

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

**GONZALO OLASCOAGA dba GONZALO
OLASCOAGA**

7674 South Edison Road
Bakersfield, Ca. 93307

Employer

DOCKETS 13-R6D5-2097
AND 2098

DECISION

Statement of the Case

Gonzalo Olascoaga dba Gonzalo Olascoaga (Appellant) is in the farming business. Beginning May 23, 2013, the Division of Occupational Safety and Health (the Division) through Associate Cal/OSHA Engineer Donald Jackson, conducted a programmed Labor Enforcement Task Force inspection at 46566 Taylor Street, Coachella, California (the site). On June 24, 2013, the Division cited Appellant for (1) failure to have a written Injury and Illness Prevention Program (IIPP), (2) failure to have a written Heat Illness Prevention Program, (3) failure to provide hand washing water (4) failure to provide drinking water on the farm site.

Appellant filed timely appeals of all citations and all items contending that the safety orders were not violated, the classifications were incorrect, that the abatement requirements were unreasonable and that all of the proposed penalties were unreasonable. Appellant asserts that he did not have any employees and that the handsoap/water stations were not on his property. Further, Appellant asserts that the handsoap/water stations did not belong to Appellant.

This matter was regularly set for hearing before Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at West Covina, California on May 28, 2014. Gonzalo Olascoaga, Owner, represented Appellant. Michael Nelmda, District Manager, represented the Division. The parties presented oral and documentary

evidence.¹ The ALJ extended the submission date on her own motion to December 31, 2014.

Issues

1. Whether Appellant was an Employer as defined by the Labor Code.
2. Whether Appellant had a written Injury and Illness Prevention Plan (IIPP)?
3. Whether Appellant had employees working outside?
4. Whether Appellant had a written Heat Illness Prevention Plan (HIPP)?
5. Whether Appellant was an agricultural employer?
6. Whether the hand washing facility held potable water?
7. Whether Appellant provided drinking water at the site?
8. Was there a realistic possibility that death or serious physical harm would result from the actual hazard created by violation of Section 3457 (c)(1)(A)?
9. Were the penalties reasonable for all violations?

Findings of Fact

1. Appellant was an employer as defined by the Labor Code.
2. Employer had two employees working in a field at the time of the inspection.
3. Employer did not have a written Injury and Illness Prevention Program
4. Employer did not have a written Heat Illness Prevention Program.
5. Employer was an agricultural employer, and therefore subject to the requirements of section 3457.
6. No water for handwashing was provided at the site on the day of the inspection.
7. Employer did not provide potable drinking water at the site.
8. The penalties were properly calculated and reasonable for Citation 1, Items 1-3.
9. As to Citation 2, there was insufficient evidence to establish that there was a realistic possibility that death or serious physical harm could result from the actual hazard of deprivation of drinking water for an undetermined amount of time on the day of the inspection and the violation is reclassified from a serious to a general.

Analysis

1. Gonzalo Olascoaga dba Gonzalo Olascoaga, was an Employer.

Appellant contested the existence of the violations, asserting that neither he nor the entity cited was an employer. Labor Code section 6300 establishes

¹ Exhibits received and testifying witnesses are listed on Appendix A. Certification of the Record is signed by the ALJ. Unless otherwise specified, all section references are to Sections of Title 8, California Code of Regulations.

the California Occupational Safety and Health Act of 1973 (the Act) “for purpose of assuring safe and healthful working conditions for all California working men and women. . .” The California Occupational Safety and Health Act of 1973 (the Act) applies only to business entities that have employees. “Employee” is defined in §6304.1(a) as “every person who is required or directed by any employer to engage in any employment to go to work or be at any time in any place of employment.” (*Sully-Miller Contracting Co.* OSHAB 99-0896 DAR (Oct. 30, 2001).)

Labor Code section 6303(a) defines “Place of Employment” as any place and the premises appurtenant thereto, where employment is carried on except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division.

Labor Code section 6303(b) defines “Employment” as including the “carrying on of any trade, enterprise, project, industry, business, occupation, or work ...or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service.”

