BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1336276**
RIOS FARMING COMPANY, LLC **3851 CHILES POPE VALLEY ROAD** **SAINT HELENA, CA 94574** **Employer**	**DECISION**

Statement of the Case

Rios Farming Company, LLC (Employer) operates a vineyard management business. Beginning August 6, 2018, the Division of Occupational Safety and Health (Division), through Associate Safety Engineer, David Kernohan, conducted an inspection of a vineyard located at 1801 Pope Canyon Road in Saint Helena, California, in response to an employee complaint that Employer was not adequately providing water.

On January 7, 2019, the Division issued one citation to Employer. The citation alleges that Employer failed to ensure that drinking water was located as close as practicable to the area where employees were working.

Employer filed a timely appeal of the citation on the grounds that the safety order was not violated, the classification is incorrect, and the proposed penalty is unreasonable. Employer asserted numerous affirmative defenses.[1]

This matter was heard by Jennie Culjat, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board), in Sacramento, California, with the parties and witnesses appearing remotely via the Zoom video platform, on June 14, 15, and 16, 2022. Lisa C. Baiocchi of the Prince Firm represented Employer. Lisa H. Friedman, Staff Counsel, represented the Division. The matter was submitted for decision on September 13, 2022.

[1] Except as otherwise noted in the 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. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer fail to locate water as close as practicable to the area where employees were working?

2. Did the Division establish that Citation 1 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation in Citation 1 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

4. Is Citation 1 properly classified as a "Repeat Violation"?

5. Is the proposed penalty in Citation 1 reasonable?

Findings of Fact

1. On August 6, 2018, Employer had a crew of about 13 employees working outdoors in a vineyard pruning and training grapevines.

2. Employer placed water in two locations. A water jug was located at the end of the rows where the crew began work, and another water jug was located on a shade trailer that was traveling with the crew as they worked their way across the vineyard.

3. The length of the row where the shade trailer was located was approximately 2,100 feet. At the time of inspection, the crew was approximately 1,500 feet into this row and away from the water jug located at the end of the row where the crew began work.

4. The crew members worked in multiple rows at a time, one employee in the row where the shade trailer was located and one employee in each row about five rows out from both sides of the shade trailer.

5. Employees not working in the row where the shade trailer was located had to cross through the trellises in order to get to the water jug located on the shade trailer.

6. Crossing the trellises required an employee to perform the coordinated movement of stepping over, balancing, and bending multiple times.

7. Some employees brought their own plastic water bottles to pass from one coworker to the next in the adjacent rows to be filled with water at the water jug located on the shade trailer and then passed back rather than cross the trellises to get to the water.

8. Elias Saldivar (Saldivar), Vineyard Manager, Carlos De Loera (De Loera), Supervisor, and Oscar Diaz Barrera (Barrera), Crew Leader, were responsible for providing water to the crew and were aware of the water location at the vineyard where the crew was working.

9. Barrera knew that some employees brought their own water bottles to be passed, filled with water, and then passed back.

10. Failure to locate water as close as practicable to the area where employees are working may result in employees not frequently drinking water, which may put them at risk for heat illness.

11. Heat illness symptoms can include profuse sweating, followed by lack of sweating, disorientation, fainting, vomiting, cramps, and prickly heat rash, which can progress to heat exhaustion or heat stroke, resulting in impairment of the kidneys, liver, and brain, or death.

12. In 2017, the Division issued a citation to employer for failure to locate water as close as practicable to the area where employees were working.

13. The circumstances surrounding the citation issued in 2017 involved employees working outdoors in a vineyard. The vineyard rows were approximately 758 feet long. Water was located at only one end of the vineyard rows.

14. Employer employed more than 100 employees.

Analysis

1. Did Employer fail to locate water as close as practicable to the area where employees were working?

In Citation 1, the Division cited Employer for an alleged violation of California Code of Regulations, title 8, section 3395, subdivision (c),[2] which requires:

> (c) Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable, including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where

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

drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged.

In Citation 1, the Division alleges:

Prior to and during the course of inspection, including but not limited to, on August 8, 2018 the employer failed to ensure that drinking water was located as close as practicable to the areas where employees are working. Specifically, employees working in the vineyard located at 1801 Pope Canyon Rd, St. Helena, CA 94574 were required to climb through grape vine trellises across several vineyard rows to access drinking water.

Section 3457 contains additional requirements for agricultural employers, set forth in subdivision (c)(1):

(A) Potable water shall be provided during working hours and placed in locations readily accessible to all employees. Access to such drinking water shall be permitted at all times.

(B) The water shall be fresh and pure, suitably cool, and in sufficient amounts, taking into account the air temperature, humidity, and the nature of the work performed, to meet the needs of all employees.

