

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

In the Matter of the Appeal of:

BHC FREMONT HOSPITAL, INC.
39001 Sundale Avenue
Fremont, CA 94538

Employer

Docket No. 13-R1D2-0204

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by BHC Fremont Hospital, Inc. (Employer).

JURISDICTION

The Division of Occupational Safety and Health (Division) conducted an inspection on July 5, 2012 through December 12, 2012 at a hospital maintained by Employer in Fremont, California. On December 19, 2012, the Division issued one citation to Employer, alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

Citation 1, Item 1 alleges a general violation of section 3203(a)(6) [lack of effective communication system to summon help during incidents of patient violence] and proposes a penalty of \$560.

Employer filed a timely appeal contesting the existence of the violations, classification and reasonableness of the proposed penalties. A hearing was held before an Administrative Law Judge (ALJ) on August 14 and 15, 2013 in Oakland, California. A decision was issued on February 28, 2014, affirming the citation and penalty.

Employer timely filed a petition for reconsideration. Employer is seeking reconsideration of the ALJ's decision in Citation 1, Item 1.

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

ISSUE

Was the decision correct in sustaining the appealed citation?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer has asked the Board for reconsideration of the ALJ's decision on the basis of (a), (c), and (e).

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

Employer maintains a private behavioral health facility with approximately 96 in-patient beds for psychiatric patients. As the facility is privately owned, it is able to reject certain patients, and will not host patients who are under the jurisdiction of the criminal justice system, have a known criminal record, or those whom the facility deems to be a danger due to violent behaviors—for instance, individuals who have behaved violently towards first responders.

The facility has five units with approximately 20 beds each, two beds per room. Rooms generally are kept open during the day, and floors are shaped in a "V", with the nurses' station at the juncture point where halls meet. Although there is security staff on-site, their function is primarily to work with visitors and prevent contraband from entering the units, rather than to assist in emergent situations with patients who may engage in unruly or dangerous behavior. There are security cameras in public areas, but the screens which capture the live feeds are not monitored by an assigned staff member.

The Division cited Employer for a violation of 3203(a)(6), which reads as follows:²

- (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
 - (6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard:

The amended citation also states:

During and prior to the Cal/OSHA inspection, the employer failed to implement an effective IIPP in that the employer did not correct an identified unsafe working condition by taking appropriate steps to ensure that an effective communication system was in place for all employees to summon help during violent behaviors by patients, including assaults on employees. Panic buttons were located in various areas, but these may not be assessable [sic] to an employee experiencing an assault. Screaming or whistling by employees is not to be relied on to communicate an emergency due to the potential failure for this type of communication to be heard by other employees.

The safety order requires employers to have procedures in place both to identify hazards as they arise, and to take appropriate corrective action to abate the hazards. (*Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).)

Employer first argues in its petition for reconsideration that the ALJ incorrectly relied on the Division's witness, Senior Safety Engineer Chris Kirkham, as an expert. The ALJ found Kirkham to be an expert based on his skill, training and experience. (Decision, p. 16). Kirkham credibly testified to his education and training in industrial hygiene, public health, and workplace violence prevention, as well as his extensive experience conducting workplace inspections for the Division.³ The documents offered as those relied upon by Kirkham in forming his opinions regarding mitigation of violence against healthcare workers can be deemed documents that would be relied upon by an

² The citation was amended by a motion filed by the Division filed on July 25, 2013 and granted by the ALJ on August 13, 2013.

³ Kirkham's testimony established his qualification to testify as an expert under CA Evidence Code 720(a): A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.

expert in forming an opinion upon the subject to which his testimony relates. (Division Exhibits 12, 13, 14; *Sargon Enterprises, Inc. v USC et. al* (2012) 55 Cal.4th 747). The ALJ's reliance on Kirkham's testimony was not error.

There is no dispute that Employer has an Illness and Injury Prevention Program (IIPP); rather, the issue is whether Employer implemented its IIPP as required. Section 3203(a)(6) requires employers to have written procedures for correcting unsafe or unhealthy conditions, as well to respond appropriately to correct the hazards. (*Contra Costa Electric, Inc.* Cal/OSHA App. 09-3271 Decision After Reconsideration (May 13, 2014), citing *Bay Area Rapid Transit District*, Cal/OSHA App. 09-1218, Decision After Reconsideration and Order of Remand (Sep. 6, 2012).) Employer argues that while there have been instances of assaults at its facility, the assaults did not primarily occur in isolated locations, making the establishment of further communications methods unnecessary, and that it did not observe what the safety order deems "unsafe or unhealthy conditions". Employer points to its existing policies to abate workplace violence, including providing training to its employees on how to respond to aggressive behaviors, its "Code Green" policy whereby employees may shout, or use a phone or radio when in need of assistance during an attack, as well as its provision of security cameras in common areas, and panic buttons in patient rooms. Employer also made pen-sized personal alarms available to staff on a voluntary basis, although no employees had opted to carry those devices at time of hearing.