The initial question in this appeal is whether the Division established by a preponderance of the evidence that Gonzalo Olascoaga dba Gonzalo Olascoaga was an Employer.

Appellant directed two individuals to engage in the work of installing irrigation tubing on the date of the inspection. Division Inspector, Donald Jackson (Jackson) observed Gonzalo Olascoaga Jr. working outside with irrigation tubing at the site² for twenty minutes. Gonzalo Olascoaga (Olascoaga) confirmed to Jackson that he was the Employer. Olascoaga told Jackson that he had two employees at the site and that the company name was the same as his name. Gonzalo Olascoaga Jr. stated that he was not working at the site. Gonzalo Olascoaga Jr. testified that he was leaning on a shovel when Jackson first arrived at the site. Jackson’s testimony regarding his observation of Gonzalo Olascoaga Jr. working in the field was more credible than Gonzalo Olascoaga Jr. because he gave details about what he saw and how long he watched Gonzalo Olascoaga Jr. and Mr. Perez³.

The evidence shows that an employee-employer relationship existed, as noted above two natural persons were in the service of Gonzalo Olascoaga dba Gonzalo Olascoaga. Additionally, on the day of inspection, Olascoaga admitted that he was the owner and that he had two employees. Olascoaga’s out of court statement to Jackson is hearsay. Olascoaga’s out of court statement was a statement contrary to his pecuniary interest. Having no objection,

² Daysi Alcantar (Deputy Labor Commissioner for Division of Labor Enforcement) was also present during the inspection.

³ The record does not contain the first name for Mr. Perez.

Olascoaga's out of court statement to Jackson is admissible as an exception to the hearsay rule pursuant to Evidence Code Section 1230⁴. Having no objection, the statement by Olascoaga (a party) is a declaration against interest. As there was an admission by Appellant that he had employees in service and the observations of the inspector corroborates this fact, it is found that Gonzalo Olascoaga dba Gonzalo Olascoaga was an Employer. Appellant is an Employer, thus, the safety order requiring an IIPP applies (§1509)(a).

2. The Division established that Appellant did not have a written Illness and Injury Prevention Plan.

Every Employer is required to establish, implement and maintain an effective Injury Illness Prevention Program (§1509(a)).

In *Josh and Carrie Salazar DBA CJ Manufacturing*, 2014 Cal/OSHA App. Bd. Lexis 13, Decision After Reconsideration (March 27, 2014) the Appeals Board held that a written Injury and Illness Prevention Program must be established by every employer including companies with fewer than 10 employees.

The evidence confirms that Appellant did not have an IIPP. DOSH Safety Engineer Jackson asked Olascoaga whether he had an IIPP. Olascoaga told Jackson that he did not have an IIPP. Olascoaga's out of court statement was a statement contrary to his pecuniary interest. Olascoaga's statement that he did not have an IIPP was hearsay. Having no objection, Olascoaga's statement is hearsay but the statement is admissible as a declaration against interest. Appellant did not have any of the documents.

As determined above, Appellant did not possess the required documentation, thus the violation is established.

3. The penalty was calculated appropriately and reasonable.

The Division has a rebuttable presumption that its proposed penalties are reasonable once it establishes that they were calculated in accordance with the Division's policies, procedures and regulations (*Stockton Tri Industries, Inc.*, Cal/OSHA pp. 02-4946, Decision After Reconsideration (Mar 27, 2006).)

Jackson presented Exhibit 4, Division's Proposed Penalty Worksheet and for Citation 1, Item 1, he rated good faith as fair (15%) because Appellant did

⁴ Evidence Code Section 1230 provides that evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true.

not give a lot of response to the questions being asked and Jackson also indicated that the Appellant was aware of Cal/OSHA.⁵ Size was rated as “small” and Appellant was given a credit of 40% because there were two employees, and history was rated good (10%) because Employer did not have a history with the Division. Severity was rated at low. Extent was rated medium because there were only two employees at the site. Likelihood was rated medium because Jackson did not believe the violations were substantial enough to affect health.⁶ A review of the proposed penalty indicates that the penalty is appropriate here because it is in compliance with §§335 and 336.

