BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: TREASURE ISLAND MEDIA, INC. 351 9th Street, Suite 302 San Francisco, CA 94103 Employer	Dockets. 10-R6D1-1093 through 1095 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, and having taken the petition for reconsideration filed by Treasure Island Media, Inc. (Employer) under submission by order dated March 27, 2014, renders the following decision after reconsideration.

JURISDICTION

Commencing on November 4, 2009 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On March 25, 2010, the Division issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.[1]

Employer timely appealed.

Thereafter administrative proceedings were held before an administrative law judge (ALJ) of the Board, including four days of contested evidentiary hearings between February and April 2013. At the hearing on February 7, 2013 the parties moved to resolve all violations alleged in Citation 1, Items 1 through 15, which motion was granted. Citations 2 and 3 remained at issue.

On January 6, 2014, the ALJ issued a Decision (Decision) which sustained the violations alleged in Citations 2 and 3 and imposed a civil penalty.

[1] References are to California Code of Regulations, title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration.

The Division answered the petition.

ISSUES

Were Employer's employees exposed to blood and/or "other potentially infectious materials" within the meaning of section 5193?

Were the performers involved in the production(s) at issue Employer's employees?

Were the violations properly classified as serious?

DISCUSSION

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. The Board has taken no new evidence. 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, except as to whether the violations alleged were properly classified as "serious."

I. Background

Employer produces and distributes videos of gay male sex acts, although it may not produce (i.e. "film" or record on video) all the material it distributes.[2] The video[3] at issue here features men engaging in sex acts without using condoms or other forms of barrier protection. For its own productions, Employer selects performers from among those who have previously been featured, those who apply, and/or who are recruited so to perform. A primary selection criterion for performers is that they be HIV-positive or "HIV+." ("HIV" is the acronym for human immunodeficiency virus, which causes AIDS; the term "positive" means that a person is infected with the virus.) Employer's rationale for casting HIV+ individuals to perform with each other is that the performers cannot further infect each other.[4]

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[2] Those acts include anal intercourse, fellatio and anilingus, among others. The videos show performers ejaculating on or in other performers, and/or penetrating another performer anally or orally immediately after ejaculation. Distribution is accomplished by sale of DVDs and by making the videos available for downloading from Employer's website. We use the term "performer" to avoid both "actor" and "model," words advanced by the Division and Employer, respectively.

[3] The video consisted of several episodes or chapters, including one titled "The Thousand Load Fuck," and as packaged and sold, used that chapter title as the title of the entire recording. When necessary to refer to that video, we shall do so with the acronym "TTLF."

[4] We understand this belief to be incorrect medically but of no consequence here.

Employer's headquarters is in San Francisco, California; at the time of the inspections at issue and the hearing of the appeal, Employer had offices in other states and countries as well. The testimony was that Employer produced videos in California as well as in those other states and countries. We are concerned only with activities which took place in California.

II. Investigation and Allegations

The Division started its investigation of Employer on November 4, 2009. As a result of its inspection of Employer, the Division issued three citations to Employer on March 25, 2010, two of which are the subject of this Decision After Reconsideration.

Citation 2 alleged a serious violation[5] of section 5193, subdivision (c)(1) [failure to establish an exposure control plan] because as of November 5, 2009, Employer had not established an exposure control plan. Section 5193, subdivision (c)(1) provides, in part:

> "(1) Exposure Control Plan. [¶] (A) Each employer having employee(s) with occupational exposure as defined in subsection (b) of this section shall establish, implement and maintain an effective Exposure Control Plan which is designed to eliminate or minimize employee exposure and which is also consistent with Section 3203. [¶] (B) The Exposure Control Plan shall be in writing and shall contain at least the following [8] elements. . . . [¶] (C) Each Employer shall ensure that a copy of the Exposure Control Plan is accessible to employees in accordance with Section 3204(e). [¶] (D) The Exposure Control Plan shall be reviewed and updated at least annually and whenever necessary as follows: […][¶] (E) [not applicable.] [¶] (F) The Exposure Control Plan shall be made available to the Chief [of the Division] or NIOSH or their respective designee upon request for examination and copying."

It is not contested that the required plan was not in existence. In essence, Employer contends that none was required.

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[5] "Serious violation" is defined in Labor Code section 6432. We apply the language of the statute as in effect in 2009: "(a) As used in this part, a 'serious violation' shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury: (1) A serious exposure exceeding an established permissible exposure limit. (2) The existence of one or more practices, means, methods, operations, or processes which have been adopted or are in use in the place of employment. [¶] (b) Notwithstanding subdivision (a), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. [¶] (c) As used in this section, "substantial probability refers not to the probability that an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation." Labor Code section 6432 was amended in 2010, effective January 1, 2011.