(C) The water shall be dispensed in single-use drinking cups or by fountains. The use of common drinking cups or dippers is prohibited.

[…]

(D) Drinking water containers shall be constructed of materials that maintain water quality, and shall be provided with a faucet, fountain, or other suitable device for drawing the water.

Here, the issue in dispute is whether the water that Employer provided was located as close as practicable to the area where the crew was working. “Practicable” is not defined in the regulation, and thus requires interpretation. In *AC Transit*, Cal/OSHA App. 08-0135, Decision

After Reconsideration (June 12, 2013), the Appeals Board explained:

> Whether interpreting statutes or administrative regulations, the same principles are used. (*County of Sacramento v. State Water Resources Control Bd*. (2007) 153 Cal. App. 4th 1579, 1586; *California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).) We first look at the words of the regulation, giving them a 'plain and commonsense meaning.' (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577.) We then evaluate the regulation as a whole; if the regulation is clear and unambiguous, we presume that the adopting agency meant what it said and the plain language controls. [Citations.]

If ambiguity remains after evaluation of the plain language of the regulation, the regulatory history may be considered when interpreting the regulation. (*Dept. of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 102.)

The word "practicable" is defined as "capable of being put into practice or of being done or accomplished" or "capable of being used" (https://www.merriam-webster.com/dictionary/practicable <accessed September 28, 2022>) or "able to be done or put into action" (https://dictionary.cambridge.org/us/dictionary/english/practicable <accessed September 28, 2022>) or "reasonably capable of being accomplished; feasible." (Black's Law Dict. (Abridged 8th ed. 2005) p. 984, col. 2.). Based on the foregoing definitions, the commonsense meaning of "practicable" is fairly understood as "capable of reasonably being done or accomplished."

The definition of the term "practicable" is not exact and requires the evaluation of the circumstances to determine what is reasonably capable of being done in a given scenario. Considering this, it is necessary to turn to the regulatory history to interpret the term "practicable" in the context of section 3395.

Section 3395 was first issued as an emergency regulation in 2005, made a permanent regulation in 2006, and amended in 2010 and 2015. During the 2015 amendment process, there was a proposed amendment of section 3395, subdivision (c), to add language requiring that water be located within 400 feet of employees unless it was not possible to place water within that distance due to worksite conditions. (Initial Statement of Reasons Proposed Amendments to Title 8, California Code of Regulations, Section 3395 of the General Industry Safety Orders (ISOR).) In the ISOR, the Occupational Safety and Health Standards Board (Standards Board) explained that the proposed 400-foot distance requirement "is based on balancing of the need to place water as close as possible to workers to enable frequent drinking throughout the day without unduly disrupting the flow of work, and feasibility of requiring multiple or even individual repositories of water that must be carried and replenished during the day."

During the public comment period, the Standards Board received various comments from stakeholders concerned that the 400-foot distance standard was both "inappropriate for various types of worksites" and "would become a default enforcement standard even when conditions allowed having the water much closer to workers." (Final Statement of Reasons for Proposed Amendments to General Industry Safety Order on Heat Illness Prevention (FSOR) at p. 2.) In response, the Standards Board deleted the 400-foot distance requirement and issued "a purely performance standard" requiring water to "be located as close as practicable to the areas where employees are working." (*Id*. at p. 1.).

The Standards Board specifically identified the "as close as practicable" requirement to be a performance standard. California Government Code section 11342.570 defines "performance standard" as "a regulation that describes an objective with the criteria stated for achieving the objective." The Appeals Board has held that performance standards intentionally lack specificity, which "establishes a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions." (*Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014), citing *Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012).)

There are several statements in the regulatory history that shed light on the goal of the "as close as practicable" standard and what employers must take into consideration when determining water location. In one such statement, while not in response to a comment concerning water location, but nonetheless useful here, the Standards Board explained that "it is not the intent of the regulation that employers force employees to drink water, but rather that employers evaluate their specific jobsite conditions and identify potential barriers or obstacles (such as location, cleanliness, etc.) that might discourage the frequent consumption of water." (FSOR at p. 67.) Based on this statement, it is evident that the Standards Board intended for employers to evaluate their worksites to determine where to provide water to employees with the understanding that the location of water may create a barrier to frequent drinking.

