

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

In the Matter of the Appeal  
of:

**DPR CONSTRUCTION, A GENERAL  
PARTNERSHIP**

5010 Shoreham Place  
San Diego, California 92121

Employer

DOCKET 13-R3D2-3734

**DECISION**

**Statement of the Case**

DPR Construction, A General Partnership (Employer) is a construction company. Beginning June 17, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Melissa Brittan (Brittan) conducted an accident inspection at a place of employment maintained by Employer at 9750-1 Summers Ridge Road, San Diego, California (the site). On December 2, 2013, the Division cited Employer for failure to maintain training records [a Regulatory violation of section 3203 subdivision (b)(2)]<sup>1</sup> and for failing to have written procedures regarding heat illness [a General violation of section 3395 subdivision (f)(3)].

Employer filed a timely appeal contesting the violation of the safety orders, classification, and the reasonableness of the proposed penalties for Citation 1, Items 1 and 2.

This matter came on regularly for hearing before Jacqueline Jones, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at San Diego, California on September 3, 2014. Fred Walter, Attorney from Walter & Prince LLP represented Employer. Kathy Derham, District Manager, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on September 3, 2014. The ALJ extended the submission date to August 31, 2015 on her own motion.

---

<sup>1</sup> Unless otherwise specified, all references are to sections of California Code of Regulations, title 8.

## Issues

1. Did Employer fail to maintain training records?
2. Was Citation 1, item 1 properly classified as a Regulatory violation?
3. Was the proposed penalty for Citation 1, item 1, appropriate?
4. Were Employer's employees working outside?
5. Did Employer have written Heat Illness Prevention procedures (HIPP)?
6. Did Employer's HIPP meet the requirements of section 3395 subdivisions (f)(1)(B),(G), (H), and (I)?
7. Was Citation 1, item 2, properly classified as a General violation?
8. Was the proposed penalty for Citation 1, item 2, appropriate?

## Findings of Fact

1. Employer failed to maintain training records.
2. Citation 1, Item 1, failure to maintain training records, was properly classified as Regulatory.
3. The penalty for Citation 1, Item 1, is appropriate.
4. Employer is a construction company with employees working outside.
5. Employer had a written HIPP.
6. Employer's HIPP failed to include procedures for replenishing water, procedures for transporting employees in the event of a medical emergency, procedures on how to monitor the weather or high heat procedures for communication to contact supervisors.
7. Citation 1, item 2 was properly classified as a General violation.
8. The penalty for Citation 1, item 2 is appropriate.
9. The penalties were properly calculated and reasonable for Citation 1, Items 1 and 2.

## Analysis

### **1. Did Employer fail to maintain training records?**

The Division cited Employer for a violation of section 3203, subdivision (b)(2), which provides as follows:

(b) Records of the steps taken to implement and maintain the Program shall include:

(2) Documentation of safety and health training required by subsection (a)(7)<sup>2</sup> for each employee,

---

<sup>2</sup> section 3203, subdivision (a)(7), which provides as follows:

(a) Effective July 1, 1991, every employer shall establish, implement, and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

(7) Provide training and instruction:

(A) When the program is first established;

including employee name, training dates, type of training, and training providers. This documentation shall be maintained for at least one (1) year.

Citation 1, Item 1, alleges as follows:

Training documents were requested on June 17, 2013. The employer did not maintain training records for employees by recording heat illness training on the employers Heat Illness Prevention Training Verification form.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

The Division has to prove that Employer failed to document safety and health training required by subsection (a)(7) for each employee including employee names, training dates, type of training provided and training provider name. On June 17, 2013, Division Safety Engineer Brittan requested documents from the Employer through Dave Flynn (Flynn), Safety Manager as part of her investigation. Brittan testified that she asked for Employer's Illness and Injury Prevention Program (IIPP) in her document request (Exhibit 2) and all Employee Safety Training Records for employee Duane Ringhand (Ringhand). The documents were due on June 21, 2013.

Brittan issued Citation 1, Item 1 because employers are required to maintain training records which record heat illness training. Brittan testified that Employer failed to produce heat illness verification documentation for Ringhand. There was no form signed by Ringhand indicating that he received heat illness training. Employee records for Ringhand confirmed that he began work for Employer on or around February 12, 2013. Brittan testified that Employer is required to keep training records for at least one year. Regional Safety Manager, Karl Shipley conceded that he looked through the company records and there was no heat illness training verification forms for Ringhand. An admission at hearing is an adequate basis on which to rest a finding of fact. (*C & S Battery & Lead*, Cal/OSHA App. 77-0001, Decision After Reconsideration (Oct. 18, 1977).) The evidence supports a finding that

---

(B) To all new employees;

(C) To all employees given new job assignments for which training has not previously been received;

(D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;

(E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,

(F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Employer failed to maintain training records. Therefore, The Division established a violation of section 3203, subdivision (b)(2).

