BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
OLAM WEST COAST, INC. **dba OLAM SPICES AND VEGETABLE INGREDIENTS** **205 E. RIVER PARK CIRCLE, SUITE 310** **FRESNO, CA 93720** **Employer**	**1334740** **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Appeals Board or Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Olam West Coast, Inc. (Employer or Olam) processes vegetables. On July 24, 2018, Employer reported an employee illness at its tomato-processing facility located at 6229 Myers Road in Williams, California. The Division of Occupational Safety and Health (Division), through Assistant Safety Engineer (ASE) Omar Castillo (Castillo)[1], conducted an investigation beginning on July 31, 2018, and on January 16, 2019, issued Employer three citations for violations of the heat illness prevention standards embodied in California Code of Regulations, title 8.[2] Employer timely appealed.

This matter was heard by Kevin J. Reedy, Presiding Administrative Law Judge (ALJ) for the Board, on December 8, 9, and 10, 2020, and January 9 and 29, 2021. The parties attended the hearing remotely via the Zoom video platform. Andrew J. Sommer and Megan S. Shaked, attorneys at Conn Maciel Carey, LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. The ALJ's Decision affirmed all three citations, the Serious classifications of Citations 2 and 3, the Accident-Related characterization of Citation 2, and the reasonableness of the abatement and proposed penalties.

Employer timely petitioned for reconsideration of the ALJ's Decision. The Board took Employer's petition under submission on June 11, 2021. The Division filed an Answer on July 19, 2021, after moving for, and receiving, extra filing time from the Board.

[1] Omar Castillo was promoted to Associate Safety Engineer in January, 2019
[2] Unless otherwise specified, all section references are to California Code of Regulations, title 8.

In its petition, Employer argues that it complied with all the requirements of the safety orders. Employer also argues that the ALJ erred in allowing the Division to amend Citation 2 to include an Accident-Related characterization. Employer does not contest the Serious classifications of Citations 2 or 3, the abatement requirements, or the reasonableness of the penalties. These issues are therefore waived. (Lab. Code § 6618.)

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUES

1. Did Employer fail to provide effective heat illness training to each supervisory employee prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness?

2. Did Employer fail to closely observe an employee newly assigned to a high heat area for signs or symptoms of heat illness during the first 14 days of the employee's employment?

3. Did Employer fail to provide effective heat illness training to each nonsupervisory employee before they began work that should reasonably be anticipated to result in exposure to the risk of heat illness?

4. Did the ALJ correctly affirm the Accident-Related characterization of Citation 2?

FINDINGS OF FACT

1. On July 24, 2018, Timothy Garcia (Garcia) was newly assigned to an outdoor high heat area. Garcia, on his first day on the job, worked in the tomato processing facility's outdoor bin assembly area, where he performed strenuous work assembling large boxes, each weighing 250 pounds. The place where the boxes are assembled is identified as the aseptic area.

2. On July 24, 2018, Garcia started his shift at 2:00 p.m. The outdoor temperature peaked at 104 degrees between 3:00 to 4:00 p.m. Garcia took his first break at approximately 4:00 p.m.

3. Garcia was experiencing signs and symptoms of heat illness at the time he took his break at approximately 4:00 p.m.

4. When Garcia came back from his 4:00 p.m. break, his supervisor, Juan Ornelas (Ornelas), did not check in with him. Garcia did not see Ornelas after his break until Garcia's heat illness symptoms became so severe that he was taken to the "safety room" by assistant supervisor Israel Gomez (Gomez).

5. Garcia was transported to the hospital on July 24, 2018, where he was admitted as an inpatient for three days and received treatment for heat illness.

6. Garcia was not acclimatized to working in high heat conditions when he developed heat illness on July 24, 2018.

7. Ornelas was not aware it was Garcia's first day working in high-heat conditions.

8. Garcia was not being closely observed by a supervisor when he developed symptoms of heat illness.

9. Employer failed to effectively train supervisory employees on the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under the standard without retaliation.

10. Employer's supervisor training failed to include effective training on how to monitor weather reports and how to respond to hot weather advisories.

11. Employer had no acclimatization methods and procedures, relating to the close observation of employees not acclimatized to heat, in its written Heat Illness Prevention Program.

12. Employer failed to effectively train non-supervisory employees on the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under the standard without retaliation.

13. There is a realistic possibility that death or serious physical injury could result from heat illness.

14. Garcia suffered heat illness as a result of exposure to high heat conditions while performing strenuous outdoor labor on his first day of work in high heat conditions.

DISCUSSION

1. Did Employer fail to provide effective heat illness training to each supervisory employee prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness?

In relevant part, section 3395, subdivision (h) provides:

> (h) Training.
>
> (1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:

…

(B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.

…

(D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subdivision (i)(4).

…

(2) Supervisor training. Prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness effective training on the following topics shall be provided to the supervisor:

(A) The information required to be provided by section (h)(1) above.

…

(D) How to monitor weather reports and how to respond to hot weather advisories.

Citation 1, Item 1 alleged:

> Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to provide effective training to each supervisory employee before they began work reasonably anticipated to result in heat illness.

The ALJ found that Employer's heat illness training for supervisory employees was insufficient or incomplete with regard to the following elements:

- (h)(1)(B): Information related to the employer's responsibility to provide water, shade, cool-down rests, and access to first aid, as well as employees' right to exercise their rights under this standard without retaliation, as required under subdivision (h)(2)(A).
- (h)(1)(D): Information related to concepts, procedures, and methods of acclimatization pursuant to the employer's procedures under section 3395, subdivision (i)(4), as required under subdivision (h)(2)(A).
- (h)(2)(D): Training on how to monitor weather reports and how to respond to hot weather advisories.

With the exception of the information required by subdivision (h)(2)(D), which was required prior to 2015, all of the information the ALJ determined to be missing has been required since a 2015 amendment to section 3395. The heat illness training at issue took place in 2018. This matter presents questions of first impression for the Board regarding the training requirements of California's heat illness prevention standard, as amended in 2015. Specifically, we must consider

what training must an employer provide to employees regarding 1) employees' right to exercise their rights to water, shade, and cool-down rests without fear of retaliation; 2) the importance, concepts, methods, and procedures for heat acclimatization; and 3) for supervisory employees, how to monitor weather reports and respond to hot weather advisories.

