

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

In the Matter of the Appeal of:

**WHITE FOREST NURSERY, INC.
300 MORNING DRIVE
BAKERSFIELD, CA 93306**

Employer

Inspection No.

1602873

DECISION

Statement of the Case

White Forest Nursery, Inc. (Employer), is a business that grows plants outdoors on-site for retail sales to the public. On June 16, 2022, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Napoli Sams (Sams), commenced an inspection of Employer's worksite located at 300 Morning Drive in Bakersfield, California.

On December 2, 2022, the Division issued two citations to Employer alleging two violations of California Code of Regulations, title 8.¹ The citations allege that Employer: (1) failed to ensure that portable fire extinguishers were visually inspected monthly; and (2) failed to provide potable drinking water to employees.

Employer filed a timely appeal of the citations, contesting the existence of the violations and the reasonableness of the proposed penalties.

This matter was heard by Leticia Tanner, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board (Appeals Board) in Sacramento, California, on December 10, 2024, and January 16, 2025. ALJ Tanner conducted the hearing with all participants appearing remotely via the Zoom video platform. Employer was represented by its owners, Jere and Rita White. Laurie Gier, District Manager, represented the Division. The matter was submitted for Decision on February 25, 2025.

¹ Unless otherwise specified, all references are to sections of the California Code of Regulations, title 8.

Issues

1. Did Employer fail to ensure that portable fire extinguishers were visually inspected monthly?
2. Did Employer fail to ensure that potable water was provided for its employees, and the frequent drinking of water was encouraged?

Findings of Fact

1. On June 16, 2022, Employer's worksite had a portable fire extinguisher mounted on an interior wall intended to be used by employees indoors.
2. Jeralynn Mica-Guzman (Mica-Guzman) performed monthly visual inspections of the portable fire extinguisher.
3. Employer had a water fountain located in the outdoor area in the center of the nursery that was used for drinking and watering the plants.
4. Employees had full access to potable water from the outdoor water fountain and regularly drank the water that was suitably cool.
5. Sams did not test the temperature of the water dispensed from the water fountain at any time during the inspection.
6. Sams did not take any samples of water from the water fountain and conducted no other testing of the water for impurities or pH levels.
7. Employer encouraged its employees to frequently drink water with daily audible reminders three to five times a day using a radio.
8. The water fountain was plumbed and continuously provided potable water available at no cost to employees.
9. The water fountain was located as close as practicable to where outdoor employees were working.

Analysis

1. Did Employer fail to ensure that portable fire extinguishers were visually inspected monthly?

The Division cited Employer for a violation of section 6151, subdivision (e)(2). Section 6151, subdivision (e)(2), provides:

(e) Inspection, Maintenance and Testing.

[...]

(2) Portable extinguishers or hose used in lieu thereof under Subsection (d) (3) of this Section shall be visually inspected monthly.

The Alleged Violation Description for Citation 1 alleges:

Prior to and during the course of the inspection, including but not limited to, on June 16, 2022[,], the employer did not ensure that the portable fire extinguishers were visually inspected monthly.

a. Applicability of the Safety Order

The safety order, section 6151, applies to Portable Fire Extinguishers. Section 6151, subdivision (a), further limits the scope and application as follows:

The requirements of this Section apply to the placement, use, maintenance and testing of portable fire extinguishers provided for the use of employees.

The Division's inspector observed and photographed a portable fire extinguisher mounted on an interior wall during his inspection. (Exh. 19.) Employer did not dispute that it was for employee use. Therefore, section 6151, subdivision (e)(2), applies to Employer.

b. Violation of the Safety Order

To prove a violation of section 6151, subdivision (e)(2), the Division must establish that Employer did not perform monthly visual inspections of a portable fire extinguisher.

The Division cited Employer for lack of monthly visual inspections of a portable fire extinguisher based upon its failure to have a tag, or other records, to demonstrate that Employer had conducted the monthly visual inspections. Sams testified he observed a portable fire extinguisher during the Division's inspection. (Exh. 19.) Sams asked Mica-Guzman if Employer visually inspected the fire extinguisher. According to Sams, Mica-Guzman replied "No." (ref. Exh. 8, p. 2.)

