BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of: **HARRIS REBAR NORTHERN CALIFORNIA, INC.** **355 SOUTH VASCO ROAD** **LIVERMORE, CA 94550** **Employer**	Inspection No. **1086663** **DECISION AFTER RECONISDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by the Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

JURISDICTION

Harris Rebar Northern California, Inc. (Employer) performs rebar installation construction services. In August of 2015, Employer was working on a bridge project located at Highway 4 and Highway 160 (the job site). An employee collapsed at the job site on August 19, 2015, which resulted in a heat illness inspection by Division Associate Safety Engineer, Joey Crocker (Crocker) on August 21, 2015.

On September 8, 2015, the Division cited Employer for a single general violation of California Code of Regulations, Title 8, section 3395, subdivision (d)(3) [requiring that employees be allowed and encouraged to take a preventative cool-down rest in the shade, and stating that such access shall be permitted at all times].

Employer filed a timely appeal of the citation, contesting the existence of the violation. Employer also asserted a series of affirmative defenses.

This matter was heard by Kerry E. Lewis, Administrative Law Judge (ALJ) for the Appeals Board, in Oakland, California, on January 10, 2017. David Donnell, Attorney, of the Robert D. Peterson Law Corporation, represented Employer. Kathy Garner, District Manager, and Allyce Kimerling, Staff Counsel, represented the Division. The case was submitted on February 13, 2017.

The ALJ issued a Decision in this matter on March 7, 2017. The decision vacated the citation. Following receipt of the Division's Petition for Reconsideration, the Board took the ALJ's Decision under reconsideration.

ISSUES

1. Were the Employer's employees allowed and encouraged to take preventative cool-down rest in the shade when they felt the need to do so to protect themselves from overheating, and was such access permitted at all times?

FINDINGS OF FACT

1. On August 21, 2015, Crocker conducted an inspection of the job site.

2. Employer's employees were performing work on the bridge deck at the job site.

3. Two five-story staircases constituted the only way to access the bridge deck where the employees were working on the date of the inspection. The stairs had been erected as semi-permanent structures from the ground level which was approximately 50 feet below the bridge deck.

4. Employer provided its employees two sources of shade at the job site. The employees could go within the shade provided by portions of a non-operational Bid-Well machine, or they could climb down the stairs and access the shade below the bridge deck.

5. The shade area under the bridge was inadequate. It defeated the purpose of taking a cool-down rest because the employees increased their heart rate and exerted muscular effort ascending and descending the stairs. Additionally, the remote location increased the risk of complications if an employee was suffering from heat-related illness and could not reach the shade quickly and safely.

6. The Division failed to present sufficient evidence that the area under the Bid-Well defeated the purpose of the shade, which is to allow the body to cool. The Division also failed to present sufficient evidence that employees were deterred or discouraged from using the area under the Bid-Well for shade.

7. The employees knew that the Bid-Well was available to use as shade and they regularly accessed the shade provided by the Bid-Well during their breaks.

8. Employer allowed and encouraged its employees to take preventative cool-down rest in the shade when they feel the need to do so to protect themselves.

DISCUSSION

The Division cited Employer for a violation of California Code of Regulations, Title 8, section 3395, subdivision (d)(3), which provides:

> (d) Access to shade.
> …
> (3) 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.
>
> In the citation, the Division alleges:
>
> Prior to and during the course of inspection including but not limited to on August 21, 2015 the employer did not have shade readily accessible at the worksite located on the highway structure 50 feet above ground level, for employees to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating or in response to an employee exhibiting signs or symptoms of heat illness.

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. Here there is little dispute that Employer did encourage and allow preventative rest breaks in shaded areas. Employer's General Manager, Dan Garza (Garza), testified that it was company policy to grant an employee's request for a preventative rest break if an employee felt overheated. Garza also testified that Employer maintained an open door policy and encouraged employees to speak-up when they felt the need for a break. His testimony is credited.