The Division has the burden to prove the violations by a preponderance of the evidence. (See, *Howard J. White, Inc., Howard White Construction, Inc*., Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) The Division need only show one missing component, of the many required by the safety order, in order to establish a violation. (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (June 10, 2010); *Tutor-Saliba-Perini*, Cal/OSHA App. 97-3209, Decision After Reconsideration (Apr. 24, 2003).)

In Employer's 2018 safety training, heat illness was one of sixteen topics covered in a one hour safety orientation meeting. (Exhibit 24.) Employer's general safety training slideshow included one slide on heat illness. (Exhibit 41.) The training section on heat illness prevention consisted of an eight-minute video produced by the Division (Exhibit D), followed by a 17-slide PowerPoint slideshow created by Employer (Exhibit 22).

Supervisor Ornelas's training records show that he received Employer's heat illness training on July 10, 2018. (Exhibit 24.) Assistant supervisor Gomez's training records show he received Employer's heat illness training on June 21, 2018. (Exhibit A.) Continuous Improvement Manager and Environmental Health and Safety Manager Lacey Gimple (Gimple), who conducted the training, testified that supervisors received no additional training; the same training was provided to both supervisory and non-supervisory employees. Both Ornelas and Gomez also testified that supervisors received no additional training.

Subdivision (h)(1)(B)

Section 3395, subdivision (h)(1)(B), read in conjunction with subdivision (h)(2)(A), requires the employer to effectively train supervisory employees on the "employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation." (§ 3395, subd. (h)(1)(B).)

Section 3395, subdivision (d)(3) provides the relevant information that must be included regarding employees' rights to preventative cool-down breaks:

> Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. An individual employee who takes a preventative cool-down rest (A) shall be monitored and asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but

in no event less than 5 minutes in addition to the time needed to access the shade.

An employer's training must cover the required topics, and it must be "effective." (§ 3395, subd. (h)(1) and (h)(2).) Whether training is effective is a question of fact. (*National Distribution Center, LP/Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2016) (*NDC/Tri-State*) citing *Ironworks Unlimited*, Cal/OSHA App. 93-024, Decision After Reconsideration (Dec. 20, 1996) [holding that implementation of an IIPP is a question of fact].) While title 8 does not define "effective," it is commonly understood to mean "adequate to accomplish a purpose; producing the intended or expected result"[3]; or, "producing a decided, decisive, or desired result."[4] The Board has held: "It is not enough for employers to simply provide employees training, the training must also be of sufficient quality to make employees 'proficient or qualified' on the subject of the training." (*NDC/Tri-State*, *supra*, Cal/OSHA App. 12-0391, citing *Siskiyou Forest Products*, Cal/OSHA App. 01-1418, Decision After Reconsideration (Mar. 17, 2003).) For training to be considered effective, then, there must be evidence to show that employees are proficient or qualified to implement the safety rules and requirements that the training was intended to convey.

As noted above, the training records of both Ornelas and Gomez show that they attended Employer's 2018 safety orientation, which included the topic of heat illness. (Exhibits 24 and A.) The fact that an employee signed off as having attended safety training does not, in itself, support an inference that the training was effective, or of sufficient quality to make the employees proficient or qualified on the particular subject of the training. (*Pacific Coast Roofing Corp*., Cal/OSHA App. 95-2996, Decision After Reconsideration (Oct. 14, 1999).) Moreover, training that is satisfactory as written may be deemed ineffective if it does not achieve the desired or intended result. Here, the desired result would be that Employer's supervisors were aware employees had the right to take a cool-down break at any time, and knew what a preventative cool-down break entailed, as described above.

We must therefore consider both the contents of Employer's training, and whether that training effectively commmunicated the required information to supervisors. Turning first to the actual contents of the training, the Division presented evidence, in the form of Employer's Heat Illness Prevention training slideshow (Exhibit 22), that the training was insufficient. This slideshow contains a slide which states that Employer must provide sufficient quantities of cool, fresh drinking water, and other slides emphasizing the importance of staying hydrated. The written content of the slide presentation makes no mention of shade or of cool-down rests, and no mention that employees have the right to take cool-down rests as needed without retaliation. Employer's own written training materials are therefore insufficient, by themselves, to satisfy the safety order.

Where the Division presents evidence which would support an adverse finding if unchallenged, the burden shifts to the employer to produce convincing evidence to avoid such a finding. (*Paramount Scaffold, Inc.*, Cal/OSHA App. 01-4564, Decision After Reconsideration (Oct. 7, 2004); *RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for

[3] Dictionary.com (Dictionary.com, LLC 2022) < https://www.dictionary.com/browse/effective > (Jan 27, 2022).
[4] Merriam-Webster (Merriam-Webster, Inc. 2022) <https://www.merriam-webster.com/dictionary/effective> (Jan. 26, 2022).

Reconsideration (May 26, 2017).) Employer argues it provided convincing evidence that its heat illness training covered all subdivision (h)(1)(B) topics. First, Employer argues, Gimple verbally supplemented the slides beyond their written content. Second, Employer argues that it included the Division's heat safety training video (Exhibit D), which addressed any required topics missing from Employer's training slideshow.

Gimple's testimony as Employer's witness, however, failed to demonstrate that the training she conducted addressed the required missing elements through her verbal comments on the slides. She acknowledged that the new training information on employee rights required by the 2015 amendments to section 3395 was not included in the training slides. Since the written content of the slides did not include all required topics, there would have been no prompt in the slides for her to discuss the missing topics. Although Gimple testified that she did tell employees that they were permitted to take cool-down breaks, she failed to specify where in the slide show she would have done so.

The Board is not suggesting that employers must keep a transcript of all employee training or otherwise document the trainer's every word. The crucial fact here is that Gimple was given the opportunity to review each training slide, and could not identify any point at which she had specifically informed employees of their rights to take cool-down breaks in the shade at any time without fear of retaliation. Employer's testimonial evidence is therefore insufficient to overcome the Division's evidence that Gimple's slide presentation did not include the required information on Employer's responsibility to provide, and employees' right to take, shade and cool-down rests, without fear of retaliation. We therefore find that Employer's own training materials, even when supplemented by Gimple's comments, failed to include all required information under section 3395, subdivision (h)(1)(B).

