cleaning practices, and reducing store capacity.

11. Employer's written IIPP contained methods and procedures for correcting unsafe conditions and work practices or procedures.

12. The Division failed to show that Employer's ventilation system was insufficient to mitigate the hazard posed by COVID-19.

## Analysis

**1. Did the Division establish, a violation of section 3203, subdivision (a)(4)?**

Citation 1, Item 1, Instance 1 asserts a Serious violation of section 3203, subdivision (a)(4), which. provides, in relevant part:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain and effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> (4) Include procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

In this citation, the Division alleges:

> Prior to and during the course of the Division's inspection, including, but not limited to, on August 13, 2020, the employer failed to implement and maintain an effective injury and illness Prevention Program relating to COVID-19 that affected its employees.

Applicability

Section 3203, subdivision (a)(4), requires that employers include in their IIPP "procedures for identifying and evaluating workplace hazards." (*Brunton Enterprises, Inc.,* Cal/OSHA App. 08-3445, Decisions After Reconsideration (Oct. 11, 2013).) "These procedures

must include 'scheduled periodic inspections to identify unsafe conditions and work practices.'" (*Id.*) The safety order contains no requirement for an employer to have a written procedure for each hazardous operation it undertakes." (*Id.*) What is required is for Employer to have procedures in place for identifying and evaluating workplace hazards, and these procedures are to include "scheduled periodic inspections." (*Id.*)

Employer did not dispute during the hearing that the safety order applies to its operations at the site, and the uncontroverted evidence establishes that Employer was an entity covered by section 3203, subdivision (a)(4), and was therefore required to include procedures in its IIPP to identify and evaluate workplace hazards. The alleged hazard here is COVID-19. Therefore, Section 3203, subdivision (a)(4) is applicable.

Exposure to the hazard addressed by the safety order:

The Division has the burden of proving a violation by a preponderance of the evidence. (*ACCO Engineered Systems*, Cal/OSHA App. 1195414, Decision After Reconsideration (Oct. 11, 2019).) "'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." (*Timberworks Construction, Inc.*, Cal/OSHA App. 1097751, Decision After Reconsideration (Mar. 12, 2019).)

Once applicability is determined, the next issue to address is whether employees were exposed to the identified hazard, as exposure is an element of the Division's burden of proof. (*Home Depot, USA., supra,* Cal/OSHA App. 1011071). The first alleged hazard in this instance is employee exposure to COVID-19 due to a lack of physical distancing between employees and customers at Locations 1-5 (Instance a). The second alleged hazard is employee exposure to COVID-19 due to lack of effective barriers (Instance b).

The store includes a sales floor, a stockroom and an egress corridor. There are two point of sale stations on the sales floor. One register station faces the store entrance, the other faces the back of the store. Manzo testified that the 6-foot physical distance recommendation from the CDC was not followed. Manzo testified that she used the CDC guidelines as a point of reference.[5]

Manzo testified that 22 employees worked at this site. Employer's location is within a mall. Employer closed on March 19, 2020, due to the Governor's order and reopened to the public on May 23, 2020. The store closed again July 25, 2020, through August 31, 2020 due to the State's second shut down order. Manzo conducted an opening conference with Kevin Privado (Manager), Joey Johnson (Area Manager), William Kuntz (Senior Corporate Counsel) and Mary Mahoney (Regional Talent Partner). Employees worked throughout the store. Privado explained that Employees work with customers and walk throughout the store including the stock room to

[5] No CDC guidelines were offered or admitted into evidence.

obtain shoes and other items as requested. Three employees working at this worksite tested positive for COVID-19 between June 21, 2020, through June 26, 2020.

Mary Kochie, (Kochie), a Nurse Consultant 3 with the Division for the past 22 years, testified based on her knowledge and professional experience that COVID-19 is an airborne transmissible disease that can transmit from person to person via aerosols, splashes or sprays. Kochi, the Division's medical expert, testified on behalf of the Division. She reviewed an Accident Report (Exhibit 4a) which was admitted without objection. The records indicated that three employees tested positive for COVID-19 in a five-day period.