The Standards Board echoed this view several times in response to the concerns it received regarding the prescribed 400-foot distance. Many of these concerns were raised by stakeholders in the agricultural industry. (See, e.g., FSOR at pp. 33, 40, 57-58, 110-111, 114.) Of relevance to this case, is a comment from the California Association of Winegrape Growers, which illustrates the particular concerns of water location in a vineyard, stating:

> It is important that [the Division] understand the scale and realities of a California vineyard. Vineyard shapes, layout, topography and sizes vary greatly and may range from [one] acre to 400 acres, or more. Movement of people within a vineyard is typically constrained by vineyard rows, which are defined by rows of winegrape vines and a trellis system (consisting of posts, support wires and a drip

> irrigation line). The vines and trellis system create a barrier to movement, which means workers must enter and exit the vineyard at end of rows…. Workers cannot, in practical terms, crawl under vineyard rows. As a consequence, water positioned in the center of a vineyard, may be physically closest to a worker two or three vine rows over, but the actual walking distance would be significantly greater than if the water were positioned at the end of the row. While water is and can be made available closest to the majority of the crew, there are instances when the crew is spread out, making the prescribed foot distance unfeasible. Water jugs/igloos can be hauled around on quads but depending on vineyard layout, particularly those on steep hills, water on a quad may not be most feasible. Employees, even when provided use of a canteen to carry around, prefer not to carry the extra weight.

(FSOR at pp. 57-58.)

In response to this comment, the Standards Board merely explained that the prescribed distance requirement had been removed due "to this and numerous other comments." (FSOR at p. 58.)

However, the Standards Board further elaborated, in response to a similar comment about water location in agricultural fields that are typically a quarter mile, with some having crops that make it impossible to cross rows, that the "as close as practicable" standard "allows the placement of drinking water as close as possible to workers to ensure frequent drinking, while taking into consideration the physical layout of the site or terrain-conditions." (FSOR at pp. 161-162.) The Standards Board also suggested that "while in many circumstances it may not be possible to cross crop rows, it is usually possible to bring and place water within rows." (*Id*. at p. 162.) Regarding another concern that "vineyards contain wire and berm" making it unfeasible to comply with the proposed 400-foot distance requirement, the Standards Board expressed, that "it is not the [Standards] Board or Division's intent for employees to cross rows where there are barriers or risk of injury to the employee (such as by tripping) or to the crop." (*Id*. at p. 27.)

Finally, it should be noted that, while the Standards Board deleted the prescribed distance requirement, it acknowledged that "the greater the distance, the greater the disincentive for workers to walk to drink water" (FSOR at p. 34) and that the "as close as practicable" requirement is "an enforceable performance standard that judicial bodies will understand as requiring water at a closer distance than 400 feet, whenever it is practicable to do so." (*Id*. at p. 156.).

Based on the foregoing regulatory history, a reasonable interpretation of the "as close as practicable" standard is that employers are required to locate water as close to the areas where employees are working as can be reasonably accomplished in order to encourage frequent water

consumption, while taking into consideration the specific jobsite conditions. With this in mind, we turn to the case at hand to determine whether the water provided by Employer was located as close as practicable to the area where the crew was working.

On the day of the inspection, Employer had a crew of about 13 employees working outdoors in a vineyard training and pruning grape vines. The vineyard consisted of rows of grapevines supported by a trellis system. The trellis system was made up of posts placed at intervals, with an irrigation hose and four support wires, running horizontally along the posts. The irrigation hose was located about one foot from the ground. About a foot above the irrigation hose, was the first support wire with the next three support wires also placed about a foot apart from one another. The trellises were about five and one-half feet high and ran the length of the vineyard without breaks in the rows.

The crew began work at one end of the vineyard rows and worked their way across the rows. Employer located a water jug at the edge of the rows where the crew began work. The layout of the vineyard was such that the rows varied in length because one boundary end of the rows ran on a diagonal. While this meant that some of the rows were shorter than others, many of the rows in this vineyard were unusually long. Saldivar testified that, due to the long row length at this vineyard, Employer decided to bring water into a row, so employees were not required to walk to the end of the rows to get water. Employer brought water into a row by locating a water jug with a cone rim paper cup dispenser on a shade trailer that travelled with the crew as they made their way across the vineyard. (Ex. 17.) The shade trailer was made of a picnic table covered by an awning that provided a place to sit and shade. (*Id*.) David Kernohan (Kernohan), Associate Safety Engineer, measured the length of the row in which the shade trailer was located. Based on Kernohan's measurement, the total length of this row was approximately 2,100 feet.

The water located at the end of the vineyard rows where the crew began work was not located as close as practicable to the area where the crew was working at the time of inspection. Based on Kernohan's measurement, the crew was approximately 1,500 feet into a 2,100-foot row.[3] Logically, as the crew moved away from the end of the rows where the water was located and crossed the halfway point of the rows, the other end of the vineyard rows became a closer location to provide water. Employer did not provide water at the other end of the rows. However, even had Employer located water jugs at both ends of the vineyard rows, due to the length of the rows and Employer's ability to bring water into the rows, locating water at both ends of the rows would not have been sufficient.

