

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

ROSENDIN ELECTRIC INC.
4700 College Oak Drive
Sacramento, CA 95841

Employer

DOCKET 12-R2D1-3028

DECISION

Introduction

Rosendin Electric Inc. (Employer) is an electrical sub-contractor involved in construction projects. Beginning August 15, 2012, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Rhyanne Truax (Truax), conducted a safety inspection at a place of employment maintained by Employer at 4700 College Oak Drive, Sacramento, California. On October 5, 2012, the Division cited Employer for a violation of Title 8, California Code of Regulations, section 3395(f)(3), failure to establish required written procedures regarding heat illness and related emergency procedures, and to make those written procedures available to employees and representatives of the Division upon request.¹

Employer filed a timely appeal for Citation 1, Item 1, contesting the existence of the violation. On September 20, 2013, the ALJ² granted Employer's motion to amend its appeal to allow Employer to also contest the classification of the violation, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalty. Finally, the ALJ granted Employer's motion to assert a series of affirmative defenses, which were attached to the amended appeal form as an addendum, and are incorporated herein as though set forth in full.

This matter was heard by Kevin J. Reedy, Administrative Law Judge for the California Occupational Safety and Health Appeals Board, at Sacramento, California on November 13, 2013. Lisa Prince, of Walter and Prince, represented Employer. Jon Weiss, District Manager, represented the Division. The parties presented oral and documentary evidence. The parties filed post-hearing briefs. The matter was submitted for decision on December 13, 2013. The submission date was extended to March 20, 2014 by the ALJ.

¹ Unless otherwise specified, all references are to Sections of Title 8, California Code of Regulations.

² Administrative Law Judge

Stipulations and Pre-Hearing Determinations

The parties stipulated to the following (Exhibit 3):

1. Rhyanne Truax, Associate Safety Engineer for Cal/OSHA at the time of the time of the investigation, opened an inspection on August 15, 2012.
2. The inspection site was located at 4700 College Oak Drive in Sacramento, California.
3. The penalty associated with the citation was calculated in accordance with the Division's policies and procedures.
4. The Division increases the good faith assessment to 30% resulting in a revised total proposed penalty amount of \$225.

Issue

1. Whether Employer violated §3395(f)(3) by failing to establish written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of the heat standard.

Findings of Fact

1. Employer did not establish written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of the heat standard.

Analysis

- 1. Employer's HIPP³ lacks required written procedures for complying with four subsections of the heat standard, specifically (f)(1)(B), (G), (H), and (I) of section 3395.**

Section 3395(f)(3), a portion of the Heat Illness Prevention standard, states:

The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

³ Heat Illness Prevention Program

Subsection 3395(f)(1) provides, in relevant parts:

(B) The employer's procedures for complying with the requirements of this standard.

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

(I) The employer's procedures for 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. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

In the citation, the Division alleges the following:

On August 15, 2012, the Division learned that Rosendin Electric Inc. had not established specific procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I).

The requirements of the safety standard are that each employer must: (1) establish procedures complying with subsections (f)(1)(B), (G), (H), and (I) of §3395, (2) the procedures must be in writing, and (3) each employer must make those written procedures available to employees and representatives of the Division upon request. Thus, a violation is established if an employer fails to establish written procedures as described, or if an employer fails to make them available to employees and representatives of the Division upon request.

In *Underground Construction Co., Inc.*, Cal/OSHA App. 09-3518, Denial of Petition for Reconsideration (Mar. 22, 2012), the employer was cited for having a heat illness plan which omitted various required details, such as how to provide water and shade, and how to summon emergency medical assistance. The Board, in *Underground Construction, supra*, found that “those elements of a heat illness prevention plan (HIPP) are necessary and apply regardless of when and where the plan was required: a HIPP which lacks necessary elements is not compliant with §3395, and the propounding employer is in violation regardless of whether the plan's operations were ‘triggered’ by workplace conditions.”

All procedures necessary for complying with the heat standard must be in writing and in the HIPP. (Subsection (f)(1)(B).) In response to the Division's request for a copy of its HIPP, employer provided a single document entitled "Heat Illness Prevention Program," (Exhibit 4). The document presented by Employer as its HIPP is missing the written provisions required by §3395(f)(3), as set out in subsections (f)(1)(B), (G), (H), and (I). Truax and Brent Bowers (Bowers), Employer's Safety Manager, both testified that Exhibit 4 lacks those provisions.

There are no procedures in Employer's HIPP for supervisors to follow to implement the provisions of the HIPP. Employer's HIPP also lacks procedures for supervisors to follow when an employee exhibits symptoms consistent with heat illness.