However, Mica-Guzman credibly testified that Sams asked her during the inspection if the fire extinguisher was inspected monthly, and she replied "Yes." Sams requested Mica-Guzman produce a written record for the monthly inspections. Mica-Guzman further testified that she performed the visual inspection monthly based on a calendared reminder, but did not maintain a written record of the inspections.

The Appeals Board cannot impose more specific requirements than those set by the Occupational Health and Safety Standards Board (Standards Board). (*Hylton Drilling Co.*, Cal/OSHA App. 82-216, Decision after Reconsideration (Jan. 17, 1986).)

The safety order does not require a written record of Employer's monthly visual inspections of a portable fire extinguisher. Mica-Guzman performed the required monthly visual inspections. Thus, the absence of a tag on the fire extinguisher is not a violation of the safety order.

The Division failed to meet its burden to prove by a preponderance of the evidence that Employer failed to visually inspect the fire extinguisher monthly as required by section 6151, subdivision (e)(2). Accordingly, Citation 1 is dismissed.

2. Did Employer fail to ensure that potable water was provided for its employees, and the frequent drinking of water was encouraged?

The Division cited Employer for a violation of section 3395, subdivision (c). Section 3395, subdivision (c), provides:

- (c) Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable, including but not limited to the requirement that it be fresh, pure, suitably cool, and provided to employees free of charge. The water shall be located as close as practicable to the areas where employees are working. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers

may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged.

In Citation 2, the Division alleges:

Prior to and during the course of the inspection, including but not limited to, on June 16, 2022, the employer failed to ensure that the frequent drinking of water was encouraged for the employees that were assigned to work outdoors. The water fountain was connected to the county water being used to water the plants and the fountain was located outside under the direct sunlight.

a. Applicability of the Safety Order

The safety order applies to all outdoor places of employment. (§3395, subd. (a)(1).) Section 3395, subdivision (c), applies to all outdoor places of work regardless of temperature. (*CA Forestry & Fire Protection*, Cal/OSHA App. 10-0728, Denial of Petition for Reconsideration (Aug. 10, 2012).) The water must be in a "readily accessible" location. (*Id.*)

Employer is an owner/operator of a nursery business who had employees who worked outdoors, and who were exposed to outdoor conditions. Therefore, Employer is required to comply with section 3395, subdivision (c).

b. Violation of the Safety Order

The Division has the burden of proving an alleged violation by a preponderance of the evidence. (*Guy F. Atkinson Construction, LLC*, Cal/OSHA App. 1332867, Decision After Reconsideration (Jul. 13, 2022).) “‘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).)

In order to establish a violation of section 3395, subdivision (c), the Division must establish that Employer failed to provide water free of charge for its outdoor employees that is potable, suitably cool and sufficient. Employer’s provision of water for its outdoor employees must encourage the frequent drinking of water throughout the day. The obligation to "provide" water means to obtain, or pay for, the water, and have it readily accessible by its employees. (*Id.*,

citing *CA Forestry & Fire Protection*, Cal/OSHA App. 10-0728, Denial of Petition for Reconsideration (Aug. 10, 2012).)

1. Potable

The word “potable” is defined as “suitable for drinking.” (<https://www.merriam-webster.com/dictionary/potable> <accessed February 20, 2025>.) The Division argued that Employer’s water provision for its employees was not potable, and in violation of section 3395, subdivision (c), and presented evidence and argument that the water was inadequate for various reasons.

The Division argued that the water from the water fountain was not potable because it was connected to water hoses that watered the plants. (Exh. 20.) Sams testified he observed several employees working outdoors at the time of inspection. Sams observed one water fountain located outdoors in the center of the nursery to which employees had access.

Sams interviewed employee Amanda Poe (Poe) during the Division’s inspection. Sams testified that Poe told Sams during the inspection that employees do not drink from the outdoor water fountain because the water is not cold. (ref. Exh. 8.) (Hearing Transcript (Hrg. Tr.) Dec. 10, 2024, p. 47, ln. 10 - p. 48, ln. 2.) However, Poe testified that she drinks the water from the fountain as needed and denied telling Sams that employees do not drink from the water fountain. (Hrg. Tr. Jan. 16, 2025, p. 44, ln. 25.)