Exposure may be established in two ways. First the Division may establish exposure by showing that an employee was actually exposed to the zone of danger created by the violative condition, i.e. that the employees have been or are in the zone of danger. (*Dynamic Construction Services, Inc.,* Cal/OSHA App. 14-1471, Decision After Reconsideration (Dec. 1, 2016).) Alternatively, the Division may establish exposure 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." (*Ibid.*)

The fact that three employees tested positive working at this worksite, constitutes persuasive evidence of actual exposure to the hazard. Here, Kochi testified that if four employees out of 21 tested positive for COVID-19 it would raise her suspicions that the exposures occurred at work.[6] During cross examination, Kochi testified that three COVID-19 employees in the workplace would be considered an outbreak. The fact that three employees out of 22 tested positive for COVID-19, constitutes persuasive evidence of actual exposure to the hazard.

Elements of the cited safety order

Notwithstanding the finding of exposure, to prove a violation of section 3203, subdivision (a)(4), based upon a failure of implementation, the Division must establish two additional elements: that a triggering event occurred requiring an inspection to identify and evaluate hazards and that Employer failed to effectively implement its duty to inspect, identify and evaluate the hazard. (*OC Communications, Inc.,* Cal/OSHA App. 14-0120, Decision After Reconsideration (March 28, 2016).)

***Instance a: Distancing***

The Division alleged Employer failed to effectively identify or evaluate COVID-19 hazard lack of physical distancing between employees and customers at five different locations at the store:

1. Store entrance facing computer station

[6] At this site, three employees tested positive out of 22. The fourth employee which tested positive was at another location owned by this Employer.

2. Store entrance facing customer point-of-sale
3. Back of store facing computer station
4. Back of store facing customer point of sale and phone station
5. Benches for fitting shoes

As to the first element, an employer's duty to inspect, identify, and evaluate is triggered, and must be implemented, by, at minimum, three events: (1) when the program is first established, (2) when new substances, processes, procedures, or equipment are introduced, or (3) whenever the employer is made aware of a new or previously unrecognized hazard. (section 3203, subdivision (a)(4)(A)-(C).) Here, the Division's allegations do not concern establishment of the IIPP. Nor did the Division demonstrate there were any new substances, processes, procedures, or equipment introduced into the workplace. Therefore, the remaining issue is whether Employer was made aware of a previously unrecognized hazard.

The Division argues that being in close proximity to customers and other employees in the midst of a deadly pandemic was a known workplace hazard during the period from May 23, 2020, when Employer's facility reopened, through the date of the inspection on August 13, 2020. The Division further argued the various Executive Orders issued by the Governor's office, guidance issued by the California Department of Public Health mandating physical distancing, and the general atmosphere in the state at that time made this hazard (lack of physical distance between employees and customers) readily apparent.

There was evidence that COVID-19 was a hazard and Employer's Regional Talent Partner, Sindy Rousseau (Rousseau), credibly testified that by March 20, 2020, all of Employer's California stores were closed pursuant to Executive Order N-33-20. This Employer was aware of the alleged hazard of COVID-19 and the lack of physical distancing as indicated by the Employer's implementation of numerous measures prior to re-opening in May 2020. The Division has demonstrated that Employer was made aware of a new or previously unrecognized hazard prior to commencing the work during the period from May 23, 2020, through the date of the inspection on August 13, 2020. This awareness triggered the duty to inspect, identify, and evaluate.

The second element of the violation, i.e. whether Employer failed to effectively implement its duty to inspect, evaluate and identify the hazard must be determined. In this matter Employer did take action to inspect and identify the hazard. Site Manager Privado, Area Manager Johnson and Regional Talent Partner Rousseau worked together prior to the May 23, 2020, re-opening to minimize hazards. According to Rousseau, Employer created a document called the Safety Plan Overview (Exhibit B) to inform every work site of ways they could prevent and reduce exposure to COVID-19. That was sent to all locations to post either on the blue wall (an area where Employer relayed information to employees) or in a customer-facing area. Rousseau also testified that Employer implemented a "Social Distancing Implementation Pack" (Exhibit D) prior to the May 23, 2020, reopening.

