

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

In the Matter of the Appeal of:

**RIVERSIDE CITY FIRE DEPARTMENT
3401 UNIVERSITY AVENUE
RIVERSIDE, CA 92501**

Employer

Inspection No.
1231720

DECISION

Statement of the Case

Riverside City Fire Department (Employer) is a local fire agency. Beginning May 11, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer May Layfield,¹ conducted an accident inspection at 3085 St. Lawrence Street, Riverside, California (the job site), in response to an injury report.

On November 3, 2017, the Division issued two citations, with Citation 1 having four items to Employer in accordance with California Code of Regulations, title 8.²

Employer filed timely appeals of the citations, contesting the existence of the violations, the classifications, and the reasonableness of the penalties. Employer also asserted a series of affirmative defenses.³

At the hearing, the parties resolved Citation 1, items 1 through 4. The Division moved to withdraw Citation 1, item 1 in exchange for a waiver of cost pursuant to Labor Code section 149.5. Employer moved to withdraw its appeal of Citation 1, items 2 through 4 in exchange for

¹ Associate Safety Engineer, May Layfield is now retired from the Division and was not called as a witness. Employer objected to the Division's failure to produce Layfield as a witness on the grounds of the ability of OSHA to lay a foundation for any materials or work done during the investigation and for the Employer's inability to cross examine Layfield. The Division argued that it was not required to produce Layfield at hearing and produced Senior Safety Engineer Robert Salgado and the injured employee as witnesses. The Division has discretion on whom it chooses to call as witnesses. The Employer's objection is overruled. Employer also objected to Salgado's testimony on the basis of hearsay. Under §376.2 hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The Employer's objection is overruled.

² Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

³ Except where discussed in this Decision, 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).)

a non-admissions clause.⁴ No objection having been heard and Good cause having been found, the motions were granted. The only citation remaining on appeal at hearing was Citation 2.

This matter was heard by Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in Riverside, California, on November 12, and 13, 2019. Rebecca McKee, Deputy City Attorney, from the Office of the City Attorney, City of Riverside represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted for decision on January 29, 2020.

Issues

1. Did Employer fail to allow and encourage employees to take a preventative cool down rest in the shade when they felt the need to do so to protect themselves from overheating?

Findings of Fact

1. On May 5, 2017, Employer conducted a mini- introductory fire academy which included orientation, safety and operations training and an introduction to physical fitness circuit training.
2. During the safety and operations training, Emergency Medical Services Coordinator Kristen Clements (Clements) encouraged the taking of breaks to rest and recover and stressed the importance of probationary firefighters gauging themselves and speaking up when or if they needed a break.
3. Probationary Firefighters and their assigned mentors (Senior Firefighters) participated in two 10-12 minute circuits of physical fitness training at some time after 4:00 p.m. on the day of the incident. The temperature was in the low 70's during the fitness training.
4. Probationary Firefighter Joseph Camarillo (Camarillo) finished the first circuit the fastest with no problems.
5. There was a rest break between the first and second circuit.
6. During the last activity of the physical fitness training, Camarillo intentionally went down on one knee and Senior Firefighter/mentor, Paul Avila intervened by telling Camarillo to sit down, open up his clothing and cool down.
7. At no point, prior to intentionally taking a knee did Camarillo ask for a break.
8. There was shade available in the gazebo/lattice covered patio area adjacent to the training site.

⁴ The settlement terms and conditions are not intended to be and shall not be construed by anyone or any proceeding as an admission of negligence, fault, or wrongdoing whatsoever by employer. Neither employer's agreement to compromise this matter nor any statement contained in this agreement shall be admissible in any other proceeding, either legal, equitable, or administrative, except for purposes of administration and enforcement of the California Occupational Safety and Health Act and in proceedings before the Appeals Board.

Analysis

1. Did Employer fail to allow and encourage employees to take a preventative cool down rest in the shade when they felt the need to do so to protect themselves from overheating?

Section 3395, subdivision (d)(3), provides:

Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. An individual employee who takes a preventative cool-down rest (A) shall be monitored and asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.

Citation 2, Item 1 alleges:

Prior to and during the course of the investigation including, but not limited to May 11, 2017, the employer did not ensure that employees were allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. As a result, on or about May 5, 2017, an employee suffered heat-related illness requiring at least two days of hospitalization.

a. Were Employer's employees allowed or encouraged to take a preventative cool down break?

The Division had the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) “Preponderance of the evidence’ is usually defined in terms of probability of truth, or of evidence that when weighed 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.” (*Sunrise Growers Frozsun Foods*, Cal/OSHA App. 09-2850, Decision After Reconsideration (Mar. 27, 2014), citing *Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001); *Leslie G. v. Perry & Associates* (1996) 43 Cal. App. 4th 472, 483, rev. denied.)

“Section 3395, subdivision (d)(3) requires an employer, at all times, to allow and encourage employees to take preventative cool-down periods in the shade when employees feel it necessary to protect themselves from overheating.” (*Harris Rebar Northern California, Inc.*, Insp. No. 1086663, Decision After Reconsideration (Sept. 22, 2017).)

On May 5, 2017, a group of five probationary firefighters, including injured worker Joseph Camarillo (Camarillo), attended a mini-introductory fire academy, which included: 1) an on-boarding orientation with Human Resources; 2) safety and operations training in the afternoon and 3) physical fitness circuit training activities in the early evening with experienced firefighter mentors.⁵ All of the physical fitness circuit training activities were conducted outside.

The Division’s evidence regarding whether Employer encouraged and allowed preventative rest breaks consisted of the testimony of Camarillo. In Camarillo’s testimony he admitted that there was “a rest break” between circuit one and circuit two. The evidence shows that Camarillo appeared rested because he volunteered to go first in the second circuit.

