

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

*In the Matter of the Appeal of:*

**KS INDUSTRIES LP**  
**6205 District Boulevard**  
**Bakersfield, CA 93313**

Employer

**DOCKET 14-R4D7-3991**

**DECISION**

**Statement of the Case**

KS Industries LP (Employer) provides a variety of field services to the oil and gas industry. Beginning May 19, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer John Rodenburg (Rodenburg), conducted a complaint investigation at a place of employment maintained by Employer at 1546 China Grade Loop Road (Gate 1, Section 3), Bakersfield, California (the site). On November 13, 2014, the Division cited Employer for two violations of California Code of Regulations, title 8.<sup>1</sup> Citation 1, item 1 alleged that Employer failed to complete Cal/OSHA Form 300 logs for calendar years 2011 through 2014. Citation 1, item 2, alleged that Employer failed to implement certain training given as part of its Heat Illness Prevention Program (HIPP) pertaining to responding to symptoms of possible heat illness.

Employer filed a timely appeal contesting the existence of the alleged violations and, with respect to Citation 1, item 2, it raised the applicability of the cited safety order.<sup>2</sup>

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on August 10, 2016. Daniel Klingenberger, Esq., Attorney, of Lebeau Thelen LLP, represented Employer.

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<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

<sup>2</sup> At hearing, Employer withdrew its appeal from Citation 1, item 1. Citation 1, item 1 is thus resolved as set forth in the attached Summary Table.

Greg Clark, Senior Safety Engineer, represented the Division. The matter was submitted for decision on August 10, 2016.

### **Issues**

1. Is section 3395, subdivision (f), applicable to a situation where the Division acknowledges that the employer provided adequate HIPP training, but alleges that the employer failed to implement the training at a worksite?
2. Did Employer fail to implement effective HIPP training by not obtaining medical evaluation or emergency medical services when an employee took ill with a stomachache while at the site?

### **Findings of Fact**

1. Citation 1, item 1 is affirmed as set forth in the attached Summary Table.<sup>3</sup>
2. Section 3395, subdivision (f), requires that HIPP training be implemented in the workplace in order to be effective.
3. On May 1, 2014, Employer's employee Tairen Walker (Walker) was at work when he began complaining of a stomachache.
4. On May 13, 2014, Employer's employee Nestor Hernandez (Hernandez) was at work when he began complaining of a stomachache.
5. Employer's HIPP training recognizes that stomachache is one objective symptom associated with potential heat illness.
6. Neither Walker nor Hernandez exhibited any additional objective symptoms of possible heat illness.
7. Employer responded to Walker and Hernandez in identical ways, by placing each in an air-conditioned pickup truck, observing and interviewing the affected employees, and by offering transportation to a medical provider to each of them.
8. Employer's response to both Walker and Hernandez was consistent with Employer's 2014 Heat Illness Prevention PowerPoint training given to its employees.

### **Analysis**

- 1. Is section 3395, subdivision (f), applicable to a situation where the Division acknowledges that the employer provided appropriate HIPP training, but alleges that the employer failed to implement the training at a worksite?**

Section 3395, subdivision (f), stated at the time of the inspection:

(f) Training.

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<sup>3</sup> This finding of fact results from a stipulation of the parties presented at the hearing.

(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:

...

(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.<sup>4</sup>

The Division alleged in the citation that:

Prior to and during the course of the investigation including, but not limited to, on May 19, 2014, the employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary, were not effectively implemented when an employee exhibited signs and symptoms of a probable heat-related illness.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

The parties do not dispute that section 3395 applied to Employer's operations at the site, because it was an outdoor place of work. Rather, the parties disagreed whether the cited safety order applies to how an employer implements its HIPP training in the workplace.

The Appeals Board and the California Courts have previously held that "the terms of the California Occupational Safety and Health Act are to be given a liberal interpretation for the purpose of achieving a safe working environment." (*Kaiser Foundation Hospitals*,, Cal/OSHA App. 80-1462, 1464,

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<sup>4</sup> Section 3395 required employers to provide effective training on numerous topics; however, the Division's case focused on Employer's alleged noncompliance with subsection (G).