Nothing in Exhibit 4 covers actual procedures for training employees and supervisors on the various facets of the HIPP and heat illness in general. Section 3395(f)(3), referencing (f)(1)(B), (G), (H), and (I), does not allow any procedures required in an HIPP to remain unwritten. If employer has procedures for supervisors to follow when an employee exhibits symptoms consistent with heat illness, they must be written. (3395(f).) A violation is established with this omission. (*Underground Construction, supra.*)

More violations have also been shown. In addition to the lack of written necessary procedures for supervisory response, Exhibit 4 lacks specific procedures as to how Employer would provide drinking water, and how to replenish drinking water during the shift, all of which is required by subsection (f)(1)(B). Employer provides nothing specific as to how and when it is providing shade.

More instances of a violation of §3395(f)(3), as alleged, are established. Employer's HIPP does not provide specific procedures which describe how an employee or a supervisor is to respond when an employee or a co-worker exhibits symptoms of heat illness, which is required by subsection (f)(1)(G). The program also fails to give adequate direction as to how to make contact with emergency response and provide adequate directions to the site.

Employer's HIPP fails to include a site-specific map, does not indicate a supervisor chain of command, including supervisors' responsibilities, directions to the closest clinic, and fails to include procedures for contacting emergency medical services or making provisions for transportation, all of which is required by subsection (f)(1)(H).

Employer's HIPP fails to include any procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed for emergency responders, including designating a person to be available to ensure that emergency procedures are invoked when appropriate. These must be in writing as required by subsection (f)(1)(I). This

additional instance of a shortcoming in the required written materials supports the citation.

In sum, Employer's HIPP does not contain the elements required in subsections (f)(1)(B), (G), (H), and (I), and is not in compliance with § 3395(f)(3).

2. Employer failed to integrate its written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) into its written HIPP.

Employer contends that Exhibits 4, A, B, C, and D together satisfy the requirements of §3395(f)(3). Employer misinterprets the requirements of the regulation as Note No. 1 contained in §3395(a) calls for a single document containing all the required elements. That Note, under "Scope and Application," provides direction as follows: "The measures required here may be integrated into the employer's written Injury and Illness Program required be §3203, or maintained in a separate document." This language is clear. Employer may choose to integrate the required written provisions of §3395(f)(3) into its IIPP⁴, or maintain those required written provisions in one separate document.

Further guidance regarding the necessity for a fully-integrated written HIPP is provided from the Standards Board's 2006 *Final Statement of Reasons* for §3395, specifically referencing §3395(e)(3) (now numbered 3395(f)(3)⁵.) The Standards Board provided direction as follows:

Subsection (e), as originally noticed, provides that the employer shall have procedures that employees and supervisors need to be aware of through training. It is proposed to add a new subsection (e)(3) to specify that the procedures specified in subsections (e)(1)(B), (G), (H), and (I) shall also be in writing and available upon request to employees and the Division. This modification is made to ensure that the procedures that employees are trained on are documented and available for future reference. The purpose and necessity for this modification is to ensure that the employer documents their procedures in writing and that these written procedures be available for employees and the Division to review.

Employers, then, must document specific aspects of employee heat illness training and make that written documentation available for future reference to both its employees and the Division.

Employer's HIPP was not, on the day of the inspection, made available to the Division. A week later, upon a verbal request by the Division, Employer provided to the Division its HIPP (Exhibit 4). And, at that time, Employer did not provide any of the other documents which it now claims to be part of its

⁴ Injury and Illness Prevention Program

⁵ The lettering of §3395(e)(3) was changed to §3395(f)(3) as the result of a 2010 amendment to §3395.

HIPP (Exhibits A, B, C, and D). Because of Employer's response to the Division's request for the HIPP, it is reasonable to infer that Employer did not consider Exhibits A, B, C, and D to be part of its HIPP. As a result, the Division correctly concluded that Employer failed to document in writing its procedures for complying with (f)(B), (G), (H), and (I). If not available for the Division to review it can also be inferred that a fully-integrated HIPP was also not available for employees to review.

In its closing brief the Division argues that "the development of written procedures to address the particular elements of §3395 is necessary to set forth expectations and direction from the Employer to its employees and further allows the training of employees to those specific procedures." This is a correct interpretation of the rationale promulgated by the Standards Board in its *Final Statement of Reasons, supra*.