In Citation 3 the Division alleged a serious violation of section 5193, subdivision (d)(1) because Employer failed to require performers and production crew members to utilize "universal precautions" (a term defined below) during the production and post-production activities. Section 5193, subdivision (d) states:

> Methods of Compliance. [¶] (1) General. Universal precautions shall be observed to prevent contact with blood or OPIM. Under circumstances in which differentiation between body fluid types is difficult or impossible, all body fluids shall be considered potentially infectious materials.

The Division contends, in part, that performers whose penises and/or semen contacted other performers should have used condoms to prevent their body fluids from coming into contact with the eyes, skin, or mucous membranes of other performers or production staff such as camera operators and those who may rearrange sets between video recording periods, and during cleaning of the set after filming is completed. Again, Employer contends the precautions are not required or section 5193 is not applicable.

III. Overview of Section 5193

We begin with a review of section 5193 to place our discussion in context.

Section 5193 "[A]pplies to all occupational exposure to blood or other potentially infectious materials as defined by subsection (b) of this section[,]" excepting "the construction industry." (§ 5193, subd. (a), and exception.) We apply the plain language of the safety order when, as here, it is not ambiguous. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010), citing *Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268; *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015), citing *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 934, *et al.*) The occupations involved here are performing sex acts for recordation and commercial distribution, the recording of those acts on video, and the concomitant tasks involved in setting up for the performances and cleaning up afterward. If any of the foregoing expose one or more employees "to blood or other potentially infectious materials[,]" section 5193 applies.

To further place the subject matter in context, we quote below several of the definitions in section 5193, subdivision (b) which are applicable or of importance in understanding this matter:

"Blood" means human blood, human blood components, and products made from human blood.

"Bloodborne Pathogens" means pathogenic microorganisms that are present in human blood and can cause disease in humans. These pathogens include, but are not limited to, hepatitis B virus (HBV), hepatitis C virus (HVC), and human immunodeficiency virus (HIV).

"Contaminated" means the presence or the reasonably anticipated presence of blood or other potentially infectious materials on a surface of in or on an item.

"Engineering Controls" means controls (e.g., sharps disposal containers, needleless systems and sharps with engineered injury protection) that isolate or remove the bloodborne pathogens hazard from the workplace.

"Exposure Incident" means a specific eye, mouth, other mucous membrane, non-intact skin, or parenteral contact with blood or other potentially infectious materials that results from the performance of an employee's duties.

"Occupational Exposure" means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.

"OPIM" means other potentially infectious materials.

"Other Potentially Infectious Materials" means: [¶] (1) The following human body fluids: semen, vaginal secretions, cerebrospinal fluid, synovial fluid, pleural fluid, pericardial fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, any other body fluid that is visibly contaminated with blood such as saliva or vomitus, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids such as emergency response; [¶] (2) Any unfixed tissue or organ (other than intact skin) from a human (living or dead); and [¶] (3) Any of the following if known or reasonably likely to contain or be infected with HIV, HBV, or HVC: [¶](A) Cell, tissue, or organ cultures from humans or experimental animals; [¶] (B) Blood, organs, or other tissues from experimental animals; or [¶] (C) Culture medium or other solutions.

"Parenteral Contact" means piercing mucous membranes or the skin barrier through such events as needlesticks, human bites, cuts, and abrasions."

"Personal Protective Equipment" is specialized clothing or equipment worn or used by an employee for protection against a hazard. General work clothes (e.g., uniforms, pants, shirts or blouses) not intended to function as protection against a hazard are not considered to be personal protective equipment."

"Source Individual" means any individual, living or dead, whose blood or OPIM may be a source of occupational exposure to the employee. Examples include, but are not limited to, hospital and clinical patients; clients in institutions for the developmentally disabled; trauma victims; clients of drug and alcohol treatment facilities; residents of hospices and nursing homes; human remains; and individuals who donate or sell blood or blood components."

"Universal Precautions" is an approach to infection control. According to the concept of Universal Precautions, all human blood and certain human body fluids are treated as if known to be infectious for HIV, HVB, and HVC, and other bloodborne pathogens."

"Work Practice Controls" means controls that reduce the likelihood of exposure by defining the manner in which a task is performed (e.g., prohibiting recapping of needles by a two-handed technique and use of patient-handling techniques)."