Decision After Reconsideration (Apr. 19, 1982), quoting and citing *Carmona v. Division of Industrial Safety* (1975) 13 303; *Bendix Forest Products Corp. v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465; see also *Whirlpool Corp. v. Marshall, Secretary of Labor* (1979) 445 U.S. 1, 13 ["...safety legislation is to be liberally construed to effectuate the congressional purpose."]) Interpretations that would lead to an absurd result are disfavored. (See *National Steel and Shipbuilding Company (NASSCO)*, Cal/OSHA App. 10-3793, Denial of Petition for Reconsideration (Sep. 20, 2012), citing *Barnes v. Chamberlain* (1983) 147 Cal.App.3d 762.)

Whether training is “effective” is a question of fact. (See, e.g. *National Distribution Center, LP, et al.*, Cal/OSHA App. 12-0391 et al., Decision After Reconsideration, Oct. 5, 2016, 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]; see also *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014) [“Section 3203(a)(6) is a ‘performance standard,’ which establishes a goal or requirement for employers to meet, while leaving the employer latitude in designing an appropriate means of compliance.”].) Although title 8 provides no definition for “effective”, the term is commonly understood to mean “producing a definite or desired result.” (*Webster’s New World Dict.* (3<sup>rd</sup> College ed. 1988), p. 432.) In the context of the safety order, the “desired result” is a workforce that is knowledgeable about how to respond to potential heat illness in the field, and (critically) will actually respond in the desired manner.

The Appeals Board recently addressed written program effectiveness in *National Distribution Center, LP, et al.*, Cal/OSHA App. 12-0391 et al., supra, where it observed that an employer’s IIPP “may be satisfactory as written, but still result in a violation of section 3203 subdivision (a)(6) if the IIPP is not implemented, or through failure correct known hazards.” Here, by analogy, Rodenburg testified that he had no criticism of Employer’s HIPP training; rather, he stated that Employer failed to implement its training because he felt that Employer inadequately responded to two incidents of heat illness with a “canned” response. Just as the Appeals Board has recognized that an IIPP may be satisfactorily written but not implemented, it follows that an employer may violate section 3395 when it provides compliant HIPP training, but does not implement its training properly in the field. To hold otherwise would lead to an absurd result, where an employer could provide training to supervisors and employees that covers all the required topics but is nonetheless ineffective because supervisors and employees do not follow their training.

For the foregoing reasons, the Division met its burden of demonstrating, by a preponderance of the evidence, that section 3395, subdivision (f) was applicable to the alleged violation.

**2. Did Employer fail to implement effective HIPP training by not obtaining medical evaluation or emergency medical services when an employee took ill with a stomachache while at the site?**

Section 3395, subdivision (f), required Employer to 1) provide effective training in the listed topics; 2) to each supervisory and non-supervisory employee; 3) before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness. As discussed previously, training that is satisfactory as written may nonetheless be deemed ineffective if it does not achieve the desired result, which is appropriate field response to suspected heat illness.

Rodenburg testified that his investigation pertained only to Employer's response to two instances where employees complained of similar stomachaches while at work and, as mentioned, he had no criticism of Employer's written training given to its employees and supervisors. In the first instance, Rodenburg was informed that on May 1, 2014, Employer's employee Tairen Walker became ill at work at approximately 10 a.m., when he complained of a stomachache and vomited. He also learned that on May 13, 2014, Employer's employee Nestor Hernandez complained of a stomachache, but did not vomit. In both instances, the affected employee displayed no further symptoms of possible heat illness. Furthermore, in both instances, Employer's response was to place the affected employee in an air-conditioned pickup truck for the rest of the workday in order to allow them to recuperate and to be observed by supervisors and safety personnel called to the worksite. In the case of Walker, Rodenburg understood that Employer did not place Walker into the air-conditioned truck until approximately two hours after Walker allegedly complained of a stomachache at the worksite.