Garza also said Employer provided employees working on top of the bridge deck two options for shade: employees could go below the bridge or employees could utilize the shade created by a non-operational Bid-Well machine on the top deck. The evidence demonstrates employees knew of these options. Garza testified workers sat within the shade of the Bid-Well regularly and that he had eaten lunch with them on at least one occasion. Crocker's employee interviews, and on-site observations, also demonstrated that employees knew to use these areas for shade.

While the evidence demonstrates that Employer did allow and encourage preventative rest breaks in shaded areas, the Division has contended, both at hearing and within its Petition for Reconsideration, that Employer's efforts were nonetheless insufficient because the designated shaded areas did not constitute shade as that term has been specially defined elsewhere in the regulation. 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 Division argues that the shaded areas did not comply with this special definition of shade.

In addition, the Division argues that the shaded areas were insufficient because Crocker measured the temperature as exceeding 80 degrees, triggering certain requirements for shaded areas. Section 3395, subdivision (d)(1) requires that:

> Shade shall be present when the temperature exceeds 80 degrees Fahrenheit. When the outdoor temperature in the work area exceeds 80 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling. The amount of shade present shall be at least enough to accommodate the number of employees on recovery or rest periods, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other. The shade shall be located as close as practicable to the areas where employees are working.

The Division argues that the shaded areas did not meet the requirements of subdivision (d)(1).

Within her Decision, the ALJ considered both of the Division's arguments. Her Decision ultimately ruled, after evaluating whether the shaded areas met both the parameters set forth under subdivision (b) and (d)(1), that the Division had "not met its burden of proving that the shade provided by the Bid-Well was insufficient to meet the criteria set forth in section 3395." The Division's Petition for Reconsideration seeks reversal of this holding. As we shall explain, we hold that the ALJ reached the right result in her decision, but for the reasons described herein.

<u>Section 3395, subdivision (b)</u>

We first consider the interplay between the special definition of shade set forth in subdivision (b) and subdivision (d)(3). The ALJ's Decision was correct to consider the definition of shade found in section 3395, subdivision (b) when interpreting subdivision (d)(3). Courts have long held that,

> The Legislature has power to prescribe legal definitions of its own language, and when an act passed by the Legislature embodies

> a defined term, its statutory definition is ordinarily binding on the courts. (*In re Ogea* (2004) 121 Cal.App.4th 974, 982 [17 Cal. Rptr. 3d 698]; *In re Marriage of Stephens* (1984) 156 Cal. App. 3d 909, 913 [203 Cal. Rptr. 331].) Terms defined by the statute in which they are found will be presumed to have been used in the sense of the definition. (*Stephens*, at p. 913; see also *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063 [103 Cal. Rptr. 2d 751, 16 P.3d 166].)
>
> (*Faulder v. Mendocino County Bd. of Supervisors* (2006) 144 Cal. App. 4th 1362, 1371.)

The foregoing proposition applies equally when the Standards Board enacts a regulation in its legislative capacity. The same rules of construction and interpretation that apply to statutes govern the construction and interpretation of administrative regulations. (*Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d, 1510, 1517; *County of Sacramento v. State Water Resources Control Bd.,* (2007) 153 Cal. App. 4th 1579, 1586.) Thus, the term shade when used in subdivision section 3395, subdivision (d)(3) is presumed to have been used in the sense of the special definition contained subdivision (b). And it is analytically correct to assume that if shade meeting the definition of subdivision (b) was not present at a job site then employees have not been allowed or encouraged to take preventative cool-down rests breaks in the shade as required by subdivision (d)(3).

We also see no error in ALJ's application and analysis pertaining to whether the shaded areas met the definition of shade in subdivision (b). First, the ALJ rightly concluded that the area under the bridge was inadequate as shade, including due to the muscular effort it takes to ascend and descend the stairs to reach that area.

