BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1360169**
CALIFORNIA DEPARTMENT OF FORESTRY AND FIRE PROTECTION **P.O. BOX 944246** **SACRAMENTO, CA 94244-2460** **Employer**	**DECISION**

Statement of the Case

CA Forestry and Fire Protection[1] (Employer) is a department of the California government involved in fire protection. On May 8, 2019, the Division of Occupational Safety and Health (the Division), issued a citation to Employer related to a work site located at Chestnut Circle in Magalia, California (jobsite). The citation alleges that Employer failed to provide protection against burns to the ears and necks of firefighters engaged in wildland fire fighting who were exposed to injurious heat and flame by way of flared neck shield attached to the brim of helmets, hood, shroud, snood, or high collars with throat straps or other equivalent methods.

Employer filed a timely appeal of the citation, contesting the existence of the violation, the classification, the reasonableness of the abatement requirements, and the reasonableness of the proposed penalty. Additionally, Employer asserted several affirmative defenses.

This matter was heard by Christopher 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 December 15, and 16, 2021, with the parties and witnesses appearing remotely via the Zoom video platform. David L. Wiseman, Staff Counsel, represented Employer. Cynthia Perez, Staff Counsel, represented the Division. This matter was submitted for Decision on March 4, 2022.

Issues

1. Did Employer fail to provide protection against burns to the ears and necks of firefighters engaged in wildland fire fighting who were exposed to injurious heat

[1] While the entity identified in the citation is referred to as "CA Forestry and Fire Protection," Employer's brief identifies Employer as the "Department of Forestry and Fire protection ('CAL FIRE')."

and flame by way of flared neck shields attached to the brim of helmets, hoods, shrouds, snoods, or high collars with throat straps or other equivalent methods?

Analysis

1. **Did Employer fail to provide protection against burns to the ears and necks of firefighters engaged in wildland fire fighting who were exposed to injurious heat and flame by way of flared neck shields attached to the brim of helmets, hoods, shrouds, snoods, or high collars with throat straps or other equivalent methods?**

California Code of Regulations, title 8,[2] section 3410, subdivision (c), provides:

> Thermal Protection of the Ears and Neck. Protection against burns on the ear and neck shall be provided by one or more of the following means, or other equivalent methods, when fire fighters engaged in wildland fire fighting are exposed to injurious heat and flame: flared neck shield attached to brim of helmet; hood, shroud or snood; high collar with throat strap. Fabric specified for this purpose shall be constructed and tested in accordance with the provisions of Section 3410(d) for body protection. Similar protection shall be provided emergency pick-up labor when exposed to injurious heat and flame.

Citation 1, Item 1, alleges:

> Prior to and during the course of the investigation including but not limited to, on 11/14/18, the employer failed to insure [*sic*] firefighters were protected against burns to the ears and neck. Firefighters received burns to the ears and neck while engaged in wildland fire fighting.
>
> The CA Forestry and Fire Protection dba Cal Fire was previously cited for a violation of this Title 8 CCR standard, which was contained in inspection number 1091806 citation number 1, item number 1 and was affirmed as a final order on 09/12/17, with respect to a workplace located at 15195 Bottle Rock Road, Cobb, California.

Pursuant to section 3410, subdivision (c), employers are required to provide employees with protection against ear and neck burns where those employees are firefighters engaged in wildland fire fighting and exposed to injurious heat and flame. Additionally, employers are required to provide similar protection to emergency pick-up labor where those employees are exposed to injurious heat and flame.

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

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).)

In order to establish a violation of section 3410, subdivision (c), the Division must prove by a preponderance of the evidence that (1) firefighters or emergency pick-up labor were (2) exposed to injurious heat and flame (3) while engaged in wildland fire fighting, and that (4) employer failed to provide protection against ear and neck burns (5) pursuant to the means contemplated by the safety order.

Evidentiary Issues

In the instant matter, the parties submitted the matter without offering any testimony or stipulations on many of the exhibits offered into evidence. The Division offered the testimony of John Wendland (Wendland) in support of its case. Wendland's testimony was focused on the penalty calculations at issue in this matter and Wendland testified that he was familiar with this matter by virtue of assigning the investigation to another Division investigator, Nick Panos (Panos). Panos did not testify and the Division did not offer the testimony of any other witnesses. Employer only offered the testimony of its expert, Doctor Thomas Ferguson (Ferguson), to discuss the potential hazards of constantly wearing personal protective equipment. Neither party offered the testimony of percipient witnesses. Therefore, as the record is relatively devoid of testimony regarding the exhibits, the authentication of the exhibits offered must be examined to determine the probative value of the exhibits offered by the parties.