Here, the evidence demonstrates a trend of attacks on staff increasing over time. The record reflects 18 recordable assaults on health care staff occurred in 2011, which more than doubled to 39 assaults in 2012. These facts were known to the CEO, as well as other management officials, who reviewed documents reporting instances of violence at the facility. As the ALJ found, the Employer is responsible under section 3203(a)(6) to address a known unsafe working condition, and must take steps in a timely manner to do so. (Decision, p. 14). While an employer's plan as written may be adequate, proof of failure to respond to a known hazard in the workplace when it arises establishes a violation of the section through failure to implement the plan. (*Los Angeles County, Department of Public Works*, Cal/OSHA App. 96-2470, Decision After Reconsideration (Apr. 5, 2002).)

Section 3203(a)(6) is a "performance standard," which establishes a goal or requirement for employers to meet, while leaving the employer latitude in designing an appropriate means of compliance. (See, *Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012).) Employer presented evidence and testimony as to the various programs it had in place to address workplace safety, including its Code Green program, panic buttons, and cameras, but the Division was able to establish that these methods were not sufficient to protect staff from increasingly

frequent attacks by patients. Nor did Employer provide testimony or evidence to show that these programs or policies had either been instituted or significantly revised to address the hazard identified in the Division's citation.⁴ The record lacks testimony or other evidence demonstrating when policies and/or procedures to address the increase in patient assaults on employees were introduced in the workplace. That lack leaves the Board unable to conclude that those policies or procedures were steps Employer took to address the growing hazard of assaults on its employees, i.e. steps to implement its IIPP when the increased hazard of patient attacks emerged, rather than longstanding practices which were already in effect. Section 3203(a)(6) requires employers to respond timely to new or changing hazards; while a new policy may not make an impact overnight, an employer must demonstrate that it is taking appropriate action in a timely manner.

Employer also argues that the controls suggested by the Division—such as personal alarms—would be of little use in certain attack situations. As the Division noted in testimony, mandatory personal alarms as an abatement to the hazard of patient attacks on staff are a suggestion only, and Employer has latitude under a performance standard to fashion other means to address the hazard. Unrebutted testimony established that Employer's current procedures leave employees unable to effectively summon assistance if they are isolated from co-workers or not able to reach a telephone or a panic button due to an aggressive patient. Regardless of which means of abatement Employer ultimately selects, the Board finds that the Division met its burden of proof in establishing a 3203(a)(6) violation.

Employer, having chosen not to provide certain evidence, such as the root cause analysis reports which may have shed light on the details of patient attacks, or more specific evidence or testimony on its hazard control programs, has failed to rebut the Division's showing that a known hazard of attacks on health care workers by patients existed, and that Employer had failed respond to the increasing hazard. In its petition, Employer argues that the ALJ incorrectly inferred that the root cause reports analyzing instances of workplace violence would have supported the Division's position. Employer failed to provide these reports to the Division during the course of its investigation, citing privacy considerations. Readaction of personal information contained in the reports should have made it possible for Employer to comply with the Division's information request, and the detailed reports related to attacks at the facility would likely have provided much more valuable information than the OSHA logs that were entered into evidence. The Board has previously found that failure to offer evidence on a certain issue, though production of such evidence is within a party's power, may raise an inference that the evidence, if produced, would have been adverse. (*Macco Constructors, Inc.*, Cal/OSHA App. 84-1106 Decision After Reconsideration (Aug. 20, 1986),

⁴ For instance, the Code Green policy appears to have been last revised on November 2009.

citing *Shehtanian v. Kenny* (1958) 156 Cal.App.2d 576).⁵ The ALJ's inference on this issue will not be disturbed by the Board. The Division met its burden to demonstrate by a preponderance of the evidence a violation of the safety order. Employer failed to produce any countervailing evidence to establish otherwise.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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⁵ See also Evidence Code 413: In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.