[3] Employer's Exhibit L is an aerial map of the vineyard. This map depicts the crew's location at the time of inspection as being closer to the edge of the vineyard rows where the crew began work, which is where one of the water jugs was located. When shown Exhibit L, Employer's witnesses testified they believed this was the crew's location at the time of inspection. However, this testimony was not based on any measurement of the crew's actual location. Accordingly, Kernohan's pace measurements taken at the time of inspection are credited.

As to the water located on the shade trailer, the Division argued that this water location was not as close as practicable to the area where the crew was working because crossing the trellises created a barrier that discouraged employees from frequently drinking water. The crew members worked in multiple rows at a time, one employee in the row where the shade trailer was located and one employee in each row about five rows out on either side of the shade trailer. Saldivar estimated that the distance between each trellis was about eight feet. Based on this estimate, depending on the row the crew member was working in, the water on the shade trailer was no more than 40 feet away (five rows multiplied by eight feet). While the water on the shade trailer was located as close as practicable to an employee working in the row where the water was located, as the employee only had to walk a few feet to the water location, an employee working in an adjacent row had to cross one or more trellises to get to the water.

The vineyard where the crew was working contained young grapevines that had not yet fully grown into the trellises, which made it possible for employees to cross the trellises by lifting their leg to step over the irrigation hose while stooping under the support wire to pass between the approximately 12-foot space between the irrigation line and support wire. (Ex. 20.) Joseph Crocker (Crocker), District Manager, testified that crossing the trellises required the ability to step over, balance, and bend. Exhibit 20, a photograph of an employee with his legs straddling the irrigation hose and bending over at his hips at a 90-degree angle to get under the support wire, demonstrates the effort and coordinated body movement that was required to cross the trellises. As discussed above, crew members worked up to five rows away from the water location, which meant some crew members had to perform the coordinated movement of stepping over, balancing, and bending a total of 10 times to get to the water and then return to their row.

Employer argued that crossing the trellises was not a strenuous activity and did not discourage the crew from frequently drinking water. Barrera, Eduardo De Loera Acevedo, and Fredy Hernandez Perez were all part of the crew working in the vineyard. These witnesses consistently testified that it was not difficult to cross the trellises, they had never tripped or had been otherwise injured while crossing, and crossing the trellises was part of their regular work duties. While Barrera testified that employees crossed the trellises “as if it’s nothing,” he also testified that some of the crew, who did not want to cross the trellises to get to the water, brought their own individual water bottles to carry, which could be passed to crew members in the adjacent rows to be filled up with water at the shade trailer and then passed back.

Although Employer’s witnesses testified that it was not hard to cross the trellises, the fact that some of the crew took it upon themselves to create an alternate way to get water strongly suggests that crossing the trellises was a deterrent to the frequent drinking of water. This fact, coupled with the fact that some employees would have to step over, balance, and bend up to a total of 10 times to cross the trellises to get to water, establishes that the trellises were a barrier to

the water location and created a deterrent to the frequent drinking of water.

Furthermore, the fact that there is no evidence of an actual injury to a worker from crossing the trellises does not mean that there was no risk of injury. There is little doubt that stepping over an irrigation hose while stooping under a support wire posed a risk of tripping or otherwise losing balance to workers crossing through. Crocker testified the movements required to cross the trellises would be more difficult for a person experiencing heat illness symptoms, which can include muscle cramps, disorientation, or light headedness. It is reasonable to conclude that it would be more difficult, and the risk of injury would be greater, for someone crossing the trellises while experiencing these symptoms.

As set forth above, the regulatory history is clear that employees should not be required to cross crop rows to get to water "where there are barriers or risk of injury to the employee (such as by tripping) or to the crop." (FSOR at p. 27.) Despite Employer's efforts to portray crossing the trellis as a simple maneuver, the trellises were an obstacle between the crew working in adjacent rows and the water located on the shade trailer, and there was risk of injury to workers crossing the trellises. While the trellises were an obstacle that discouraged frequent drinking of water, it must still be determined whether the water was, nonetheless, placed as close to the crew as Employer was reasonably able to accomplish.

The Division argued that Employer had several other reasonable options for water location, such as placing water jugs in each row where a crew member was working or providing refillable water bottles that the workers could carry. Employer's position was that the water it provided on the shade trailer was located as close to the crew as could be reasonably accomplished because it was not feasible to move and maintain 13 water jugs, the number of jugs that would have been required to locate a water jug in each row that an employee was working. Employer also argued that it was not reasonable to provide individual water containers while keeping in compliance with the other requirements of section 3395, subdivision (c), that water be fresh, pure, and suitably cool.