Also, "employee" is defined, in pertinent part, as "[E]very person who is required or directed by any employer to engage in any employment or go to work or be at any time in any place of employment." (Lab. Code § 6304.1, subd. (a).) An "employer," in pertinent part, is "Every person including any public service corporation, which has any natural person in service." (Lab. Code § 6304, ref. Lab. Code § 3300, subd. (c).)

IV. Standard of Review

The Division has the burden of proof to establish each element of the alleged violations by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jan. 16, 1983); *Cambro Manufacturing Company*, Cal/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) "Preponderance of the evidence" means that the thing to be proved is more likely true than not – the quantum of proof needed to meet the party's burden. (*Gaehwiler Construction Co.*, Cal/OSHA

App. 78-651, Decision After Reconsideration (Jan. 7, 1985); see Evid. Code § 115.)

Having taken Employer's petition for reconsideration under submission and after review of the record, [we] "may affirm, rescind, alter or amend the order or decision [of the ALJ] and may, without further proceedings . . . enter [our] findings, order or decision based on the record in the case." (Lab. Code § 6621.)

V. Employer's Arguments in Its Petition for Reconsideration

Employer claims its appeal of the citations should have been granted for several reasons. We list them here and address them each below.

Employer asserts (1) that the inspectors' testimony was based on uncorroborated hearsay; (2) that there was no evidence of exposure to blood or OPIM; (3) that even if there were violations, there is no evidence that they occurred within the period of the statute of limitations; (4) that the performers were independent contractors, not employees; (5) that section 5193 does not apply to the adult film industry; (6) that even if there were violations as alleged, the violations were not shown to be serious; (7) that the ALJ erred in admitting Division's Exhibit 30 into evidence; and (8) that because the ALJ's Decision was issued after the period stated in Labor Code section 6608, the Board acted in excess of its powers and therefore the Division did not meet its burden of proof to establish the safety orders applied.

1. Inspector's Testimony Was Not Based on Uncorroborated Hearsay

Board regulation section 376.2 provides, that "[A] hearing need not be conducted according to technical rules relating to evidence[.] . . . Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Despite Employer's contentions on this issue, the inspector's testimony was corroborated both by other testimony and by documentary evidence. Further, testimony by two persons who were among Employer's managers at the time of the inspection, one of whom was still a manager at the time of the hearing, not only corroborated the inspector's testimony but was the source of many details in that testimony. Because those two witnesses were managers at the time of the inspection, their statements to the inspectors "would be admissible over objection in civil actions." (*Ibid.*; Evid. Code § 1222; *Valley Crest Landscape, Inc.*, Cal/OSHA App. 86-171, Decision After Reconsideration (Oct. 29, 1987).)

2. Evidence of Exposure to Blood and/or OPIM

The Division has the burden of showing that there was employee exposure to a violative condition addressed by the safety order. (*Benicia Foundry & Iron Works, Inc.*, Cal/OSHA App. 00-2976, Decision After Reconsideration (Apr. 24, 2003).) There must be reliable proof that there was an existing hazardous condition or circumstance. (*Id.*) We here examine the evidence of exposure of the performers; whether they are employees is addressed in section V. 4. below.

The DVD in evidence, which we have abbreviated as "TTLF," depicts sex acts between men without use of condoms or other protective barriers.[6] It is not disputed that condoms or other barriers were not used. Those depictions include scenes of performers having unprotected genital-oral and genital-anal contact, and of performers being orally and anally exposed to semen ejaculated onto or into them by other performers. Semen is one of the bodily fluids within the definition of OPIM. (§ 5193, subd. (b).) The evidence was that the mouth and anus are among the parts of the human body which consist of or include mucosal tissues, and thus contact of some performers' semen with the "eye[s], mouth[s], other mucous membrane[s]" of other performers constituted "exposure incident[s]" as defined. (*Id.*) The evidence therefore establishes exposure of the individual performers to the hazard of blood borne pathogens. Even if we were to accept (which we do not) Employer's contention that since all the performers were HIV positive and that therefore there was no exposure to further HIV infection, that does not mean that there was not also exposure to other blood borne pathogens such as the hepatitis B and C viruses, among other infectious agents. Given the above facts established by the evidence, the TTLF shows "exposure incident[s]" as defined in section 5193, subdivision (b). And since, as we explain later, the performers were employees, the exposures fall within the section 5193, subdivision (b) definition of "occupational exposure" as well.

3. Violations Occurred Within Limitations Period

Employer also contends that even if violations were shown, there is a lack of evidence establishing they occurred within the six-month period of the statute of limitations.

