

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

In the Matter of the Appeal of:

**WALMART INC  
dba WALMART SUPERCENTER #01593  
702 S.W. 8TH STREET  
BENTONVILLE, AR 72716**

**Employer**

Inspection No.

**1398365**

**DECISION**

**Statement of the Case**

Walmart Inc. (Employer), is a retailer. Beginning April 30, 2019, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Harpreet Dhillon, commenced an inspection at Employer's work site at 12721 Moreno Beach Boulevard in Moreno Valley, California. On September 30, 2019, the Division cited Employer for allegedly failing to implement an effective Injury and Illness Prevention Program (IIPP).

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, the abatement requirements are unreasonable as to the required changes, and the proposed penalty is unreasonable. Employer also asserted numerous affirmative defenses.<sup>1</sup>

This matter was heard by Sam E. Lucas, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). On December 8, 2020, ALJ Lucas conducted the hearing from Los Angeles, California, with the parties and witnesses appearing remotely via the Zoom video platform. Matthew Gurvitz, attorney for Venable LLP, represented Employer. Eric Compere, Staff Attorney, represented the Division. The matter was submitted for decision on January 22, 2021.

**Issues**

1. Did the Division establish that Employer failed to implement an effective Injury and Illness Prevention Program?

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<sup>1</sup> Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 10926000, Denial of Petition for Reconsideration (May 26, 2017).)

2. Did Employer establish the affirmative defense that an Independent Employee Action caused the violation?
3. Is the violation properly classified as Serious?
4. Are the abatement requirements unreasonable as to the required changes?
5. Is the proposed penalty reasonable?

### **Findings of Fact**

1. Employer had a written safety program that included procedures for identifying and evaluating workplace hazards. The written program included the requirement for scheduled periodic inspections to identify unsafe conditions and work practices.
2. Employer's employee Sergio Cabrera (Cabrera) developed symptoms of heat illness while unloading boxes from a trailer at Employer's dock area.
3. The dock area was equipped with an air-conditioning unit and five ceiling fans to circulate air and keep the area cool.
4. The hazard of employee exposure to excessive heat inside the trailer was not a new or previously unrecognized hazard.
5. Employer made an industrial fan available that could be placed outside the trailer at employees' request.
6. Employer was not aware of any previous reactions to heat in the trailer similar to that of Cabrera.
7. Employer did not offer medical assistance to Cabrera or insist that he stop working.
8. There is a realistic possibility that death or serious physical harm could result from the actual hazard created by Employer's failure to adopt appropriate methods and procedures to correct the hazard of heat exposure in the workplace.

9. The proposed civil penalty was calculated in accordance with the Division's policies and procedures.

### Analysis

#### **1. Did the Division establish that Employer failed to implement an effective Injury and Illness Prevention Program?**

In Citation 1, Item 1, Employer was cited for a violation of California Code of Regulations, title 8, section 3203,<sup>2</sup> which provides, in relevant part:

- (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

[...]

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

- (A) When the Program is first established;

[...]

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

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

[...]

- (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:

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<sup>2</sup>All section references are to the California Code of Regulations, title 8, unless otherwise specified.

- (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.

(7) Provide training and instruction:

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

In the citation, the Division alleges four violations, set forth in four separate instances:

Prior to and during the course of the inspection, including but not limited to, on April 30, 2019, the employer failed to effectively implement the required elements of an Injury & Illness Prevention Program including, but not limited to:

Instance 1: The implementation of procedures set forth in the employer's written IIPP for identifying and evaluating workplace hazards did not result in a comprehensive evaluation of the hazards present at the site. The employer did not effectively evaluate and identify the hazards of

working in a truck trailer under excessive heat conditions {Reference T8 CCR Section 3203(a)(4)}.

Instance 2: The implementation of the methods and/or procedures set forth in the employer's written IIPP for correcting unsafe work conditions, work practices and procedures did not achieve abatement of the hazards present at the site. The employer failed to effectively develop and implement methods and procedures for correcting the hazards related to working in a truck trailer with excessive heat conditions. {Reference T8 CCR Section 3203(a)(6)}.