Sams also interviewed employees Clifford Jackson (Jackson) and Mica-Guzman. Sams testified that Jackson told Sams that employees took turns bringing bottled water for the ice chest and Sams noticed that there was no bottled water on the date of inspection. (Hrg. Tr. Dec. 10, 2024, p. 51, ln. 3 - 19.) Jackson testified employees have an ice chest because they prefer colder water and other beverages, and that employees refill water bottles from Employer’s water fountain to place in the ice chest. (Hrg. Tr. Jan. 16, 2025, p. 50, ln. 7-20.) Mica-Guzman testified she makes her coffee using water from the water fountain on a daily basis. (Hrg. Tr. Dec. 10, 2024, p. 155, ln. 22 - p. 156, ln. 1.) Poe, Jackson and Mica-Guzman testified credibly that the employees drink from the water fountain and had full access to the water fountain during working hours.

The Division did not establish how having a hose connected to the same pipe as the drinking fountain affected the potability of the drinking water. The Division did not meet its burden of proof to establish that the water was not suitable for drinking or that the employees did not have full access to drink the water while the hose connected to the fountain was being used to water the plants.

2. Fresh, pure, suitably cool

The water provided by Employer for its outdoor employees must be fresh, pure and suitably cool to comply with the requirements of section 3395, subdivision (c). Sams testified that the location of the water fountain outdoors in high outdoor temperatures caused the pipes to heat the water coming out of the water fountain. Sams opined the employees did not drink from the water fountain because the water it dispensed must be hot. (Hrg. Tr. Dec. 10, 2024, p. 116, ln. 23 - p. 117, ln. 12.) Sams concluded water from the outdoor water fountain was not potable due to the fountain dispensing water that he believed was not suitably cool or fresh for drinking. (Hrg. Tr. Dec. 10, 2024, p. 117, ln. 9-12.)

However, Mica-Guzman and Poe testified they drink the water on a regular basis. Guzman testified that the water from the fountain during the summer is the temperature of “tap water.” (Hrg. Tr. Dec. 10, 2024, p. 155, ln. 11-20.) Poe denied telling Sams during the inspection that the water in the water fountain was too hot to drink. (Hrg. Tr. Jan. 16, 2024, p. 39, ln. 15-19.) Poe testified the water was “suitably cool” even in very high outdoor temperatures and described the temperature of the water on a hot day as “cool, refreshing, cool, cold.” (Hrg. Tr. Jan. 16, 2024, p. 39, ln. 2-14.) Sams testified that he did not touch the water dispensed from the outdoor water fountain or otherwise measure the water’s temperature during his inspection. (Hrg. Tr. Dec. 10, 2024, p. 119, ln. 14-16.)

Sams also testified the water fountain was under direct sunlight and appeared unsanitary and unsuitable for drinking (ref. Exh. 17). (Hrg. Tr. Dec 10, 2024, p. 50, ln. 4-9; p. 54, ln. 1-14.) Sams claimed the water fountain bowl had a lot of buildup and its appearance made it unsuitable for drinking the water. (Hrg. Tr. Dec 10, 2024, p. 116, ln. 15-22.) According to Poe, the white residue on the fountain was calcium or mineral deposits which did not discourage her from drinking from the water fountain. (Hrg. Tr. Jan. 16, 2025, p. 42, ln. 10-15.) Sams did not test the quality of the water for impurities or pH levels. (Hrg. Tr. Dec. 10, 2024, p. 132, ln. 14-19.) Sams’ impression of the water fountain’s appearance might lead one to suspect the water may be unsuitable for drinking, but the Division has a burden of proof that is not satisfied with mere suspicion.

The Division presented no evidence regarding the actual temperature or quality of the water. Mica-Guzman and Poe’s testimony is credited and refutes the Division’s assertion that the water from the fountain was not fresh, pure and suitably cool. The Division did not meet its burden of proof to establish the water was not “fresh, pure, suitably cool.”

3. Encouraged

The safety order also requires Employer to encourage the frequent drinking of water by its employees. The Division argued that Employer failed to encourage employees working outdoors to frequently drink water. Sams testified Employer did not encourage the drinking of water based upon the appearance and location of the water fountain, temperature of the water, and because the water fountain was being used to water the outdoor plants in the nursery. Sams testified that the hoses connected to the water fountain shared the same pipes which discouraged its use as a drinking fountain.