## **2. Was Citation 1, item 1, properly classified as Regulatory?**

Brittan presented Exhibit 7, Division's Proposed Penalty Worksheet and stated that the citation was classified as a Regulatory<sup>3</sup> violation because it is a record keeping violation. Employer did not possess the required documentation recording heat illness training records for employee Ringhand, thus the violation is established. The violation was properly classified as Regulatory because it relates to record keeping requirements.

## **3. Was the proposed penalty for Citation 1, item 1 appropriate?**

There is a rebuttable presumption that the proposed penalties are reasonable once the Division establishes that the penalties were calculated in accordance with the Division's policies, procedures and regulations (Stockton Tri Industries, Inc., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Brittan testified that severity, extent and likelihood are not evaluated on Regulatory violations. The only reduction allowed and allowable was for "Good Faith". The penalty for Regulatory violations start at \$500. Under §335(c), the good faith of an employer is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA and any indications of the employer's desire to comply with the Act by specific displays of accomplishments. "Good Faith is rated as: GOOD-Effective safety program; FAIR-Average safety program; POOR-No effective safety program." (§335(c) The Division allowed a reduction of the penalty in the amount of 15 percent for Employer's good faith during the investigation. Brittan testified that the "fair" rating was because the IIPP was ineffective due to the Section 3203 subdivision (b) (2) violation, resulting in a penalty of \$350. Under these circumstances, a preponderance of the evidence supports the Division's rating of good faith. Employer did not provide adequate evidence to rebut the presumption about calculation of the penalties, and therefore, the penalty for Citation 1, Item 1, of \$350 is found reasonable.

## **4. Were Employer's employees working outside?**

In order for section 3395, subdivision (a) to apply, the Division has to prove that the employer was engaged in outdoor employment. Brittan observed employees engaged in construction work outside at the site. The evidence

---

<sup>3</sup> A Regulatory violation is defined as "a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation; *failure to keep required records*; failure to report industrial accidents, etc. (§334(a).) (emphasis added) The instant violation falls squarely within the definition of regulatory.

confirms that Employer's employees were working outside. Therefore, Employer's construction business was an outdoor place of employment.

**5. Did Employer have written Heat Illness Prevention procedures (HIPP)?**

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 section 3395, (2) the procedures must be in writing, and (3) each employer must make those written procedures available to employees and to the Division upon request.

In this matter Employer was performing construction work outside and was therefore required to have a written Heat Illness Prevention Plan (HIPP) Brittan testified that she gave Flynn a document request form on June 17, 2013 requesting Employer's HIPP. Employer submitted Exhibit 4 in response to the document request on June 21, 2013. Employer had a written HIPP.

**6. Did Employer's HIPP meet the requirements of section 3395 subdivisions (f)(1)(B),(G), (H), and (I)?**

The Division cited Employer for violation of section 3395 subdivision (f)(3)<sup>4</sup> which provides as follows:

- (1) This standard applies to all outdoor places of employment.

Section 3395 subdivision (f)(3), under Heat Illness Prevention, provides the following:

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.

Section 3395 subdivision (a)(2)(B) provides that the Construction industry is subject to all provisions of Section 3395, including high heat provisions.

Subsections 3395 subdivision (f)(1) provides, in relevant parts:

- (B) The employer's procedures for complying with the requirements of the standard. (G) The employer's procedures for responding to symptoms of possible

---

<sup>4</sup> This is the safety order in effect at all relevant times. Section 3395 was subsequently amended effective May 1, 2015.

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:

At the time of the inspection employees perform outdoor construction activities at a jobsite located at 9750-1 Summers Ridge Road in San Diego and the employer had not developed written procedures required by this section to protect employees from the hazard of exposure to heat illness. The employers program did not include such as but not limited to procedures for replenishing water, procedures for transporting employees to a point where they can be reached by an emergency medical service provided, procedures of how to monitor the weather at a jobsite and high heat procedures for communication procedures to contact supervisors.

Here, Employer's plan omitted various required details. Referring to Exhibit 4, Brittan testified that procedures for replenishing water were not provided in the HIPP. Employer did not meet the requirements of subsection (G). Brittan testified that this is a health hazard. Employer had no method of transporting employees suffering from heat illness. As a result, Employer did not meet the requirements of subsection (H).

