

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

In the Matter of the Appeal of:

MARTIN J. SOLIS dba  
SOLIS FARM LABOR CONTRACTOR  
1052 Parnel Way  
Galt, CA 95632

Employer

Dockets. 08-R2D1-3414 through 3418

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having ordered reconsideration on its own motion and taken the petitions for reconsideration filed by the parties under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on May 29, 2008, the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment in Farmington, California maintained by Martin J Solis dba Solis Farm Labor Contractor (Employer). On August 11, 2008, the Division issued five citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.<sup>1</sup>

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. The parties reached certain stipulations as to penalties.<sup>2</sup> After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision

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

<sup>2</sup> Parties stipulated to a \$1350 civil penalty for each item in Citation 1, Items 1-4. Division moved, without objection from Employer, to delete the accident-related determination for Citations 2 through 5 for insufficient evidence, resulting in a proposed civil penalty of \$8435 for each citation. Motion was granted.

on July 27, 2010. The Decision granted in part and denied in part Employer's appeal.

Citation 1, Item 1 alleged a General violation of section 3203(a) [failure to maintain a written Injury and Illness Prevention Program (IIPP)], with a proposed penalty of \$1350. Citation 1, Item 2 alleged a General violation of 3395(e)(3) [failure to provide written Heat Illness Prevention program training procedures upon request], with a proposed penalty of \$1350. Citation 1, Items 1 and 2 were found to be established. The penalty for Item 2 was found to be duplicative of Citation 3, and therefore vacated. (See section 336(k).) Citation 1, Item 3 alleged a General violation of section 3439(a) [failure to have a first-aid kit available], with a proposed penalty of \$1350. The appeal of Citation 1, Item 3 was granted, as the ALJ found the Division failed to meet its burden of proof. Citation 1, Item 4 alleged a General violation of section 3457(c)(1)(C) [failure to dispense water in single-use drinking cups or fountains], with a proposed penalty of \$1350. Citation 1, Item 4 was found to have been established, and Employer conceded this point in its post-hearing brief.

Citation 2 alleged a Serious violation of section 3395(d) [failure to provide access to shade under a Heat Illness Prevention program], with a proposed penalty of \$11,250. The ALJ found that the Division failed to establish the violation in Citation 2 by a preponderance of the evidence.

Citation 3 alleged a Serious violation under section 3395(e)(1) [failure to provide training under a Heat Illness Prevention Program to non-supervisory personnel] with a proposed penalty of \$11,250. Citation 3 was established by a preponderance of the evidence, and was shown to be serious.

Citation 4 alleged a Serious violation under section 3395(e)(2) [failure to provide Heat Illness Prevention training to personnel supervising employees working in the heat], with a proposed penalty of \$25,000. Citation 4 was established by a preponderance of the evidence, and was found to be properly classified as serious.

Citation 5 alleged a Serious violation under section 3439(b) [failure to make provision in advance for prompt medical attention in remote locations] with a proposed penalty of \$25,000. The ALJ found that in Citation 5, the Division failed to establish a violation of the safety order by a preponderance of the evidence.

The Board, on its own motion, ordered reconsideration of the ALJ's decision to consider one issue: Whether the ALJ's interpretation of section 3395(d) is correct. The Employer and Division filed separate answers to the Board's Order of Reconsideration. Employer also timely filed a petition for reconsideration of the ALJ's Decision, addressing Citation 1, Item 2 and Citations 3 and 4. The Division filed a response to Employer's petition, as well

as its own petition for reconsideration, addressing only Citation 2. The Board took both Employer and Division petitions under reconsideration.

### **TIMELINESS OF ANSWER TO ORDER OF RECONSIDERATION**

We address the timeliness of the Division's Answer to Order of Reconsideration first. The Employer argues that the Division's answer is untimely because the Employer was not served with the answer within thirty days of the issuance of the Order of Reconsideration. Section 390.2 provides that a party may, within thirty days of service of any order of reconsideration, file an answer with the Appeals Board.

The Appeals Board issued and served an Order of Reconsideration regarding the ALJ decision on August 26, 2010. The parties were therefore granted until September 30, 2010 to serve their answers on the Appeals Board. The Division's answer was received at the Appeals Board on October 4, with a mailing date of September 30, and Employer's two answers were received on September 1 and October 6, 2010, with a mailing date of October 4 for the latter.