As determined above, Appellant is an Employer and thus, the safety orders requiring an IIPP apply. Employer did not possess the required documentation, thus the violation is established. Therefore, the penalty for Citation 1, item 1 is reasonable.

4. The Division established that Appellant did not have a Heat Illness Prevention Program.

Section 3395(f)(1) provides in relevant parts:

- (1) This standard applies to all outdoor places of employment.

Section 3395(f)(3), under Heat Illness Prevention, provides the following:

The employer’s procedures for complying with each requirement of this standard required by subsections (f)(1)(B)(G), (H), and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

Section 3395(a)(2)(B) provides that the Agriculture industry is subject to all provisions of §3395, including high heat provisions.

Section 3395(f)(1) provides, in relevant parts:

⁵ Under §336((3)(c), “good faith” is defined as follows: The Good Faith of the Employer-is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer’s awareness of CAL/OSHA, and any indications of the employer’s desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good faith is rated as GOOD-Effective safety program. FAIR-Average safety program. POOR-No effective safety program.

⁶ “Likelihood: is defined in §335(a)(3) as follows: “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”.

(B) The employer's procedures for complying with the requirements of this standard.

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

The alleged violation description states:

At the time of the inspection the employer had not established a written heat illness prevention program nor was there one on site.

The Division has to prove that the employer was engaged in outdoor employment. Jackson observed two employees working outside at the site installing irrigation tubing. The evidence confirms that Employer's employees were working outside. Therefore, Employer's agricultural business was an outdoor place of employment.

The Division has to prove that Employer did not have a Heat Illness Prevention Program. At the time of the inspection Jackson requested Appellant's HIPP. Olascoaga told Jackson that he did not have an HIPP. Olascoaga's statement that he did not have an HIPP was a statement against pecuniary interest. Olascoaga's statement that he did not have an HIPP was hearsay. Having no objection, the statement by Olascoaga (a party) is admissible as a declaration against interest.

In this matter Appellant was performing agricultural work outside and was therefore required to have a written HIPP. Employer did not have a written HIPP and thus the violation is established.

Employer appealed the reasonableness of the penalties. Employer did not present any evidence to rebut the presumption about the reasonableness of the penalty, and the penalty was calculated in the same way as for Citation 1, item 1 therefore, the penalty for Citation 1, item 2 is reasonable for the same reasons as state above.

5. The handwashing facility was not adequate.

The Division cited Appellant for violation of section 3457(c)(3)(G)(2) which provides as follows:

Handwashing facilities shall be refilled with potable water as necessary to ensure an adequate supply.

The Division alleged the following:

At the time of the inspection observation was made of a hand washing barrel located in the okra field with no hand washing water provided.

Section 3457(a) defines the scope of section 3457 as applying “to all agricultural employers.” “Agricultural employer” is defined to include any person or business entity that “owns or operates an agricultural establishment.” “Agricultural operation” means any operation necessary to farming pursuant to section 3427. The evidence that Appellant’s employers were engaged in activities related to irrigation is sufficient to establish that Appellant was an agricultural employer, and therefore subject to the requirements of section 3457.

At the time of Jackson’s visit to the site, the handwashing barrel was cracked and there was no water in it.⁷ Olascoaga told Jackson that there was no potable water at the site. The statement by Olascoaga is a statement against pecuniary interest. The statement of Olascoaga is hearsay. Having no objection, the statement of Olascoaga is admissible under the declaration against interest exception. Therefore, the evidence supports the citation for violation of §3457(c)(3)(G)(2).

Labor Code §6712(d)(1) requires imposition of a penalty of at least \$750 for any violation of the field sanitation standard (section 3457). Therefore, the penalty of \$750 must be assessed against Appellant for this violation.

6. Employer did not provide potable water at the site.

The Division cited Appellant for violation of section 3457(c)(1)(A) which provides as follows:

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.

⁷ The barrel intended for handwashing water is seen in Exhibit 3.

