BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1297346**
ROADSAFE TRAFFIC SYSTEMS, INC. **8750 W. BRYN MAWR AVENUE, SUITE 400** **CHICAGO, IL 60631**	**DECISION**
Employer	

Statement of the Case

Roadsafe Traffic Systems, Inc. (Employer), performs traffic control and flagging operations related to the maintenance of railroad crossings on public streets. On February 12, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Ji Young Oh (Oh), commenced an investigation of a project that included the intersection of Lambert Road and Leffingwell Road in Whittier, California (the job site), in response to a complaint submitted on February 9, 2018.

On August 9, 2018, the Division cited Employer for a failure to provide access to potable drinking water for employees working outdoors. Employer timely appealed the citation, contesting the existence of the violation, the classification of the violation, and the reasonableness of the proposed penalty.[1] Additionally, Employer asserted a series of affirmative defenses.[2]

This matter was heard by Mario L. Grimm, Administrative Law Judge (ALJ) for the Occupational Safety and Health Appeals Board, in West Covina, California, on January 29, 2020. Jennifer Yanni, Attorney, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., represented Employer. Martha Casillas, Staff Counsel, represented the Division. Employer arranged the presence of a certified court reporter. The ALJ designated, upon stipulation of the parties, the court reporter's transcript as the official record of the hearing. The matter was submitted on March 20, 2020.

[1] At hearing, Employer moved to amend the appeal to include the grounds that the classification is incorrect and the proposed penalty is unreasonable. The Division did not oppose the motion. No prejudice being found, the motion was granted.

[2] Except as otherwise noted, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

1. Did Employer provide access to potable drinking water for employees working outdoors?

2. Did the Division establish the rebuttable presumption that the violation is serious?

3. Did Employer rebut the presumption that the violation is serious?

4. Was the proposed penalty reasonable?

Findings of Fact

1. Employer's employees, including Alexa Leon (Leon), worked outdoors on February 9, 2018.

2. Leon asked a designated supervisor for water. The designated supervisor directed Leon to get water from a restaurant down the street during a break.

3. After not receiving water, Leon began to feel sick, left work early, experienced vomiting, and went to a hospital where she was treated with intravenous (IV) fluids.

4. Jaime Ortiz (Ortiz) supervised some of the employees working on the project. Ortiz distributed water to employees he supervised. Ortiz did not supervise Leon.

5. Employer has a health and heat stress policy that includes providing water to employees working outdoors. Employer did not train Leon on its health and heat stress policy.

6. Lack of water can lead to dehydration. Dehydration can lead to exhaustion, impact on bodily functions, and death.

7. The Division did not calculate the proposed penalty in accordance with the penalty-setting regulations.

Analysis

1. Did Employer provide access to potable drinking water for employees working outdoors?

The Division cited Employer for a violation of California Code of Regulations, title 8, section 3395, subdivision (c),[3] which provides:

> Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable, including but not limited to the requirements that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged.

The Alleged Violation Description alleges:

> Prior to and during the course of investigation, including but not limited to, on February 9, 2018, the employer did not provide access to potable drinking water for employees working outdoors as required by this section.

Section 3395, subdivision (c), applies to all outdoor places of work regardless of temperature. (*CA Forestry & Fire Protection*, Cal/OSHA App. 10-0728, Denial of Petition for Reconsideration (Aug. 10, 2012).) The obligation to "provide" water means to obtain, or pay for, the water, and then give it to employees. The water must be in a "readily accessible" location. (*Id.*)

"An inference is a deduction about the existence of a fact that may be logically and reasonably drawn from some other fact or group of facts found to exist." (*Barrett Business Services, Inc.*, Cal/OSHA App. 315526582, Decision After Reconsideration (Dec. 14, 2016).) "The Board has previously held that reasonable inferences can be drawn from the evidence introduced at a hearing." (*Morrow Meadows Corporation*, Cal/OSHA App. 12-0717, Decision After Reconsideration (Oct. 5, 2016).)

Evidence presented by one credible witness is sufficient to support any fact. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (June 28, 2012); Evid. Code § 411.)

[3] Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

In the present case, Employer was performing maintenance on railroad crossings on public streets. Ortiz was a Railroad Technician on the project. Railroad technicians supervised "flaggers" regulating traffic at each railroad crossing. Ortiz testified that Employer had "a lot of crossings" on the project. Ortiz supervised three crossings. Aside from Ortiz, there were four to six other railroad technicians on the project. Each railroad technician supervised ten flaggers. Employer received at least some flaggers from a staffing agency.