Employer's arguments are unconvincing. Even assuming that it would have been impracticable for Employer to maintain 13 water jugs, there was no reason put forth as to why Employer could not have reconfigured the layout of the crew, by having multiple employees working in a row, which would have lessened the number of rows requiring water jugs and the need to move and maintain those water jugs. Along these same lines, Employer put forth no reason it could not have located water jugs within more than one row, for example, in every other row. This would have eliminated the need to cross the trellises as the crew would only need to pass water once in the cone rim cups that were provided as opposed to the multiple passings from one crew member to another it took with water located in only one row.

Other than to argue that the water in plastic bottles would heat up quickly, potentially putting Employer in violation of other requirements in section 3395, subdivision (c), Employer offered no other reason that it was not within its means to provide individual water bottles or some other container with a lid that the employees could have reasonably passed through the trellises multiple times to get water from the water jug located on the shade trailer. The cone rim cups provided by Employer were not suitable for multiple passings because there was no lid. The water bottle or container would not be the source of water, rather the vessel used to get and drink the water from the water source. The fact that some of the crew took it upon themselves to bring their own plastic water bottles to get water this way, demonstrates that this was a reasonable option. However, because Employer did not supply the water bottles, it was not providing this option to the crew. Kernohan testified that the abatement of this matter was a revision to Employer's Heat Illness Prevention Plan that Employer would provide water bottles in vineyards with extremely long rows, which further demonstrates that this option was within Employer's means.

Employer argued that section 3395, subdivision (c), does not require employers to provide individual water bottles, and the Division cannot require that Employer do so as it circumvents the nature of a performance standard. However, there is nothing indicating that the Division is attempting to enforce a specific requirement. Rather, providing individual water bottles was identified as an option to locate water as close as practicable to employees in this particular vineyard considering the unusually long length of the vineyard rows and the trellises.

Employer also took issue with the fact that the Division did not issue a citation to Employer for a shade violation. Section 3395, subdivision (d), outlines the requirements regarding "Access to shade" and requires that shade "be located as close as practicable to the areas where employees are working." Employer asserts that because the standard for water and shade location is the same, the Division engaged in inconsistent enforcement and created confusion about compliance by not also issuing a citation to Employer for a shade violation as the shade and water were both located on the shade trailer. However, Employer fails to account for the fact that how water and shade is provided, for example a water jug versus a pop-up tent, impacts feasibility of location. Indeed, the Standards Board commented on this very issue stating that "[g]iven the importance of frequent consumption of water as a heat illness prevention measure and water's greater portability, the [Standards] Board does not believe that water can or should be equated with shade…in terms of its accessibility to workers." (FSOR at p. 22-23.)

Based on the foregoing, Employer failed to locate water as close as practicable to the area where employees were working. Accordingly, the Division established that Employer violated section 3395, subdivision (c), and Citation 1 is affirmed.

2. Did the Division establish that Citation 1 was properly classified as Serious?

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

> (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:
>
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes 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).)

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 Division relied on the testimony of Crocker to establish the Serious classification. Crocker testified that he is current on his division-mandated training. Crocker estimated that he has performed about 50 heat illness inspections since becoming employed with the Division in 2014. In addition, Crocker has received annual training on heat illness. For a year and a half during 2018 and 2019, Crocker held the position of Regional Heat Coordinator, which required that he train staff on heat illness and review inspection files related to heat illness for the Division's American Canyon, Fremont, San Francisco, and Oakland district offices. Crocker estimated that, as the Regional Heat Coordinator, he reviewed about 40 to 50 heat illness cases. Additionally, prior to becoming employed by the Division, Crocker worked for the California Department of Transportation, during which time he received and provided trainings on section 3395. Accordingly, Crocker is deemed competent to offer testimony regarding the classification of the citation.

a. Did an actual hazard exist?

"For the Division to meet its initial burden, the record must support the existence of an 'actual hazard' created by the violation." (*Shimmick Construction Company, Inc*., Cal/OSHA App. 1192534, Decision after Reconsideration (Aug. 26, 2022.).) "[A]n actual hazard may exist if: (1) there exists in a place of employment: (2) one or more practices, means, methods, operations or processes that have been adopted or in use; and (3) which are unsafe or unhealthful." (*Id.*; Lab. Code, § 6432, subds. (a) and (a)(2).)

