

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal
of:

ROSENDIN ELECTRIC INC.
880 Mabury Road
San Jose, California 95133

Employer

DOCKET 13-R3D2-2401

DECISION

Statement of the Case

Rosendin Electric Inc. (Employer) is an electrical sub-contractor involved in construction projects. Beginning June 6, 2013, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Michele Boswell (Boswell) conducted a complaint inspection at a place of employment maintained by Employer at 255 Ferrel, Calexico, California (the site). On July 19, 2013, the Division cited Employer for failing to establish, implement and maintain an effective Injury and Illness Prevention Program (IIPP)[a general violation of section 1509]¹ 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, the appropriateness of the classifications, the reasonableness of the abatement requirements and the reasonableness of the proposed penalties for Citation 1, Items 1 and 2. The Employer also raised a number of affirmative defenses².

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 December 2, 2014. Lisa Prince, Attorney from Walter & Prince LLP represented Employer. David Pies,

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

² Employer presented no evidence regarding affirmative defenses.

Staff Counsel, represented the Division. The parties presented oral and documentary evidence and the matter was submitted on January 5, 2015. The ALJ extended the submission date to November 4, 2015 on her own motion.

Issues

1. Did Employer's IIPP fail to include all required elements?
2. Was Citation 1, Item 1 properly classified as a general violation?
3. Was the abatement requirement for Citation 1, Item 1, reasonable?
4. Did Employer have written heat illness prevention procedures?
5. Did Employer's Heat Illness Prevention Program (HIPP) meet the requirements of section 3395 subdivisions (f)(1)(B),(G), (H), and (I)?

Findings of Fact

1. Employer had a written Injury and Illness Prevention Program (IIPP).
2. Employer's IIPP did not include a system to identify and evaluate hazards, and to provide training and instruction to employees.
3. Citation 1, Item 1, was properly classified as a General violation because an IIPP relates to employee safety and health.
4. The abatement requirements for Citation 1, Item 1 were reasonable in that the requirements are what the safety order requires.
5. The penalties as to Citation 1, Items 1 and 2 were calculated in accordance with the Division's policies and procedures.³
6. Employer had a written Heat Illness Prevention Plan (HIPP).
7. Employer met the requirement of having a written Heat Illness Prevention Plan (HIPP) which included procedures for acclimatization of employees, supervisor's awareness of changing temperature and environmental conditions at the job site and procedures for contacting emergency medical services and transportation thereto.

Analysis

1. Did Employer's IIPP fail to include all required items?

The Division cited Employer for a violation of section 1509, which provides as follows:

- (a) Every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program in accordance with section 3203 of the General Industry Safety Orders.

³ This Finding is based on the stipulations of the parties.

The relevant provisions of section 3203 include the following:

- (a)Every Employer shall establish, implement and maintain an effective Injury and Illness Prevention Program. The program shall be in writing and shall, at a minimum:

....

- (3) Include a system for communicating with employees in a form readily understandable by all affected employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the worksite without fear of reprisal. Substantial compliance with this provision includes meetings, training programs, posting, written communications, a system of anonymous notification by employees about hazards, labor/management safety and health committees, or any other means that ensures communication with employees.
- (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.
- (5) Include a procedure to investigate occupational injury or occupational illness
- (6) Include methods and or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard
 - (A) When observed or discovered; and,
 - (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.
- (7) Provide training and instruction:
 - (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.

Citation 1, Item 1, alleges as follows:

At the time of the inspection, the Division requested a copy of the written Injury and Illness Prevention Plan (IIPP). The employer provided a written IIPP to the Division. The employer's IIPP did not contain the following required elements: 3203(a)(3), 3203(a)(4)(A-C) 3203⁴, 3203(a)(6)(B), 3203(a)(7)(D-F).

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).)

To establish the violation, the Division has to prove that Employer failed to establish, implement and maintain its IIPP. A single, isolated failure to implement a detail within an otherwise effective program does not necessarily establish a violation for failing to maintain an effective program where that failure is the sole imperfection. (See *GTE California*, Cal/OSHA App. 91-107, Decision After Reconsideration (Dec. 16, 1991).) *David Fischer, dba Fischer Transport, A Sole Proprietorship*, Cal/OSHA App. 90-762, Decision After Reconsideration (Oct. 16, 1991).)

On June 7, 2013, Division Safety Engineer Boswell requested documents from the Employer through Senior Safety Manager Ron Johnson (Johnson), as part of her investigation. Boswell testified that she asked for Employer's IIPP, HIPP and OSHA 300 Logs in her document request (Exhibit 3). The documents were due on June 11, 2013. Employer provided the IIPP in an email attachment dated June 7, 2013 (Exhibit 4A). The citations were issued to employer on July 19, 2013. Johnson testified that he submitted the wrong IIPP in response to the Division's June 7, 2013, document request. On August 2, 2013, employer provided "corporate IIPP" via email (Exhibit A) and Site

⁴ ALJ Jones granted the Division's unopposed Motion to amend the citation due to typographical error from 3202(a)(5) to 3203(a)(5) was granted.