Ortiz further testified that Employer has a health and heat stress policy. Employer trains employees from staffing agencies on its health and heat stress policy. Employer documents attendance at health and heat stress trainings by having employees sign a form indicating they understand "the rules and regulations on health and heat stress."

As part of Employer's policy, railroad technicians distribute water bottles to employees working outdoors. During the project, Ortiz had an ice chest of water bottles locked in his truck. He drove among his three crossings to distribute water bottles and to check on employees. Ortiz's duties also included providing information to employees about safety, health, heat stress, and staying hydrated.

At hearing, Ortiz testified plainly and directly. He was not evasive under cross-examination. He acknowledged he did not witness water being provided at other crossings ("I don't know what they were doing"), and that he could only "speak for myself." These acknowledgments do not contradict his testimony that Employer has a policy of providing water to employees. Thus, Ortiz is found to be a credible witness.

Leon was one of the flaggers regulating traffic at the railroad crossing at the intersection of Lambert Road and Leffingwell Road. Her first day on the project was February 9, 2018, which happened to be the last day of the project. Leon testified the staffing agency provided heat illness training when it hired her in October of 2017. Leon did not receive heat illness training from Employer, but received training on how to regulate traffic.

Leon further testified that she brought her own water bottle to the job site, and finished it in the morning. Her crossing had a "designated supervisor," although it is unclear whether this person was a railroad technician with the same safety responsibilities as Ortiz. Leon asked the designated supervisor for more water. The designated supervisor told Leon that she would have to get water from a McDonald's restaurant, which was "a few blocks" down the street. Leon had to wait until her lunch break because there was not enough time during her 10-minute rest break. Leon called the staffing agency to report that she was out of water. The staffing agency directed Leon to ask a supervisor at the job site. Leon observed other employees without water at her crossing, and she never saw a railroad technician drive to her crossing to provide water. Leon

later began to feel sick. She left the job site, and went to a hospital where she received an IV treatment.

During the Division's investigation, Oh confirmed with the staffing agency that one employee reported a lack of water. Oh did not find evidence that other employees lacked water.

Leon testified plainly and directly. She was not evasive under cross-examination. She acknowledged Employer did not tell her that she was not allowed to have water. She acknowledged that she did not see a written policy that Employer would not provide water. These acknowledgments do not contradict her testimony that a supervisor directed her to get water from a restaurant during a break. Thus, Leon is found to be a credible witness.

Since Leon is a credible witness, her testimony is sufficient to prove Employer failed to provide access to water. (*See Sherwood Mechanical, Inc., supra*, Cal/OSHA App. 08-4692.) Additionally, Ortiz's testimony does not directly refute Leon's testimony. Ortiz's testimony was limited to his observations of his own three crossings, and the evidence does not indicate Ortiz supervised Leon's crossing.

Although Employer demonstrated it has a health and heat stress policy that includes the provision of water, there are several reasons to conclude Employer did not follow its policy on the day in question, at least with respect to Leon. First, as discussed above, Leon testified credibly that Employer did not train her on the health and heat stress policy, and did not provide her with water. Second, Employer did not offer a witness to testify that he or she trained Leon on the policy or provided water at Leon's crossing. Third, Employer did not present signed documentation that it trained Leon on the policy. This is important because, given Employer's policy of documenting such training, the documentation would be expected if Employer had provided the training. Therefore, the absence of the expected documentation supports an inference that Employer did not follow its policy to train all employees on the health and heat stress policy. In turn, this inference casts doubt on whether Employer followed its related policy of providing water, at least with respect to Leon.

The Division has the burden of proving a violation 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. (*Nolte Sheet Metal, Inc.*, Cal/OSHA App. 14-2777, Decision After Reconsideration (Oct. 7, 2016).)

As set forth above, Employer did not provide water to Leon and directed her to obtain water from a restaurant down the street during a break. Thus, Employer failed to provide water and ensure it was at a readily accessible location as required. Accordingly, the Division has met its burden of proof to establish a violation of section 3395, subdivision (c).

2. Did the Division establish the rebuttable presumption that the violation is serious?

The Division classified the violation as a "serious violation." Labor Code section 6432, subdivision (a), defines a serious violation as follows:

> 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 created by the violation.