Labor Code section 6317 states, "No citation or notice shall be issued by the division for a given violation or violations after six months have elapsed from the occurrence of the violation." We have held that the limitations period is jurisdictional. (*Granite Construction Co.*, Cal/OSHA App. 07-3611, Denial of

[6] "TTLF" is the main title of the DVD as sold. The DVD consists of several different chapters or episodes each of which is given its own title, one of which is the TTLF itself. We refer here to contents of the chapter titled TTLF.

Petition for Reconsideration (Jun. 22, 2010), writ denied Sacramento County Superior Court (2013).)

The record shows that the TTLF chapter of the video was recorded in San Francisco during the last weekend of September 2009. That weekend encompassed the dates of Saturday, September 26 and Sunday, September 27. Since the citations in question were issued on March 25, 2010, violations occurring on September 26 and/or 27 are within the six-month statute.

The evidence to which we are referring includes the testimony of a former manager that performers were brought to San Francisco for the filming that weekend, that arrangements were made to use a private residence in San Francisco as the filming location that weekend, and also documents indicating the performers were paid and that they signed documents which both federal law and Employer's own business practices required to be executed before filming could occur.

There is also other but less definitive evidence that other filming occurred in California after September 27, 2009. Even if, for sake of argument, we were to give Employer the benefit of the doubt regarding those other events, the preponderance of the evidence is that violations occurred on at least September 26 and/or September 27, 2009, in San Francisco.

4. The Performers Were Employees

Employer argues that after applying the multiple factors of the test of employee or independent contractor status articulated in *S.G. Borello & Sons, Inc. v Department of Industrial Relations* (1989) 48 Cal.3d 341 (*Borello*), we must conclude the performers were independent contractors. This issue is central to the case, for if the performers are not employees, Employer may not be cited for any exposure to them, although that would not rule out exposure to Employer's production staff, those employees such as cameramen and other on-set personnel, and employees who cleaned up after filming. Indeed, the Division alleges other individuals who were undisputed employees were also exposed; the evidence is contradictory with respect to such others, such as camera operators, and to some degree speculative. For purposes of our analysis of the performers' status as employees we here give Employer the benefit of the doubt and assume without deciding that the record does not establish that its acknowledged employees were exposed to blood or OPIM.[7]

[7] Even that assumption, however, does not necessarily absolve Employer from the requirement to have an exposure control plan established and in effect. (§ 5193, subd. (c)(1).) (See *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb. 26, 2015) [not having complete plan required by § 3203(a) is a violation].)

Although *Borello* was a workers' compensation case, its rationale has subsequently been followed in other employment contexts as well, including by the federal Ninth Circuit Court of Appeals (*Alexander v. FedEx Ground Package Sys.* (2014) 765 F.3d 981) and ourselves (*Desert Valley Date, Inc.*, Cal/OSHA App. 11-2207, Denial of Petition for Reconsideration (Aug. 23, 2013). Moreover, *Borello* noted that several additional factors used to determine whether a relationship was one of employer-employee or independent contractor status "derived principally from the Restatement Second of Agency." (*Borello*, *supra,* 48 Cal.3d. p. 351.) Thus, the court's analysis may be applied in contexts other than workers' compensation.

The *Borello* court stated that "the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*Borello*, *supra,* 48 Cal.3d, at p. 350 (internal quotes and citations omitted).) Employer argues that it exercises minimal control over the performers, in order to capture a real-life or documentary style of performance. Still, Employer directs or selects performers to have specific sex acts with specific other individuals, and selects the time and place for the performance. While cinematic direction may be minimal in Employer's style of filmmaking, Employer does control the time and place of performance, selects the performers, and tells them which sex act(s) to perform. Within the present context, that degree of control weighs in favor of the performers' status as that of employees.

Employer further argues that it is seeking only to achieve specific results, the performance of specific sex acts, not the manner in which that result is achieved. Given the ultimately limited ways in which any two or more individuals can have sex with each other at any given time, this argument is neither persuasive nor dispositive. Further, the physical characteristics and limitations of the place of filming and the camera equipment being used (factors under Employer's control) are likely to require more direction of the performers than is acknowledged, for instance directing them where to position themselves, what furniture (if any) they use, their respective postures, and so on.