Here, there was no dispute that the vineyard, where the crew was working, was a place of employment. The practice at issue is not placing water as close as practicable to the area where employees are working. Crocker testified that when water is not placed as close as practicable, employees are discouraged from frequently drinking water. Crocker explained that employees may be deterred by the amount of time it takes to stop work in order to get to water and/or the physical effort required to get to water when there are obstacles, including distance, in the way. Crocker testified that the hazard that results from not drinking enough water is the risk of dehydration and heat illness. Crocker further testified that proper hydration is an important measure in preventing heat illness as it keeps the body hydrated.

Employer argued that the Division failed to establish that there was an actual hazard present in this case because there was no evidence that the crew was unable to access water as needed. Both Saldivar and Barrera testified that the work being performed by the crew was done at a slow pace without production goals. Employer's witnesses also testified that they were able to access water when they wanted, and it was not difficult to cross the trellises. Employer also

pointed to Kernohan's inspection notes that indicate employees were encouraged to frequently drink water and that both Kernohan and Crocker testified that they were not aware of any employees who were not frequently drinking water.

Kernohan's inspection notes indicate that employees were encouraged, verbally, by posted signs, and at tailgate meetings, to frequently drink water. (Ex. 3.) However, his inspection notes also identify the trellises as a barrier to accessing water. (*Id*.) Section 3395, subdivision (c), has several requirements regarding the "Provision of water." In addition to placing water as close as practicable to the areas where employees are working, employers are required to encourage employees to frequently drink water, up to four cups per hour, when the work environment is hot. (§ 3395, subds. (c) and (h)(1)(C).) These are two separate requirements. Although an employer may instruct and train employees to frequently drink water, this does not also mean that water is placed in such a location that it does not discourage frequent water consumption.

As established above, the trellises were a barrier to the water location. While there may not have been production goals impacting a worker's decision whether to stop work to get water and for some of the crew it may not have been difficult to cross the trellises, employees brought their own water bottles to be filled rather than having to cross the trellises. If the trellises were not a deterrent to the frequent consumption of water, then employees would not have devised their own method for getting water that did not require crossing the trellises. It is reasonable to conclude that had these employees not brought their own bottles to fill with water, that having to cross the trellises would have resulted in these employees foregoing frequent water consumption.

Accordingly, the Division established that the violation created an actual hazard.

b. Was there a realistic possibility that death or serious physical harm could result from the actual hazard?

As the Division established that there was an actual hazard created by the violation, it now must be determined whether there is "a realistic possibility that death or serious physical harm could result from the actual hazard." (Lab. Code, § 6432, subd. (a).) The term "realistic possibility" means a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) The Appeals Board recently explained that "we interpret the 'realistic possibility' portion of the statute to refer not to the probability that an accident will occur, but to the possibility, if an accident occurred, that death or serious physical harm could result from the accident." (*Shimmick Construction Company, Inc*., *supra*, Cal/OSHA App. 1192534.)

Here, Crocker testified that the agriculture industry is high risk for heat illness and the

environmental risk factors for heat illness include radiant heat, relative humidity, type of work, and personal protective equipment. Crocker explained that heat illness symptoms can include profuse sweating, followed by lack of sweating, disorientation, fainting, vomiting, cramps, and prickly heat rash. Crocker further explained that the pace at which heat illness sets in varies based on personal risk factors, but it can progress to heat exhaustion or heat stroke, which can result in impairment of the kidneys, liver, and brain, and even death.

According to the reading taken by Kernohan with his Kestrel thermometer during the inspection, the temperature where the crew was working was 95 degrees Fahrenheit. (Ex. 22.) Crocker testified that, based on the temperature and the type of work being performed, that the crew was at risk of dehydration and heat illness. Given the temperature, the fact that frequent water consumption is a key measure in preventing heat illness, and that heat illness progresses at varying rates, the Division established that if heat illness occurred, it could have resulted in serious physical harm or death.

Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

3. Did Employer rebut the presumption that the violation in Citation 1 was Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a Serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]
>
> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

(Lab. Code, § 6432, subd. (c).)

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Here, Employer was aware of the violation. The knowledge of a supervisor is imputed to an employer, who cannot argue pursuant to Labor Code section 6432, subdivision (c), that it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." (*Mountain F. Enterprises*, Cal/OSHA App. 1113595, Decision After Reconsideration (Feb. 14, 2018).) Employer's Vineyard Manager, Saldivar, Pope Valley Supervisor, De Loera, and Crew Leader, Barrera, all testified that they were responsible for providing water to employees. All three knew or reasonably should have known of the water location in the vineyard and that employees would have to cross the trellises to get to the water on the shade trailer.