In Rodenburg's opinion, Employer's response to Hernandez's symptoms<sup>5</sup> was more appropriate than its response to Walker's symptoms, although Rodenburg did not explain why he felt this way, or what a more appropriate response would have been. Rodenburg merely testified that he believed that Employer utilized a "canned response" and insinuated through his testimony that Employer should have sought medical evaluation of Walker and/or Hernandez by a trained medical professional such as a doctor.

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<sup>5</sup> Rodenburg did not interview Hernandez. Rodenburg did review Employer's investigation materials (Exhibit 5), which included a witness statement from Hernandez that stated he became sick to his stomach after consuming a Monster energy drink, a conclusion that the Division did not challenge. No further evidence was offered by the Division regarding the Hernandez incident; instead, the Division's evidence focused on the Walker incident.

Ample evidence, however, demonstrated that Employer in fact did implement its training and respond to suspected heat illness. Phillip Clarke, Employer's Director of Health Safety and Training, credibly testified about Employer's comprehensive HIPP training (Exhibit 2). Clarke testified that Employer gives HIPP training when an employee starts with the company, and then gives annual refresher training to employees in the field. Although Clarke acknowledged stomachache and vomiting as potential signs of heat illness, he stated that Employer looks for more than one objective symptom before assuming that an employee is suffering from heat illness, and here the only confirmed symptom was stomachache. Employer's protocols call for field assessment by the foreperson and safety person, and include taking employees who display multiple symptoms of heat illness to a hospital. Finally, Clarke acknowledged having reviewed approximately several dozen investigations regarding potential heat illness in the field.

George Powell, Employer's general foreman on the date of the incident, testified that he was called by his lead worker Jesus Hernandez, who told him that Walker had thrown up. Powell called his safety worker, Demetrius Harris (Harris), and asked Harris to meet him at the site. Powell testified that it was not particularly hot that day, and that Walker had not been performing strenuous work prior to his complaints. When he spoke with Walker, Walker told Powell that he was "ok", that he just had an upset stomach, and that he had recently quit drinking. Walker refused to go to a doctor for medical evaluation.

Finally, Demetrius Harris, Employer's Safety Professional, testified that when he arrived at the site, he observed Walker, who displayed no physical symptoms of possible heat illness.<sup>6</sup> Walker even stated that he wanted to continue working. Walker was oriented and intelligible, was not pale, and seemed calm. Walker did not complain about heat to Harris. In fact, he observed Walker get out of the air-conditioned pickup truck and walk "fine" following the incident. Harris went to the area where Walker had reportedly vomited, but found no evidence of vomiting, nor did Walker admit to vomiting.

Employer implemented the training in its HIPP for responding to potential heat illness. Employer's training called for providing a Preventative Recovery Period "to all employees who are feeling the initial effects of heat illness", which was accomplished by placing both Walker and Hernandez in

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<sup>6</sup> The Division introduced Exhibit 4, which is a screen shot of a portion of a webpage prepared by the United States Centers for Disease Control and Prevention (CDC), which provides a (presumably non-exhaustive) list of symptoms associated with heat exhaustion. Nausea is listed as a symptom. Employer did not dispute that either Walker or Hernandez complained of stomachaches; rather Employer argued that having a stomachache as ones only symptom was insufficient to conclude that one suffered from heat illness. Common experience demonstrates that stomachaches can be caused by a variety of ailments, including but not limited to food poisoning, ulcer, and indigestion.

an air conditioned pickup truck for a period greater than the 5 minutes required by Employer's training. (See Exhibit 2, p. 7.) Employer's HIPP training also instructs supervisors and employees to "watch out for each other" (Exhibit 2, p. 8), which was accomplished by Hernandez when he informed Powell that Walker was experiencing a stomachache and may have vomited.

As noted above, neither Walker nor Hernandez displayed multiple symptoms associated with heat illness. In the case of Walker, he claimed that he had recently quit drinking and Employer reasonably believed his only observed symptom, a stomachache, was not heat illness related. Similarly, Hernandez only complained of a stomachache, which he apparently attributed to drinking a Monster energy drink earlier that day. Walker, whose incident was the focus of the Division's case, refused to visit a doctor for medical evaluation, and there was no credible evidence that Walker actually suffered heat illness in connection with the events of May 1, 2014. In summary, Employer's response to the Walker and Hernandez incidents was appropriate given the factual circumstances, and the response effectively implemented Employer's HIPP training.