According to Rousseau the Store Managers had to implement everything and review it with the Area Manager in the Social Distancing Implementation Pack before re-opening. This included posting social distancing posters at the entrance of the store and throughout the store, moving fixtures (including benches) at least six feet apart, installing social distancing dots six feet apart near the cash registers and outside the store where customers lined up, posting signs next to the cash registers to encourage contactless payment, encouraging customers to step back from the register while processing a transaction, and modifying the shoe try-on process for minimal contact. Rousseau's testimony is credited.

Rousseau testified that Employer implemented a process in which employees were required to report a positive diagnosis or symptoms consistent with COVID-19 to their manager/and or talent partner. Employees also had an option to report a positive diagnosis or symptoms consistent with COVID-19 via a coronavirus hotline that Employer created. If an employee was positive outside of work, they were asked to stay home. If symptomatic or positive at work they were asked to go home.

Privado and Johnson documented Employer's actions and used checklists to minimize hazards. For example, Privado minimized hazards before the re-opening by training employees, sending out social distancing packets, cleaning and disinfecting store merchandise and surfaces and completing weekly and daily checklists for cleaning were required. Further, Johnson reviewed safety measures with employees on May 20 and 21, 2020, prior to re-opening. Employer implemented screening questions for employees before they checked in for work. Employer provided gloves and face shields for all employees. In sum, Employer took action to inspect and evaluate the hazard.

The Division alleged a failure to effectively identify or evaluate COVID-19 hazard lack of physical distancing between employees and customers at five different locations in the store. The Division relied on CDC guidelines but did not request admission of the guidelines into evidence. The Division did not take any measurements of the distances in the store.

On cross examination Manza testified that Employer's IIPP (Exhibit J-1) contained all of the required elements as to inspections, investigative procedures and correction procedures. On cross examination Manzo testified that she saw the floor markings and that employee Marcos Pitino told her this was to remind the customers to keep the social distance of 6 feet.

***Instance b: Barriers***

The Division alleged Employer failed to effectively identify or evaluate the COVID -19 hazard by not installing effective physical barriers at the facility, including but not limited to the following locations:

1. Store entrance facing computer station
2. Store entrance facing customer point-of-sale
3. Back of store facing computer station
4. Back of store facing customer point of sale and phone station

As previously stated, the issue is whether Employer was made aware of a previously unrecognized hazard. The Division argues that employees were required to work for extended periods of time within 6 feet of customers and other employees. The Division argues that at some point after re-opening and prior to the inspection, Employer installed plexiglass barriers behind the computer stations and the store entrance facing and back of store facing computer stations noted in locations 1 and 3. The Division argues that Employer did not, at any point prior to or during the inspection, install plexiglass barriers at the adjacent points of sale as noted in locations 2 and 4. The Division contends that as a result, Employer failed to effectively identify and evaluate the hazard in Citation 1, Item 1, paragraph (b) in violation of Section 3203, subsection (a)(4).

The Division relied on the "COVID-19 Industry Guidance for Retail" (Exhibit A) but the Inspector conceded on cross examination that it was not a law or regulation. The guidelines did not impose any requirements on employers. The guidelines listed strategies and practices, one of which was installing physical barriers. Other steps to minimize exposure included social distancing, signage, requiring employees to wear a face covering, and encouraging customers to wear face coverings. Employer contended that no violation existed regarding section 3203, subdivision (a)(4). The testimony of both Johnson and Privado, establish that Employer had identified the hazard of COVID-19 and had conducted a comprehensive assessment of COVID-19 as a hazard before allowing the store to re-open in May of 2020. On cross-examination Cantu conceded and admitted that training for store employees on COVID-19 occurred prior to the store's reopening in May 2020. Part of the training included social distancing.

