

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

In the Matter of the Appeal of:

**GIUMARRA VINEYARDS CORPORATION
11220 Edison Highway
Bakersfield, CA 93307**

Employer

Inspection No.

1256643

**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 Giumarra Vineyards Corporation (Employer).

JURISDICTION

The California Division of Occupational Safety and Health (Division) issued two citations to Employer alleging Employer committed four violations of occupational safety and health standards codified in California Code of Regulations, title 8 at one of its workplaces in California.¹ Employer timely appealed the citations.

Administrative proceedings followed before an administrative law judge (ALJ) of the Board, including a duly-noticed contested evidentiary hearing. At the start of the hearing the parties announced they had resolved two of the four violations, leaving two at issue: failure to report to the Division a serious illness occurring at the worksite, and failure to implement effective emergency procedures when an employee exhibited indications of heat illness at work. After the hearing concluded, the ALJ issued a decision (Decision) which held that Employer had committed the violations at issue and imposed civil penalties.

Employer timely filed a petition for reconsideration of the Decision regarding the heat illness violation.

The Division did answer the petition.

ISSUES

Did Employer violate section 3395, subdivision (f)(2)?

If so, was the violation a repeat violation?

Was the penalty assessed reasonable?

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

**REASONS 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 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.

Summary of Facts.

The Decision contains a thorough review of the facts in the record, which we incorporate here by reference. We have summarized them here for context and convenience of the reader.

On July 10, 2017, Employer had deployed a crew to pick grapes in a vineyard in Wheeler Ridge, California, approximately 30 miles south of Bakersfield. In the late morning, when the temperature was between 93 and 97 degrees Fahrenheit, a member of the crew became disoriented and confused, symptoms of heat illness. The employee was working with two of her sisters, who noticed her condition and reported it to their immediate supervisor, foreman Eliseo Salazar Bravo (Bravo). First aid was also rendered, and the foreman notified the crew's supervisor, Senen Duran (Duran). Duran arranged to have a different employee drive to the worksite in order to pick up the stricken employee and transport her to the medical clinic Employer routinely used to provide care to sick or injured employees. It took 30 minutes for that driver to arrive at the worksite, and the journey to the clinic took approximately another 40 minutes. Later information showed that the employee was not suffering from heat illness but rather "autoimmune encephalitis," which proved fatal. Other facts are stated in the discussion below.

Discussion

Failure to Implement Heat Illness Plan.

The citation which is at issue, Citation 2, alleged a "repeat serious" violation of section 3395, subdivision (f)(2). That section states:

(f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:

[¶]

(2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided.

(A) If a supervisor observes, or any employee reports, any signs or symptoms of heat illness in any employee, the supervisor shall take immediate action commensurate with the severity of the illness.

(B) If the signs or symptoms are indicators of severe heat illness (such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.

(C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with the employer's procedures.

Section 3395, subdivision (a)(1) provides that the standard applies to “all outdoor places of employment[.]” and subdivision (a)(2) further provides that agriculture is one of the industries to which all portions of the standard apply.

As the Decision correctly states, section 3395, subdivision (f)(2) is a performance standard, that is one which establishes a goal or end result and which leaves the means to achieve the result to the employer’s discretion. (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014) (writ denied, Alameda County superior court, Feb. 2015) citing *Davey Tree Service*, Cal/OSHA App. 08-2708, Denial of Petition for Reconsideration (Nov. 15, 2012).) Specifically, subdivision (f)(2) requires employers to take immediate action and implement emergency procedures when there are indications that an employee is possibly suffering from severe heat illness. “Severe” is defined in section 3395, subdivision (f)(2)(B), as including, without limitation, “disorientation” and “irrational behavior.” In this instance, the victim was telling her sisters that her children were there in the vineyard (they were not) and then denying she had children or a husband (she did have children and a husband). Those statements, in light to the victim’s known actual circumstances, are reasonable to take as indicating disorientation and/or irrational behavior, in other words, severe heat illness.² Further, Employer had direct knowledge of the symptoms. The victim’s disoriented, irrational and confused behavior was communicated to her foreman (who, as her father-in-law, knew of her family status) and supervisor by her sisters, and that information, once imparted, required Employer to implement emergency medical response procedures. (§ 3395, subd. (f)(2)(B).)