Jackson testified he did not tell Sams that he did not drink from the water fountain because it was connected and watering the plants. (Hrg. Tr. Jan. 16, 2025, p. 49, ln. 22 - p. 50, ln. 1.) Mica-Guzman, Poe, and Jackson all testified they regularly drank the water from the water fountain. Poe and Jackson testified that Employer made daily audible reminders encouraging employees to drink water. Jackson testified employees have radios used by Employer to announce reminders “every two or three hours.” (Hrg. Tr., Jan. 16, 2025, p. 57, ln. 3-16.) Poe testified that, on hot days, Employer announced a reminder to encourage the drinking of water “three to five times.” (Hrg. Tr. Jan. 16, p. 42, ln. 24, p. 43, ln. 5.)

Employer made regular announcements to all the employees throughout hot days reminding them of the importance of drinking water. The Division did not establish by a preponderance of the evidence that employees were not encouraged by Employer to frequently drink water. Similarly, the Division did not establish that employees were discouraged from drinking from the water fountain for any reason.

4. Provided free of charge

The Division asserted Employer’s employees were required to purchase and provide their own water. Sams testified that the employees purchased bottled water for an ice chest located at Employer’s worksite using recycling money. Sams testified that Jackson said Employer provided water for its employees in the ice chest. (Hrg. Tr. Dec. 10, 2024, p. 51, ln. 13-21.) Sams relied on the employee interviews to determine a violative condition due to Employer not providing bottled water in the ice chest on the date of the Division’s inspection. Employer was cited because it had allegedly not provided its employees with bottled water free of charge and there was allegedly no potable water available for employees to drink at the work site.

Poe and Jackson testified that the employees preferred their beverages ice cold during hot temperatures and used the ice chest to cool their beverages. Poe and Jackson testified that employees had water available throughout the day at Employer’s water fountain at no cost when

the ice chest had no water bottles available. Poe testified the employees recycled so they did not spend their own money on bottled water for the ice chest. (Hrg. Tr. Jan. 16, 2025, p. 40, ln. 21 - p. 41, ln. 20; p. 50, ln. 13-16.) Jackson testified he did not tell Sams that the employees needed to bring their own water for the ice chest. (Hrg. Tr. Jan. 16, 2025, p. 49, ln. 12-15.)

The Division did not meet its burden of proof to establish that employees did not have drinking water available at all times free of charge.

5. Plumbed and continuously supplied

The Division argued that the plumbed water fountain with a hose connected and used to water plants rendered the water not potable. However, Employer's witnesses (Mica-Guzman, Poe, and Jackson) testified they regularly drank from the water fountain which always had water available. The water fountain is located outdoors in the center of the nursery where all employees working outdoors always had full access. The water source for the outdoor water fountain is plumbed and continuously supplied. (Exh. 20.) The Division presented no evidence that the location was too far away from anyone. The Division's argument is not persuasive to demonstrate that the water from the plumbed fountain which also watered the plants was not potable or continuously supplied.

The Division did not meet its burden of proof by a preponderance of the evidence to establish the elements to demonstrate that the water provided by Employer for its outdoor employees was not potable. The Division's evidence did not support a finding that Employer did not frequently encourage its outdoor employees to drink water. The Division presented no evidence that the location of the water fountain was not as close as practicable to where the outdoor employees were working. Accordingly, Citation 2 is dismissed.

Conclusion

The Division failed to establish a violation of section 6151, subdivision (e)(2).

The Division failed to establish a violation of section 3395, subdivision (c).

Order

It is hereby ordered that Citation 1 is dismissed and the penalty is vacated.

It is hereby ordered that Citation 2 is dismissed and the penalty is vacated.

Dated: 03/26/2025

/s/ Leticia Tanner

Leticia Tanner
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.**

If no petition is filed, the penalty amount set forth in the Summary Table is due and payable 30 days after the Order or Decision is issued. If the Appeals Board approved a payment plan, all payments are due in accordance with the dates indicated in the Summary Table. If a Petition for Reconsideration is filed, no payment should be made until the final outcome of the appeal.