The Division ultimately served the Employer twenty days after serving the Board, but its answer is deemed timely because it was filed at the Appeals Board on September 30, 2010, the date it was mailed to the Appeals Board. (See, *Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration, (Aug. 20, 2002).)

### **ISSUES**

Did the ALJ properly interpret section 3395(d)?<sup>3</sup> Did the ALJ correctly decide Citation 1, Item 2, Citation 2, Citation 3 and Citation 4?

### **EVIDENCE**

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issues presented.

Associate Safety Engineer and Industrial Hygienist for the Division, David Caraveo (Caraveo), testified to the inspection he conducted at a rural, 16 square mile vineyard in the Farmington area on May 29, 2008. The vineyard, owned by West Coast Grape, was the same location where a worker contracted by Merced Farm Labor had suffered from an eventually fatal case of heat illness several weeks earlier. Once on the property, Caraveo introduced himself to a

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<sup>3</sup> Section 3395 was amended in October 2010, with changes going into effect on November 4, 2010. This decision addresses the regulations as they existed in May 2008.

man wearing what appeared to be a uniform of grey slacks and shirt with “Solis FLC” and “Seguro” written on it. The man identified himself as Sergio Seguro (Seguro), and according to Caraveo, Seguro denied being a supervisor for the Employer.

Caraveo inferred that Seguro was the supervisor in the field based on his uniform, the radio he was carrying, that he was directing work, and did not appear to be engaging in manual labor. Caraveo also asked a safety representative of Merced Farm Labor, which also had workers in the field, if he knew Seguro, and the Merced employee told Caraveo that Seguro was a supervisor for Solis Farm Labor. The owner of West Coast Grape, Brian Franzia (Franzia), also made an appearance, and when Caraveo asked what Seguro’s position was, Franzia confirmed that Seguro was a Solis supervisor.

During the course of the visit, Caraveo took an ambient air temperature reading with his calibrated thermometer, which measured the temperature as 95.2 degrees Fahrenheit at approximately 11 am. The workers in the field that day were cutting off new shoots of leaves (“suckering”) from the grapevines, and there was no dispute that the workers were laboring in full sun. However, none of the workers were reported to suffer a heat illness that required medical attention.

Seguro called a short break for the Employer’s workers and gave Caraveo permission to interview several of the employees. Once those interviews were completed, according to the testimony of Caraveo, Seguro then sent a portion of the crew, which Caraveo estimated to be about 15 employees total, off to another area in the vineyard to continue the suckering. Caraveo testified that the employees he interviewed had no training in heat illness prevention. Caraveo also interviewed Seguro, asking him about his heat illness prevention training and what he would do in the event of a heat illness. According to Caraveo, Seguro stated that he had not received any heat illness prevention training, and he was unable to describe any of the signs or symptoms of heat illness.

At the end of the inspection, Caraveo prepared a document request form, requesting the Employer’s Illness and Injury Prevention Plan (IIPP), IIPP training records, and its heat illness prevention program and training records. According to Caraveo’s testimony, Seguro refused to sign the document, but identified the Employer’s headquarters as being located in Galt, California.

On June 18, 2008, Bob Senchy (Senchy), Associate Safety Engineer for the Division, served an Order Prohibiting Use on Employer to shut down the business due to the “heat incident” that had occurred at West Coast Grape in May involving a Merced Farm Labor employee. Senchy conducted an opening conference with Martin Solis and his wife, Myrna Solis, at their place of business, which was also their home. Senchy testified that Myrna Solis stated

she worked for Employer as a bookkeeper and secretary; Ms. Solis acted as the primary spokesperson for Employer, although Mr. Solis was comfortable speaking and understanding both English and Spanish, in Senchy's estimation. Senchy gave Employer the request for documents form.

On June 13, 2008, Myrna and Martin Solis met Senchy at the Division's Sacramento office. Ms. Solis stated that Employer did not have an IIPP and "never had one." She said Seguro supervised four field crews of 20 employees each, and one foreman who was responsible for directing the work. Ms. Solis also said that Employer did not have a heat illness prevention program (HIPP) and had not provided any heat illness prevention training.

Senchy testified that he issued the citations, using information from Caraveo's inspections and from the information gathered from the meetings with Employer.

