

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

In the Matter of the Appeal of:

**APTCO, LLC.
1998 ROAD 152
DELANO, CA 93215**

Employer

Inspection No.
1332715

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following Decision After Reconsideration in the above-entitled matter.

JURISDICTION

Aptco, LLC (Employer or Aptco) manufactures foam packing cases in its facility located at 31381 Pond Road in McFarland, California (Employer's yard). Beginning July 25, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido, conducted an inspection at Employer's yard following a report of an employee illness that had occurred on June 27, 2018.

On December 21, 2018, the Division cited Employer for one Serious violation of title 8 health and safety standards. Citation 1, Item 1, alleges that Employer failed to implement its heat illness emergency procedures in response to an employee exhibiting signs or symptoms of a possible severe heat-related illness, in violation of section 3395, subdivision (f)(2).

The matter was heard by Kerry Lewis, Administrative Law Judge (ALJ) for the Board, in Bakersfield, California on June 13, 2019, and March 10 and 11, 2020. Kathryn Woods, Staff Counsel, represented the Division. Manuel Melgoza, attorney with Donnell, Melgoza, and Scates, LLP, represented Employer. On August 3, 2020, the ALJ issued a Decision affirming Citation 1, Item 1.

Employer timely filed a Petition for Reconsideration of the ALJ's Decision on September 3, 2020, and the Employer/the Division filed a timely response. The Board took the ALJ's decision under reconsideration on its own motion. Issues not raised in the Petition for Reconsideration are deemed waived. (Lab. Code, § 6618).

In making this decision, the Board has engaged in an independent review of the entire record. The Board additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUE

Did the ALJ correctly decide Citation 1, Item 1?

FINDINGS OF FACT

1. Hector Villalobos (Villalobos) began working for Employer on June 26, 2018.
2. Beginning at approximately 1:00 to 1:15 pm, and until approximately 2:45 pm, on June 27, 2018, Villalobos was performing strenuous outdoor work, loading foam boxes into the back of a truck.
3. The temperature on June 27, 2018 reached approximately 101 degrees Fahrenheit in the afternoon.
4. Aron Flores (Flores) was Employer's Yard Supervisor and Villalobos's direct supervisor.
5. Flores observed Villalobos experiencing two episodes of cramping that afternoon: once while loading boxes into the truck in Employer's yard, and again while at an off-site facility (Bidart) where the boxes were being unloaded. On both occasions, Flores told Villalobos to rest in the shade and drink water.
6. After observing these episodes of cramping, Flores left Bidart and returned to Employer's yard, leaving Villalobos and two coworkers at Bidart.
7. Shortly after Flores left Bidart, one of Villalobos's coworkers called Flores and reported that Villalobos was vomiting. Flores did not return to Bidart and did not summon emergency services. As Villalobos and his coworkers were returning to Employer's yard, Villalobos vomited again.
8. On the evening of June 27, 2018, Villalobos went to the emergency room, where he was diagnosed with an acute kidney infection unrelated to his employment with Employer.
9. Villalobos had been experiencing symptoms including cramping, nausea, and vomiting for three weeks prior to June 27, 2018.
10. At the time that Villalobos displayed symptoms of heat illness, Employer was unaware that he had been experiencing symptoms prior to June 27, 2018.
11. Employer's Heat Illness Prevention Plan (HIPP) did not contain specific emergency response procedures for employees showing signs or symptoms of heat illness.
12. Employer's Injury and Illness Prevention Plan (IIPP) and an informational poster used by Employer to train employees on heat illness advised employees that an ambulance should be called when an employee showed symptoms including vomiting.
13. Employer's HIPP contained an acclimatization provision that required close observation and supervision of new employees for their first two weeks.
14. Failure to implement timely emergency response procedures, including calling emergency medical services, when an employee is exhibiting signs of severe heat illness, may result in exacerbation of heat illness, including death.
15. Villalobos was the only employee exhibiting signs of possible heat illness for which emergency response procedures were not implemented during the course of the Division's inspection.

DISCUSSION

The Division cited Employer for a Serious violation of California Code of Regulations, title 8, section 3395, subdivision (f)(2), which provides:

(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.

The Division alleged:

Prior to and during the course of the inspection, the employer did not implement effective and immediate emergency response procedures commensurate with the signs and symptoms of possible severe heat illness exhibited by an employee loading foam boxes on or about June 27, 2018, in temperatures exceeding 95 degrees Fahrenheit.