The *Borello* court further stated that a mechanical application of the control test is "often of little use in evaluating the infinite variety of service arrangements." (*Borello*, *supra,* 48 Cal.3d, at p. 350.) While control is the most important consideration, several other indicia are also endorsed for use in such analysis. *Borello* went on to list the following: (a) The right to discharge at will is "strong evidence in support of an employment relationship"; (b) whether the one performing services is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the

principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the services are to be performed; (g) the method of payment, whether by the time or by the job; (h) whether the work is part of the regular business of the principal; and (i) whether the parties believe they are creating the relationship of employer-employee. "The factors cannot be applied mechanically as separate tests, they are intertwined and their weight depends often on particular combinations." (*Id.*, pp. 350-351.) We summarize the evidence as to each of these secondary factors below.

(a) Employer has the right to select performers from a pool of applicants, and selects on the basis of the individual's willingness to perform various sexual acts, HIV status, and other criteria not specified. After Employer records a performance, and presumably pays for it, it has, by contract, full rights to use, edit, publish, re-edit and republish the recorded content. Employer is not required to use or publish it, and may edit the raw video in ways to make it more appealing to customers. Since the power to select performers and performances and publish (or not) rests solely with Employer, it seems reasonable to hold that deciding to select someone to perform is equivalent to hiring that person; the right to select, or not, is solely Employer's. This factor weighs in favor of employee status.

(b) The evidence was that performers are engaging in what is most likely a part-time occupation of having sex act(s) recorded. One may consider having sex to be a normal and common human behavior, albeit that most people do not do so for recordation and compensation, so it is not a distinct occupation in the nature of a profession or trade.[8] Further, Employer argues that the style of performance it seeks to capture is "documentary" or "real life," further suggesting that there is nothing distinct going on. This factor weighs in favor of employee status.

(c) The occupation at issue is that of adult film model[9] or performer. The evidence is that the individuals so performing for Employer do not do so as full time work, but are free to engage (and apparently do engage) in other lines of work. It also appears that however little "direction" the performers in any given scene are given, Employer sets the time, place, and type of act or acts to be performed. This factor weighs in favor of employee status.

(d) There is no evidence in the record that the performers possessed the degree of specialized skill or knowledge typical of independent contractors. This factor weighs in favor of employee status.

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[8] Case law from the mainstream entertainment industry involves contractual arrangements between actors and producers. As far as we can ascertain from the cases, actors are employees and not independent contractors under such agreements.

[9] Employer calls the performers "models" rather than "actors."

The immediately preceding analysis has a close analogue in *Borello*. Addressing an argument by Borello, the court stated, "Moreover, contrary to [Borello's] assertions, the cucumber harvest involves simple manual labor which can be performed in only one correct way. Harvest and plant-care methods can be learned quickly. While the work requires stamina and patience, it involves no peculiar skill beyond that expected of any employee." (*Borello*, *supra,* 48 Cal.3d, at p. 356.) Much the same can be said for engagement in any particular sex act.

(e) Employer only supplied the place for performing work, not tools or instrumentalities, as was the situation in *Borello*, where Borello & Sons "furnish[ed] and prepare[d] the land, plant[ed] the crop [etc.]" and the workers "prepare[d] for and harvest[ed] the [crop]." (*Borello*, *supra,* 48 Cal.3d, p. 346.) And since an independent contractor may frequently work at a place owned or occupied by the client, that Employer here supplied the place for filming, this factor weighs in favor of independent contractor status.

(f) The evidence established that performers are filmed and paid for a few hours' work; in other words, each "shoot" or filming event lasts a few hours. The evidence also shows that performers do not perform for Employer on a frequent or regular basis, such as monthly or weekly. Compensation is by the shoot and includes payment for the media rights to the material recorded. This factor weighs in favor of independent contractor status.

(g) The method of payment is by the job. This factor weighs in favor of independent contractor status.

(h) The work done by the performers is part of the regular business of Employer, which is in the business of acquiring, producing, and publishing adult or pornographic works. This factor weighs in favor of employee status.

(i) The evidence shows that the performers and Employer intended to create an independent contractor relationship. The court in *Borello* noted, however, that "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced. [Citation omitted.]" (*Borello*, *supra,* 48 Cal.3d, at p. 349.)

The court in *Borello* also took note of "the six-factor test developed in other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation." (*Borello*, *supra,* 48 Cal.3d, at p. 355.) The right to control is the first factor. In addition to the right to control, the other factors are: (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of

permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. (*Id.*, p. 356.)