Safety Plan for Mount Signal Project (Exhibit C). Boswell received the documents on August 9, 2013 because the documents sent on August 2, 2013 went to her spam email folder⁵.

After reviewing all of the documents submitted by employer, Boswell concluded that both IIPP's had missing elements. Boswell testified that when she reviewed Exhibit 4A she determined that Employer failed to include the following: (1) a system to communicate with all employees; (2) procedures for identifying and evaluating work place hazards; (3) procedures to investigate occupational injury or occupational illness; (4) methods or procedures for correcting unsafe or unhealthy conditions and (5) training and instruction to employees.

Boswell acknowledged receipt of email from Johnson addressing two issues. Johnson informed Boswell that the original IIPP was not the current IIPP. Johnson also told Boswell that he would email Employer's IIPP (Exhibit A). Boswell confirmed that Johnson did email Employer's IIPP, Exhibit A to her. Boswell reviewed Employer's IIPP (Exhibit A) on August 9, 2013. Boswell found that this IIPP lacked two elements required by section 3203: Subdivision (a)(6)(B) and Subdivision (a)(7)(D),(E),and (F).

Section 3203, Subdivision (a)(6)(B) has a specific requirement that all personnel be removed from the area except those necessary to correct the existing hazardous condition, and a requirement that employees necessary to correct the hazardous condition be provided the necessary safeguards. Exhibit C, at page 2 makes mention of an evacuation plan but it appears to be incomplete. Thus, Employer's IIPP does not satisfy the requirements of Section 3203 (a)(6)(B) and is deficient in this respect.

Here, Employer's IIPP addresses safety and health training information on page 18 of Exhibit A but it does not have any specific written provisions requiring training when there are new hazards or newly discovered hazards. General references are insufficient to satisfy the requirements of Section 3203 subdivision (a)(7). (*Tomlinson Construction*, Cal/OSHA App. 95-2268, Decision After Reconsideration (Feb. 18, 1998).) The Board has found that training is a critical element and the touchstone of an effective IIPP. (*Cranston Steel Structures*, Cal/OSHA App. 98-3268, Decision After Reconsideration (Mar. 26, 2002).) A training deficiency by itself supports a violation of Section 3203(a) or Section 1509(a). (*Mountain Cascade, Inc.*, Cal/OSHA App. 01-3561, Decision

⁵ The Division's objection to exhibits A, B and C on the grounds that the documents are unreliable and lack credibility are overruled. Employer's Vice-President of Safety, William Rouse and Employer's Safety Manager Ron Johnson testified credibly regarding the documents origins and why they were provided after the issuance of the citations.

After Reconsideration (Oct. 17, 2003.) Therefore, the Division established a violation of Section 1509, subdivision (a).

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

In order to establish a general violation, the Division need only show that the safety order was violated and that the violation has a relationship to occupational safety and health of employees. (*California Dairies, Inc.*, Cal/OSHA App. 07-2080, Denial of Decision After Reconsideration (June 25, 2009), citing *A Teichert & Sons, Inc.*, Cal/OSHA App. 97-2733, Decision After Reconsideration (Dec. 11, 1998).) Employer's IIPP relates to safety and health of its employees. The violation was properly classified as General.

3. Were the abatement requirements reasonable?

An employer may appeal from a citation by challenging the "reasonableness of the changes required by the Division to abate the condition" (Cal. Lab. Code section 6600.) The Board will affirm required changes if they are deemed "reasonable" (See, e.g. *Southern California Rapid Transit District*, Cal/OSHA App. 85-974, Decision After Reconsideration (Nov. 6, 1987).) Employer's IIPP did not have all of the required elements. Employer did not present any evidence regarding why the abatement requirements were unreasonable or why it could not abate the violation within the time allowed. (See *Starcrest Products of California, Inc.*, Cal/OSHA App. 02-1385, Decision After Reconsideration (Nov. 17, 2004).) Therefore, the abatement requirements and the time to abate are found reasonable.

4. Did Employer have written heat illness prevention procedures?

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 project work outside and was therefore required to have a written Heat Illness Prevention Plan (HIPP). Boswell testified that she gave Johnson a document request form on June 7, 2013 requesting Employer's HIPP. Employer submitted Exhibits 7 (HIPP)⁶ and 8 (HIPP)⁷ in response to the document request on June 7, 2013 via email. Johnson testified credibly that he failed to include the Site Safety Plan

⁶ Employer's HIPP for all California locations.

⁷ Employer's HIPP for Mount Signal, California.

(Exhibit C) in the June 7, 2013 response. Johnson sent the Site Safety Plan to Boswell via email on August 2, 2013. Boswell received it on August 9, 2013. The evidence demonstrates that Employer had a written HIPP.

5. 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)⁸ 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 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

⁸ This is the safety order in effect at all relevant times. Section 3395 was subsequently amended effective May 1, 2015.