Amalia Neidhardt (Neidhardt) is a Senior Safety Engineer and Certified Industrial Hygienist for the Division. Neidhardt worked with Dr. Janice Prudhomme, an occupational medicine physician, to research case studies of medically confirmed heat illness. This research was part of the rule making process for the heat illness prevention program standard. Neidhardt testified that initially an individual case of potential heat illness will be referred to Neidhardt and Dr. Prudhomme from the Department of Industrial Relations, and at that point they will gather pertinent medical information to determine if the employee's cause of death was actually heat illness.

Neidhardt testified that the permanent version of section 3395 does not include a trigger temperature, nor does it have a provision specifying a minimum duration time. Neidhardt explained that various forms of heat illness exist, including heat cramps, heat exhaustion, heat syncope, and heat stroke. The benefit of shade is helping the body to get rid of some heat load. There is a 15 degree difference between the sun and the shade. Heat illness training informs employees on the signs and symptoms of heat illness, acclimatization to heat, water consumption, reporting symptoms immediately to a supervisor, knowing how to help others get medical attention, humidity, and the risks of radiant heat.

### **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and answer to order for reconsideration, Division's petition for reconsideration and the Division's answer to Employer's petition.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e). The Division also petitioned for reconsideration on the basis of 6617(a) and (e).

### **Constitutionality**

The Employer contends that section 3395 in its entirety is unconstitutionally vague, for lack of specific “triggering provisions.” On this basis, Employer challenges the following citations for vagueness: sections 3395(e)(3), (Citation 1, Item 2), 3395(e)(1) (Citation 3), and 3395(3)(2) (Citation 4). Employer also incorporates arguments set forth in its Motion to Dismiss as to why section 3395(d) (Citation 2) is unconstitutionally vague.

Employer finds the lack of a triggering temperature in section 3395(d), and the lack of guidance in the standard as to how long an employee must be out in the “heat” before the standard is applicable, renders the standard unconstitutionally vague.

A similar argument regarding lack of a “trigger provision” was made in *Mascon, Inc.*, Cal/OSHA App. 08-4279, Denial of Petition for Reconsideration (Mar. 4, 2011), where the Board found sections 3395(e)(1) and (e)(3) to be constitutional on the basis of reasoning which continues to be sound. *Mascon, Inc., supra*, reiterates a familiar rule of statutory construction -- regulations should be construed in a manner that will render the language valid and constitutional. (*General Telephone Company of California*, Cal/OSHA App. 82-406, Decision After Reconsideration (Nov. 19, 1982).) There may be alternative ways of interpreting a regulation, but this does not equal constitutional vagueness. (See, *People v. Anderson* (1972) 29 Cal. App. 3d 551, 561, 105 Cal. Rptr. 664).

Where the safety orders are written in plain language, employers may reasonably read the order to know if they are subject to the provisions (i.e. if employer is an outdoor operation, the regulation is applicable under the common meaning of the words). (*Structural Shotcrete System*, Cal/OSHA App. 03-986, Decision After Reconsideration (Jun. 10, 2010).) An agricultural contractor with employees working in a vineyard over the course of a full work day has little reason to expect that it is exempt from the provisions of the 3395(d) regulation. Lack of a specific temperature, or specific amount of time that a worker must be out doors for the safety order to come into effect does not render the regulation so vague as to be unconstitutional. An employer may use good judgment and common sense to decide whether or not it is appropriate to make provisions for shade, so as to ensure employees are protected from potential heat illnesses on a given day, using the statutory language provided in section 3395(b) as guidance.

Similarly, the Board finds that sections 3395(e)(1), (e)(2), and(e)(3), which require supervisor and employee training on an enumerated list of heat illness prevention issues prior to assignment to supervision of employees “in the heat,” as well as a requirement that the Heat Illness Prevention Program (HIPP) be provided to the Division upon request, are not void for vagueness. Common sense dictates that a temperature of 95 degrees at 11 in the morning is hot, and the provisions of the section would apply on such a day. In *Mascon, Inc.*, *supra*, the Board held that discussion of specific triggers in the 3395(e) context is contrary to the intent of the safety order, which is designed to be preventative in nature—the purpose of the safety order is to ensure that both employees and their supervisors have the training they need prior to working in the heat. The Board finds that the logic of *Mascon, Inc.*, is applicable here, and lack of a specific triggering event does not render the safety orders in 3395(e)(1), (e)(2) or (e)(3) to be unconstitutionally vague.