Employer also supplemented its training slideshow with a Division heat illness prevention training video (Exhibit D). The Division does not allege that its own training materials were defective. Upon review, the Division's video did include the required (h)(1)(B) elements. The video states, "Your employer is required to provide plenty of fresh, cool water during the workday," (Exhibit D at 3:38) and, "Employers must provide plenty of cool, fresh water [and] shade and rest periods." (*Id.* at 6:05.) Regarding employees' right to cool-down breaks, the video states, "By law, you can ask for at least five minutes to recover from heat, and your employer must provide shaded areas." (*Id.* at 3:52.) The video also depicts a scenario in which a group of agricultural laborers collectively approach their supervisor to assert their right to take cool-down breaks in the shade. (*Id*. at 6:43.)

While such materials can be a useful tool for employers, nonetheless the standard requires that training must be effective in conveying the necessary information. We find that in this matter, Employer's use of the Division training video did not effectively address the gaps in Employer's own heat illness training materials. As the Board has previously held, to be considered effective, training must "be of sufficient quality to make employees 'proficient or qualified' on the subject of the training." (*NDC/Tri-State*, *supra*, Cal/OSHA App. 12-0391.) The record shows that Employer's supervisors were not aware of all the required information, missing from Employer's own training materials, that the video was intended to convey. For the same reason, even if Gimple's verbal elaborations on the slideshow did cover the missing information, we would still find Employer's training ineffective and insufficient.

Demonstrating that Employer's training was not sufficient to make the supervisors proficient or qualified on the subject, Ornelas's testimony identified significant gaps in his knowledge. When asked what he recalled from the training video about cool-down breaks, Ornelas testified that, from his recollection of the training video, an employer is supposed to provide employees with water, shade, and a cool-down break area. He did not mention hearing that employees were allowed to take a cool-down break at any time. Ornelas's further testimony left several issues unclear: whether he considered an employee momentarily pausing work to drink water or stand in front of a fan a cool-down break, versus allowing the employee to cool down for at least five minutes, or as long as needed, in the shade or an air-conditioned room; whether he believed an employee needed a supervisor's permission to take a cool-down break; or whether he believed an employee had to be displaying visually obvious symptoms of heat illness before they were entitled to a cool-down break. These gaps in Ornelas's knowledge reinforce the ineffectiveness of Employer's training.

Gomez's testimony similarly demonstrated that Employer's training was not sufficient to make supervisors proficient or qualified on the subject of the training. Gomez testified that he did recall hearing in the training that employees were permitted to take cool-down breaks. However, his testimony indicates that he was not fully aware of the distinction between an as-needed cool-down break and a worker's regular allotted breaks.[5] Gomez testified, "a cool-down break means they could take ten minutes to drink water, go stand by the fan in the shade and just cool down." If a worker needed a cool-down break, he repeatedly testified, he would "tell" or "remind" them to take "their ten-minute break," or "a ten-minute cool-down period."[6] A reasonable inference may be drawn that Garcia was not effectively trained on the information that a cool-down break may be taken as needed, for as long as needed.

While employees may not be expected to perfectly recall every detail of training on a given topic, training cannot reasonably be considered effective if the supervisors charged with implementing that training have incomplete or incorrect knowledge of the necessary information. Ornelas's and Gomez's testimony establishes that they did not receive effective training, as supervisors, on employees' rights to take as-needed cool-down breaks without fear of retaliation. We therefore find that Employer failed to effectively train supervisory employees on the topics required by section 3395, subdivision (h)(1)(B).

Subdivision (h)(1)(D)

Section 3395, subdivision (h)(1)(D), read in conjunction with subdivision (h)(2)(A), provides that supervisor training must include "[t]he concept, importance, and methods of acclimatization pursuant to the employer's procedures under subdivision (i)(4)." (§ 3395, subd. (h)(1)(D).)

[5] The record indicates that employees were allotted one break before lunch, a half-hour lunch, and one break after lunch, per eight-hour shift. Ornelas testified that the two allotted breaks were fifteen minutes each. Garcia testified that the two allotted breaks were ten minutes each.

[6] Section 3395, subdivision (d)(3)(C) provides, "an individual employee who takes a preventative cool-down rest … shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade."

Subdivision (i)(4) provides:

> (i) Heat Illness Prevention Plan. The employer shall establish, implement, and maintain, an effective heat illness prevention plan. The plan shall be in writing in both English and the language understood by the majority of the employees and shall be made available at the worksite to employees and to representatives of the Division upon request. The Heat Illness Prevention Plan may be included as part of the employer's Illness and Injury Prevention Program required by section 3203, and shall, at a minimum, contain:
> …
> (4) Acclimatization methods and procedures in accordance with subdivision (g).

Subdivision (g), in turn, provides:

> (g) Acclimatization.
> (1) All employees shall be closely observed by a supervisor or designee during a heat wave. For purposes of this section only, "heat wave" means any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and at least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days.
> (2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

Prior to the 2015 amendments, section 3395 required only training on the "importance" of acclimatization. (*State Roofing Systems, Inc*., Cal/OSHA App. 08-276, Denial of Petition for Reconsideration (Apr. 28, 2010).). The Board has not previously issued a Decision After Reconsideration interpreting the interplay of these 2015 amendments to section 3395.

Read together, the plain language of subdivisions (g), (i)(4), and (h)(1)(D), require Employer's HIPP to contain, among other things, acclimatization methods and procedures addressing the requirement that employees must be "closely observed" under certain conditions presenting an increased risk of heat illness, and require supervisors be effectively trained on those methods and procedures. (§ 3395, subds. (g), (i)(4), (h)(1)(D).)

The Division argues Employer did not, and could not, provide effective training on its HIPP's acclimatization methods or procedures pertaining to close observation because it had no such procedures in its written HIPP. The Division argues Employer cannot train on procedures that do not exist. Accordingly, we begin our analysis by reviewing the contents of Employer's HIPP to determine whether it contains sufficient acclimatization methods or procedures pertaining to closely observing employees under certain specific conditions.