1. The safety order was applicable.

In its petition, Employer argues that it should not have been cited for a violation of the heat illness safety order because Villalobos did not, in fact, suffer from heat illness. When he started working for Employer on June 26, 2018, he had an underlying medical condition that Employer was not aware of. Villalobos went to the hospital on the night of June 27, 2018, and reported to hospital personnel that he had been experiencing cramps, nausea, vomiting, and other symptoms for three weeks. He was ultimately diagnosed with an acute kidney infection. Employer argues that because Villalobos's symptoms were not caused by heat illness, he was not actually exposed to the hazard addressed by the safety order (i.e., heat illness), and the heat illness safety order is inapplicable.

However, although Villalobos's symptoms were later found not to have been caused by heat illness, he was undoubtedly exposed to environmental conditions that raised a genuine risk of heat illness. The Board has recognized that the safety order is intended to abate the risk of heat illness due to "working conditions that create the possibility that heat illness could occur." (Section

3395, subdivision (b).) (See *National Distribution Center, LP /Tri-State Staffing*, Cal/OSHA App. 12-R6D2-0391 and 12-R6D2-0378, Decision After Reconsideration (Oct. 5, 2015) (*NDC/TSI*).) 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.) To adopt Employer's interpretation - that employers must comply with section 3395, subdivision (f)(2), only in the event that an employee is actually suffering from heat illness - would run counter to both the purpose of section 3395 and Board precedent. It would permit employers who are not qualified medical professionals to independently diagnose heat illness symptoms in the workplace and then decide whether to summon emergency medical services. This would not only result in delays in emergency medical treatment for employees suffering from heat illness, it would result in fewer employees receiving potentially life-saving treatment by allowing employers to decide when emergency medical services are needed.

Villalobos was a new employee who had not yet become acclimatized to working in the heat. It is undisputed that he performed outdoor work for at least ninety minutes on June 27, 2018, during the early to mid-afternoon, when temperatures climbed as high as 101 degrees Fahrenheit. These circumstances necessitate compliance with heat illness safety precautions and procedures. An employer cannot justify its failure to comply with the heat illness safety order on the basis that the employee's symptoms were later discovered to have some other cause.

The Board recently addressed an almost identical situation. In *Giumarra Vineyards Corporation*, the Board held that a violation of section 3395, subdivision (f)(2), was established where a supervisor failed to implement the employer's procedures for summoning emergency medical services for an employee displaying symptoms that could have been related to heat illness:

Although it was later determined that the victim was suffering not from heat illness but another condition, that ultimate diagnosis ... 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.

(*Giumarra Vineyards Corporation*, Cal/OSHA App. 1256643, Denial of Petition for Reconsideration (May 26, 2020).)

The ALJ correctly found that the safety order is equally applicable here.

2. Employer's emergency response procedures for heat illness required that emergency medical services be called when an employee showed signs of severe heat illness.

The safety order requires that an employer's HIPP have written emergency response procedures in place. (Section 3395, subdivision (i)(3).) These can be integrated into an employer's IIPP or contained in a separate document. (Section 3395, subdivision (a), Note No. 1, and subdivision (i).) In order to comply with section 3395, subdivision (f)(2), the employer's own procedures must be followed in response to an employee displaying signs or symptoms of "possible heat illness."

The “Emergency Response/First Aid” section of Employer’s HIPP contained only one sentence, which stated: “Emergency response procedures include effective communication, response to signs and symptoms of heat illness and procedures for contacting emergency responders to help stricken workers.” (Exhibit 7, p.4) The HIPP also provided that, to ensure emergency medical services could be provided without delay when needed, supervisors were to carry cell phones and that employees were to be reminded of the address where they were working.

Employer’s HIPP and IIPP did not contain specific procedures for employees to follow in the event of possible severe heat illness. However, Employer’s IIPP included generally applicable emergency response procedures. These provide:

It is not always easy to know whether an incident requires the assistance of an ambulance. As a guideline, you should call an ambulance if a victim’s condition is life-threatening, such as:

[...]

j. Is vomiting or passing blood.

[...]

(Exhibit 8, p. 14)

Employer also trained its employees on heat illness using an informational illustrated poster, provided to employers by the Division. (Exhibit 11.) This poster lists vomiting and cramps as symptoms of heat exhaustion. The poster also instructs employees to call for “medical help” and to “get help right away” if a worker has symptoms of heat illness, and to “start providing first aid while you wait for the ambulance to arrive.”