### **Citation 1, Item 2: General Violation of Section 3395(e)(3)**

Section 3395(e)(3) requires the Employer to have in writing and make available to employees and representatives of the Division the Employer’s HIPP. The ALJ affirmed the violation based on the testimony of Caraveo, who testified that the Employer did not have a HIPP. The Division introduced as an exhibit a request for Employer’s HIPP, which Senchy delivered to the Employer’s place of business in Galt. Senchy testified that he did not receive a response to the request. At hearing, the Employer provided no countervailing testimony to show that it had complied with the mandates of section 3395(e)(3). On this basis alone, the ALJ’s finding that Employer has violated section 3395(e)(3) can be and is upheld.

Employer, in its post-hearing brief, objects to the Division supporting its burden of proof on the basis of hearsay evidence.<sup>4</sup> Specifically, Employer disputes the supervisory status of Seguro, and argues that the only evidence offered by the Division in support of Employer having received the request for a copy of the HIPP is hearsay from Division witness Caraveo. However, the ALJ's factual finding may be affirmed without the use of hearsay evidence. The ALJ was able to consider supplementary evidence to bolster the finding, but further evidence was not required.

The Employer disputes that Seguro had authority from Employer to speak concerning the Employer's business, and describes statements by Seguro as inadmissible hearsay.<sup>5</sup> Caraveo testified to a number of elements which lead to the ALJ's reasonable finding that Seguro held a supervisory position: a unique uniform with Employer's name, distinguishing from other laboring employees, a radio allowing him to communicate with both the owner of the property and a subordinate (who refreshed the water containers), his ability to direct the work of the vineyard crew and call breaks, and the independent statements of at least two other individuals on the site, identifying him as a supervisor for Employer, including the vineyard owner. (See, *Duinick Bros., Inc.*, Cal/OSHA App., 06-2870, Decision After Reconsideration and Order of Remand (Apr. 13, 2012).) Seguro's statements may properly be attributed to the Employer as authorized admissions by a supervisor representative of the Employer, and the Board adopts the ALJ's ruling on this matter. (Decision, p. 20).

The ALJ also properly found Myrna Solis' statements in Martin Solis' presence were admissible against him as an adoptive admission, and Employer's silence may be considered a tacit admission.<sup>6</sup> The Employer's failure to testify and contradict any of the statements made by Division witnesses also makes it reasonable to infer that the statements were accurate.<sup>7</sup>

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<sup>4</sup> Employer cites section 376.2, which states in part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded."

<sup>5</sup>See Evidence Code section 1222: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authorization or, in the court's discretion, as to the order of proof, subject to the admission of such evidence."

<sup>6</sup> See Evidence Code section 1221, which states: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." Also see section 1220: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

<sup>7</sup> See Evidence Code section 413: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain

We agree with the ALJ's finding that the Division has met its burden of proof and has established a general violation of 3395(e)(3). The penalty of \$1,350 is affirmed.

### **Citation 2 Section 3395(d)**

Section 3395(d) states in full:

Access to Shade. Employees suffering from heat illness or believing a preventative recovery period is needed, shall be provided access to an area with shade that is either open to the air or provided with ventilation or cooling for a period of no less than five minutes. Such access to shade shall be permitted at all times.

According to the Division, access to shade must be permitted at any and all times, since there is no "trigger temperature" in the regulation, and as the Division's witnesses testified to, heat illness can impact different workers in different ways, depending on body type, acclimatization to working in the heat, the type of work, uniform or work gear, medical history, and other factors. What might be a comfortable working environment for one employee might cause heat stress for another, making it important to have shade ready at all times. Employer argues that the standard is not to be read so broadly, but access to shade is only required when an employee asks for a preventative recovery period, or has an actual heat illness.

The ALJ found Employer's interpretation of section 3395(d) was persuasive, and that the safety order requires access to shade only for those employees who are either "suffering from heat illness" or who believe that they are in need of a preventive recovery period. The Division did not explicitly show that any employees were suffering from heat illness, nor did they demonstrate that any employee told Seguro or anyone else that he or she needed a recovery period on May 29, 2008. (Decision, p. 15). On these facts, the ALJ found that the Employer was not in violation of the regulation, as the Employer did not have the necessity of providing shade.