Employer's HIPP contains several sections pertaining to acclimatization. First, it contains a definition for the word "Acclimatization," which it derived from section 3395, subdivision (b), along with the language from subdivision (g). The definition is:

> Acclimatization: The temporary adaptation of the body to work in the heat that occurs gradually when a person is exposed to it. Acclimatization peaks in most people within four to fourteen days of regular work for at least two hours per day in the heat. All employees shall be closely observed by a supervisor or designee during a heat wave. For purposes of this section only, "heat wave" means any day in which the predicted high temperature for the day will be at least 80 degrees Fahrenheit and at least ten degrees Fahrenheit higher than the average high daily temperature in the preceding five days. An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment. (Exhibit 20).

Next, under the section, "Training," Employer's HIPP states, "Training shall be provided for affected employees prior to being assigned to work tasks to include the following: …. The importance of acclimatization." (*Id.*) The only further methods of acclimatization in Employer's HIPP are provided in Appendix B, "Precautions to Prevent Heat Illness," which includes the bullet point text, "Condition yourself for working in hot environments. Start slowly and build up to more physical work. Allow your body to adjust over a few days (acclimatization)." (Exhibit 20.) This latter section addresses the employee's responsibility to avoid heat illness through proper acclimatization, without reference to the close observation of un-acclimatized employees. No further mention is made of the concept, importance, procedures, or methods of acclimatization in the HIPP's training section.

Ultimately, after an independent examination of the record, we conclude that Employer's HIPP did not contain any specific acclimatization methods or procedures for implementing the close observation required by subdivision (g). Although the Definition of "Acclimatization" within Employer's HIPP indicated Employer should closely observe employees during heat waves, and closely observe employees newly assigned to a high heat area (Exhibit 20), the HIPP does not specify how such close observation will be accomplished. Section 3395, subdivisions (g) and (i)(4) require the development of methods and procedures for acclimatization addressing close observation, and their inclusion in the HIPP. To comply with the regulation, an employer's HIPP must go beyond the mere language of the regulation and include specific methods and procedures tailored to Employer's workplace. The absence of such procedures within the HIPP alone constitutes a sufficient basis to affirm the violation, since Employer cannot train employees on HIPP methods and procedures that do not exist.

Employer argues it provided the required training on acclimatization, and argues that Gimple elaborated on the written contents of the slide to discuss the required topics. For example,

Employer's heat illness training slideshow was offered into evidence. (Exhibit 22.) The slide titled "Acclimatization" states, in its entirety:

> - We are all responsible for the working conditions of our employees, so we must act effectively when conditions result in sudden exposure to heat that our workers are not used to.
> - All employees shall be closely observed by a supervisor or designee during heat waves.
> - Employees newly assigned to high heat areas shall be closely observed by a supervisor or designee for the first 14 days of employment.

Gimple testified that close observation included verbal communication with employees who displayed visually detectable symptoms of heat illness, such as body language indicating fatigue.

However, even assuming that such training occurred, a violation would still be established for at least two reasons. First, there is no indication in the record that any methods or procedures existed to ensure that new employees were closely observed. Gimple and Ornelas both testified that all employees in high heat areas received the same level of observation.

Second, the record demonstrates the training was not of sufficient quality to make employees "proficient or qualified" on the subject of the training, which also demonstrates a violation. (*NDC/Tri-State*, *supra*, Cal/OSHA App. 12-0391.) As will be discussed in greater detail regarding Citation 2, Employer failed to closely observe Garcia, an employee working his first shift in high-heat conditions, and therefore was not aware of Garcia's symptoms until he had suffered heat illness so severe that he required three days of inpatient hospital care. Supervisor Ornelas testified that he was not trained, as a supervisor, on any methods or procedures to monitor new employees more closely during their first 14 days, and took no additional steps to prevent heat illness in employees, such as Garcia, who were not acclimatized. Assistant supervisor Gomez, who took over supervisory responsibilities in Ornelas's absence, also testified that he received no supervisory training on methods or procedures for closely observing newly assigned employees. These failures demonstrate that supervisors were not effectively trained.

The preponderance of evidence therefore indicates that Employer failed to effectively train its supervisory employees on methods and procedures for closely monitoring employees newly assigned to work in high heat conditions. While there is nothing preventing an employer from including additional acclimatization topics in its training, even if Employer did so here, it still failed to provide the necessary training in accordance with subdivision (h)(1)(D).

In concluding that a violation exists, however, we do depart from the analysis of the ALJ. The ALJ affirmed a violation, in part, on the basis that Employer's HIPP and heat illness training failed to include the specific acclimatization methods of 1) lessening the intensity and/or shift length of the newly-hired employees' work during a two or more week break-in period, and 2) modifying work schedules or by rescheduling non-essential duties during hot summer months. (Decision, pp. 2-3, 6, 9.) Castillo testified that he believed (h)(1)(D) required the inclusion of these two specific elements in Employer's heat illness prevention training. These elements are derived

from training and guidance documents created by the Division (Exhibits 37, 38, and S) which contain "best practices," recommendations, and examples, not legal requirements. We conclude that the ALJ went beyond the plain language of the safety order by mandating specific methods and procedures not specifically required by the safety order.

We note that the various subdivisions, when read together, can be read as a performance standard, 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); *NDC/Tri-State*, *supra*, Cal/OSHA App. 12-0391.) California Government Code section 11342.570 defines "performance standard" as "a regulation that describes an objective with the criteria stated for achieving the objective." To be considered a performance standard, a safety order must state both its objective and the means or criteria for achieving the objective. (*Webcor Construction LP dba Webcor Builders*, Cal/OSHA 07-5150, Denial of Petition for Reconsideration (June 24, 2009) (*Webcor Construction LP*).) Therefore, Employer has some latitude in selecting appropriate acclimatization methods and procedures, provided these are effective. The ALJ unnecessarily circumscribed that latitude.

It is well-established that the Board may not impose stricter or more detailed requirements than those set out in a safety order promulgated by the Standards Board. (*E.L. Yeager Construction Company, Inc*., Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007); *Webcor Construction LP*, *supra*, Cal/OSHA 07-5150.) The Occupational Safety and Health Standards Board is the only state agency authorized to adopt occupational safety and health standards. (Labor Code section 142.3(a)(1); *E.L. Yeager Construction Company, Inc.*, *supra*, Cal/OSHA App. 01-3261.) Although it may seem that to require acclimatization training only on the specific topic of close employee observation leaves gaps in worker protections by not requiring training on other important topics, such as modifying the shift length, work schedule, or duties of un-acclimatized employees (Exhibits 37, 38, S), the Standards Board did not include these topics in the safety order.