² Employer argues in its petition for reconsideration that the victim suffered only one symptom, “confusion.” But, as the Decision points out, confusion and disorientation are synonyms. (Decision, p. 9.) Further, the victim was also behaving irrationally, another symptom of severe heat illness. Given the totality of the circumstances, such as the hot weather and the victim’s hallucinations and irrational behavior, it was well within the realm of possibility that she was suffering from severe heat illness. Since both section 3395, subdivision (f)(2) and Employer’s HIPP are triggered if an employee shows signs of heat illness, we are not persuaded that the victim presented no relevant signs or symptoms.

Although it was later determined that the victim was suffering not from heat illness but another condition, that ultimate diagnosis was made much later and is not relevant in light of the standard's command that employers "must" implement emergency response procedures when an employee displays signs or symptoms of possible heat illness. The intent of the standard is to get an affected employee medical attention as soon as possible rather than require employers to make medical diagnoses in the work environment. We believe there are at least two reasons for that intent. First, employers are generally not qualified to make medical diagnoses, and second, time is of the essence to prevent or minimize harm to affected employees. Demonstrating that time is of the essence, the dictionary definition of emergency states, "an unforeseen combination of circumstances or the resulting state *that calls for immediate action.*" (Merriam-Webster Dictionary (Online) www.merriam-webster.com/dictionary/emergency (accessed May 4, 2020; emphasis added).) Thus, the standard requires employers to summon emergency medical assistance immediately.

Employer contends, despite the undisputed fact that Duran did not call for an ambulance, paramedics, or other emergency medical technicians, that it did implement emergency response procedures. Employer argues that section 3395 does not require a formal emergency responder be summoned, and that Duran's decision to utilize another employee to come to the scene to pick up and transport the victim to a clinic (a process which would take at least one hour and ten minutes) complied with section 3395's requirements. We disagree.

We are required to construe section 3395 in a way most protective of employee health and safety. (*Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303, 313.) Applying that rule here, we construe "emergency medical services" (section 3395, subdivision (f)(2)(C)) to mean medical care rendered by those trained to do so, such as emergency medical technicians, (EMTs), paramedics, or others appropriately trained and equipped. Employer's Heat Illness Prevention Plan (HIPP) embodies that requirement. But, there was no evidence that the woman called to drive the victim to the clinic was medically trained or licensed, and Employer does not argue she was so trained or licensed, or that her vehicle was outfitted with medical supplies and equipment. Further, it appears that driver was alone, so would have had both to drive and, in theory, care for the victim en route the clinic. This itself demonstrates a violation of the safety order.

Section 3395, subdivision (f)(2) requires emergency response procedures be implemented if an employee is showing signs of severe heat illness. The employee is to be "provided with emergency medical services *in accordance with employer's procedures.*" (§3395, subd. (f)(2)(C) [emphasis added].) Employer here failed to adhere to its own plan.

Employer's HIPP speaks of "emergency service providers" being called "immediately," and, in the same paragraph states, "While the ambulance is in route[.]" The standard requires emergency *medical* services be provided, and Employer's HIPP incorporates that requirement when it equates the term "emergency service providers" with "ambulance." Although the text of Employer's HIPP complies with section 3395, subdivision (f)(2), Duran's actions in this instance did not follow those requirements, and therefore he failed to implement Employer's HIPP.

Indeed, Employer's HIPP states, "When an employee is showing signs of possible heat illness, steps will be taken immediately to keep the stricken employee cool and comfortable once emergency services responders have been called (to reduce progression to more serious illness)." (Quoted in Decision, p. 11.) The HIPP further requires supervisors or foremen to summon "emergency service providers . . . immediately if an employee displays signs or symptoms of heat illness [such as] disorientation, irrational behavior . . .[.]" (*Ibid.*) And, in the same paragraph, the HIPP states that "While the ambulance is enroute first aid will be initiated[.]" (*Ibid.*)