In *Preston Pipelines, Inc.*, Cal/OSHA App. 09-3345, Denial of Petition for Consideration, (Aug. 30, 2012), the Board addressed the issue of how access to shade under section 3395(d) will be interpreted. The Board's holding in *Preston Pipelines, Inc. supra*, is consistent with the notion that safety orders should be interpreted both within the context of the section as a whole, and to further a reasonable and practical construction of the language. (*Duke Timber Construction Co. Inc.*, Cal/OSHA App. 81-347, Decision After Reconsideration

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or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

(Aug. 19, 1985.) The final sentence of section 3395(d) states unequivocally that access to shade shall be “permitted at all times.”

The ALJ found it undisputed that the grape vineyard did not provide any access to shade by trees, the grape vines themselves, or outbuildings. Employer argues that the cars parked near the vineyard where the farmworkers were at work on their suckering task would be acceptable as shade under section 3395(d).

Under section 3395(b), the term “shade” is defined as follows:

"Shade" means blockage of direct sunlight. Canopies, umbrellas and other temporary structures or devices may be used to provide shade. One indicator that blockage is sufficient is when objects do not cast a shadow in the area of blocked sunlight. Shade is not adequate when heat in the area of shade defeats the purpose of shade, which is to allow the body to cool. For example, a car sitting in the sun does not provide acceptable shade to a person inside it, unless the car is running with air conditioning.

By its own terms, the definition of shade does not include cars parked in the sun. Caraveo testified that the cars parked in the sun at the vineyard were not running. The Division’s expert, Neidhardt, testified that putting an employee suffering a heat illness into a car that had been sitting in the sun, before it has been cooled off by air conditioning, would further exacerbate the employee’s condition. The Employer called no witness to testify that the Employer had a habit of keeping an air conditioned car running for employees. The language of the regulation clearly disfavors using vehicles as a primary means of shade. In *Preston Pipelines, supra*, the Board rejected the use of a parked vehicle as a replacement for shade, as “the cooling would not begin immediately” and “even though the system would start to produce cold air in relatively few seconds, the air in the cab would take minutes to cool down.”

The ALJ and Employer’s construction of the language would require an employee in need of a cooling off break-- either because he or she is actually in the beginning stage of a heat illness, or simply because that employee is hot and tired from working in the sun-- to seek out a management official and then wait for the manager to set up the pop-up tent, canopy, or whatever shade device the Employer has at their disposal. In *Preston Pipelines, Inc., supra*, the Board found this to be an absurd result that is not in keeping with the intent of the safety order—or with *Carmona v. Division of Industrial Safety (1975) 13 Cal.3d 303*, which calls for liberal interpretation of safety orders to achieve a safe working environment. At an agricultural location stretching over 10,000 acres, where a crew of employees may not necessarily be in earshot of the foreperson or supervisor, this interpretation of the language not only leads to

an unwieldy result, but a potentially dangerous one. The common sense interpretation of the rule is for the Employer to have shade readily available whenever the heat illness provisions are applicable, from the beginning of the shift to the end.

An unnecessarily narrow reading of the regulation does not further the goal of section 3395, to protect employees from heat illness and injury. By ensuring that shade is available at all times, for outdoor employees when there is a risk that heat illness may affect employees, the goal of mitigating the risk of heat-related illness and injury under the regulatory scheme is best served. Where there is the possibility for two competing constructions of a regulation, one of which leads to an illogical result, and the other which consists of sound sense and a reasonable policy outcome, the former will be rejected by the Board, and the latter adopted. (See, *Lockheed Missiles & Space Co., Inc.*, Cal/OSHA App. 79-492, Decision After Reconsideration (Apr. 14, 1982).)

The Board rejects the ALJ's interpretation of section 3395(d), and finds that access to shade shall be permitted and provided at all times. The Board finds a violation of 3395(d).

### **Citation 3 3395(e)(1)**

Citation 3 alleges that employees were not trained in heat illness prevention. Having discussed the issue of Employer's objection to hearsay testimony in Citation 1, above, and holding that the evidence in question was not hearsay, the Board affirms the ALJ's finding that Employer did not provide required heat illness training, as required by section 3395(e)(1). Employer was unable to produce records showing compliance with this section, and Employer's employees were unable to describe basic heat illness training concepts to Division's inspector.

### **Citation 4 3395(e)(2)**

Employer's supervisor was out at the worksite on an undisputedly hot day, and had never received any training from Employer. Employer did not provide the requested documentation to show that it did have a heat illness and injury training program for supervisors. Employer, through Myrna Solis, confirmed that supervisor Seguro did not have this required training. The Board finds a violation of section 3395(e)(2).