"Realistic possibility" means it is within the "bounds of reason," and "not purely speculative." (*Langer Farms, LLC*, Cal/OSHA App. 13-0231, Decision After Reconsideration (Apr. 24, 2015).) To meet its initial burden, the Division must produce "some satisfactory evidence demonstrating the types of injuries that could result and the possibility of those injuries occurring." (*MDB Management, Inc.*, Cal/OSHA App. 14-2373, Decision After Reconsideration (Apr. 25, 2016).)

Oh is an Associate Safety Engineer with the Division. She has been employed by the Division since June of 2016. Prior to her employment with the Division, Oh worked for ten years in the Environmental Health and Safety Department of the Los Angeles Unified School District. Oh is current with her Division-mandated training. She is, therefore, qualified to provide competent testimony on the elements of a serious violation. (Lab. Code § 6432, subd. (g).) In particular, Oh received Division training concerning heat illness.

Oh testified that dehydration is the actual hazard created by the violation. With respect to the types of injuries that can result, Oh stated dehydration can lead to exhaustion, impact on bodily functions, and even death. With respect to the possibility of the injuries occurring, Oh testified there is a "definite" possibility of the injuries occurring if an employee goes "without replenishing their fluids." This testimony establishes that potential injuries are within the bounds of reason and not purely speculative.

Employer did not offer witnesses to testify regarding the types of injuries that could result and the possibility of those injuries occurring. In discussing inspector testimony and serious violations, the Appeals Board has stated: "We will not reject uncontroverted testimonial

evidence absent physical impossibility or inherent improbability." (*Sherwood Mechanical*, *supra*, Cal/OSHA App. 08-4692.)

In sum, the preponderance of the evidence indicates there is a realistic possibility of death from the actual hazard created by the violation. Accordingly, the Division established the rebuttable presumption that the violation is a serious violation.

3. Did Employer rebut the presumption that the violation is serious?

An employer may rebut the presumption that a violation is serious. Labor Code section 6432, subdivision (c), provides:

> If the division establishes a presumption pursuant to subdivision (a) that a violation is serious, the employer may rebut the presumption and establish that a violation is not serious by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. The employer may accomplish this by demonstrating both of the following:
>
> > (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b).
> >
> > (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

The reference to subdivision (b), of Labor Code section 6432, incorporates the following factors: (A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

Here, Employer had a health and heat stress policy before the violation occurred. However, the policy was not fully executed in this case. With respect to the factors of Labor

Code section 6432, subdivision (b), Employer did not train Leon on health and heat stress. Employer did not establish it trained Leon's "designated supervisor," given that the supervisor told Leon to get water at a restaurant during a break. Finally, Leon never saw a railroad technician drive to her crossing or provide water, which indicates a lack of both supervision and procedures for discovering the hazard.

In sum, Employer did not take all the steps a reasonable and responsible employer in like circumstances should be expected to take before the violation occurred. Accordingly, Employer did not rebut the presumption that the violation is a serious violation.

4. Was the proposed penalty reasonable?

Penalties calculated in accordance with the penalty-setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The Appeals Board has held that if the Division fails to establish all of the facts supporting the implementation of the penalty calculation, the employer is to be given maximum credit. (*C.A. Rasmussen, Inc.*, Cal/OSHA App. 08-0219, Decision After Reconsideration (July 19, 2012).)

Exhibit 6 is the Division's "Proposed Penalty Worksheet (C-10)." Oh explained how she calculated the penalties from this C-10 worksheet.

Severity

Section 335, subdivision (a)(1)(B), provides that the severity of a serious violation is considered to be High. Section 336, subdivision (c), provides a Base Penalty of $18,000 for a serious violation.

Here, the violation was properly classified as serious. Therefore, the Base Penalty is $18,000.

Extent

Section 335, subdivision (a)(2)(i), provides: "When the safety order violated pertains to employee illness or disease, Extent shall be based upon the number of employees exposed: Low -- 1 to 5 employees. Medium -- 6 to 25 employees. High -- 26 or more employees."

Section 336, subdivision (c), provides that for a rating of Low, 25 percent of the Base Penalty shall be subtracted; for a rating of Medium, no adjustment to the Base Penalty shall be made; and for a rating of High, 25 percent of the Base Penalty shall be added.

Here, Oh rated the Extent of the violation as Low because she was able to verify only one employee was not provided water. She subtracted 25 percent of the Base Penalty ($4,500). Accordingly, the Division properly reduced the Base Penalty.