Instance 3: The employer failed to provide effective training on the following topics: 1) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment. 2) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties. 3) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers. 4) The employer's procedures for responding to signs or symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary. 5) The employer's procedures for contacting emergency medical services and provisions to ensure that an employee exhibiting signs of heat illness does not leave the premises until being offered onsite first aid and/or being provided with emergency medical services. {Reference T8 CCR Section 3203(a)(7)}.

Instance 4: On or about April 2, 2019 an employee experienced heat illness related symptoms, requiring hospitalization for treatment, while unloading a truck trailer with excessive heat conditions.

Pursuant to section 3203, subdivision (a), employers are required to establish, implement, and maintain an effective IIPP. Employer argues as a preliminary matter that there is no applicable regulation governing indoor heat illness. Employer is mistaken. The Appeals Board has previously found that the hazard of indoor heat illness is a hazard that, when present, may serve as a basis for a violation of section 3203. (*National Distribution Center LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) [employers

failed to implement an IIPP that included appropriate methods and/or procedures to correct or minimize the risk of heat exposure at an indoor warehouse].)

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).)

*A. Did the Division establish that Employer failed to implement an effective Injury and Illness Prevention Program by not identifying and evaluating the hazard of working in a truck trailer under excessive heat conditions?*

Section 3203, subdivision (a)(4), requires that employers include in their IIPP “procedures for identifying and evaluating work place hazards.” (*Brunton Enterprises, Inc.*, Cal/OSHA App. 08-3445, Decision 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.*) A review of Employer’s IIPP reveals that Employer indeed has a written program that requires “periodic inspections, investigation of injuries, accidents and illnesses...” Employer’s IIPP requires that unsafe or unhealthy work conditions be “corrected in a timely manner based on the severity of the hazards,” and that periodic inspections be performed “when new, previously unidentified hazards are recognized.” As written, Employer’s IIPP includes the written elements required of the regulation, and no violation is found on that basis.

However, the Division may demonstrate a violation of section 3203, subdivision (a)(4)(C), by showing “(1) that an employer was made aware of a ‘new or previously unrecognized hazard,’ and (2) that the employer failed to conduct an inspection to identify and evaluate that hazard.” (*OC Communications, Inc.*, Cal/OSHA App. 14-0120, Decision After Reconsideration (Mar. 28, 2016).) The Appeals Board’s analysis in *Coast Waste Management, Inc.*, Cal/OSHA App. 11-2385, Decision After Reconsideration (Oct. 7, 2016), is instructive here. In that case, the Division cited Employer for a violation of section 3203, subdivision (a)(4)(C), alleging that Employer failed to identify and evaluate a workplace hazard. (*Id.*) The Appeals Board found that evidence existed to show that Employer had identified the hazard and

had taken reasonable steps to mitigate the hazard, and as a result found no violation of section 3203, subdivision (a)(4)(C). (*Id.*)

In this instance, the Division alleges that Employer failed to identify and effectively mitigate the workplace hazard associated with employee exposure to excessive heat inside a trailer. The Division argues that Employer's failure to monitor the temperature inside the trailers with thermometers is a violation of their duty to effectively evaluate the hazard pursuant to section 3203, subdivision (a)(4)(C). However, the evidence adduced at hearing here shows that the hazard of employee exposure to excessive heat inside the trailer was not a "new or previously unrecognized hazard." Associate Safety Engineer Harpreet Dhillon (Dhillon) testified that the dock area was equipped with an air-conditioning unit and five ceiling fans to circulate air and keep the area cool. Summer Valenzuela (Valenzuela), a supervisor for Employer, testified that, in addition to the air-conditioning unit and ceiling fans, an industrial fan is available that can be placed outside the trailer at employees' request. No evidence was presented at hearing that showed Employer was aware of any reactions to heat in the trailer similar to that experienced by Cabrera, such as body tingles, nausea, sweating or shaking. The evidence supports a finding that Employer identified the hazard and created a policy it believed effectively mitigated the hazard. Employer's conclusion was not unreasonable, given that no employee had suffered similar heat exhaustion symptoms in the past. No violation of section 3203, subdivision (a)(4)(C), is found here because Employer sufficiently identified and evaluated the potential hazard of heat illness.