The Board has consistently recognized that it is not enough that an employer has written procedures in place for identifying and evaluating workplace hazards; proof of implementation requires evidence of actual responses to known or reported hazards. (*National Distribution,* Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015), citing *Los Angeles County Department of Public Works,* Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

The testimony of Johnson and Privado demonstrate that Employer took steps to implement its IIPP. Employer had actual responses to the hazard of COVID-19. Pursuant to Governor Gavin Newsom's Executive Order N-33-20, the store was closed on March 19, 2020. Pursuant to Governor Newsom's Executive Order N-60-20 the store was re-opened on May 23, 2020. Here, before the store re-opened on May 23, 2020, Johnson and Privado worked with the corporate office to provide information packs on store windows and markings on the floor for social distancing. Before the store re-opened on May 23, 2020, Johnson and Privado worked together and reviewed the CAL-OSHA COVID-19 Industry Guidance for Retail (Exhibit A). Prior to the re-opening Johnson and Privado used preventative procedures and discussed and trained on new work practices.

Johnson and Privado testified that Employer had COVID-19 screening questions for employees before they clocked in for work. Employer provided access to computers at the store

with COVID-19 related links and resources. Employer had protocols if an employee tested positive for COVID-19 or was symptomatic. Employer provided training on safety and health to employees regarding COVID-19 on re-opening day. Johnson and Privado testified that all employees were trained on COVID-19 by the training department on a computer. All employees were trained on what to do when they see an unhealthy or unsafe condition.

Employer identified COVID-19 as a hazard and reviewed guidance from the CDC and California Department of Public Health and Cal-OSHA. The evidence establishes that Employer identified COVID-19 as a hazard. Employer conducted a hazard assessment prior to re-opening. The flaw in Division's argument is that it addresses correction of the hazard, rather than inspection, identification, and evaluation. Therefore, the Division did not establish Employer violated section 3203, subdivision (a)(4).

**2. Did the Division establish a violation of section 3203, subdivision (a)(6)?**

Section 3203, subdivision (a) (6) states that all written IIPP's shall:

> (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, and work procedures in a timely manner based on the severity of the hazard:
>
> (A) When observed or discovered; and,
>
> (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

In this citation, Instance 2 the Division alleges:

> Prior to and during the course of the Division's inspection, including, but not limited to, on August 13, 20202, the employer failed to implement and maintain an effective injury and illness Prevention Program relating to COVID-19 that affected its employees.

The Division does not challenge the written contents of Employer's IIPP. The Division alleged a violation of Section 3203, subdivision (a)(6), which specifically requires that employers implement appropriate methods and/or procedures to correct unsafe or unhealthy conditions in the workplace. (*National Distribution Center, LP/Tri-State Staffing,* Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).)

Elements of the cited safety order:

"Section 3203 (a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well [as] to respond appropriately to correct the hazards. [Citations.]" (*BHC Fremont Hospital, Inc.,* Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) In a section 3203, subdivision (a)(6) citation, the issue is generally not that the IIPP is flawed, but that the employer has neglected to implement that IIPP, by failing to correct a hazard at the workplace. (*Contra Costa Electric, Inc.,* Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014).) To establish the violation, the Division must therefore demonstrate that Employer failed to implement its IIPP by failing to correct a hazard. (*MCM Construction, Inc.,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016.).) As the Board has described in several prior Decisions After Reconsideration, section 3203, subdivision (a)(6) is a performance standard, and creates a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions. (*Davey Tree Service,* Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012).)