Likelihood

Section 335, subdivision (a)(3), provides:

> 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.

Section 336, subdivision (c), provides that for a rating of Low, 25 percent of the Base Penalty shall be subtracted; for a rating of Medium, no adjustment to the Base Penalty shall be made; and for a rating of High, 25 percent of the Base Penalty shall be added.

Here, Oh rated the Likelihood as Medium. In determining this rating, she considered the time of year, and the fact that the temperature on the day of the violation, 73 degrees, was "not extreme." She further considered that a lack of water can cause issues or illnesses even at lower temperatures.

Oh did not indicate she factored the number of exposed employees into Likelihood. Because Oh factored one exposed employee into Extent, it is reasonable to conclude that one exposed employee should be factored into Likelihood, in which case, it is not clear how Likelihood was rated as Medium. Accordingly, the Likelihood rating is reduced to Low, and Employer is entitled to an additional 25 percent reduction of the Base Penalty.

Therefore, the Base Penalty of $18,000 is reduced by 50 percent due to the reductions of 25 percent for Extent and 25 percent for Likelihood. The resulting Gravity-Based Penalty is $9,000.

Penalty Adjustments - Good Faith

Section 335, subdivision (c), provides:

> 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.

Section 336, subdivision (d)(2), provides that the Gravity-Based Penalty shall be reduced by 30 percent for a rating of Good, 15 percent for a rating of Fair, and zero percent for a rating of Poor.

In determining the rating for Good Faith, the Appeals Board considers the employer's attitude toward safety of its employees, as well as peculiar circumstances affecting the application of safety orders, and the employer's experience. A determination that the employer did not intend to disregard its employees' safety may be taken into consideration for potential reduction of penalties. (*Watkins Contracting, Inc.*, Cal/OSHA App. 93-1021, Decision After Reconsideration (Sep. 24, 1997), citing *Wunschel and Small, Inc.*, Cal/OSHA App. 78-1203, Decision After Reconsideration (Feb. 29, 1984).)

Here, Oh rated Good Faith as Fair, but did not identify the evidence supporting the rating. Accordingly, Employer is entitled to a maximum adjustment of 30 percent for Good Faith.

Size

Section 335, subdivision (b), and section 336, subdivision (d)(1), provide that adjustment may be made for Size when an employer has 100 employees or less.

Oh did not testify regarding the number of employees employed by Employer. Ortiz testified Employer had five to seven railroad technicians on the project, with 10 flaggers for each technician. This indicates Employer had at least 55 employees at the time of the violation (five technicians and 50 flaggers). Accordingly, Employer is entitled to an adjustment of 20 percent for Size. (*See* § 336, subd. (d)(1).)

History

Section 335, subdivision (d), and section 336, subdivision (d)(3), provide that if an employer has not had a history of violations in the past three years, the employer is entitled to a 10 percent History credit.

Here, Oh provided the maximum 10 percent credit for History. Accordingly, Employer is entitled to a History credit of 10 percent.

In sum, Employer is entitled to a 30 percent reduction for Good Faith, a 20 percent reduction for Size, and 10 percent reduction for History. Application of these adjustment factors results in a reduction of the Gravity-Based Penalty by 60 percent, or $5,400. Accordingly, the Adjusted Penalty is $3,600.

Abatement Credit

Section 336, subdivision (e)(2), provides that the Division shall not grant an abatement credit unless the violation is corrected during the inspection or within ten days after a date designated as the abatement period. Application of the 50 percent abatement credit is not discretionary. It must be applied wherever it is not prohibited. (*Luis E. Avila dba E & L Avila Labor Contractors*, Cal/OSHA App. 00-4067, Decision After Reconsideration (Aug. 26, 2003).)

The Citation and Notification of Penalty indicates the violation was corrected during the inspection. There was no contrary evidence at hearing. Thus, Employer is entitled to a 50 percent abatement credit.

Accordingly, the assessed penalty is $1,800.

Conclusion

The Division established Employer violated section 3395, subdivision (c), because Employer did not provide water to an employee working outdoors. The proposed penalty was not calculated in accordance with the penalty-setting regulations, and is modified as set forth above.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty is modified to $1,800.

It is further ordered that the penalty indicated above and as set forth in the attached Summary Table be assessed.

Dated: 04/10/2020

MARIO L. GRIMM
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. **For further information, call: (916) 274-5751.**