*B. Did the Division establish that Employer failed to implement an effective Injury and Illness Prevention Program by not providing effective training on the topics of risk factors for heat illness, the importance of consumption of water, the importance of reporting symptoms or signs of heat illness, the procedures for responding to such symptoms and signs, and/or the procedures for contacting emergency medical services?*

"Training is the touchstone of any effective IIPP." (*National Distribution Center LP, Tri-State Staffing, supra*, Cal/OSHA App. 12-0391), citing *Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002).) The Division may prove a violation of section 3203, subdivision (a)(7), by showing that the implementation of the training required by this section is inadequate. (*National Distribution Center LP, Tri-State Staffing, supra*, Cal/OSHA App. 12-0391.)

The parties do not dispute that Employer had heat illness training programs. The focus of the testimony at hearing was the question of whether Employer's heat illness training program was sufficient to address the specific hazard of heat inside of trailers. The Division argues that Employer's training is specific to outdoor heat illness prevention and does not address the

specific hazard of heat inside of a trailer. Employer's position is that the training is meant to cover both outdoor and indoor heat illness prevention.

To support its position, the Division relies partly on the testimony of Cabrera and partly on the text of two documents Employer produced at hearing related to heat illness: a one-page handout entitled "Keep Your Cool: A Guide to Heat-Related Illness Prevention" (Exhibit B), and a three-page document entitled "Heat Related Illness." (Exhibit C.) Cabrera testified that he received training on the heat-related illness program,<sup>3</sup> and that he believed that the program only applied to outdoor workers because that is what he was told by his supervisors. The Division also points out that the documents produced by Employer do not make any direct reference to heat conditions inside of the trailers.

Employer, however, alleges that the program is not meant to be exclusive to outdoor heat illness prevention or only apply to outdoor workers and offered the testimony of Valenzuela to support that position. Valenzuela testified that all employees of Employer, regardless of whether assigned to indoor or outdoor work, are given this training. The Division did not refute Valenzuela's testimony. The contention that the training is meant to apply to outdoor employees and indoor employees is also supported by the fact that Cabrera himself, an employee assigned to work indoors, was trained on the program. The text of the training documents themselves further support the proposition that the program was not intended to only apply to employees working outdoors. The "Overview" section of the "Heat Related Illness" document states, "All managers must discuss the following information with any associate working outdoors *or in an environment that could cause Heat Related Illness.*" (Emphasis added.) The same document goes on to specifically state that the information contained in the document is to be discussed with employees who work primarily indoors in the job classes "Carter Pusher/Stockperson" and "Unloaders," among others.

The weight of the evidence supports a finding that Employer provided heat illness training that was given to indoor employees and was meant to apply to indoor work. The Division has not met its burden of proof to establish that the training program was inadequate to address the specific hazard of heat-related illness in the trailers. Here, no violation of section 3203, subdivision (a)(7), is found.

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<sup>3</sup> Cabrera's testimony that he received training on both documents is supported by training records produced at hearing showing he participated in "Heat-Related Illness Prevention" (Exhibit I) on February 15, 2019, and December 13, 2019.



C. *Did the Division establish that Employer failed to implement an effective Injury and Illness Prevention Program by failing to effectively develop and implement methods and procedures for correcting the hazards related to working in a truck trailer with excessive heat conditions?*

“An Employer’s IIPP may be satisfactory as written, but still result in a violation of section 3203, subdivision (a)(6) if the IIPP is not implemented, or through failure [to] correct known hazards.” (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) “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.” (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) “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.” (*National Distribution Center LP, Tri-State Staffing, supra*, Cal/OSHA App. 12-0391.)

The Division asserts Employer “failed to effectively develop and implement methods and procedures for correcting the hazards related to working in a truck trailer with excessive heat conditions.” In *National Distribution Center, supra*, the Appeals Board found a violation of section 3203, subdivision (a)(6), when the employer failed to implement appropriate corrective measures while responding to an employee’s complaints of symptoms consistent with heat illness. In that case, an employee reported to his supervisor that he was “experiencing dizziness, stomach cramps, and other symptoms of heat illness.” (*Id.*) The Appeals Board found that the supervisor “should have arranged appropriate and reliable transportation for [the employee] to medical treatment.” (*Id.*)