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 of Rosendin Electric were observed working outside at various locations at the jobsite while temperatures ranged from 99 degrees Fahrenheit at 11:30 AM to 116 degrees Fahrenheit at 2:30 PM. The Division requested a copy of the employer's written Heat Illness Prevention Plan (HIPP) during the inspection and the employer provided a written HIPP to the Division. The employer's HIPP did not include the employer's procedures for complying with the requirements of this standard, including specific procedures for acclimatization of employees, procedures for supervisors to follow in order to be aware of changing temperature and environmental conditions at the job site; the employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point at each site where they can be reached by an emergency medical service provider; the employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to each work site can and will be provided as needed to emergency responders. The employer's HIPP states that shade will be provided "as close as possible" to the work but this was not being implemented at the job site at the time of the inspection. Field supervisors (crew leaders) were not provided with thermometers or other means of monitoring the temperature at each job location while employees were working at the time of the inspection.

In order for section 3395, subdivision (a) to apply, the Division has to prove that the employer was engaged in outdoor employment. On June 6, 2013, Boswell observed employees engaged in construction project work outside at the site. Employer offered no opposing evidence even though it had the opportunity to do so. The evidence confirms that Employer's employees were working outside. Therefore, Employer's business was an outdoor place of employment.

Subsection (f)(1)(B) requires written procedures for compliance with the standard. Employer's Exhibits 7, 8 and C⁹, contain written procedures to address Heat Illness. Subsection (G) requires procedures for responding to symptoms of possible heat illness. Johnson testified that procedures regarding acclimatization were on page 12. Boswell testified that the section on page 12 defines acclimatization but it does not give specifics and does not give procedures. Here, Employer's procedures regarding acclimatization are on Exhibit 7, at section (D), page 7. Procedures for supervisors to follow in order to be aware of changing temperature are at Exhibit 7, page 6 and Exhibit 8 page 3. Subsection (H) requires procedures for contacting emergency medical providers. A procedure for contacting emergency medical services and if necessary for transporting employees to a point where they can be reached by emergency medical services is on Exhibit C, page 69. Subsection (I) requires procedures for clear and precise directions to the work site for emergency responders. Directions between the site and an occupational clinic were included in the site specific program (Exhibit C). The required elements were all present, based on the evidence presented at the hearing.

Employer's HIPP contained all of the required elements. The Division failed to establish a violation of section 3395 subdivision (f)(3). Employer's appeal is granted. Accordingly, Citation 1, item 2 is dismissed and the penalty is set aside.

Conclusion

Therefore, Employer's appeal as to Citation 1, item 1 is denied. The Division established Employer failed to establish, implement and maintain an effective IIPP. Employer's appeal as to Citation 1, item 2 is granted. Employer's HIPP included all required procedures in compliance with section 3395, subdivision (f)(3). Citation 1, item 1 is affirmed. Citation 1, item 2 is dismissed.

⁹ Exhibit C is Employer's Site Safety Plan for the Mount Signal Project.

Order

Citation 1, item 1 and the proposed penalty totaling \$840 is affirmed. Citation 1, item 2 and the proposed penalty of \$700 is dismissed. It is further ordered that the penalty indicated above and set forth in the attached Summary Table shall be assessed.

Dated: December 4, 2015

JJ:ao

JACQUELINE JONES
Administrative Law Judge

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

ROSENDIN ELECTRIC, INC.
Docket 13-R3D2-2401

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-R3D2-2401	1	1	1509(a)	G	[Failure to maintain establish, implement and maintain an effective IIPP] ALJ affirmed citation.	X		\$840	\$840	\$840
			3395(f)(3)	G	[Failure to have written procedures regarding heat illness] ALJ vacated citation.		X	\$700	\$0	\$0
								\$1,540	\$840	\$840

Total Amount Due*

(INCLUDES APPEALED CITATIONS ONLY)

\$840

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: 12/04/2015

**APPENDIX A
SUMMARY OF EVIDENTIARY RECORD**

ROSENDIN ELECTRIC INC.

Dockets 13-R3D2-2401

DATE OF HEARING: December 2, 2014

DIVISION'S EXHIBITS- Admitted

<u>Exhibit Number</u>	<u>Exhibit Description</u>
1.	Jurisdictional Documents
2.	Site Photographs
3.	Document request form
3A.	IIPP document analysis form
3B.	HIPP analysis
4A.	Email response from Ron Johnson
5.	Rosendin Site Safety Plan
6.	c-10Proposed Penalty Worksheet
7.	Heat Illness Prevention Program (App-19)
8.	Heat Illness Prevention Plan for Mt. Signal

EMPLOYER'S EXHIBITS - Admitted

<u>Exhibit Letter</u>	<u>Exhibit Description</u>
A.	IIPP-Site Safety Plan
B.	email dated August 9, 2013
C.	Site Safety Plan App1

Witnesses Testifying at Hearing

1. Michele Boswell
2. Marty Rouse
3. Ron Johnson

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: December 4, 2015

Jacqueline Jones
Administrative Law Judge