Brittan testified that medical services are needed when an employee suffers from heat illness because the worker could go into a coma or die from heat stroke. Brittan testified that the HIPP that Employer provided in response to the document request discusses Supervisory Training and makes reference to section 2.5 but there is no section 2.5 in the HIPP document. The HIPP mentions how to monitor weather reports but does not give instructions on how to monitor weather reports. Brittan testified that monitoring the weather is important for outside work because a Supervisor may need to change work hours or make adjustments regarding the need for water. Although the procedures in Exhibit 4 were in writing Employer failed to establish procedures

complying with subsections (f)(1)(B), (G), (H), and (I) of section 3395. The Division established a violation of section 3395 subdivision (f)(3).

**7. Was Citation 1, item 2, properly classified as a General violation?**

Brittan testified that the citation was classified as a general because it has a direct relationship to safety and health. Brittan found moderate severity because if someone suffers heat illness it is likely to affect your health. Here, the Employer argues that they gave the wrong Heat Illness Prevention Program to the Division on June 21, 2013 and that the revised plan was given to the Division on January 29, 2014. Employer additionally argues that if the Heat Illness Prevention Plan had a deficiency said deficiency did not have a relationship with safety and health. The Division has established by a preponderance of the evidence that Employer's written procedures did not meet the requirements needed to protect employees from the hazard of exposure to heat illness. The Division has established that the failure to have a Heat Illness Prevention Plan has a relationship to health and safety. Therefore, Citation 1, item 2 was properly classified as a General.

**8. Was the proposed penalty for Citation 1, item 2 appropriate?**

Brittan found moderate likelihood because all of the employees are affected by the written plan. Construction workers wear lots of equipment such as hard hat and protective equipment and do a lot of upper body and trunk twisting which is taxing on a person and there is a likelihood of heat illness. Brittan rated good faith at fifteen per cent because the Employer's IIPP was not fully implemented in that Employer did not keep training records for all employees.

Employer did not provide adequate evidence to rebut the presumption about calculation of the penalties, and therefore, the penalty for Citation 1, Item 2, \$420 is found reasonable.

**Conclusion**

Therefore, Employer's appeals are denied. The Division established employer failed to maintain training records in violation of section 3203, subdivision (b)(2). The Division established that Employer's HIPP failed to include adequate procedures in violation of section 3395, subdivision (f)(3). Citation1, items 1-2 are affirmed.

**Order**

Citation 1, items 1 and 2 and the proposed penalties totaling \$795 are affirmed. It is further ordered that the penalty indicated above and set forth in the attached Summary Table shall be assessed.

Dated: September 28, 2015

JJ:ao

---

**JACQUELINE JONES**  
Administrative Law Judge

## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

### DPR CONSTRUCTION, A GENERAL PARTNERSHIP Docket 13-R3D2-3734

Abbreviation Key: Reg=Regulatory	
G=General	W=Willful
S=Serious	R=Repeat
Er=Employer	DOSH=Division

IMIS No. 315348987

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	MODIFICATION OR WITHDRAWAL	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
13-R3D2-3734	1	1	3203(b)(2)	Reg	[Failure to maintain training records] ALJ affirmed citation.	X		\$375	\$375	<b>\$375</b>
			3395(f)(3)	G	[Insufficient Procedures heat illness] ALJ affirmed citation.	X		\$420	\$420	<b>\$420</b>
								<b>\$795</b>	<b>\$795</b>	<b>\$795</b>

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$795**

NOTE: Payment of final penalty amount should be made to:

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: JJ/ao  
POS: 09/28/2015

**APPENDIX A  
SUMMARY OF EVIDENTIARY RECORD**

**DPR CONSTRUCTION, A GENERAL PARTNERSHIP**

**Dockets 13-R3D2-3734**

**DATE OF HEARING: September 3, 2014**

**DIVISION'S EXHIBITS- Admitted**

<b><u>Exhibit Number</u></b>	<b><u>Exhibit Description</u></b>
1.	Jurisdictional Documents
2.	Photo of site
3.	Cal/OSHA 1AY
4.	Section 26-Work Environment
5.	Worker Information Sheet
6.	Title 8, Section 334
7.	Proposed Penalty Worksheet

**EMPLOYER'S EXHIBITS - Admitted**

<b><u>Exhibit Letter</u></b>	<b><u>Exhibit Description</u></b>
A.	Cal/OSHA 1A
B.	4 pages interview notes
C.	Section 26-Revised-Work Environment
D.	Emergency Response Plan
E.	Email from Dave Flynn dated 1-29-14

**Witnesses Testifying at Hearing**

1. Melissa Brittan
2. Karl Shipley

**CERTIFICATION OF RECORDING**

I, Jacqueline Jones, 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.

Dated: September 28, 2015

---

Jacqueline Jones  
Administrative Law Judge