The facts in this case are similar. On April 2, 2019, Employer’s employee Cabrera started his shift at approximately 2:00 p.m. His task was to unload a truck containing merchandise. This was a typical task for his position, and Cabrera reports that it was Employer’s policy that the unloading should be done within the first two hours of the shift. Unloading the truck involved taking items from the truck and handing them off to a co-worker who placed the items on a conveyor belt. On April 2, 2019, Cabrera was working with two co-workers, one of whom was Kaci Idema (Idema). Cabrera described the temperature inside the truck as “very hot,” illustrated in part, he says, by the sides of the truck being hot enough to burn when he touched them. Cabrera started to feel ill about an hour into his shift when his back and side began to tighten or cramp. Idema was not Cabrera’s supervisor, but she told him to take a break. Cabrera testified he did not take a break because he feared being disciplined by his supervisors. Cabrera testified that, at some point he asked his supervisor, Victoria Guzman (Guzman), to be replaced by another employee, but she refused. According to Cabrera, Guzman told him he could drink water but needed to finish unloading the truck by 4:00 p.m. This testimony is contradicted by Dhillon’s interview notes of Guzman. The notes report that Guzman twice told

Cabrera to get out of the trailer and that he refused to comply. Cabrera's testimony is given more weight because of his direct knowledge of the contents of the purported conversations between him and his supervisor, Guzman. The statements of Guzman to Dhillon, recorded in Dhillon's investigation notes, are not found to be as reliable as the first-hand testimony of Cabrera. It is noted that Guzman was not called to testify to either corroborate or contradict Cabrera's testimony.

Later, as Cabrera was about five rows from finishing unloading, his symptoms worsened. He felt tingles on his back, he felt nauseous, and he was sweating and shaking. Just after 4:00 p.m., Cabrera finished unloading the truck and took a break. Cabrera described his body temperature as "freezing," and he vomited in the bathroom. Cabrera testified that when he came back from a break, Guzman asked him to move pallets of water, but says he had "no strength" to do so. Cabrera testified that he told Guzman at that point that he "couldn't do anything," presumably meaning that he could not continue to work. Cabrera testified that he reported his specific symptoms to Guzman, who told him he "did not look good." Cabrera told Guzman he was going home. Cabrera attempted to drive himself home, but instead was picked up by his brother. Cabrera went to the emergency room later that day. At the hospital, Cabrera says that the doctor diagnosed him with heat exhaustion and he was given an IV. Employer offered no testimony to refute Cabrera's interpretation of his symptoms or diagnosis. According to Cabrera, no employee of Employer offered him medical assistance at any time. As above, more weight is given to Cabrera's first-hand account that he reported his specific symptoms to Employer and that at no point did Employer offer medical assistance or insist that he stop working.

The evidence supports finding that Employer did not offer medical assistance to Cabrera even after learning of Cabrera's symptoms and where Employer admits Cabrera had symptoms of heat illness. The offer of a break came in the form of a suggestion from a colleague, not a direction from a supervisor. Consequently, Employer violated section 3203, subdivision (a)(6), by not effectively implementing its IIPP when it failed to implement appropriate corrective measures. When a citation alleges more than one instance of a violation of a safety order, it is enough to sustain a violation if just one instance is proven. (*Petersen Builders Inc.*, Cal/OSHA App. 91-057, Decision After Reconsideration (Jan. 24, 1992), fn. 4.) Accordingly, Citation 1 is affirmed.

*D. Did the Division establish that Employer failed to implement an effective Injury and Illness Prevention Program because an employee experienced heat illness related symptoms, which required hospitalization for treatment?*

In Instance 4 of the alleged violation, the Division alleges that "an employee experienced heat illness related symptoms, requiring hospitalization for treatment, while unloading a truck trailer with excessive heat conditions." Employer does not offer a dispute to this allegation. However, the occurrence of an accident, by itself, is not sufficient proof that an employer's

overall training program is deficient. (*Michigan-California Lumber Company*, Cal/OSHA App 91-759, Decision After Reconsideration (May 20, 1993).) On their own, the facts alleged in Instance 4 are not sufficient proof that Employer’s overall training program is deficient.

**2. Did Employer establish the affirmative defense that an Independent Employee Action caused the violation?**

There are five elements to the defense that an Independent Employee Action caused the violation: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program; (3) the employer effectively enforces the safety program; (4) the employer has a policy of sanctions which it enforces against employees who violate the safety program; and (5) the employee caused the safety violation which he knew was contra to employer’s safety rules. (*Synergy Tree Trimming*, Cal/OSHA App. 317253, Decision After Reconsideration (May 15, 2017).)