Although Employer took some steps to anticipate and prevent the violation by bringing water into one of the rows, Employer should have been aware that crossing the trellises created a barrier to the water location and taken additional action. Barrera specifically testified that for employees who did not want to cross the trellis to get to the water, they relied on their coworkers to refill their plastic water bottles. This was enough to put Employer on notice that additional steps were needed to ensure that water was located as close as practicable to employees.

Therefore, Employer had knowledge that the water was not located as close as practicable to the area where employees were working and cannot rebut the presumption that Citation 1 was properly classified as Serious.

4. Is Citation 1 properly classified as a "Repeat Violation"?

Section 334, subdivision (d), provides that a "Repeat Violation" is:

> [A] violation where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon a later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest of: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law. For violations other than

those classified as repeat regulatory, the subsequent violation must involve essentially similar conditions or hazards.

Here, the Division classified Citation 1 as a Repeat Violation based on a citation that it issued to Employer on November 30, 2017 (2017 Citation). As with the current citation, the 2017 Citation alleged a violation of the requirement that water be placed as close as practicable to the area where employees are working found in section 3395, subsection (c).[4] Employer abated the violation in the 2017 Citation, as evidenced by the citation itself, which reflects that the violation was "corrected during inspection" (Ex. 2, 2017 Citation 2, Item 1.) and further evidenced by Crocker's testimony that Employer abated the 2017 violation.[5] The 2017 Citation was affirmed and became final through a Settlement Order issued by the Appeals Board on October 3, 2018. (Ex. 2.) The current citation was issued on January 7, 2019 (2019 Citation), which is within five years of the 2017 Citation becoming final.

To determine the final element, whether the prior and subsequent violations involve essentially similar conditions or hazards, the circumstances of the 2017 Citation must be compared to the 2019 Citation.

a. The 2017 Citation

On July 17, 2017, Crocker, who at the time was a Senior Safety Engineer, conducted an inspection of a vineyard located at 5550 Pope Valley Road in Saint Helena, California, where Employer's employees were working outdoors. In addition to Employer's employees, there were also employees of a farm labor contractor that Employer had engaged to provide labor working at this vineyard. The temperature was 96 degrees Fahrenheit. (Ex. D.) The employees were performing digging work, which Crocker testified was moderately strenuous.

Employer did not directly provide water to its employees at this vineyard. However, the farm labor contractor was providing water in one location to all employees, including Employer's employees, at one edge of the vineyard rows. As a result, employees working on the opposite end of the vineyard from where the water was located had to walk the length of the row to get a drink of water and then walk back to return to their work area. Crocker measured from one end of a vineyard row to the opposite end where the water was located. The length was approximately 758 feet. (Ex. E.)

[4] This was one of three citations issued to Employer on November 30, 2017.

[5] Employer pointed out that the Division did not submit into evidence an abatement document that was signed by Employer for the 2017 Citation and that neither Kernohan nor Crocker could verify that Employer was sent the Certification of Repeat Violation for the 2019 Citation. However, Employer did not argue that the violation in the 2017 Citation was not abated or that it was not put on notice of the Repeat Serious classification of the 2019 Citation.

The Division cited Employer for failing "to ensure that water onsite was located as close as practicable to the area where employees were working in the field." (Ex. 2, 2017 Citation 2, Item 1, AVD.) Crocker testified that it was determined, based on the length of the vineyard rows and the work being done, that placing water at both ends of the vineyard row was sufficient to bring Employer into compliance. Employer abated the violation by locating water at both ends of the vineyard rows.

b. The 2019 Citation

As discussed in detail above, the circumstances of the 2019 Citation also involved water location at a vineyard. The crew was working in the vineyard rows training and pruning vines, which witnesses described as light, non-strenuous work. The vineyard rows where the crew was working were approximately 2,100 feet in length. A water jug was located at one edge of the vineyard rows and on the shade trailer traveling with the crew.

As in the 2017 Citation, Employer was cited because the water was not located as close as practicable to the area where the crew was working. The Division determined that having to cross through the trellis created a barrier to getting to the water location and discouraged workers from the frequent drinking of water.

c. Comparison of the 2017 and 2019 Citations

Violations need not be precisely the same in order to establish a repeat classification. (*Zapata Constructors, Inc*., Cal/OSHA App. 80-284, Decision After Reconsideration (May 31, 1984).)

Here, Employer argues that the subsequent violation did not involve essentially similar conditions as the prior violation. As Employer points out, the size of the vineyards and row lengths were not the same, the crews were working in two locations versus one location, the crews were performing different levels of work, and the location of the water was not the same. However, those differences are insufficient to overcome the fundamental similarities that employees were working outdoors in vineyard rows in temperatures reaching 95 degrees Fahrenheit where water was not placed as close as practicable to the employees.

