BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
UNITED PARCEL SERVICE, INC. **5588 CUSHING PARKWAY** **FREMONT, CA 94538**	**1604884**
Employer	**DECISION**

Statement of the Case

United Parcel Service, Inc. (Employer), provides package delivery services for business and residential customers. On June 27, 2022, the Division of Occupational Safety and Health (the Division), through Senior Safety Engineer Perry Churchill (Churchill), commenced an inspection of Employer at 4500 Norris Canyon in San Ramon, California, in response to a complaint.

On December 23, 2022, the Division issued one citation to Employer. The citation alleges Employer failed to implement effective emergency response procedures for responding to signs and symptoms of heat illness.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, the reasonableness of abatement,[1] and the reasonableness of the proposed penalty. Employer also asserted a series of affirmative defenses for the citation and the alleged violation.[2]

This matter was heard by Christopher Jessup (Jessup), Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (the Appeals Board). ALJ Jessup conducted the hearing from Sacramento, California, on May 30 and 31, 2024, with the parties and witnesses appearing remotely via the Zoom video platform. Eldrin Masangkay,

[1] While the reasonableness of abatement was raised as an issue by Employer at the time it filed the appeal, Citation 1 shows that the alleged violation was corrected during inspection. Accordingly, the issue of abatement is rendered moot because there was no allegation by the Division of an unabated violation at issue in this matter.

[2] 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).)

attorney with Morgan, Lewis & Bockius LLP, represented Employer. Staff Counsels, Kathryn Tanner and P. Ann Surapruik, represented the Division. The matter was submitted on October 31, 2024.

Issues

1. Did Employer fail to implement effective emergency procedures for responding to signs and symptoms of heat illness?

2. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

3. Did Employer rebut the presumption that the violation alleged in Citation 1 was properly classified as Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

4. Is the proposed penalty for Citation 1 reasonable?

Findings of Fact

1. Employer's Heat Illness Prevention Plan requires Employer to contact 911 if an employee is exhibiting symptoms of severe heat illness, including vomiting.

2. Jason Smith (Smith) was employed by Employer on September 6, 2022, and was delivering packages to businesses on that date, which involved outdoor labor.

3. Smith experienced symptoms of heat illness including headache, excessive sweating, nausea, and vomiting.

4. Smith notified Employer, using Employer's messaging system, that he was experiencing symptoms, including specifically informing Employer that he had vomited.

5. In response to Smith's notification that his symptoms included vomiting, Smith's manger, Scott MacDonald (MacDonald), went to Smith's location.

6. MacDonald did not immediately contact 911 or other emergency medical services upon learning that Smith was vomiting.

7. After MacDonald arrived, Smith vomited a second time. After Smith vomited a second time, MacDonald called 911.

8. Churchill was current on his Division-mandated training as of the date of hearing.

9. Delayed treatment for heat illness poses a realistic possibility of death or serious physical harm.

10. The penalty for Citation 1, Item 1, was properly calculated in accordance with California Code of Regulations, title 8, sections 335 and 336 and with the Division's policies and procedures.[3]

Analysis

1. Did Employer fail to implement effective emergency procedures for responding to signs and symptoms of heat illness?

The Division cited Employer for a violation of California Code of Regulations, title 8,[4] section 3395, subdivision (f). Section 3395, subdivision (f), provides:

> (f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:
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> (1) Ensuring that effective communication by voice, observation, or electronic means is maintained so that employees at the work site can contact a supervisor or emergency medical services when necessary. An electronic device, such as a cell phone or text messaging device, may be used for this purpose only if reception in the area is reliable. If an electronic device will not furnish reliable communication in the work area, the employer will ensure a means of summoning emergency medical services.
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> (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.
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> (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.

[3] This Finding of Fact is pursuant to stipulation by the parties.

[4] All references are to California Code of Regulations, title 8, unless otherwise indicated.

(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.

(3) Contacting emergency medical services and, if necessary, transporting employees to a place where they can be reached by an emergency medical provider.

(4) Ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

In Citation 1, the Division alleges:

Prior to and during the course of inspection, including but not limited to, June 27, 2022, the employer failed to follow their own emergency response procedures when dealing with employees suffering from suspected heat illness, in the following instances:
1 - The employer failed to stay on the phone with the employees while they waited for EMS to be called and arrived [*sic*].
2 - The employer failed to call 911 when notified by the employee that they needed help.
3 - The employer failed to respond in a timely manner to an employee who was experiencing a suspected heat illness.

"The Division has the burden of proving a violation by a preponderance of the evidence." (*Wal-Mart Stores, Inc. Store # 1692,* Cal/OSHA App. 1195264, Decision After Reconsideration (Nov. 4, 2019).) "'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." (*Sacramento County Water Agency Department of Water Resources,* Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).) Full consideration is to be given to the negative and affirmative inferences to be drawn from all the evidence. (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.)