### **Classifications of Citations**

Labor Code section 6432 defines a "serious violation" in the following manner: "a 'serious violation' shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could

result from a violation...”<sup>8</sup> This “substantial probability” refers not to the likelihood of an accident occurring in the workplace due to the violative condition—the accident may be a statistically uncommon event—but to the probability of a death or serious harm occurring, should that accident or exposure actually take place. (*Vernon Melvin Antonsen & Colleen K. Antonsen, individually and dba Antonsen Construction*, Cal/OSHA App.06-1272, Amended Decision After Reconsideration (Aug. 30, 2012).) The Board has established that “substantial probability” requires a showing by the Division that serious injuries are more likely than not to be the result of the violation. (*Southern California Edison*, Cal/OSHA App. 89-445, Decision After Reconsideration (Mar. 14, 1991).)

The Division’s expert, Neidhardt, testified that one of the first treatment protocols for an individual suffering from any kind of heat illness is to move the individual into a shaded area. Both for employees who are in need of a recovery period, and for those who are actually suffering from a heat illness, the shaded area, which may be approximately 15 degrees lower in temperature, provides the body with an opportunity to shed heat load that can eventually lead to heat stroke or other serious or fatal conditions.

Evidence upon which the Board may base a finding of substantial probability of serious physical harm or death must be based upon a sound and reasonable evidentiary foundation, which can include specific scientific or experienced based rationale, reliable or generally accepted empirical evidence. (See, *Wright & Associates, Inc.*, Cal/OSHA App. 95-3649, Decision After Reconsideration (Nov. 29, 1999).) According to Neidhardt, when asked about the section 3395(d) provisions of the regulation, fatalities have occurred in temperatures as low as 85 degrees where there was a lack of shade. Neidhardt’s testimony, based on research she has participated in on behalf of the Division, was that shade is an element to be considered, but Neidhardt was unable to testify as to the health risk measured by lack of access to shade alone: “it’s not a single factor, it’s all of them combined.” She included lack of access to shade, limited access to drinking water, and working in direct sun in an agricultural operation as factors which may combine to create a substantial probability of body organ failure or death.

The Division’s last witness, Industrial Hygienist and Associate Safety Engineer Bob Senchy, was able to provide more focused testimony on the shade issue. Senchy testified to participating in over twenty agricultural inspections, and having been involved in at least ten cases of heat exhaustion and six cases of heat stroke. According to Senchy, there is a high probability of an important body organ, such as the brain, kidney, circulatory system, or liver, being damaged if a worker with a heat illness is not moved to a shaded

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<sup>8</sup> Labor code section 6432 was amended effective January 1, 2011. We apply the rule in effect at the time of the events discussed herein.

area. Senchy discussed how a healthy body cools itself through sweat. If the body overheats to the point where sweat doesn't occur, the body begins to overheat, and key organs being shutting down. Shade provides cooling to a heat exposed employee, potentially keeping that person from overheating to the point of organ shutdown. Division witness Caraveo also testified that depending on the physical condition of the individual, heat illnesses including heat stroke can advance to organ failure or death in as little as 15 minutes.

The Division established that on May 29, 2008, an employee who theoretically fell ill from heat exhaustion, would have more likely than not suffered a serious illness due to the lack of shade. (See, *Ray Products, Inc.*, Cal/OSHA App. 99-3169, Decision After Reconsideration (Aug. 20, 2002).) This conclusion is reasonable considering the high temperature that employees were laboring in that morning. Even if the temperature did not climb over 95 degrees, it was still a hot day to be working outdoors. Further, employees may not yet have been acclimatized to this level of heat early in the season, i.e. May 29th.

Although one expert witness, Neidhardt, was unable to isolate lack of shade as the one factor that was the cause of serious injuries and deaths that she studied, she testified to the importance of shade or its absence as an operative factor in the deaths and injuries she has studied. Notably, several of the other factors she listed, such as lack of easy access to clean drinking water, were also present at the vineyard on May 29, making it more likely than not that if a heat illness had occurred on that date, it would have been serious or fatal. Neidhardt was also able to testify that on the whole, shade was a protective factor that was a commonality in those cases the Division studied of workers who survived heat illnesses, versus those who ultimately died of heat illness: "Statistically what we determined, the determination was made that statistically shade was providing a protective factor. So that the people that survived had that factor in common—the presence of shade. And what happens is when the body can no longer cool itself and it can no longer sweat that access to that cooler area allows the body to get rid of some of the heat load."