For the foregoing reasons, the Division failed to meet its burden of demonstrating, by a preponderance of the evidence, that Employer violated section 3395, subdivision (f) by failing to implement its otherwise effective HIPP training.

### **Conclusions**

Employer's appeal from Citation 1, item 1 is resolved pursuant to the parties' stipulated settlement at hearing. Employer's appeal from Citation 1, item 2 is granted.

### **Orders**

It is hereby ordered that the Citation 1, item 1 is resolved pursuant to the parties' stipulation and as set forth in the attached Summary Table. It is hereby further ordered that Citation 1, item 2 is vacated. Total penalties are assessed in the amount of \$210.

Dated: September 2, 2016  
HIC:ao

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**HOWARD I. CHERNIN**  
**Administrative Law Judge**

**APPENDIX A**  
**SUMMARY OF EVIDENTIARY RECORD**

**Name: KS Industries LP**  
**Docket 14-R4D7-3991**

**Date of Hearing: August 10, 2016**

**Division's Exhibits**

| <b>Number</b> | <b>Exhibit Description</b>   | <b>Admitted</b> |
|---------------|--|-----------------|
| 1             | Jurisdictional Documents   | YES             |
| 2             | 2014 Heat Illness Prevention<br>PowerPoint Presentation                | YES             |
| 3             | Heat Stress – Heat Related Illness                                     | NO              |
| 4             | Screenshot of CDC Webpage re Heat Related<br>Illness – Heat Exhaustion | YES             |
| 5             | Witness statements re Tairen Walker and Nestor<br>Hernandez incidents  | YES             |

**Employer's Exhibits**

| <b>Exhibit<br/>Letter</b> | <b>Exhibit Description</b> | <b>Admitted</b> |
|---------------------------|----------------------------|-----------------|
|---------------------------|----------------------------|-----------------|

**Witnesses Testifying at Hearing**

Phillip Clarke  
John Rodenburg  
George Powell  
Demetrius Harris

**CERTIFICATION OF RECORDING**

*I, HOWARD I. CHERNIN, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.*

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**HOWARD I. CHERNIN**

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Date

## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**KS INDUSTRIES LP  
DOCKET 14-R4D7-3991**

|                                  |               |
|----------------------------------|---------------|
| Abbreviation Key: Reg=Regulatory |               |
| G=General                        | W=Willful     |
| S=Serious                        | R=Repeat      |
| Er=Employer                      | DOSH=Division |
| AR-Accident Related              |               |

IMIS No. 316982057

| DOCKET                   | CITATION | ITEM | SECTION    | TYPE | MODIFICATION OR WITHDRAWAL               | APPEAL | REMOVED | PENALTY PROPOSED BY DOSH IN CITATION | PENALTY PROPOSED BY DOSH AT HEARING | FINAL PENALTY ASSESSED BY BOARD |
|--------------------------|----------|------|------------|------|--|--------|---------|--------------------------------------|-------------------------------------|---------------------------------|
| 14-R4D7-3991             | 1        | 1    | 14300.7(a) | R    | Affirmed per stipulation of the parties. | X      |         | \$210                                | \$210                               | <b>\$210</b>                    |
|                          |          | 2    | 3395(f)    | G    | Vacated by ALJ as set forth in Decision. |        | X       | \$635                                | \$635                               | <b>\$0</b>                      |
| <b>Sub-Total</b>         |          |      |            |      |  |        |         | \$845                                | \$845                               | <b>\$210</b>                    |
| <b>Total Amount Due*</b> |          |      |            |      |  |        |         |                                      |                                     | <b>\$210</b>                    |

NOTE: Please do not send payments to the Appeals Board. **All penalty payments should be made to:**

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

(INCLUDES APPEALED CITATIONS ONLY)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

**ALJ: HIC/ao  
POS: 09/02/2016**