Employer's current approach of assembling several scattered documents and then labeling those documents its HIPP does not satisfy the requirements of the regulation. New employees reading Exhibit 4 would not be made aware of any other documents relating to heat illness. Employees would also have to be directed to wall postings to garner the information on Exhibits A and B. Employees would have to be directed to the location of Exhibit C to gain site-specific information. And finally, employees would have to be directed to where Exhibit D is kept to review any heat illness training information included on that document. In keeping with the intent of the Standards Board, this approach is not logical, nor is it reasonable. The safety order requires that written procedures be available for employees and the Division to review. Employer failed make its HIPP, which would include the written training required by subsections (f)(B), (G), (H), and (I), available for review by the Division on the initial inspection date, and again failed to make that fully-integrated written HIPP available to the Division a week later.

Employer's argument that Exhibits A through D and Exhibit 4, constitute its written HIPP only serves to obfuscate the salient issue before the Appeals Board, to wit, whether Employer established a written and fully integrated HIPP. As the Appeals Board found in *Underground Construction, supra*, a HIPP which lacks necessary elements is not compliant with §3395. Section 3395(f)(3) requires various portions of an employer's HIPP to be in writing and made available to employees and to representatives of the Division upon request. The record is clear that Employer did not establish written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of the heat standard, and then include those procedures in its HIPP.

3. Exhibits 4, A, B, C, and D, even if taken as a whole, do not satisfy the requirements of §3395(f)(3).

As discussed above, cobbling together a series of documents associated with heat illness procedures and training (Exhibits A through D⁶) and then characterizing the documents as part of its written HIPP, does not satisfy the requirements of §3395(f)(3). As noted above, Truax and Bowers both testified that Exhibit 4 does not include written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of §3395. An analysis of Exhibits A, B, C, and D, therefore, will determine whether Employer had a collection of documents containing the required written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of the heat standard. Some elements of Exhibits A through D may contain topics related to heat illness and prevention but they do not, as a whole, when combined with Employer's HIPP, satisfy the requirements of §3395(f)(3).

Exhibit A is a document entitled "Newsflash," referencing Employer's onsite First Aid Management Program, and life threatening and other types of injuries. The reverse side of Exhibit A also contains the following language: "In case of a life threatening injury call 911." Nothing in this document refers to heat illness. There is no description of how employees are to respond when they or co-workers exhibit symptoms of heat illness. Exhibit A fails to include any of Employer's heat illness procedures required by §3395(f)(3).

Exhibit B is Employer's "Emergency Posting Notice." Nothing in this document refers to heat illness and how this information is to be utilized by employees when they or co-workers exhibit symptoms of heat illness. Exhibit B fails to include any of Employer's heat illness procedures required by §3395(f)(3).

Exhibit C, the site specific plan, covers some heat illness topics on page 25. Employees receive training regarding the signs of heat illness, and what to do in the event symptoms of heat illness occur. A vendor provides weekly water deliveries. Water is made available to all employees in the field. The document also discusses provisions for shade. The same document addresses high heat procedures. However, page 25 does not address what to do if the water runs out, does not address the size of the water bottles, fails to address how much water the employees should drink during the day, and does not address where the specific shaded break areas are located and the amount of shade needed (based on the number of employees). Nothing in Exhibit C covers actual procedures for training employees and supervisors on the various facets of the HIPP and heat illness in general. Therefore, Employer is not in

⁶ There was some inconsistent testimony by Truax, on the one hand, and Zygaczenko and Brent Bowers, Employer's Safety Manager, on the other hand, about the extent to which documents referred to here were available at the work site to workers and to Truax. In view of the finding here that the documents taken together are inadequate to satisfy the requirements of section 3395(f)(3), it is not necessary to make any determinations about which documents were available at the site.

compliance with subsection (f)(1)(B). Section 3395(f)(3) requires that each of subsections (f)(1)(B), (G), (H), and (I) be in writing. Non-compliance with any one of those four subsections would constitute a violation of the safety standard.⁷

Exhibit C, page 25, provides that employees suffering minor heat related symptoms be provided rest and shade, and further provides that its third party medical vendor be contacted to check the affected worker. Bowers estimated that it might take as long as 45 minutes for this medical vendor to arrive to provide treatment. There are no written procedures in place advising co-workers or the employee of what to do, if anything, while waiting for medical attention. Therefore, Employer is not in compliance with subsection (f)(1)(G).