In this instance, Duran failed to follow the requirements of Employer's HIPP. Instead of calling an ambulance or other emergency service provider, he called one of Employer's offices some distance away to have another employee drive to Wheeler Ridge to pick up the victim and then transport her to the medical clinic. Duran's failure to comply with Employer's own procedure was a failure to implement its HIPP, and a violation of section 3395, subdivision (f)(2). Duran's failure to follow the procedures established there was an omission which caused the violation. It is not enough for employers to create heat illness plans, they must also put them into action or "implement" them. (*National Distribution Center, LP*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015) (writ denied, Los Angeles County superior court, Jul. 2017); citing *BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014) (writ denied, Alameda County superior court, Feb. 2015).) Duran's actions and omissions, as a supervisor, are attributable to Employer. (*Siliconsage Construction, Inc.*, Cal/OSHA App. # 1188395, Denial of Petition for Reconsideration (May 9, 2019).)

For the above reasons, we affirm the Decision as to the existence of the violation.

Classification of the Violation.

The Division cited Employer for a "repeat serious" violation of section 3395, subdivision (f)(2). A "serious violation" is one which creates a realistic possibility that death or serious physical harm could result from the hazard caused by the violation. (Lab. Code §6432, subd. (a); §334, subd. (c).) Section 334, subdivision (d) defines a "repeat" violation as:

[A] violation where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon a later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest of: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law. For violations other than those classified as repeat regulatory, the subsequent violation must involve essentially similar conditions or hazards.

The record shows that in July 2014 Duran and Bravo were involved in another situation in which an employee showed symptoms of heat illness but they did not contact emergency response providers. That employee was later shown to have food poisoning, not heat illness. In 2015 Employer was cited for failing to ensure its supervisors were adequately trained in responding to employees' showing signs of heat illness, including emergency response procedures. The circumstances which arose in 2018 at issue here are, as the ALJ put it,

“remarkably similar[.]” (Decision, p. 16.) Again, Duran and Bravo failed to follow Employer’s HIPP’s procedures by calling for one of Employer’s employees to drive the victim to a clinic instead of calling for an ambulance as required.

The elements of a repeat violation, as stated in section 334, subdivision (d) are: (1) an earlier violation in California for which a citation was issued, (2) within five years immediately of the subsequent violation, (3) of a substantially similar regulatory requirement, and (4) involving essentially similar conditions or hazards.

The evidence adduced at the hearing showed all four elements were satisfied. Employer was cited in 2015 for its failure to train Duran and Bravo on its emergency procedures for responding to heat illness. The instant citation was issued in 2018, within five years of 2015. The regulatory requirement is substantially similar because in 2015 Employer had failed to train its supervisors on its own heat illness emergency response procedures as shown by their failure to follow those procedures. Here, those same supervisors again failed to follow Employer’s heat illness emergency response procedures, demonstrating either ineffective training historically or a callous disregard of what they had learned. And, the same hazard or condition, heat illness, was involved in both situations.

Employer’s petition contends the two requirements are not substantially similar. In view of the close parallels of the two incidents giving rise to the two citations, as summarized above, we disagree. Both violations stemmed from the same supervisors’ failure to follow Employer’s HIPP. In 2015 the citation alleged a failure to train them, presumably because the HIPP as written was adequate but the supervisors did not do what it directed them to do to address an employee’s apparent heat illness. In 2018, those supervisors again failed to follow Employer’s HIPP procedures, thereby failing to implement the plan. In both cases the same individuals failed to follow the HIPP.

As did the ALJ, we do not view the revisions to section 3395 that were made after 2015 to have changed the nature of the instant violation as a repeat of the 2015 violation. The standard in 2015 was less detailed than it is currently, but included the same basic requirements.

Penalty

Employer’s challenge to the penalty is based on the premise that there was no violation, or that the violation was not a repeat violation. Since we have held, above, that Employer did violate section 3395, subdivision (f)(2), and that the violation was a repeat violation as defined in section 334, subdivision (d), we hold that the penalty was appropriate under the circumstances.

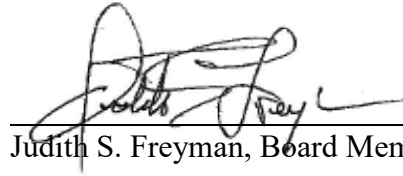
DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ’s Decision is affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chair



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **05/26/2020**