The evidence presented at hearing focused on Employer's response to reports of signs and symptoms of heat illness by employees. As such, the initial focus of the analysis will be directed to section 3395, subdivision (f)(2), to examine whether Employer implemented effective procedures for responding to signs and symptoms of possible heat illness.

In order to establish a violation of section 3395, subdivision (f)(2), the Division must establish that an employer failed to have or implement procedures to respond to signs and symptoms of possible heat illness. In *Giumarra Vineyards Corporation,* Cal/OSHA App. 1256643, Denial of Petition for Reconsideration (May 26, 2020) (hereafter *Giumarra*), the Appeals Board identified that section 3395, subdivision (f)(2), is a performance standard that establishes a goal for employers without mandating the means for employers to achieve that goal. In *Giumarra*, the Appeals Board explains that section 3395, 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. Notably, "severe" is defined in section 3395, subdivision (f)(2)(B), to include vomiting. In *Giumarra*, the Appeals Board considered an incident involving an employee with severe symptoms of heat illness, in that case disorientation and/or irrational behavior, and concluded that because that employer had knowledge of the symptoms it was required to implement emergency medical response procedures. The Appeals Board explained:

> 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.
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> 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.

(*Giumarra Vineyards Corporation, supra,* Cal/OSHA App. 1256643.)

a. Did Employer fail to include appropriate procedures to respond to signs and symptoms of severe heat illness in its Heat Illness Prevention Plan?

Turning first to Employer's Heat Illness Prevention Plan (HIPP), it is necessary to consider whether the written plan has sufficient response instructions to satisfy the requirements of section 3395, subdivision (f)(2). Appendix A of the HIPP lists symptoms of heat stroke to include vomiting and indicates that the first aid guidance is to "Call 911." (Exh. 19.) Notably, all of the other response actions provided in conjunction with heat stroke come after "Call 911" and follow the words "While waiting for help." (*Id.*) Additionally, in a portion of the HIPP under the title of "Section 3. Responsibilities of [Managers/Supervisors] (All)" the following is provided:

> First Aid and Emergencies. Supervisors and managers will maintain frequent communication with employees via telephone and/or DIAD text messaging, so that emergency medical services can be called if needed. When an employee reports or shows symptoms of possible heat illness, supervisors and managers will take immediate and appropriate steps to keep the stricken employee cool and comfortable, such as having the employee sit or lie down in a cool shady area and drink water or other cool beverages, monitor the employee via telephone and/or DIAD text messaging while the employee is resting in the shade, and ensure they do not leave the site without being offered appropriate first aid or provided

with emergency medical services. Supervisors and managers will use *Appendix A* as a guide for appropriate first aid and emergency response.

(Exh. 19, italics in original.)

The HIPP also mentions "911" in several places and provides, in relevant parts:

Heat Stroke – IMMEDIATE MEDICAL EMERGENCY! CALL 911. Start appropriate cooling and first aid procedures. The body core temperature rises rapidly to dangerous levels and may result in permanent disability or death.

[…]

NOTE: HEAT STROKE IS A MEDICAL EMERGENCY. IF HEAT STROKE IS SUSPECTED CALL 911. Engage in appropriate cooling and first aid procedures.

[…]

(Exh. 19, emphasis in original.)

The foregoing sections of the HIPP provide that severe heat illness symptoms, including vomiting, require a response including calling 911 to obtain emergency medical attention. As discussed in *Giumarra*, "[t]he 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." The HIPP meets this standard where it identifies heat stroke as a medical emergency and requires immediately calling 911. Having not found Employer's written HIPP to be deficient, it is necessary to consider the implementation of Employer's HIPP through the instances that gave rise to the citation.

b. Did Employer fail to implement appropriate procedures to respond to signs and symptoms of severe heat illness?

As discussed above, in *Giumarra*, the Appeals Board explained that section 3395, 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. Additionally, in *Aptco, LLC,* Cal/OSHA App. 1332715, Decision After Reconsideration (Jan. 27, 2021), the Appeals Board held that compliance with section 3395, subdivision (f)(2), requires employers to implement their own emergency response procedures if any employee reports signs or symptoms which are indicators of suffering from possible heat illness. In *Aptco,*

LLC, *supra,* Cal/OSHA App. 1332715, the Appeals Board considered facts where a supervisor failed to immediately call 911 while aware that an employee had vomited after working outdoors in high heat conditions. The Appeals Board held:

> 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.