The preponderance of evidence therefore indicates that Employer failed to effectively train its supervisory employees on methods and procedures for closely monitoring employees newly assigned to work in high heat conditions.

Subdivision (h)(2)(D)

Section 3395, subdivision (h)(2)(D) requires that supervisory employees receive effective training on how to monitor weather reports and how to respond to hot weather advisories.

ASE Castillo presented a Division training slideshow (Exhibit 37) which contained the recommendation that hot weather advisories be used to "modify work schedules, increase the frequency of breaks, or cease work if necessary." The regulation itself does not contain such language or specifically require that weather reports and advisories be put to those uses; these are only guidance or best practices, not legal requirements. As discussed with regard to subdivision (h)(1)(D), the standard sets forth only its objective and criteria, leaving employers to determine an appropriate method of compliance. Nonetheless, supervisor training must include (1) information on how to monitor weather reports, and (2) information on how to respond to hot weather advisories.

As discussed above, training that is satisfactory as written may still be deemed ineffective if it does not achieve the desired or intended result of ensuring that supervisors are proficient or qualified on the subject of the training. (*NDC/Tri-State*, *supra*, Cal/OSHA App. 12-0391.) Here, the desired result would be that Employer's supervisors had a basic knowledge of methods and procedures for both monitoring the weather and responding to hot weather advisories.

Employer's Heat Illness Prevention training slideshow (Exhibit 22) contains a single slide titled "Monitor the Weather," which states in its entirety, "It's important for supervisors to track the weather," and provides the URL for the National Weather Service website. Employer's written training materials provide no information on how to monitor weather reports or respond to hot weather advisories, and are therefore insufficient.

Employer argues that Gimple's oral elaborations on this and other slides were sufficient to satisfy the requirements of the standard. On the requirement that supervisors receive training on methods and procedures to monitor weather reports, Gimple testified that her verbal comments on the slide directed supervisors to check the National Weather Service website, a weather application on their phones, or the temperature readings displayed on a monitor in the break room and time clock area, every day and to check predicted weather conditions up to a week in advance. On the requirement that supervisors receive training on how to respond to hot weather advisories, Gimple testified that supervisors were told to respond to hot weather conditions by visually observing employees throughout the day for possible heat-related symptoms, ensuring that sufficient water was available at the job site, and giving workers more frequent reminders to drink water.

Since the language of the safety order does not specify what methods or procedures the training must include, this might be considered sufficient, if evidence demonstrated that the training was effective in communicating information on methods and procedures for monitoring the weather, and responding to hot weather advisories, to supervisory employees.

However, Ornelas's testimony established that Gimple's verbal elaborations on the slide were not effective in communicating the required information. Ornelas testified that he got no training as a supervisor on monitoring weather reports, or on Employer's procedures for monitoring the weather. Ornelas testified that he did not monitor weather reports or even check the temperature on a regular basis. Instead, he relied on a daily notification from Employer telling him when to implement high heat procedures.[7] He testified that, if he did not receive such a notice at the start of the workday, he would only check the temperature or remind employees to drink water if he himself felt hot. He also testified that he did not monitor weather conditions, and was not aware of the temperature, on the day of Garcia's illness.

Subdivision (h)(2)(D) requires that supervisors be trained to both monitor weather reports and respond to hot weather advisories. This implies that supervisors must be trained to track the temperature throughout the workday, and to react to this information by implementing high heat procedures or other appropriate response as necessary. A supervisor who implements high heat procedures only when directed to do so by the company at the start of the workday, regardless of how hot the temperature actually becomes over the course of the day, cannot reasonably be said to

[7] Section 3395, subdivision (e) defines high heat conditions as dry bulb temperatures exceeding 95 degrees Fahrenheit.

be proficient or qualified on the subject of the training. (*NDC/Tri-State*, *supra*, Cal/OSHA App. 12-0391.)

Even if we characterize the daily notifications from Employer as hot weather advisories to which Ornelas responded, we would still find the training deficient, because Ornelas's testimony demonstrated that he did not receive effective training on how to monitor weather reports. The preponderance of evidence establishes that supervisors were not given effective training on how to monitor weather reports and respond to hot weather advisories.

For the aforementioned reasons, the Board finds that the Division established the violations alleged in Citation 1.

2. Did Employer fail to closely observe an employee newly assigned to a high heat area for signs or symptoms of heat illness during the first 14 days of the employee's employment?

Section 3395, subdivision (g)(2) provides:

> (g) Acclimatization.
> …
> (2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

Citation 2, Item 1 alleged:

> Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to closely observe employees newly assigned to a high heat area, for signs or symptoms of heat illness during the first 14 days. As a result, on July 24, 2018, an employee suffered a serious illness. [8]

Crucially, Ornelas testified that he did not know that it was Garcia's first day working in high heat conditions. Although Garcia had done seasonal work in Employer's tomato-processing facility in previous years, Garcia's last job prior to his seasonal employment with Olam in 2018 had been as a kitchen assistant in a casino. Employer would have been aware of this information from Garcia's job application, but it did not communicate this information to Ornelas. Ornelas knew only that it was Garcia's first day working in the outdoor bin assembly area that season. This fact alone suggests that Employer lacked effective procedures for the close observation of un-acclimatized employees. "Close observation" implies that un-acclimatized employees must be observed more closely than other employees. Employer failed to advise Ornelas that Garcia required close supervision during his first two weeks, and Garcia took no independent action to determine whether Garcia was heat-acclimatized.

It is undisputed that on July 24, 2018, Garcia was newly assigned to work in an outdoor

[8] Citation 2 was amended prior to hearing to clarify the accident-related characterization, pursuant to the Division's motion.

area, doing strenuous physical labor assembling large boxes, weighing 250 pounds each, to hold cans of tomato paste. Garcia began work at 2 p.m. As Garcia testified, no supervisor checked on him to monitor his condition, asked how he was feeling, or did anything else to satisfy the close observation required by subdivision (g)(2).

