BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **WALMART INC #5193** **702 S.W. 8th Street** **Bentonville, AR 72716** **Employer**	Inspection No. **1398365** **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 Walmart Inc., store number 5193 (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued one citation to Employer alleging four instances of violations of occupational safety and health standards codified in California Code of Regulations, title 8.[1]

Employer appealed timely and administrative hearing procedures were conducted, including a contested evidentiary hearing before an administrative law judge (ALJ) of the Board.

The ALJ issued his decision on March 12, 2021, holding that Employer committed a violation of section 3203 in only one of the four alleged instances, specifically Instance 3.

Employer timely petitioned for reconsideration, seeking review of the Decision's finding that it had committed the violation alleged in Instance 3. The other instances are not at issue.

The Division answered the petition.

ISSUE

Did Employer violate section 3203, subdivision (a)(6)?

FINDINGS OF FACT

1. One of Employer's employees informed his supervisor that he was not feeling well.

[1] References are to California Code of Regulations, title 8 unless specified otherwise.

2. The stricken employee was exhibiting symptoms of heat illness.

3. The employee's supervisor did not follow the procedures set forth in Employer's injury and illness prevention plan (IIPP) after the employee complained of not feeling well.

4. The employee was later that day admitted to the hospital and diagnosed as having heat illness.

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's petition asserts that the evidence does not justify the findings of fact in the Decision, 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 Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances. We have taken no new evidence.

Instance 3 alleged that Employer failed to implement its IIPP by failing to implement methods and procedures to correct hazards associated with working in an excessive heat environment. The Decision states that when the affected employee developed symptoms of heat illness while unloading a trailer truck, he continued to work despite a co-worker's suggestion he take a break. His supervisor refused to have someone take over for him, and later he told her he was leaving the work. He later went to the emergency room and was diagnosed and treated for heat exhaustion.

Employer argues that four witnesses testified that the affected employee "was instructed by his direct supervisor" to take a break. (Petition, p. 1, ll. 21-22.) The ALJ found differently, specifically giving more weight to the employee's testimony that the other witnesses, and pointing out that neither party called the supervisor as a witness. And, even if the supervisor did tell the employee to take a break, that was not the action required by Employer's IIPP.

The disagreement noted above regarding giving the stricken employee a break does not address the key element of the violation, nor does Employer's petition. The evidence established that the employee affected by heat exhaustion told his supervisor he was ill, he was presenting symptoms of heat illness, and the supervisor did not implement Employer's protocols or procedures and call for emergency assistance for the employee. The failure to do so was a violation of section 3203, subdivision (a)(6), which provides that [every employer's IIPP] "shall [¶s] Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard." Failure to implement an IIPP or to correct a known hazard is a violation of the standard. *(National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Section 3203, subdivision (a)(6) requires employers both to have an IIPP and to respond appropriately to correct known hazards. (*Id*.)

The supervisor's failure to call for medical assistance means that she was not trained properly to recognize and correct the hazard of heat illness. Alternatively, even if trained, she did not follow the requirements of Employer's IIPP because she did not act appropriately when the employee exhibited symptoms of heat illness. And, the violation is established even if she did tell the employee to take a break. His refusal to do so was further evidence of heat illness, one symptom of which is confusion or disorientation. Although Employer makes a clever attack and argument in its petition, Employer's theory of the case ignores the uncontroverted fact that emergency medical help was not summoned.

Employer argues that a violation, if found, is absolved by the independent employee action defense (IEAD), an affirmative defense established by the Board. (*Mercury Service, Inc*., Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).) That is not correct. Since a supervisor committed the violation, the IEAD does not apply. (*Davey Tree v. Occupational Safety and Health Appeals Bd.* (1985) 167 Cal. App. 3d 1232, 1241.)

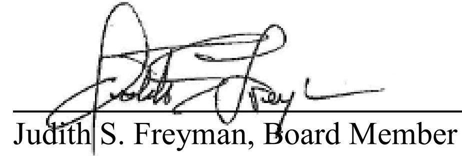
Lastly, Employer argues that, if the violation is upheld by the Board, the penalty should be adjusted because only one of four alleged instances was upheld. This too is incorrect. "[T]he Board has repeatedly stated that in order to prove a violation, the Division need only demonstrate that one of the multiple instances charged by a citation is violative of the safety order. [Citation omitted.]" (*Shimmick Construction Company Inc*., Cal/OSHA App. # 1059365, Decision After Reconsideration (July 5, 2019).)

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's Order and penalties are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair



Judith S. Freyman, Board Member

Marvin P. Kropke, Board Member

FILED ON: **06/02/2021**