(*Id.*)

In the instant matter, Smith, an employee of Employer, had an incident on September 6, 2022, where he developed signs and symptoms of heat illness while performing his job duties of delivering packages to business locations. Smith testified about the events and that testimony is relied upon here for the following findings. Smith's symptoms started with headache, excessive sweating, and some nausea. As a result, Smith messaged Employer to advise regarding his condition. Shortly thereafter, Smith vomited. Smith then sent a message to Employer to advise that he vomited. Smith received a message back that someone would come to check on him right away and Smith's manager, MacDonald, appeared at his location a short while later. MacDonald gave Smith water and then Smith vomited again. MacDonald walked Smith to a nearby store and then MacDonald called 911. Smith was subsequently taken to a hospital and received treatment.

In summation, Smith experienced symptoms of heat illness, including vomiting, in conjunction with outdoor employment and notified Employer of those symptoms, and specifically noting the vomiting. Additionally, pursuant to Smith's testimony, it is inferred that MacDonald did not contact 911 or other emergency medical services upon learning that Smith was vomiting, but instead waited until he drove over to check on Smith. Both Employer's HIPP and section 3395, subdivision (f)(2)(B), identify vomiting as a symptom of severe heat illness. Employer's HIPP requires that when an employee vomits, Employer's managers or supervisors must call 911 immediately. These facts bear a notable similarity as to those under consideration in *Aptco, LLC*, *supra,* Cal/OSHA App. 1332715. As the Appeals Board explained in that case, "vomiting is a potential sign of severe heat illness that is specifically listed in section 3395, subdivision (f)(2)" and it triggers the "safety order's mandate to implement emergency response procedures." (*Id.*) Here, Employer's failure to contact 911 in conformance with its own HIPP is a failure to effectively implement its HIPP.

Having found that Employer failed to comply with the provisions of section 3395, subdivision (f)(2), in relation to the allegations in instance 2, the Division has met its burden of

proof to establish a violation of section 3395, subdivision (f), and Citation 1 is affirmed. The Appeals Board has held that a citation may be upheld on the basis of a single instance, so here it is unnecessary to consider whether Employer violated other portions of section 3395, subdivision (f). (*Golden State Boring & Pipe Jacking, Inc*, Cal/OSHA App. 1308948, Decision After Reconsideration (Jan. 27, 2021).)

2. Did the Division establish a rebuttable presumption that Citation 1 was properly classified as Serious?

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

> 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:
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> […]
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> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in:

> (1) Inpatient hospitalization for purposes other than medical observation.
> (2) The loss of any member of the body.
> (3) Any serious degree of permanent disfigurement.
> (4) Impairment sufficient to cause a part of the body or the function of an organ to become permanently and significantly reduced in efficiency on or off the job, including, but not limited to, depending on the severity, second-degree or worse burns, crushing injuries including internal injuries even though skin surface may be intact, respiratory illnesses, or broken bones.

(Lab. Code §6432, subd. (e).)

The Appeals Board has explained the term "realistic possibility" means a prediction that is within the bounds of human reason, not pure speculation. (*Sacramento County Water Agency Department of Water Resources*, *supra,* Cal/OSHA App. 1237932.)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Churchill, a Senior Safety Engineer for the Division, testified that he was current on his Division-mandated training as of the hearing. Churchill testified that the hazard of delayed treatment for heat illness could lead to heat stroke which could lead to medical conditions including seizures, convulsions, coma, organ failure, brain damage, or death. Churchill testified that there is a realistic possibility that a delay in treatment for an employee with the signs and symptoms of heat illness can lead to serious injury or death. As such, the Division demonstrated that there was a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation.

Accordingly, the Division established a rebuttable presumption that the citation was properly classified as Serious.

3. Did Employer rebut the presumption that the violation alleged in Citation 1 was properly classified as Serious by demonstrating that it did not know, and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b); and
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> (2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

In the instant matter, Employer failed to respond to Smith's report of severe heat illness symptoms by contacting 911 in compliance with its HIPP. As the violation arose from Employer's failure to act in conformance with its own safety policy, it cannot be concluded that Employer took all the steps a reasonable and responsible employer in like circumstances would be expected to take, before the violation occurred, to anticipate and prevent the violation.

Accordingly, Employer failed to rebut the presumption of a Serious classification, and the Serious classification was properly established.

4. Is the proposed penalty for Citation 1 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*Sacramento County Water Agency Department of Water Resources, supra,* Cal/OSHA App. 1237932, citing *RNR Construction, Inc., supra,* Cal/OSHA App. 1092600.)

The parties stipulated that the penalty was calculated in accordance with the Division's policies and procedures. As the citation is affirmed and no additional evidence was presented regarding the penalty calculations to call them into question, the proposed penalty is found reasonable.

Conclusion

The evidence supports a finding that Employer violated section 3395, subdivision (f), by failing to implement effective emergency response procedures. The citation was properly classified as Serious and the proposed penalty is found reasonable.

Order

It is hereby ordered that Citation 1, Item 1, is affirmed and the associated penalty is sustained and assessed as set forth in the attached Summary Table.

/s/ Christopher Jessup

Dated: 11/25/2024

Christopher Jessup
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.**