On that day, the outdoor temperature reached approximately 104 degrees between 3 and 4 p.m. By 4 p.m., Garcia was sweating profusely and felt tired and overheated. He took his scheduled ten-minute break in his car, but was still feeling symptoms of heat illness when he returned to work. Upon Garcia's return, Ornelas told him to discard an unopened energy drink. Other than that, Garcia testified, he did not see or communicate with Ornelas after he returned from his break, until after he was taken to the safety room.[9] No other supervisor checked on his condition either before or after his break.

Garcia testified that over the next one and a half hours after his break, he felt increasingly hot, tired, dizzy, and nauseated. During that time, no supervisor checked on him or asked how he was doing. He kept drinking water and was sweating profusely, but could not cool down. Garcia testified that he finally had to sit down on the floor of the bin assembly area because the severity of his symptoms triggered an anxiety attack.[10] At that point, Garcia asked a co-worker to call "safety." Garcia experienced increasingly severe symptoms of heat illness, including fatigue, excessive sweating, dizziness, nausea, and feeling too hot. These signs and symptoms could have been detected by close observation. But Garcia testified that it was difficult to find a supervisor, even when one was needed.

The record indicates that a number of factors prevented Ornelas from closely observing Garcia. Ornelas supervised 15 employees, in a large area (described as the size of "half a football field."). There was physical distance between the employee work areas within the aseptic area, with some employees outside and some inside, and machinery or equipment blocking the view of some areas. (Exhibits 33 and 34.) When Ornelas was not making his hourly rounds, he was stationed 20-40 feet away from employees in the bin assembly area. During Ornelas's hourly rounds, he not only monitored employees for visually obvious signs of heat illness, but was also responsible for inspection and maintenance of production, machinery, and equipment. These various responsibilities meant he spent only about five minutes an hour, on his estimation, in the bin assembly area. When Garcia was taken to the safety room, Ornelas was filling in for a forklift driver who was on a lunch break. Ornelas could not observe Garcia from the areas where he was operating the forklift.

As noted, when Ornelas took his lunch or rest breaks, or was filling in for another employee, Gomez assisted with supervisor duties. Ornelas testified that he did not inform Gomez, or any other individual, that they were Ornelas's designee for the purpose of closely observing Garcia while Ornelas was away. Because Ornelas did not know it was Garcia's first day working in high heat, he was not able to communicate that information to Gomez. Instead, Ornelas gave Gomez general instructions to "keep an eye on everybody."

[9] Ornelas's testimony confirmed that he had no other direct communication with Garcia.

[10] Garcia testified that he had a history of anxiety and panic attacks, and stated as much to Employer when he was taken to the safety room.

Gomez testified that no manager at Olam ever told him that, when Ornelas was not in the aseptic area, it was the responsibility of Gomez to assume the responsibilities for overseeing the close observation of a new employee, in addition to generally observing all employees for signs of heat illness. Gomez also testified that, other than Employer's general training, he received no additional supervisor training on closely observing un-acclimatized employees for heat illness.

Employer argues that its observation was adequate because, "If Ornelas or Gomez observed any employee displaying possible heat-related symptoms, he would approach the employee and inquire into his or her well-being by, for example, asking if the employee was okay, if there was anything wrong, or if the employee needed help." (Petition, p. 5.) Ornelas and Gomez testified that they looked for employees not working or working slowly, leaning against something, fanning themselves, or otherwise appearing obviously afflicted. Employer also argues that Ornelas instructing Garcia to discard an energy drink is an example of close observation, because caffeine consumption can increase the risk of heat illness.

The Division's medical expert, however, testified that this was not adequate or sufficient "close observation" of a new employee. Dr. James Seward stated that effective observation of an employee for signs or symptoms of heat illness requires not only "close visual observation" but also regular communication about how the employee is feeling and any symptoms they may be experiencing. The commonly-understood definition of "observation" includes verbal communication as well as visually checking on an employee. Observation is defined as, "the act of careful watching and listening: the activity of paying close attention to someone or something in order to get information";[11] or, "an act or instance of noticing or perceiving."[12]

The object of close observation is to detect heat-related illness in its earliest stages, Dr. Seward explained, when an employee's symptoms may not yet be visually apparent. Without sufficient and effective observation, including regular communication to monitor early symptoms, heat illness can rapidly progress. Dr. Seward testified that visually checking employees for obvious symptoms once an hour would not be sufficient to detect the crucial early symptoms and prevent them from progressing. Here, Employer failed to detect Garcia's symptoms through close observation.

Employer finally argues that there is no rule requiring a supervisor be assigned to "exclusively" observe a new employee one-on-one. (Petition, p. 25.) While this may be so, the record evidence indicates that Employer's supervision of Garcia fell short of the required standard. Again, the "close observation" required by subdivision (g)(2) implies that un-acclimatized employees must be observed more closely than other employees. Both Ornelas and Gomez testified that they took no additional steps to more closely monitor or observe newly-assigned employees such as Garcia. Indeed, Employer did not even provide Ornelas with the information that Garcia was newly-assigned to working in a high heat area. Even if Employer had any procedures in place for closely observing new employees, Ornelas would not have known to implement them in Garcia's case.

[11] Merriam-Webster (Merriam-Webster, Inc. 2022) < https://www.merriam-webster.com/dictionary/observation> (Feb. 2, 2022).
[12] Dictionary.com (Dictionary.com, LLC 2022) < https://www.dictionary.com/browse/observation> (Feb. 2, 2022).

Accordingly, we find that the Division established the violation alleged in Citation 2.

3. Did Employer fail to provide effective heat illness training to each nonsupervisory employee before they began work that should reasonably be anticipated to result in exposure to the risk of heat illness?

As set forth above under Citation 1, Section 3395, subdivision (h)(1) provides that employees must receive effective heat illness training on specified topics, prior to starting work that should be reasonably anticipated to result in exposure to the hazard of heat illness.

Citation 3, Item 1 alleged:

> Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to provide effective training to each non-supervisory employee before they began work reasonably anticipated to result in heat illness.