Reading this poster along with Employer’s HIPP and IIPP, then, Employer’s emergency response procedures for heat illness required that emergency medical services were to be called when an employee exhibited symptoms such as vomiting while working in high heat conditions. The Board has construed “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.” (*Giumarra Vineyards Corporation, supra*, Cal/OSHA App. 1256643.) Employer’s emergency response procedures specified that calling for emergency medical services meant calling an ambulance.

3. Employer did not implement its own emergency response procedures in response to Villalobos’s symptoms of possible severe heat illness.

When Flores observed Villalobos experiencing cramps, he administered first aid by having him rest in the shade and drink water. He allowed Villalobos to continue working after Villalobos said he felt better. Although Employer’s HIPP specified that “[n]ew employees must be closely observed for their first two weeks on the job” to ensure proper heat acclimatization, Flores did not stay with Flores to monitor him after the second episode of cramping. Flores left Bidart to return to the Employer’s yard, leaving Villalobos and two co-workers unsupervised. Flores also failed to take effective action when he was notified that Villalobos was vomiting. When Flores learned that Villalobos had vomited, after exhibiting visibly painful cramping, while working in high heat

conditions, the proper action was to implement Employer's emergency response procedures by calling for an ambulance or instructing one of Villalobos's co-workers to do so. Flores did not. Instead, Villalobos returned to Employer's yard with his co-workers. During the drive, he continued to vomit. Still, no one called an ambulance. Upon returning to the yard, Villalobos was allowed to drive home by himself.

Flores testified that he considered the IIPP's instruction to call an ambulance in the event of an employee vomiting to be discretionary, although he admitted that the other items on the list (such as "chest pain" or "bleeding severely") were mandatory. (Division's post-hearing brief, p. 4.) Employer argues that it is unreasonable to require an employer to call an ambulance any time an employee vomits as the result of morning sickness or a hangover. The ALJ correctly pointed out that this argument has no weight when a supervisor observes an employee exhibiting symptoms of possible severe heat illness, in circumstances that pose a legitimate risk of heat illness. (Decision, p. 8.) The Board has held that "employers are not generally qualified to make medical diagnoses," and accordingly, "an employer should not assess an employee's condition when faced with signs and symptoms of severe heat illness, and should act to get that employee treatment immediately." (*Giumarra Vineyards Corporation, supra*, Cal/OSHA App. 1256643.)

Employer places great weight on the fact that Villalobos repeatedly insisted that he was fine and that he stated that he did not want medical attention. While an employer may not be able to force medical aid upon an employee, it still must follow required procedures when the circumstances trigger them. Specifically, section 3395, subdivision (f)(2), requires employers to implement their own emergency response procedures when there are indications that an employee may be suffering from severe heat illness. Here, Flores failed to adhere to those procedures. Flores's actions and omissions, as a supervisor, are attributable to Employer. (*Giumarra Vineyards Corporation, supra*, Cal/OSHA App. 1256643; *Siliconsage Construction, Inc.*, Cal/OSHA App. # 1188395, Denial of Petition for Reconsideration (May 9, 2019).) Had Flores called an ambulance for Villalobos, and had Villalobos then refused treatment, Employer's mandate to comply with the safety order would have been satisfied.

It is well-established Board precedent that an employer may not substitute its judgment for the mandate of safety orders. (*City of Sacramento Fire Department*, Cal/OSHA App. 76-1168, Decision After Reconsideration (Oct. 17, 1980).) Nor may an employer delegate the choice of whether to follow those rules to employees. (*Western Pacific Roofing Corp.*, Cal/OSHA App. 92-1787, Decision After Reconsideration (May 23, 1996); *The Office Professionals*, Cal/OSHA App. 92-604, Decision After Reconsideration (June 19, 1995).)