***Instance c: Distancing***

The Division alleged that Employer failed to correct the hazard of a lack of physical distancing between employees and customers at the following locations:

1. Store entrance facing computer station
2. Store entrance facing customer point of sale and phone station
3. Back of store facing computer station
4. Back of store facing customer point of sale and phone station
5. Benches for fitting shoes were employees were closer than 6 feet from customers

To establish a section 3203, subdivision (a)(6), violation, the Division must either demonstrate the IIPP itself did not have written methods and/or procedures or it must demonstrate Employer failed to implement such written procedures in the IIPP. Within its closing brief, the Division argues that employer's IIPP was not implemented effectively. "Section 3203, subdivision (a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions as well as to respond appropriately to correct the hazards." *BHC Fremont Hospital, Inc.* Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration, (May 30, 2014).) To establish a violation, the Division must demonstrate that Employer failed to implement its IIPP by failing to correct a hazard. (*MCM Construction, Inc.,* Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

The Division alleges that Employer failed to correct identified hazards in the workplace. The Division alleged a lack of physical distancing between employee and customers at the store entrance facing the computer station and at the customer point-of-sale station. The Division offered the testimony of Cantu to support the allegation. Cantu's memory at times seemed unclear in that at first she testified that there was no training prior to reopening and then later she

admitted that there was training regarding COVID-19. Cantu testified that when the store was re-opened in May 2020 there were no plexiglass barriers. Cantu also testified that mask, hand sanitizers and dots (placed so that customers would know to stand 6 feet apart) on the floor of the store were in place at the time of the re-opening. Cantu also estimated that there were more than 50 customers in the store on average on the days that she worked in May 2020.

Employer required all employees to complete a COVID-19 training course entitled "Returning to Retail" (Exhibit G). Johnson met with all employees prior to re-opening to discuss social distancing, wearing masks, implementing capacity restrictions and to distribute a social distance implementation packet. Privado testified that the store capacity was limited to fifty percent. Before COVID-19, the store capacity was 100 people. As of May 23, 2020, the store capacity was 50 people. Privado lowered capacity to 25 people at times and even lowered it to 12 people at one time.

Manzo testified that two plexiglass barriers were installed two weeks prior to August 21, 2020. The plexiglass barriers were installed at or near the two cash registers (Exhibit 3). The Division alleges that the plexiglass barriers should have been installed before the date the store was reopened, May 23, 2020. The Division alleges that physical distance between the two cash registers was less than six feet and that Employer could have taken alternative measures such as adding or extending another plexiglass barrier.

The Employer contended that no violation existed regarding Section 3203, subdivision (a)(6). Employer offered the testimony of Dr. Shannon Magari regarding the citation at issue. Dr. Magari testified that the most important ways to reduce COVID-19 exposure at the time of the inspection were: screening procedures, masking requirements, and ventilation.[7] Dr. Magari indicated that the knowledge regarding COVID-19 was changing during the inspection period. Dr. Magari testified that plexiglass barriers can change air flow and they can give people a false sense of security.

Johnson testified that Employer implemented methods and procedures to correct unsafe or unhealthy conditions in the workplace by implementing the following: screening employees before they were allowed to work each day; training employees on hand hygiene and mask use; staggering employee breaks; posting signs telling employees and customers to wear masks; requiring all employees to wear masks; posting social distancing posters at the entrance of the store and throughout the store; installing social distancing dots near the case registers and outside the store where customers line up; reducing store capacity to 25%; posting several safety posters including a Plan Overview in English and Spanish around the store, which included social distancing and masking guidance; completing a daily COVID-19 Compliance Checklist promoting social distancing; modifying the shoe try-on process to reduce contact; and moving

[7] Dr. Magari has a Doctorate degree in Environmental Health from Harvard University. She also holds a Master of Public Health from Boston University. A Master of Science in Engineering from Dartmouth College and a Bachelor of Science in Bioengineering from Syracuse University.

fixtures and benches to maximize social distancing. In addition, Johnson reviewed Exhibit A, the Covid-19 Industry Guidance for Retail to prepare for the store reopening[8].

Manzo conceded on cross examination that she followed CDC and CDPH guidelines when conducting her inspection. The Division did not introduce any evidence of the CDC guidelines that the inspector relied on, and these are not in evidence. Exhibit A is not a law or regulation, it provided guidance for Employer. Manzo conceded on cross examination that Exhibit A includes recommendations to minimize exposure to COVID-19.