There is some overlap of the above six factors (counting right to control as the first) and the nine factors the court identified and which we analyzed earlier. As we have noted, Employer had the right to control the time, place, and content of the work (performances), which weighs in favor of an employment relationship. Since the performer's opportunity for profit or loss depending on his managerial skill is absent in the present circumstances, this factor suggests an employment relationship. The record reveals no performer investment in equipment or materials, further weighing in favor of an employment relationship. We view having sex as not requiring special skill, note that Employer did not present evidence that it does or did for its productions, again point out that Employer contended that it was attempting to record documentary or real life sex acts. All of those points support the conclusion that the relationship here was that of employer-employee. Although Employer characterized some performers as "exclusives," a term said to be a marketing technique intended to generate addition sales of its productions, there was little if any permanence of a relationship between Employer and the performers, which suggests an independent contractor relationship. Lastly, recording sex acts on video is the essence of Employer's business, and this factor weighs in favor of finding an employment relationship.

In sum, although not all the multiple factors listed in *Borello* point in the same direction, we find that when viewed as a whole, they indicate that the performers were employees, not independent contractors as Employer contends.

5. Section 5193 Applies To The Adult Film Industry

Employer argues that section 5193 does not apply to the adult film industry. The argument largely rests on the federal blood borne pathogen standard as initially promulgated, which was aimed at several specific aspects of the health care industry. (See 29 CFR § 1910.1030.) In 1996, however, the federal bloodborne pathogen standard was amended to apply to general industry. In language identical to section 5193, subdivision (a), 29 CFR section 1910.1030 states the standard "applies to all occupational exposure to blood or other potentially infectious materials." A federal Occupational Safety and Health Review Commission administrative law judge so held in 1999. (*Thoroughgood, Inc., dba Azalea Court* (1999) OSHRC No. 97-23.) More recently, a federal appellate court stated, "The [bloodborne pathogen standard] applies to all 'occupational exposure' which might be 'reasonably anticipated [to lead to employee] contact with blood or other potentially infectious materials.'" (*Secretary of Labor v. Beverly Healthcare-Hillview* (2008) 541 F.3d 193, 195 (second brackets in original).) We conclude that the plain language of

the federal standard, at least since it was amended in 1996 to apply to general industry employment, means that it would apply to the adult film industry.

As to section 5193 itself, Employer makes a similar argument that the standard was not intended to apply to adult film work, pointing out, for example, that the only mention of condoms in the California rulemaking was in the context of handling potentially contaminated materials such as used condoms and tampons. Despite that historical argument, section 5193 is codified as one of California's "general industry safety orders," which "apply to all employment and places of employment in California[.]" (§ 3202, subd. (a).) And, section 5193, subdivision (a) itself provides, "This section applies to all occupational exposure to blood or other potentially infectious materials as defined by subsection (b) of this section." Thus, although the Standards Board did not state that the standard applies to the adult film industry, the plain language of the standard shows that it does so apply, since employment in the adult film industry is among "all employment and places of employment in California." (§ 3202, subd. (a); *HHS Construction*, Cal/OSHA App. 12-0492, Decision After Reconsideration (Feb 26, 2015), citing *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 139 Cal.App.4th 914, 934 [where plain language of regulation unambiguous, Board applies the language as written].)

6. The Violations Were Not Shown To Be Serious

Employer challenges the serious classification of the violations. The argument is that the safety order refers to "exposure," and that even assuming, as we must, that an exposure has occurred, that does not mean that disease or illness will result.

When the alleged violations took place, Labor Code section 6432 provided:

> (a) As used in this part, a 'serious violation' shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a violation, including, but not limited to, circumstances where there is a substantial probability that either of the following could result in death or great bodily injury:
> (1) A serious exposure exceeding an established permissible exposure limit.
> (2) The existence of one or more practices, means, methods, operations, or processes which have been adopted or are in use, in the place of employment.
> (b) Notwithstanding subdivision (a), a serious violation shall not be deemed to exist if the employer can demonstrate that it did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

> (c) As used in this section, "substantial probability" refers not to the probability of an accident or exposure will occur as a result of the violation, but rather to the probability that death or serious physical harm will result assuming an accident or exposure occurs as a result of the violation.

We assume, therefore, that an "exposure [ ] occur[red] as a result of the violation." (*Id.*, subd (c).) And thus, former Labor Code section 6432 required the Division to "prove by credible evidence that a serious physical injury is more likely than not to occur as a result of" exposure to blood or OPIM. (*National Steel and Shipbuilding Company*, Cal/OSHA App. 10-3791, Decision After Reconsideration (Nov. 17, 2014).)[10]

The evidence established that there is risk of contracting HIV, HBV and/or HCV (among other but potentially less serious diseases) from exposure to blood or OPIM. And it is apparent that HIV, while probably manageable in most instances, is presently an incurable illness. Similarly, HVC is a presently incurable but somewhat manageable illness, and recent breakthroughs may provide a cure or greater ability to treat and/or manage it. These two diseases can also result in death or at least chronic serious effects for the life of the victim. There is currently a vaccine for HVB, but it is not clear from the record that treatment after exposure is always efficacious, or how effective pre-exposure vaccination is. HVB, too, can have serious long-term effects or result in death. Thus, we do not dismiss or diminish the serious consequences if someone contracts any of those three diseases.