In addition to essentially similar conditions, the hazards in both citations were the same. Not placing water as close as practicable to the area where the crews were working may result in employees not drinking enough water, thereby leading to heat illness.

Employer argued that it would have been in compliance with the 2017 abatement requirements in the 2019 Citation had it located water at both ends of the vineyard rows, but that

it went above and beyond that requirement. Employer further argued that if the Division can require a specific abatement and then change the abatement requirement in a subsequent inspection, Employers are unable to comply with performance standards. However, what employers are required to do is to evaluate the job site and place water as close to employees as can be reasonably accomplished in order to encourage frequent water consumption. By the nature of this requirement, what is close as practicable in one work location may not be in another. The fact that the abatement requirements were not the same in the 2017 Citation and 2019 Citation, does not mean that the conditions or hazards were not essentially similar.

Accordingly, the Division properly classified Citation 1 as a Repeat Violation because the conditions and hazards involved in the 2017 Citation and 2019 Citation were essentially similar.

5. Is the proposed penalty in Citation 1 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc.,* Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

An initial penalty of $18,000 is assessed for all Serious violations. (§ 336, subd. (c).) As such, the Division correctly assessed an initial penalty of $18,000. The penalty may be further adjusted based on Extent and Likelihood, resulting in the Gravity-Based penalty. Where Extent or Likelihood is rated as High, the Base Penalty is increased by 25 percent, where it is rated as Medium, the Base Penalty is not adjusted, and where it is rated as Low, the Base Penalty is decreased by 25 percent. (§ 336, subd. (c).)

Section 335, subdivision (a)(1)(B), defines the relevant factors to determining the Extent and Likelihood of a violation:

> (2) Extent.
>
> i. When the safety order violated pertains to employee illness or disease, Extent shall be based upon the number of employees exposed:
>
> LOW-- 1 to 5 employees.
>
> MEDIUM-- 6 to 25 employees.

HIGH-- 26 or more employees.

[…]

(3) Likelihood.

Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:

LOW, MODERATE OR HIGH

Here, Kernohan testified that the safety order in this case did not pertain to employee illness because the inspection was complaint-based and no employee experienced heat illness. However, Kernohan's testimony is mistaken. As its very title, "Heat Illness Prevention in Outdoor Places of Employment" indicates, the provisions of section 3395 are related to heat illness. Furthermore, "[t]he Board has recognized that the safety order is intended to abate the risk of heat illness…." (*Aptco, LLC*, Cal/OSHA App. 1332715, Decision After Reconsideration, (Jan. 27, 2021).) As section 3395 pertains to employee illness, the Extent factor is determined based on the number of exposed employees.

According to the penalty calculation worksheet, the Division assessed Extent at Medium. (Ex. 13.) There were about 13 employees in the crew working at the vineyard. While there may have only been 12 workers at a time exposed to the violation, accounting for the one crew member working in the row where the water was located, 12 exposed employees is within the range of the Medium rating and supports the Division's rating of Medium for Extent.

Kernohan testified that Likelihood is based on the number of exposed employees, but did not provide information about the "extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records." (§ 335, subd. (b).) Crocker testified that likelihood would be determined based on what Kernohan found at the inspection, experience, statistical data, and available records, but he did not elaborate on how these factors were applied to determine the Medium rating in this case. As such, the Division presented insufficient information to support the Medium rating for Likelihood. When the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) Accordingly, Likelihood is rated as Low, which results in a 25 percent reduction.

Based on the foregoing, the violation is determined to be High Severity with Medium Extent and Low Likelihood, resulting in a Gravity-Based Penalty of $13,500.

Section 335 provides for further adjustment to the Gravity-Based Penalty for Good Faith, Size, and History. However, section 336, subdivision (d)(12), provides that the only adjustment factor permitted for Repeat violations is for Size. Kernohan testified that Employer had 200 employees, which results in no further adjustment to the $13,500 Gravity-Based Penalty.

Section 336, subdivision (g), provides, in relevant part, that for a first repeat of a Serious violation, the penalty is multiplied by two. Therefore, the Gravity-Based Penalty of $13,500 is multiplied by two based on the determination that the citation was properly classified as a Repeat Violation. Accordingly, the resulting final penalty for Citation 1 is $27,000.

Conclusion

For Citation 1, the Division established that Employer violated section 3395, subdivision (c), by failing to locate water as close as practicable to the area where employees were working. The citation was properly classified as Repeat Serious and the modified penalty is found reasonable.

ORDER

It is hereby ordered that Citation 1 is affirmed and the associated penalty is modified and assessed as set forth in the attached Summary Table.

Dated: 10/12/2022

_____
Jennie Culjat
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.**