Employer, in its closing brief, argues that “the standard’s provision relating to directing emergency services is intended to apply to situations of remote work where a ready address would be unavailable to first responders,” referencing page 17 of the *Final Statement of Reasons, supra*. According to Bowers, page 27 of Exhibit C was posted at the jobsite trailer. The document includes the jobsite address, the nearest approved clinic, and directions to the clinic, including a map. Bowers testified that the jobsite is not a remote location. The jobsite is, however, located at a parking structure on a college campus. The address provided on Employer’s documents is the address for the college. Subsection (f)(1)(H) requires that procedures for contacting emergency medical services be in writing. Subsection (f)(1)(I) requires that procedures for 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 the instant matter Employer is not absolved of the requirements of (f)(1)(H) and (I) as emergency responders will require more precise information than is provided on its jobsite postings – who will be designated to ensure that emergency procedures are invoked when appropriate, where is the parking structure located on campus, and where at the parking structure will first responders find the affected employee? Therefore, Employer is not in compliance with subsections (f)(1)(H) and (I).

Exhibit D is a two-page document dated August 13, 2012. The first page are notes about heat illness, identifying factors that may increase the likelihood of a worker being struck by heat illness (e.g. weight, poor physical condition, alcohol consumption), and the benefits of acclimatization. The second page is a daily work sign-in sheet which has a column indicating attendance at a “safety toolbox talk” on August 13, 2012, signed by six people. This document provides information that six people received training on the topics listed therein. Exhibit D provides many definitions of words and phrases associated

⁷ Appeals Board precedent holds that if a safety standard includes two or more distinct requirements, if an employer violates any one, it is in violation of the safety standard. Golden State Erectors, Cal/OSHA App. 85-0026, DAR (Feb. 25, 1987). Also: California Erectors Bay Area Inc Cal/OSHA App. 93-503, DAR (Jul 31, 1998).

with general heat illness training, but fails to include any of Employer's heat illness procedures required by §3395(f)(3).

Exhibits A, B, C, and D, collectively, lack the required written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of the heat standard. Thus, as in *Underground Construction Co., supra*, inasmuch as specific required elements of a heat illness prevention program were not included in any of Employer's documents, Employer was not in compliance with the requirements of §3395(f)(3).

The Parties stipulated that the penalty associated with the citation was calculated in accordance with the Division's policies and procedures. The parties further stipulated that the good faith assessment would be increased to 30%, resulting in a revised total proposed penalty amount of \$225. The penalty is therefore established in the amount of \$225.

Conclusions and Order

The evidence supports a finding that Employer violated §3395(f)(3) by failing to establish written procedures for complying with subsections (f)(1)(B), (G), (H), and (I) of the heat standard, which exposed its employees to hazards §3395(f)(3) was designed to address. A penalty of \$225 is assessed for the reasons described herein, and as set forth in the attached Summary Table.

Dated: April 10, 2014

KEVIN J. REEDY
Administrative Law Judge

SUMMARY TABLE

DECISION

<i>In the Matter of the Appeal of:</i> ROSENDIN ELECTRIC INC. DOCKET 12-R2D1-3028					ABBREVIATION KEY: Reg=Regulatory G=General S=Serious ER=Employer DOSH=Division W=Willful R=Repeat 					
IMIS No. 316517390										
DOCKET NO.	CIT. NO.	ITEM NO.	SECTION NO.	TYPE	MODIFICATION OR WITHDRAWAL	A F F I R M	V A C A T E	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
12-R2D1-3028	1	1	3395(f)(3)	G	ALJ affirmed violation	X		\$280	\$225	\$225
						Sub-Total		\$280	\$225	\$225
						Total Due				\$225
NOTE: <i>Please do NOT send payments to the Appeals Board.</i> All Penalty payments must be made to:					(INCLUDES APPEALED CITATIONS ONLY)					
Accounting Office (OSH) Department of Industrial Relations P.O. Box 420603 San Francisco, CA 94142					*You will 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.					

ALJ: KR
POS: 04/10/14

APPENDIX A

SUMMARY OF EVIDENTIARY RECORD

Rosendin Electric Inc.

Docket No. 12-R1D1-3028

Date of Hearing – November 13, 2013

Division's Exhibits – Admitted

Exhibit Number	Exhibit Description
1.	Jurisdictional documents
2.	Penalty calculation worksheet
3.	Stipulations of parties
4.	Employer's HIPP
5.	Copy of section 3395

Employer's Exhibits - Admitted

Exhibit Letter	Exhibit Description
A.	Employer's injury "Newsflash"
B.	Employer's "Emergency Posting Notice"
C.	Employer's Site Safety Plan
D.	Documentation of heat illness training

Witnesses Testifying at Hearing

1. Rhyanne Truax
2. Nick Zygaczenko
3. Brent Bowers

CERTIFICATION OF RECORDING

I, Kevin J. Reedy, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hearing the above-entitled matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge the electronic recording equipment was functioning normally.

Signature

Date