The record, however, does not include any evidence of what the probability of contracting any sexually transmitted disease is, assuming one is exposed to them through sexual contact or contact with semen or OPIM.[11] On this record, therefore, we cannot say that, even assuming the alleged violations caused exposure to bloodborne pathogens, it is more likely than not that the exposed employees would contract an illness. And, since we cannot assume the existence of a fact which is not in evidence, we cannot sustain the serious classification. (*SDUSD -- Patrick Henry High School*, Cal/OSHA App. 11-1296, Decision After Reconsideration and Order of Remand (Dec. 26, 2012).)

The violation not having been proved to be serious must be deemed to have been "general." A general violation is one "specifically determined not to be of a serious nature, but [which] has a relationship to occupational safety

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[10] We express no present opinion regarding the wisdom of decisions rendered on the issue of the quantum of proof needed to establish a serious violation under the language of Labor Code section 6432 before it was amended in 2010, effective January 1, 2011. Moreover, we note that had the violations occurred on or after January 1, 2011, the quantum of proof necessary to prove they were serious would have been far different.

[11] The ALJ appears to have overlooked this gap in the Division's evidence when she sustained the serious classification of the violations.

and health of employees." (§ 334, subd. (b).) The change in classification also requires the penalty to be recalculated.[12] We start with the base penalty by evaluating the severity of the harm which an affected employee is likely to suffer as a result of an occupational illness which could result from the violation. (§§ 335, subd. (a)(1)(A)i and 336, subd. (b).) Since the harm, if one of the illnesses of concern were to result, would be great, the severity is high, and the base penalty is $2,000. (*Id.*) The ALJ agreed the extent of the violation was "high," which increases the base penalty by 25%, to $2,500. There were further (downward) adjustments for good faith, size, and history totally 45%, which make the penalty $1,375, and a further reduction for a 50% abatement credit, bringing the final penalty to $685 (rounded). The ALJ also correctly noted that the violations alleged in Citations 2 and 3 were subject to the same abatement, and therefore only one penalty was assessed for both.

(7) The ALJ Did Not Err in Admitting Division's Exhibit 30 Into Evidence.

Employer argues that Division Exhibit 30 was not provided timely before the hearing commenced and should not have been admitted into evidence. We find that the contents of Exhibit 30 were a summary of information found in other properly admitted evidence, and therefore it was not error to admit the exhibit. Further, since the exhibit was admitted during the first two days of hearing in February 2013 and there were two additional days of hearing in April 2013, and any resulting harm or disadvantage to Employer was de minimis.

(8) Lateness of the ALJ's Decision.

Employer correctly points out that the Decision was issued after the period stated in Labor Code section 6608, but then *incorrectly* contends that, as a result, the Board acted in excess of its powers and therefore the Division did not meet its burden of proof to establish the safety orders applied and the citations must fail.

First, the ALJ exercised her authority under our regulations to extend the date of submission. (§ 385, subd. (a).) Second, the thirty day time period stated in Labor Code section 6608 for issuing a decision is directory, not mandatory. (*CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 11, 2013) citing *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145; *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007), writ denied Imperial County Superior Court (Apr. 2008).) Third, it follows, therefore, that the Board did not act in excess of its powers in issuing the Decision. More to the point, there is no logical or causal connection

[12] In doing so, we apply the penalty adjustment factors used by the ALJ in her Decision. (Decision, pp. 33, 35 and 36.)

between the time when the ALJ's Decision was issued and the question of whether, given the record of this proceeding, the Division met its burden of proof. The administrative record remains unchanged, and its contents are the basis on which we decide whether the Division met its burden.

As indicated above, with the exception of the "serious" classification of Citations 2 and 3, we hold that Division did meet its burden.

