

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

In the Matter of the Appeal of:

THE COCA COLA COMPANY
3220 East Malaga Avenue
Fresno, CA 93725

Employer

Docket 11-R2D5-2461

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by the Coca Cola Company (Employer).

JURISDICTION

Commencing on July 5, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On September 16, 2011 the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On November 6, 2013 an ALJ issued a Decision (Decision) which, upon motion of the parties, sustained one of the three alleged violations, vacated the second upon the Division's withdrawal of the allegation, and after considering the evidence and arguments of the parties, sustained the third alleged violation and imposed civil penalties accordingly.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration of the Decision insofar as it held Employer had violated section 3395(f)(3).

The Division did not answer the petition.

ISSUE

Was the Decision correct in holding Employer had violated section 3395(f)(3)?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

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 petitions on the grounds that the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

DISCUSSION

The issue we must decide is a narrow one: Did Employer provide a copy of its heat illness prevention program to the Division's representative on request.

After receiving a complaint the Division conducted an inspection of Employer's facility in Fresno from which it distributes a variety of liquid products. During that inspection the Division's inspector interviewed Employer's General Distribution Manager, Bob Thomanson (Thomanson). As

part of the interview, the inspector asked Thomanson for copies of various elements of Employer's Heat Illness Prevention Program (HIPP), which were not provided. The inspector also asked Thomanson whether Employer had such a program, and Thomanson stated Employer did not. As a result the Division issued Employer a citation alleging a violation of section 3395(f)(3), which states: "(3) 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."

The evidence is straightforward. During the inspection the Division's inspector asked to see portions of Employer's HIPP, which are required to "be made available . . . upon request." Employer did not do so, for the stated reason that it had no HIPP. The violation was established on that basis.

Employer's petition for reconsideration raises a number of issues which are intellectually stimulating and revealing, but not dispositive.

Employer argues that the Division did not "conduct a proper investigation before issuing a citation, a violation of [Employer's] due process rights." The petition does not claim that the inspector did not present his credentials as required or get permission to enter Employer's premises, so due process rights are not implicated. (See *Salwasser Manufacturing Co., Inc. v. Occupational Safety and Health Appeals Bd.* (1989) 214 Cal.App.3d 625.) And although the inspection was limited to an unfortunate degree, it was adequate for purposes of establishing the violation at issue.

Section 3395(f)(3) requires various portions an employer's HIPP to be in writing and made available to its employees and the Division upon request. During the inspection in question the required portions of the HIPP were requested and not made available. Further, Thomanson stated there was no such plan, making it impossible to provide it to anyone upon request.

Employer further argues that the ALJ's Decision failed to define "outdoor places of employment," which term appears in section 3395(a)(1). This argument is misplaced. Although there is no definition of the term in section 3395, the Board and its ALJ's may not provide one as we may neither add nor subtract terms from a safety order. (*E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007).) When a term is not defined by the legislative body, the term's ordinary meaning is applied. (*In re Marriage of Bonds* (2000) 24 Cal.4th 1, 16; *Anning-Johnson Company*, Cal/OSHA App. 06-1976, Decision After Reconsideration (Jan. 13, 2012).) The ordinary meaning of *outdoor* is: "being or taking place outdoors," and *outdoors* is in turn defined as "in or into the open; outside a building or

shelter; any area or place outside a building or shelter.” (Webster’s New World Dict. (3d college ed. 1991) pp. 960, 961.)

Given that the evidence showed that some of Employer’s employees work outdoors, the applicability of the standard was established, contrary to Employer’s arguments. Whether the nature and extent of that outdoor work *should* trigger the requirements of the heat illness standard is a question we do not address here, although we note that section 3395 is silent as to what degree of exposure, if any, was intended to cause the standard to apply to outdoor places of employment.

The inspector’s testimony about what Thomanson said to him during the inspection is not hearsay because Thomanson is a member of Employer’s management cadre. Statements by managers fall within the authorized admissions exception to the hearsay evidence rule. (Evid. Code § 1222.)

DECISION

For the reasons stated above, the petition for reconsideration is denied.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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