The Division alleged the following:

At the time of the inspection observation was made of no drinking water on the farm site, exposing employees to a serious injury.

Section 3457(c)(1)(A) requires that every agricultural employer make potable drinking water available to employees at all times. Here, Jackson did not observe any potable drinking water at the site. Jackson asked Olascoaga whether there was any potable drinking water at the site and Olascoaga told him that the water bottle had been either knocked over or there was a crack in the bottle. Olascoaga told Jackson that the reason that he was not at the site initially when the inspection began was because he had gone to get more water. Olascoaga's statement that there was no potable water at the site was a statement against pecuniary interest. The statement by Olascoaga was hearsay. Having no objection, the statement of Olascoaga is admissible under the declaration against interest exception.

The evidence is sufficient to establish that Employer did not provide potable drinking water at the site. Thus, the violation of section 3457(c)(1)(A) is established.

Labor Code Section 6432(a) provides "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."

The legal standard "realistic possibility" is not defined in the safety orders. The Appeals Board utilized a "reasonable possibility" standard in *Oliver Wire & Planting Co., Inc.*, Cal/OSHA App. 77-693, Decision After Reconsideration (April 30, 1980) when analyzing whether an employer must ensure workers possibly exposed to the danger of splashing caustic chemicals were required to wear eye protection. The Appeals Board determined that it is unnecessary for DOSH to "present actual proof of hazardous splashing if a realistic possibility of splashing exists." They explained, "conjecture as to what would happen if an accident occurred is sufficient to sustain (a violation) of the existence of unsafe working conditions if such a prediction is clearly within the bounds of human reason, not pure speculation." This definition was again utilized in *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (September 27, 2001).

Jackson said that water is important for agricultural workers and that he has seen many cases of dehydration in his 25 years working for the Division and 14 years working as a Paramedic prior to working for DOSH. Jackson also indicated that there is no way of knowing how fast a person can become dehydrated. It can be inferred that moderate physical exertion is required by agricultural workers. Here, it is unknown how long the employees were

without water. Jackson indicated that it varies on how long a person can go without water. Jackson said the amount of time a person can go without water depends on many factors, such as size and physique. Jackson did not testify regarding the size or physique, weight or age of Appellant's employees. Jackson testified that each body is different. The inspector testified that he observed the employees for 20 minutes and then Olascoaga returned to the site with water. Therefore, it is found that even if dehydration can occur when water is unavailable here, it would be speculative because it varies on how long a person can go without water. The evidence is insufficient to establish that there was a realistic possibility that death or serious physical harm could result from the actual hazard of deprivation of drinking water for an undetermined amount of time on the day of the inspection and the violation is reclassified from serious to general.

Therefore, the statutory minimum penalty of \$750 required by Labor Code §6712(d)(1) is assessed against Employer.

Conclusion

Citation 1, items 1-3 are affirmed. Citation 2, item 1 is reclassified from a Serious to a General.

Order

Citation 1, item 1 is sustained and a penalty of \$175 is assessed. Citation 1, item 2, is sustained and a penalty of \$175 is assessed. Citation 1, item 3, is sustained and a penalty of \$750 is assessed. Citation 2, item 1 is reclassified from Serious to General and a penalty of \$750 is assessed.

Dated: January 29, 2015

JJ:ao

JACQUELINE JONES
Administrative Law Judge

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

**GONZALO OLASCOAGA dba GONZALO OLASCOAGA
Dockets 13-R6D5-2097/2098**

DATE OF HEARING: May 28, 2014

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1.	Jurisdictional documents
2.	CAL OSHA FORM 1BY
3.	Photograph of water barrel – page 1 Photograph of toilets and water barrel – page 2
4.	c-10 Penalty Worksheet

EMPLOYER'S EXHIBITS – None

Witnesses Testifying at Hearing

1. Donald Jackson
2. Gonzalo Olascoaga Jr.

CERTIFICATION OF RECORDING

I, Jacqueline Jones, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Dated: January 29, 2015

Jacqueline Jones
Administrative Law Judge