Employer also appears to argue that Villalobos's symptoms did not justify calling an ambulance because the symptoms were intermittent. For example, Employer asserts that, before Flores left Bidart, "to Flores, [Villalobos] did *appear* well," and that "Villalobos appeared to *recover* from whatever was ailing him." (Employer's Petition, p. 7., emphases in original.) Employer specifically points to video surveillance tapes that show Villalobos, at various points in the day on June 27, 2018, exhibiting "no visible signs of illness" and "in no visible distress." (Employer's Petition, pp. 9, 14.) Again, Board precedent on this point is clear that it is not the province of the employer to diagnose an employee's symptoms or to substitute its judgment for the requirements of a safety order. (*Giumarra Vineyards Corporation, supra*, Cal/OSHA App. 1256643; *City of Sacramento Fire Department, supra*, Cal/OSHA App. 80-1014.) On a day with

temperatures approaching or exceeding 100 degrees Fahrenheit, Villalobos displayed symptoms of cramping and vomiting while, and immediately after, performing physical labor outdoors; vomiting is a potential sign of severe heat illness that is specifically listed in section 3395, subdivision (f)(2). Those undisputed facts triggered the safety order's mandate to implement emergency response procedures, which Employer failed to do.

Employer further asserts that Villalobos "spent little more than an hour and a half" working outdoors, spending "approximately 75%" of his time "in an air-conditioned truck cab." (Employer's Petition, p. 3.) The argument here appears to be that Villalobos was not actually at risk for heat illness under these conditions. Section 3395 does not provide exceptions for the length of time an employee is exposed to the risk of heat illness.

Nor is there merit to Employer's complaint that it was not permitted to examine Villalobos's un-redacted medical records, or to question the Division about the redacted contents. Employer offers no evidence of how it suffered prejudice without access to the redacted information, or that anything contained therein might materially affect the outcome in this matter. There is no dispute that Villalobos did not suffer from heat illness. There was no further need for Employer to examine his private medical records once this fact was established.

Finally, Employer tangentially argues that, because the Division did not cite Sphericon Staffing, LLP (Sphericon), Villalobos's primary employer, under the same safety order, the Division should now be estopped from citing his secondary employer, Aptco, for the alleged violation. Because Employer offers no supporting authority for the broad proposition that the Division must cite both a primary and secondary employer or else be estopped from citing either, we need not address it. (*Interline Brands, Inc.*, Cal/OSHA App. 1251604, Decision After Reconsideration (Sep. 17, 2020); *People ex re. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 873; Labor Code sections 6616 and 6618.) Even if we were required to address this argument, we now reject it for the following reasons.

The Board has long held that an employee may, in some instances, have two employers, where the primary employer leases or assigns the employee to work for a secondary employer, and that in such instances both employers have a duty to implement IIPP/HIPP requirements. (See, e.g., *Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal.App.4th 684; *Barrett Business Services, Inc.*, Cal/OSHA App. 315526582, Decision After Reconsideration (Dec. 14, 2016); *NDC/TSI, supra*, Cal/OSHA App. 12-R6D2-0391; *Staffchex*, Cal/OSHA App. 10-2456, Decision After Reconsideration (Aug. 28, 2014); *Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011); *Manpower*, Cal/OSHA App. 98-4158, Decision After Reconsideration (May 14, 2001).) Nothing in this line of cases, however, sets forth a rule that primary and secondary employers must be held jointly and not severally liable in every instance where an alleged violation occurs, or that the Division must cite both employers or else cite neither, or even that if the Division does not cite the primary employer it is estopped from citing the secondary employer.

In dual employer situations, the secondary employer typically controls the work of the employee. (*NDC/TSI, supra*, Cal/OSHA App. 12-R6D2-0391; *Kelly Services, supra*, Cal/OSHA App. 06-1024.) The Board has recognized that a primary employer must include all its employees in its HIPP/IIPP, and a secondary employer must include those employees "who the employer

controls or directs and directly supervises on the job.” (Labor Code section 6401, subdivision (h); *MCI Worldcom, Inc.*, Cal/OSHA App. 00-R1D1-440, Decision After Reconsideration (Feb. 13, 2008.)) In the present matter, Aptco was required to apply its IIPP and HIPP to Villalobos because Aptco was the employer directly supervising and directing Villalobos on the job.

The Division conducted accident investigations of both Sphericon and Aptco, and concluded that Sphericon had satisfied its responsibilities with regard to implementation of its HIPP and IIPP, on the accurate basis that Villalobos had not experienced heat illness in the course of his employment with Sphericon. (Exhibit F; Exhibit G.) The Division separately concluded that Aptco, which controlled Villalobos’s employment on June 27, 2018, did not implement its emergency response procedures when Villalobos displayed symptoms of possible severe heat illness. As previously discussed, the fact that Villalobos was not actually suffering from heat illness is not relevant to Aptco’s obligation to respond to Villalobos’s symptoms. Nothing requires the Division to cite both employers when only one has failed to appropriately implement its HIPP and/or IIPP. As the employer that exposed Villalobos to environmental risk factors for heat illness, Aptco was severally liable for the alleged violation of section 3395. (Labor Code section 6400.)