The Appeals Board has long held that where the employee causing the safety infraction is a foreman or supervisor, the defense is inapplicable. (*Davey Tree v. Occupational Safety and Health Appeals Bd.* (1985) Cal.App.3d 1232, 1241.) The court in *Davey Tree* held that the supervisor causing the safety violation results in the employer failing to meet the third element of the IEAD test (“the employer effectively enforces its safety program”), because the violation of a safety rule by a supervisor meant the employer, through its representative, had itself failed to enforce its safety program. As the court in *Davey Tree, ibid.*, explained, supervisors and foremen are management’s representatives at worksites, and when they violate a safety standard their behavior is attributed to management. (*PDM Steel Service Centers, Inc.*, Cal/OSHA App. 13-2446, Denial of Petition for Reconsideration (June 10, 2015).) The violation here was Cabrera’s supervisor failing to effectively implement Employer’s IIPP when she failed to implement appropriate corrective measures, as required by section 3203, subdivision (a)(6). Consequently, Employer failed to show all five elements of its defense that an Independent Employee Action caused the violation.

**3. Is the violation properly classified as Serious?**

Labor Code section 6432, subdivision (a), states:

There shall be a rebuttable presumption that a “serious violation” exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:

[...]

- (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

[...]

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

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

(Lab. Code §6432, subd. (e).)

The Appeals Board has defined the term “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

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

A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

The violation at issue is Employer’s failure to effectively implement its IIPP by failing to implement appropriate corrective measures while responding to an employee’s complaints of symptoms consistent with heat illness. Dhillon, who was current on his Division-mandated training at the time of the hearing, testified that a realistic possibility of serious physical harm

exists in cases of heat illness, and testified that, if not treated, heat illness could result in death. Accordingly, the Division established that the violation was properly classified as Serious.<sup>4</sup>

**4. Are the abatement requirements unreasonable as to the required changes?**

Employer's appeal asserted that the abatement requirements are unreasonable. However, the Division does not mandate specific means of abatement; rather, employers are free to choose the least burdensome means of abatement. (*Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004).) In order to establish that abatement requirements are unreasonable an employer must show that abatement was not feasible, impractical, or unreasonably expensive. (See *The Daily Californian/Caligraphics*, Cal/OSHA App. 90929, Decision After Reconsideration (Aug. 28, 1991).) Employer did not present testimony or other evidence that attempted to show abatement as to the violation here is unfeasible, impractical, or would be unreasonably expensive. Therefore, it is found that the abatement requirements were not unreasonable.

**5. Is the proposed penalty reasonable?**

Employer asserted as a ground for appeal that the penalty was unreasonable. Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, *supra*, Cal/OSHA App. 1092600), citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) The parties stipulated at hearing that, should the classification of Serious be sustained, the penalties were calculated by the Division pursuant to Title 8. No other testimony was taken during hearing regarding the reasonableness of the penalty. The classification having been sustained above as Serious, the proposed penalty of \$15,300 is found to be reasonable.

**Conclusion**

The Division established that Employer violated section 3203, subdivision (a)(6). The citation was properly classified as Serious, the abatement requirements are not unreasonable, and the proposed penalty is reasonable as assessed herein.

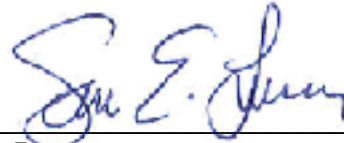
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<sup>4</sup> California Labor Code section 6432, subdivision (c), provides a means wherein an employer can rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. Employer in this instance offered no evidence or argument that it did not know of the existence of the violation.

**Order**

It is hereby ordered that Citation 1 is affirmed and the penalty of \$15,300 is assessed, as set forth in the attached Summary Table.