Employer’s Emergency Medical Services Coordinator, Clements, testified that she conducted a training session with the group of probationary firefighter/employees on the day of the incident, May 5, 2017. In the training session Clements reviewed and discussed the signs and symptoms of heat illness, the importance of the probationary firefighters gauging themselves, recognizing their physical limitations, and taking breaks to rest and recover. Clements recalled specifically telling the group of probationary firefighters “not to be macho” and “to say something,” if they felt like they were reaching their physical limit or needed to take a break.

Additionally, Firefighter Josh Lavin (Lavin) recalled telling the probationary firefighters/employees before the fitness skills that “if they felt tired” or “if they couldn’t go anymore” or “if they felt sick or injured,” to “say something” and “to speak up” and “let the trainers know.” The Division provided no rebuttal to this testimony. The testimony of Clements and Lavin is credited. Another probationary firefighter, Vincent Gibby (Gibby) testified that during the training session, Clements covered heat related topics and encouraged drinking water and/or Gatorade. According to Gibby, Clements emphasized recovery time and taking a break. Gibby credibly testified that Clements’ training session also emphasized that if the probationary firefighter felt the need to stop, they should take a knee. Gibby’s testimony was clear and consistent with Clements description of the training. His testimony is credited.

⁵ The circuit consisted of crawling, walking, lunges, climbing and descending stairs, push ups, tire pulls, flipping tires and pulling hoses.

At some time after 4:00 p.m., the probationary firefighters practiced putting on their protective gear and participated in two 10-12 minute circuits of physical fitness training, with a ten minute rest break in between the circuits. Each probationary employee was assigned a mentor (more senior firefighter) to complete the physical activities in full gear.

Lavin testified that the entire group took a rest break in the area marked in Exhibit G.⁶ According to Lavin the area depicted in Exhibit G is the break area. Lavin, Clements, and Avila all testified that there was shade available at the training ground. Avila and Lavin specifically testified that the Gazebo area (also described as the lattice covered patio) depicted in Exhibit G had shade. Avila testified that the East side of all buildings depicted in Exhibit G had shade.

Camarillo completed the first 10-12 minute circuit with no problems and finished the circuit first. Camarillo's mentor for the second 10-12 minute circuit was Firefighter Paul Avila (Avila). The circuits were not timed.

Avila testified that Camarillo volunteered to go first on the second circuit and he appeared ready and exhibited no signs of heat illness. Avila's job was to watch the new hire and make sure he could perform the task. Camarillo testified that during the last 4 inch hose pull activity he began to experience heat illness and stumbled down to a knee. Avila testified that he thought Camarillo lost his balance due to having to pivot to pull the hose. Camarillo testified that he never asked to take a break during the second circuit and after he stumbled he immediately popped back up. A few seconds later, Camarillo went down unto a knee. At that point, Avila intervened and told Camarillo to sit down, open up his clothing and cool down. Avila appeared straight forward and direct in his testimony. Avila's testimony is credited.

According to Camarillo's own testimony, he never asked for a break during the physical fitness circuit even though he had been trained about the importance of taking breaks and staying hydrated. The Division never gathered any contradictory statements from two key witnesses, 1) Lavin and 2) Avila. Lavin and Avila were percipient witnesses who could have provided relevant statements to the investigation as mentioned above. The weight of the evidence shows that Employer encouraged cool down rests, and allowed a preventative cool down rest between the physical fitness circuits.

Accordingly, it is found that Employer allowed and encouraged employees including Camarillo to take preventative cool down breaks.

b. Did Employer provide access to shade at all times?

⁶ Exhibit G is an aerial photo of the break area which includes the gazebo/lattice covered tables.

The Division contends that shade meeting the definition of subdivision (b) was not present. Section 3395, subdivision (b), contains a special definition for shade, which states: “‘Shade’ means blockage of direct 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. ...Shade may be provided by any natural or artificial means that does not expose employees to unsafe or unhealthy conditions and that does not deter or discourage access or use.”

The goal of section 3395 is “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.” (*Martin J. Solis DBA Solis Farm Labor Contractor*, Cal/OSHA App., 08-3434, Decision After Reconsideration (Dec. 30, 2013).) As set forth above, section 3395, subdivision (d)(3) provides, in relevant part: “Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times.” This provision has no temperature threshold and is applicable regardless of the temperature.

Here, Avila credibly testified that when he arrived at the site for the physical fitness training activities the temperature was in the low 70’s. Clements testified that she observed shade on the training ground as she walked to her car to leave for the day while noticing the physical fitness training activities. Avila testified that shade was available in the gazebo area. Lavin testified that there were shaded areas in the gazebo area/lattice covered patio and throughout the training ground. Camarillo testified that he was not trained regarding shade. This safety order requires access to shade. Here, it appears that Camarillo had access to shade. Avila, Clements, and Lavin’s testimony was unchanging and supported with photographic evidence as depicted in Exhibit G. The testimonies of Avila, Clements and Lavin are credited. Here, Employer met its obligations to provide shade for its employees. The Division failed to show there was no access to shade.

The totality of the evidence presented by the Division failed to show a violation of the safety order. Employer encouraged and allowed preventative cool down breaks and rest in the shade for employees as needed to prevent overheating.

Conclusions

The evidence fails to support a finding that Employer violated section 3395, subdivision (d)(3). Accordingly, Employer’s appeal is granted.

Order

It is hereby ordered that Citation 1, Item 1 is vacated. Citation 1, Items 2 through 4 are affirmed as set forth in the attached Summary Table. Citation 2 is vacated.



Dated: 02/25/2020

Jacqueline Jones
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.**