In short, none of Employer’s arguments - that Villalobos was not actually suffering from heat illness, that he refused offers of medical aid, that his symptoms and/or his actual exposure to the risk of heat illness did not warrant implementation of emergency response procedures, that the Division did not cite Villalobos’s primary employer - are persuasive with regard to the ALJ’s finding that Villalobos showed symptoms consistent with possible severe heat illness in circumstances that mandated Employer to implement its emergency response procedures under section 3395, subdivision (f)(2), and that Employer failed to do so.

The ALJ’s Decision is affirmed as to the existence of the violation.

4. The ALJ properly upheld the classification of the violation as Serious.

Labor Code section 6432, subdivision (a), provides in relevant part:

(a) 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. The demonstration of a violation by the division is not sufficient by itself to establish that the violation is serious. The actual hazard may consist of, among other things:

[...]

(2) The existence in the place of employment of one or more unsafe or unhealthful practices, means, methods, operations, or processes that have been adopted or are in use.

The Board has defined “realistic possibility” to mean a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

Here, the violation alleged Employer's failure to implement its emergency response procedures by calling an ambulance when Villalobos, a new employee unaccustomed to working in the heat, exhibited symptoms of possible severe heat illness, including vomiting, while working in high heat conditions.

A heat illness pamphlet produced by the Division, and submitted into evidence by Employer, warns: "Workers have died or suffered serious health problems from" heat illness. (Exhibit B.) The Division's expert, Mary Kotchie (Kotchie), testified that heat illness is exacerbated when an already dehydrated person is vomiting, and that in such cases, lack of swift emergency medical attention beyond mere first aid can lead to death. (Decision, p. 9; Division's Answer to Petition for Reconsideration, p. 5.) It is a realistic possibility that failure to implement the emergency response procedures of a HIPP could result in serious injury or death.

The Division therefore established that Employer's failure to call an ambulance for Villalobos created a hazard with a realistic possibility of resulting in serious injury or death. In rebuttal, Employer argues, "There is no evidence that Appellant adopted a practice that caused or worsened" Villalobos's pre-existing and then-undiagnosed medical condition, and Flores "would have transported the employee for medical treatment, but for the worker's emphatic objections." (Employer's Petition, p. 21, emphasis in original.)


We have addressed both of these arguments. Employer exposed Villalobos to conditions with a high risk for heat illness, and failed to implement its own emergency procedures when Villalobos displayed symptoms indicative of potential severe heat illness. The resulting hazard carried with it a realistic possibility of serious injury or death.

The classification of the violation is upheld.

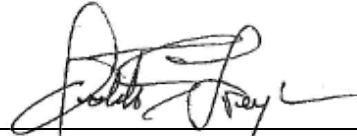
DECISION

For the reasons stated above, the ALJ's decision is upheld.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD



Ed Lowry, Chairman



Judith S. Freyman, Board Member



Marvin P. Kropke, Board Member



FILED ON: **01/27/2021**

SUMMARY TABLE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of:
APTCO, LLC

Inspection No.
1332715

Citation Issuance Date: **12/21/2018**

C I T A T I O N	I T E M	S E C T I O N	T Y P E	C I T A T I O N / I T E M R E S O L U T I O N	A F F I R M E D	V A C A T E D	P E N A L T Y P R O P O S E D B Y D O S H I N C I T A T I O N	F I N A L P E N A L T Y A S S E S S E D
1	1	3395 (f)(2)	S	ALJ Decision affirmed.	A		\$13,500.00	\$6,750.00
Sub-Total							\$13,500.00	\$6,750.00

Total Amount Due* **\$6,750.00**

**You may owe more than this amount if you did not appeal one or more citations or items containing penalties.
Please call (415) 703-4291 if you have any questions.*

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to:
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2. Write the **Inspection No.** on your payment

3. If sending via US Mail:
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Abbreviation Key:

G=General	R=Regulatory	Er=Employer	
S=Serious	W=Willful	Ee=Employee	A/R=Accident Related
RG=Repeat General	RR=Repeat Regulatory	RS=Repeat Serious	