The Division is alleging that two hazards alleged here by the Division are (1) lack of physical distance between employees and customers at the registers and shoe fitting benches and (2) lack of effective plexiglass barriers at the registers. Manzo testified that the citation was based on the absence of barriers when the store reopened in May 2020.

The Division's witness Kochie testified that the science is mixed on the use of plexiglass barriers and that they do not help on finer particles. Kochie also testified that the science was rapidly changing in 2020 regarding COVID-19.

Employer implemented and maintained its IIPP with its comprehensive response to a global health emergency. Employer addressed the physical distancing issue by posting social distancing posters at the entrance of the store and throughout the store, installing social distancing dots near the cash registers and outside the store where customers lined up, installing plexiglass barriers at the registers as soon as it received them, reducing store capacity to 25% which was lower than the California Department of Public Health and Cal/OSHA recommended, posted a Safety Plan Overview in English and Spanish around the store which included social distancing and masking guidance, completed a daily COVID-19 Compliance Checklist which promoted social distancing, modified the shoe try-on process to reduce contact, moved fixtures and benches to maximize social distancing, trained employees on the store's COVID-19 policies and procedures, and implemented a curbside pickup program. No section 3203 (a)(6) violation is found.

**3. Did the Division establish a violation of section 5141, subdivision (a)?**

Citation 1, Item 1 alleged in the alternative a Serious violation of section 5141, subdivision (a). That section provides in relevant part:

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

The Division alleges:

> Prior to, and during the course of the Division's inspection, including, but not limited to, on August 13, 2020, the employer failed to prevent harmful exposures

[8] Employer requested *Official Notice* of Exhibit A, COVID-19 Industry Guidance: Retail dated May 19, 2020. The undersigned takes *Official Notice* of COVID-19 Industry Guidance: Retail dated May 19, 2020.

of its employees, to infectious or potentially infectious airborne particles by ensuring the use of engineering controls to prevent the spread of COVID-19, including but not limited to installation of Plexiglass screens or other physical barriers to limit contact and block potentially infectious particles from being released among its employees who were stationed and working closer than six feet from customers at the following locations:

1. Store entrance facing computer station where employees were closer than six feet from customers while at the work station.
2. Store entrance facing customer point-of-sale and phone station where employees were closer than 6 feet from customers while at the work station.
3. Back of store facing computer station where employees were closer than six feet from customers while at the work station.
4. Back of store facing customer point-of-sale and phone station were employees were closer than 6 feet from customers while at the work station.

To establish a violation of section 5141, subdivision (a), there are two elements that must be shown: (1) harmful exposures existed, and (2) Employer failed to use feasible engineering controls to prevent the hazard. Exposure to the hazard of COVID-19 was established, as discussed in the preceding section. The Division did not elicit any testimony regarding the ventilation system. On cross examination Manzo conceded her inspection did not include any questions regarding the Heating, Ventilation, and Air Conditioning system. The Division's own expert conceded that even with extended plexiglass barriers aerosols can travel around and over the barriers. Dr. Magari testified that plexiglass barriers can interfere with the efficacy of the ventilation system and can have the unintended consequence of people changing their behaviors because they feel a false sense of protection from the barriers or feel they need to get closer to the barrier for a transaction. Manzo conceded on cross examination that there were no laws or regulations requiring plexiglass barriers prior to the November 2020 Emergency Temporary Standard. The Division did not address the alternate pleading of the alleged violation of section 5141, subdivision (a), Instance (d), in its closing brief. No section 5141, subdivision (a), violation is found.

## CONCLUSION

The evidence does not support a finding that Employer violated section 3203, subdivisions (a)(4) or (a)(6). The evidence does not support a finding that Employer violated section 5141, subdivision (a).

## ORDER

It is hereby ordered that Citation 1, Item 1, is dismissed.

It is further ordered that the penalty is dismissed as set forth in the attached Summary Table.

/s/ Jacqueline Jones

Dated: 03/23/2023

Jacqueline Jones
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.**