The ALJ found that Employer's heat illness training for non-supervisory employees was insufficient and incomplete with regard to the following elements:

> (h)(1)(B): Information related to the employer's responsibility to provide water, shade, cool-down rests, and access to first aid, and employees' right to exercise their rights under this standard without retaliation.
> (h)(1)(D): Information related to the concept, importance, and methods of acclimatization pursuant to the employer's procedures under section 3395, subdivision (i)(4).

Garcia attended Employer's one hour safety orientation, which included heat illness as one of sixteen topics, on June 7, 2018. (Exhibit 23.) As described with regard to Citation 1, the training on heat illness prevention consisted of the Division training video (Exhibit D) and Employer's Heat Illness Prevention slideshow (Exhibit 22).

Subdivision (h)(1)(B)

The arguments and evidence applicable to this subdivision, as discussed regarding Citation 1, also apply here. However, the most important additional evidence that Employer did not effectively train non-supervisory employees on their rights to take rest, shade, and water breaks without fear of retaliation is Garcia's testimony.

Garcia testified that he did not know he had the right to take a cool-down break anytime; he thought he would be punished for doing so. He testified that he was only permitted two 10-minute breaks and one 30-minute lunch each day. He believed that if he took an extra break, told a supervisor he was feeling sick, asked to go home early, or slowed his work pace, he would receive a disciplinary "point." An employee who accumulated over 3 points was fired. He had no recollection of being told that he could take extra cool-down breaks as needed without fear of getting a point. Garcia also testified that did not know he could take a break in the facility's air-conditioned control room. He instead took his scheduled ten-minute break in his car, which had been sitting outside in the heat.

The Board credits this unrebutted testimony. The preponderance of evidence establishes that Garcia did not receive effective training on his rights to take cool-down breaks without fear of retaliation.

Subdivision (h)(1)(D)

The arguments and evidence applicable to this subdivision, as discussed regarding Citation 1, also apply here. The preponderance of evidence establishes that Employer's HIPP did not contain, and Garcia did not receive, information on the concept, importance, and methods of acclimatization as related to close observation of un-acclimatized employees.

We find that the Division established the violation alleged in Citation 3.

4. Did the ALJ correctly affirm the Accident-Related characterization of Citation 2?

Employer does not contest the Serious classifications of Citation 2 or Citation 3, waiving the issue. (Lab. Code § 6618.) However, Employer argues that the Division should not have been permitted to amend Citation 2 to include the Accident-Related characterization. We must therefore consider, first, whether the Division's motion to amend the citation should have been granted; second, if so, whether the Accident-Related characterization was proper.

Was the Division's amendment of Citation 2 appropriate?

Citation 2 originally alleged:

> Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to closely observe employees newly assigned to a high heat area, for signs or symptoms of heat illness during the first 14 days.

On November 9, 2020, the Division filed a motion to amend Citation 2 to add the sentence, "As a result, on July 24, 2018, an employee suffered a serious illness." On November 20, 2020, Employer filed its opposition to the motion. The motion was granted on November 23, 2020.

Section 371.2, subdivision (a)(1) provides, "A request for amendment of a citation that does not cause prejudice to any party may be made by a party or the Appeals Board at any time." In cases where there is prejudice, subdivision (a)(2) sets forth different criteria to be evaluated in deciding whether to grant the motion, depending on whether the motion was filed at least 20 days prior to the hearing. Section 371, subdivision (c)(1), requires a prehearing motion to be filed and served at least 20 days prior to the scheduled hearing date. The hearing began on December 8, 2020. The Division's motion to amend was filed timely and in compliance with sections 371 and 371.2.

An amendment proposed by the Division, more than six months after the occurrence of an alleged violation, is not time-barred if the amendment relates back to the original citation. (§ 371.2, subd. (b).) Under the relation back doctrine, the amendment is not time-barred if, first, the original and amended citation relate to the same general set of facts; and second, the amendment does not

prejudice or mislead the employer. (*Webcor Builders, Inc*., Cal/OSHA App. 06-3030, Denial of Petition for Reconsideration (Jan. 11, 2010).)

First, if the proposed amendment changes the citation to the extent that it alleges a new violation that falls outside of the original general set of facts, the amendment must be denied as untimely. (*G.T. Alderman*, Cal/OSHA App. 05-3513, Decision After Reconsideration (Nov. 22, 2011); § 371.2; Lab. Code § 6317.) Here, the Division's amendment arose from the same set of facts as the original citation: Garcia was newly assigned to a high heat area, and he was not closely observed by a supervisor or designee during the first 14 days of his employment. The amendment only clarified that Garcia did suffer heat illness as a result of the facts already alleged. The classification of the violation as serious, and the subdivision allegedly violated, also remained unchanged. The first prong of the test is therefore satisfied.

Second, if the proposed amendment is within the originally described general set of facts, but adds or changes the factual or legal details, such that prejudice would result if the party responding to the amendment was not provided additional time to prepare and opportunity to respond, the Board has held that the remedy is to remand the matter for further hearing proceedings, to allow "parties to engage in further discovery, present or subpoena witnesses, entertain potential settlement discussions, and any other mechanism they wish to proceed with before, during, or after the administrative hearing." (*L&S Framing, Inc*., Cal/OSHA App. 1173183, Decision After Reconsideration (Apr. 2, 2021); § 371.2; Lab. Code § 6317.) The burden is on the non-moving party to establish prejudice through production of evidence; prejudice will not be presumed. (*L&S Framing, Inc*., *supra*, Cal/OSHA App. 1173183; *Sierra Forest Products*, Cal/OSHA App. 09-3979, Decision After Reconsideration (Apr. 08, 2016).) To demonstrate prejudice, Employer must show that it was "unfairly disadvantaged or deprived of the opportunity to present facts or evidence it would have offered had the ... amendments been timely." (*Calstrip Steel Corporation*, Cal/OSHA App. 312668825, Decision After Reconsideration (Jun. 30, 2017).)