Dated: 03/12/2021



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**Sam E. Lucas**  
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**

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD**

Inspection No.: **1398365**

Employer: **WALMART INC dba WALMART SUPERCENTER #01593**

Date of hearing(s): December 8, 2020, October 9, 2020, August 27, 2020, April 29, 2020,  
March 19, 2020

**DIVISION'S EXHIBITS**

Exhibit Number	Exhibit Description	Status
1	Jurisdictional Documents	Admitted Into Evidence
2	C-10	Admitted Into Evidence
3	Document Request	Admitted Into Evidence
4	1-BY	Admitted Into Evidence
5	Email confirming 1-BY delivery	Admitted Into Evidence
6	Response to 1-BY	Admitted Into Evidence
7	Accident Claim Form-Redacted	Admitted Into Evidence
8	Photo of loading Bay	Admitted Into Evidence
10	Photo of loading bay truck door	Admitted Into Evidence
12	Photo of truck interior	Admitted Into Evidence
13	Photo of loading bay ceiling	Admitted Into Evidence
14	Photo of loading bay ceiling fans	Admitted Into Evidence
15	Photo of temperature reading: truck entrance	Admitted Into Evidence
16	Photo of temperature reading: loading bay	Admitted Into Evidence
18	Photo of fan at front of truck	Admitted Into Evidence
19	Photo of temperature reading: truck interior	Admitted Into Evidence
24	Photo of temperature reading: outside	Admitted Into Evidence
25	Photo of water cooler	Admitted Into Evidence
26	Photo of water fountain	Admitted Into Evidence

## EMPLOYER'S EXHIBITS

Exhibit Letter	Exhibit Description	Status
A	Employer's replacement A: Abatement - Store 1600	Admitted Into Evidence
B	Heat Plan Handout	Admitted Into Evidence
C	Heat Related Illness	Admitted Into Evidence
D	Heat Related Illness Training	Admitted Into Evidence
E	Heat Wave Contingency Plan	Admitted Into Evidence
F	Heat Related Illness Manager Associate Training	Admitted Into Evidence
G	Team Safety	Admitted Into Evidence
H	IIPP	Admitted Into Evidence
I	Cabrera Training Records	Admitted Into Evidence
K	Cabrera Interview Notes	Admitted Into Evidence
L	Guzman Interview Notes	Admitted Into Evidence
M	Idema Interview Notes	Admitted Into Evidence

Witnesses testifying at hearing:

Summer Valenzuela  
Sergio Cabrera  
Harpreet Dhillon

Employer  
Employee  
Associate Safety Engineer

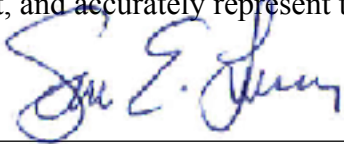


**APPENDIX A  
CERTIFICATION OF HEARING RECORD**

Inspection No.: **1398365**

Employer: **WALMART INC dba WALMART SUPERCENTER #01593**

I, Sam E. Lucas, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.



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Sam E. Lucas

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Date

## SUMMARY TABLE

### OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of: <b>WALMART INC dba WALMART SUPERCENTER #01593</b>	Inspection No. <b>1398365</b>
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Citation Issuance Date: **09/30/2019**

C I T A T I O N	I T E M	SECTION	T Y P E	CITATION/ITEM RESOLUTION	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	FINAL PENALTY ASSESSED
1	1	3203 (a)	S	ALJ affirmed citation and penalty.	A		\$15,300.00	<b>\$15,300.00</b>
<b>Sub-Total</b>							\$15,300.00	<b>\$15,300.00</b>

**Total Amount Due\*** **\$15,300.00**

*\*You may 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.*

#### PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:  
**Department of Industrial Relations**

2. Write the **Inspection No.** on your payment

3. If sending via US Mail:  
 CAL-OSHA Penalties  
 PO Box 516547  
 Los Angeles, CA 90051-0595

If sending via Overnight Delivery:  
 US Bank Wholesale Lockbox  
 c/o 516547 CAL-OSHA Penalties  
 16420 Valley View Ave.  
 La Mirada, CA 90638-5821

*Online Payments can also be made by logging on to [http://www.dir.ca.gov/dosh/CalOSHA\\_PaymentOption.html](http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html)*

**-DO NOT** send payments to the California Occupational Safety and Health Appeals Board-

**Abbreviation Key:**

G=General	R=Regulatory	Er=Employer
S=Serious	W=Willful	Ee=Employee
RG=Repeat General	RR=Repeat Regulatory	RS=Repeat Serious
		A/R=Accident Related