DECISION

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

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: AUG 13, 2015

SUMMARY TABLE
DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

TREASURE ISLAND MEDIA, INC.
Docket No(s). 2010-R6D1-1093 through 1095

Abbreviation Key: Reg=Regulatory
G=General W=Willful
S=Serious R=Repeat
Er=Employer DOSH=Division

IMIS No. 313833097

Site: 351 9th Street, Suite 302, San Francisco, CA 94103
Date of Inspection: 11-04-2009 ~ 03/25/2010 Date of Citation: 03/25/2010

DOCKET	CITATION	ITEM	SECTION	TYPE	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	AFFIRMED	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY ASSESSED BY ALJ	**FINAL PENALTY ASSESSED BY BOARD**
10-R6D1-1093	1	1	3202(a)	G	[Failure to develop a written Injury and Illness Prevention Program, failure to conduct health and safety training for hazards, including prevention of sexually transmitted diseases, and failure to conduct health and safety inspections for hazards in the workplace.]	x		$410	$410	**$410**
10-R6D1-1093	1	2	2340.16(a)	G	Failure to have access to wiring in junction box on 2nd floor, boxes and trash in the working space in front of the electrical distribution & meter equipment.]	x		$135	$0	**$0**
10-R6D1-1093	1	3	2599.1(a)	G	Use of flexible cords as a substitute for fixed wiring and attached to building surfaces, use of extension cords were placed between receptacles and powertaps, extension cords were attached to walls, floors and beams.]	x		$205	$0	**$0**
10-R6D1-1093	1	4	2473.2(a)	G	[Missing cover on the junction box on the SE wall in inventory storage area.]	x		$135	$135	**$135**
10-R6D1-1093	1	5	3214(c)	G	[Handrails not continuous & did not extend at least 12" beyond top & bottom risers.]	x		$305	$305	**$305**
10-R6D1-1093	1	6	3215(c)	G	[No fire alarm to warn occupants of the existence of fire within the building.]	x		$205	$205	**$205**

10-R6D1-1093	1	7	3215(c)	G	Failure to have the emergency lighting units in both interior stairwells functioning throughout the exit paths; failure to have emergency lighting in IT area, shipping area, 23rd floor landing rear exit or 1st floor landing front exit.]	x		$205	$0	**$0**
10-R6D1-1093	1	8	3216(c)	G	Light bulbs not functioning in Exit signs for Suite 302, both front & rear 1st floor exits.]	x		$305	$305	**$305**
10-R6D1-1093	1	9	3220(a)	G	[Failure to have a written site specific emergency action plan for 351 9th Street and did not address actions and responsibilities in the event of an earthquake or procedures to account for all employees after an emergency evacuation.]	x		$305	$305	**$305**
10-R6D1-1093	1	10	3225(b)	G	The double doors between shipping area and freight elevator were marked as EXITs and the doors lead to an adjoining area that did not provide a direct means of egress to an exit.]	x		$205	$205	**$205**
10-R6D1-1093	1	11	3234(g)(4)	G	3rd floor landing to the rear stairs which extends beyond the end of the top step, 8.5" perpendicular to the direction of travel for the run of the stairs, without guardrail to prevent entry to this area.]	x		$205	$0	**$0**
10-R6D1-1093	1	12	5194(e)(1)	G	[Use of bleach to clean up biological waste including OPIM from work surfaces; failure to develop a written hazard communication program.]	x		$205	$205	**$205**
10-R6D1-1093	1	13	6151(c)(4)	G	Failure to maintain a fully charged portable fire extinguisher.]	x		$135	$0	**$0**
10-R6D1-1093	1	14	6151(e)(2)	G	[Failure to inspect portable fire extinguishers in electrical utilities room monthly.]	x		$205	$205	**$205**
10-R6D1-1093	1	15	6170(a)(3)	G	[Failure to maintain minimum clearance of 36 inches between top of storage and sprinkler deflector.]	x		$205	$205	**$205**
10-R6D1-1094	2	1	5193(c)(1)	G	[Failure to establish, implement and maintain an effective exposure control plan where employees are exposed to semen and OPIM due to work activities during filming and set cleaning.] ALJ sustained violation. Board reduced citation to General and adjusted penalty.	x		$9,000	$6,185	**$685**
10-R6D1-1095	3	1	5193(d)(1)	S	[Failure to observe universal precautions during production of films, failure to institute engineering and work practice controls to eliminate or minimize contact with blood & semen, including but not limited to, the use of barrier protection such as condoms.] ALJ sustained violation. Penalty vacated as single abatement is needed for Citation 2 and 3.	x		$9,000	$0	**$0**

Sub-Total			$21,440	$8,670	**$3,170**

Total Amount Due* **$3,170**

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Payment of final penalty amount should be made to:

Accounting Office (OSH)
Department of Industrial Relations
P.O. Box 420603
San Francisco, CA 94142

*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

POS: 8/13/2015