Here, Employer had ample notice of the Division's position that Garcia suffered from heat illness as a result of exposure to high heat conditions in the workplace. On May 23, 2019, the Division provided Employer with its Penalty Calculation Worksheet, showing no abatement credit per section 336, subdivision (e)(2)(D), which prohibits abatement credit for serious violations causing serious illness as defined in Labor Code section 6302. (Exhibit 2.) On December 16, 2019, the Division produced to Employer the medical records from Garcia's hospitalization, showing a diagnosis of heat illness. (Exhibit 36.) On October 9, 2020, the Division provided Employer with a medical opinion prepared by Dr. Paul Papanek, an occupational medicine physician employed by the Division. Dr. Papanek's opinion, after reviewing Garcia's hospital records, concluded that Garcia's symptoms and treatment at the hospital were consistent with a diagnosis of heat illness. (Answer, p. 20.) Because Dr. Papanek had since retired, the Division also made its expert witness, Dr. Seward, available for deposition; on October 20, 2020, Dr. Seward was deposed on his opinions that Garcia suffered from heat illness as a result of heat exposure in the workplace. (Exhibit V.) In addition, the Division's noticed motion to amend provided Employer with ample notice of the proposed amendment prior to hearing, and an opportunity to respond. Employer therefore cannot show that it was prejudiced or misled by the amendment.

The amendment was therefore properly permitted under section 371.2.

However, Employer argues in its Petition that Labor Code section 6319, subdivision (d) requires written notice of an accident-related determination issued concurrently with the citation. (Petition, p. 29.) Specifically, Employer argues that because the Division did not issue a Notice of Accident-Related Violation After Investigation at the same time as the citation, the Division lacked jurisdiction to amend Citation 2 to include the Accident-Related characterization.

Labor Code section 6319, subdivision (d) provides, in relevant part:

> Whenever the division issues a citation for a violation covered by this subdivision, it shall notify the employer of its determination that serious injury, illness, exposure or death was caused by the violation and shall, upon request, provide the employer with a copy of the inspection report.

Labor Code section 15 provides that, when used in the Labor Code, the word "shall" is mandatory, and "may" is permissive. While this would seem to indicate that the Division must provide employers with some type of notice that it has determined an alleged violation was accident-related, no language in the statute requires such notice to take any particular form, or be issued contemporaneously with the citation. Even if, as Employer claims, "Division policy requires" the Division to issue a Notice of Accident-Related Violation After Investigation (Petition, p. 29), internal Division procedures and policies are guidance, not regulations enacted pursuant to the APA, and thus are not enforceable. (*Tidewater Marine Western, Inc., v. Bradshaw* (1996) 14 Cal.4th 557.) Nor does Employer cite legal authority for the proposition that failure to provide such notice with the original citation precludes the Division from issuing an Accident-Related citation on the same facts, or amending an existing citation to change its classification to Accident-Related.

Further, section 6319, subdivision (d) is silent as to the effect of failure to provide such notice, suggesting the notice requirement is directory rather than mandatory. If an agency's failure to comply with a procedural requirement has the effect of invalidating subsequent action, it is said to be "mandatory." If an agency's failure to comply with a procedural requirement will not normally invalidate subsequent agency action, the requirement is "directory." (*Airco Mechanical*, Cal/OSHA App. 99-3140, Decision After Reconsideration (April 25, 2002).) Many statutory provisions which are "mandatory" in the obligatory sense are accorded only "directory" effect. (*Id*., citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 908.)

By contrast, Labor Code section 6432 provides that the Division "shall," prior to issuing a Serious citation, provide the employer with a standardized form (1BY Notice) containing the alleged violative description and an opportunity to provide the Division with additional information. (Lab. Code § 6432, subd. (b)(1) and (2).) If the Division fails to provide the statutory form, the "trier of fact may draw a negative inference." (Lab. Code § 6432, subd. (d).) Failure to issue the 1BY Notice does not jurisdictionally bar the Division from issuing the Serious citation. As the Division noted in its Answer to Employer's Petition, it would be incongruous for the Board to read into 6319, subdivision (d) a mandatory notice requirement voiding the Division's jurisdiction if notice is not given, where notice under 6432, subdivision (b) is not mandatory.

(Answer, p. 22.)

In addition, as elaborated above, the Division did provide Employer with notice of its determination that Garcia suffered heat illness as a result of Employer's failure to closely observe him as a newly-assigned employee. The Division provided Employer with its Penalty Calculation Worksheet, Garcia's hospital records including his diagnosis, and the opportunity to depose its medical expert. Since the statute does not specify when notice is to be given, or in what form, this would seem to be sufficient, under this set of facts.

Finally, section 371.2, subdivision (b) specifically provides for evaluation, under the relation back doctrine, of proposed amendments made more than six months after the alleged violation occurred. The Division's amendment satisfied those requirements. The Board has consistently applied the relation back doctrine to proposed citation amendments, including amendments to the character of a citation. (*Webcor Builders, Inc.*, *supra*, Cal/OSHA App. 06-3030. See also *Western Roofing Service*, Cal/OSHA App. 75-029, Decision After Reconsideration (April 23, 1981); *E & G Contractors, Inc.*, Cal/OSHA App. 81-825, Decision After Reconsideration (Mar. 27, 1987); *T & C General Contractors*, Cal/OSHA App. 91-1199, Decision After Reconsideration (May 20, 1994).) To limit the type of amendment permitted under the relation back doctrine, would not only run counter to Board precedent, it would require the Board to, in effect, re-write section 371.2, which is beyond the scope of the Board's authority. (*E.L. Yeager Construction Company, Inc.*, *supra*, Cal/OSHA App. 01-3261.)

We therefore find that the Division was not jurisdictionally barred from amending Citation 2 to include the Accident-Related characterization.

Was Citation 2 properly characterized as Accident-Related?

Having established that the amendment was properly granted, the next determination is whether the characterization was proper. The Division's evidence must establish a "causal nexus between the violation and the serious injury." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) While the violation need not be the only contributing factor, the Division must show that "the violation was more likely than not the cause of the injury." (*MCM Construction, Inc.*, Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Castillo testified that a causal nexus existed between Employer's failure to closely observe Garcia, Garcia's lack of acclimatization, the progression of Garcia's symptoms, and Garcia's subsequent hospitalization and diagnosis of heat illness. This is sufficient evidence to sustain the accident-related character of Citation 2.

DECISION

For the reasons stated, we affirm Citation 1, Citation 2, Citation 3, and the Accident-Related characterization of Citation 2.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 02/17/2022