Second, the ALJ also correctly determined that the Division failed to present sufficient evidence that the area under the Bid-Well defeated the purpose of the shade, which is to allow the body to cool, and also failed to present sufficient evidence that employees were deterred or discouraged from using the area under the Bid-Well for shade. The weight of the evidence in the record supports each of ALJ's conclusions. First, Garza estimated that the shade supplied by the Bid-Well was approximately eight feet by eight feet and his measurements were not disputed. Second, while Crocker said that Bid-Well machine radiated heat defeating the purpose of shade, Garza specifically testified that he had personally taken lunch within the shade of the Bid-Well machine and that the area within the shade was cooler. Garza also testified that any heat from the machine radiates upwards, not downwards. Garza's testimony is credited, particularly since Crocker did not offer any temperature measurements to contradict Garza's testimony. Finally, with regard to the Division's argument that the height of the Bid-Well discouraged use, the decision correctly concluded that there is "no standard set forth in the regulations or in Appeals Board case law which requires that an employee must be able to walk or stand under a shade structure without having to crouch." (Decision p. 7.) Further, the evidence does not support a finding that employees were discouraged from using the Bid-Well machine due to its height. In sum, we concur with the ALJ's conclusion that the Division did not meet its burden of proving

that the shade provided by the Bid-Well was insufficient to meet the criteria set forth in section 3395, subdivision (b).

In affirming this holding, we caution employers that using industrial equipment as a source of shade may pose a risk should the equipment be moved or started when employees use it for shade. While we perceive no issues in the use of the Bid-Well machine as a source of shade in this instance due to the testimony regarding how different work was scheduled and the inactivation of the machine during rebar work, we can envision circumstances where use of industrial equipment for shade would be dangerous to employees and discourage use.

Section 3395, subdivision (d)(1)

We next consider whether it was appropriate for the ALJ to analyze whether the shaded areas met the requirements of section 3395, subdivision (d)(1) since the citation at issue solely charges a violation of subdivision (d)(3). As we shall explain below, the Board rejects the ALJ and Division's analysis of section 3395, subdivision (d)(1), as extraneous to upholding the citation issued by the Division.

Much, if not the majority, of the legal analysis in the Decision and Division's Petition for Reconsideration turns on whether the shaded areas were as close as practicable to the employees, whether the shaded areas had sufficient room to accommodate the number of employees on rest periods, and whether the employees were able to sit in a normal posture fully in the shade without having to be in physical contact with each other. All of these issues pertain to the requirements of subdivision (d)(1). Employer was not cited with a violation of that subdivision. Although the Division acted to amend the citation to reference subdivision (d)(1) at the commencement of the hearing, the Division never sought to actually amend the citation to assert a violation of subdivision (d)(1). We have held that a mere reference to another regulation within a citation does not alter the character of the citation, nor does it require that the Board even consider the referenced section or subsection. (*National Distribution Center, LP/Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) Section 3395, subdivision (d) contains multiple subparts. While the various subparts of subdivision (d) all have a degree of interrelatedness, we note that they should nonetheless be cited by the Division separately, particularly since the various subparts each contain different requirements and often contain different triggering provisions. Here, the Division's overwhelming and repeated focus on subdivision (d)(1) demonstrated that it lost sight of what it actually cited.

In finding that the ALJ erred in reaching the section 3395, subdivision (d)(1) arguments, we perceive that she did so to address the arguments made by each party pertaining to subdivision (d)(1), and we also hold that any error was harmless. In addition, while there was no need to for the ALJ to address the subdivision (d)(1) arguments, after review of the record, we otherwise observe no errors in her factual and legal analysis with regard to that subdivision and would have reached a similar result had such a violation been charged.

CONCLUSION

The citation is vacated. The Decision of the ALJ is affirmed, as modified herein.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Art R. Carter, Chairman
Ed Lowry, Board Member
Judith S. Freyman, Board Member

FILED ON: 09/22/2017