The Division has also demonstrated that Employer's supervisor was aware of the violations of section 3395 that were taking place at the vineyard. An Employer may defend against a serious citation by showing that the hazard occurred at a time and place where the Employer was unable, with the exercise of reasonable diligence, to discover the presence of the violation. (*Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 8, 2007).) Employer has failed to show that Seguro was not a supervisory employee; Seguro's knowledge of the violative conditions at the vineyard on May 29, 2008 may be imputed to the Employer. (*Tri-Valley Growers, Inc.* Cal/OSHA App. 81-1547, Decision After Reconsideration (Jul. 25, 1985).)

The Board finds the violation of 3395(d) to be serious. The proposed penalty of \$8,435 is assessed.

The ALJ found the Division was able to establish the section 3395(e)(1) failure to train violation as serious under applicable Board precedent. (Decision, p. 17). The Division must “establish that the lack of training regarding the hazard would result in a substantial probability of serious injury or death. *Jerlane, Inc. dba Commercial Box and Pallet*, Cal/OSHA App. 01-4344, Decision After Reconsideration (Aug 20, 2007); *Sully-Miller Contracting Co.*, Cal/OSHA App 99-896, Decision After Reconsideration (Oct. 30, 2001).” (*Blue Diamond Materials, A Division of Sully Miller Construction*, Cal/OSHA App. 02-1268, Decision After Reconsideration (Dec. 9, 2008).) The Division relied largely on its expert, Neidhardt, to make this showing, and Neidhardt testified to the importance of training, so that an employee both knows of the symptoms of heat stroke or heat exhaustion, is able to recognize it in their peers, and has the training to seek out a supervisor if a recuperative break or medical attention is needed.

From Neidhardt’s lengthy testimony on heat illness and the different facets of mandated training, the ALJ was able to establish it was sufficiently probable that a worker not trained in heat illness prevention, working in the conditions found in the vineyard that day, would be at a substantial probability of serious injury or death. The Employer offered no witnesses of its own to rebut the Division’s credible testimony.

Neidhardt testified on various cases of work-related heat illness and death that she had studied at the Division, and explained that a heat illness can progress to organ failure, or death, in as little as five to fifteen minutes, and what may begin as a headache, nausea, or faintness can progress to a serious condition if steps are not taken to cool the body, such as applying cool packs, drinking water, and resting in the shade, and possibly seeking medical treatment. A worker who is not aware of the symptoms may choose to work through them or take the incorrect steps, leading to the substantial probability for heat stroke. This conclusion was echoed by Senchy in testimony, who testified that an employee who has not been trained will not recognize that he or she is experiencing heat illness, which has often lead to the employee allowing the condition to advance before he or she realizes a need to seek help. It is substantially probable that the Employer’s failure to train its employees could have been the cause of a serious employee heat stroke injury or death on May 28, 2008, when the temperature was 95 degrees at 11 in the morning, and employees were laboring under full sun.

We uphold the ALJ’s finding of a serious violation of section 3395(e)(1), and the penalty of \$8,435.

Citation 4 addresses supervisor training under 3394(e)(2), and Neidhardt again provided credible testimony. The Division's expert testified that an employee with a supervisor trained in the various elements of heat stroke prevention has a significantly higher likelihood of surviving a case of heat stroke. Neidhardt testified on heat illness emergencies where the supervisor was uneducated on heat illness and told an employee to sit down and wait for the shift to end, or assumed the worker had been drinking alcohol because the employee's face was red, rather than taking the appropriate steps to put the employee in the shade, hydrate, apply cool packs, and seek medical treatment if appropriate. According to Neidhardt, a supervisor's lack of training had a direct statistical correlation to fatalities studied by the Division, and she drew the conclusion that the lack of training created a substantial probability of serious physical harm or death for those employees supervised by the untrained supervisor. As discussed above, the ALJ appropriately found Seguro to be a supervisory employee of Employer at the worksite on May 29, 2008. The ALJ ruled that the Division established a serious violation of section 3395(e)(2). The finding is affirmed, and the proposed penalty of \$8,435 is upheld.

ART CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: DECEMBER 30, 2013