Proceedings before the Appeals Board are governed by Section 376.2, which provides:

> The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

> An objection to hearsay evidence is timely if made before submission of the case or raised in a petition for reconsideration. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing and irrelevant evidence shall be excluded. The Appeals Board may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

While proceedings before the Appeals Board do not rely upon the "technical rules relating to evidence and witnesses," all evidence must have appropriate foundation laid to establish its relevance. The Court of Appeal in *Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349, has explained:

> "While administrative bodies are not expected to observe meticulously all of the rules of evidence applicable to a court trial, common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined. Among these are the following: the evidence must be produced at the hearing by witnesses personally present, or by *authenticated* documents, maps or photographs; [and] ordinarily, hearsay evidence standing alone can have no weight [citations], …" (*Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d 446, 455 [296 P.2d 882], italics added.)

(Emphasis in original.)

Evidence Code section 1400 defines authentication as "(a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law. The Supreme Court in *Hart v. Keenan Properties, Inc.* (2020) 9 Cal.5th 442, 450, explained, with regard to Evidence Code section 1400:

> "Authentication is to be determined by the trial court as a preliminary fact (§ 403, subd. (a)(3)) and is statutorily defined as 'the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is' … (§ 1400)." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266 [172 Cal. Rptr. 3d 637, 326 P.3d 239].)

The Supreme Court in *Hart v. Keenan Properties, Inc.*, *supra*, 9 Cal.5th at p. 450, went on to explain that:

> The means of authenticating a writing are not limited to those specified in the Evidence Code. [Citations.] For example, a writing can be authenticated by

> circumstantial evidence and by its contents." *(People v. Skiles* (2011) 51 Cal.4th 1178, 1187 [126 Cal. Rptr. 3d 456, 253 P.3d 546] (*Skiles*).) Section 1410 clarifies: "Nothing in this article shall be construed to limit the means by which a writing may be authenticated or proved."

However, there are limitations on what can be relied upon to establish proper authentication of a document. One such restriction is that competent testimony requires personal knowledge. (See Evid. Code § 702; see also *Alvarez v. State* (1999) 79 Cal.App.4th 720, 731.)

The Division's post-hearing brief relies repeatedly on Exhibit 9 to establish facts and alleges that Exhibit 9 is information received from Employer. However, the record is silent as to the source and accuracy of Exhibit 9. Testimony was not provided regarding Exhibit 9 and the parties did not provide a stipulation related to the exhibit. Exhibit 9 purportedly refers to the Camp Fire in Butte County, California, and events on November 8, 2018. Exhibit 9 refers to two distinct incidents referencing employee injuries. It is noted that Employer's closing brief also references Exhibit 9, but provides no further indication as to the source or accuracy of the document. The foundation laid for Exhibit 9 is weak and the other exhibits admitted do not resolve the authentication issue noted here. Therefore, the probative value of Exhibit 9 is deemed to be low, if any.

The Division's post-hearing brief also relies repeatedly on Exhibit 11 and asserts that Exhibit 11 establishes facts for consideration. Wendland testified that Exhibit 11 was called an Investigatory Summary report and that it was from the Division's Office of Information System. However, Wendland did not testify as to the author of the document, the knowledge of the author of the document at the time of its creation, or other matters pertaining to the details contained within Exhibit 11. Employer's post-hearing brief also references Exhibit 11, but does not provide the aforementioned details. The foundation laid for Exhibit 11 is weak and the other exhibits admitted do not resolve the authentication issue noted here. Therefore, the probative value of Exhibit 11 is deemed to be low, if any.

The Division's post-hearing brief also relies on Exhibit 7 and asserts that Exhibit 7 establishes Employer's policy regarding personal protective equipment. Wendland did not testify regarding Exhibit 7 and the parties did not provide a related stipulation. Employer's post-hearing brief does not reference Exhibit 7. The foundation laid for Exhibit 7 is weak and the other exhibits admitted do not resolve the authentication issue noted here. Therefore, the probative value of Exhibit 7 is deemed to be low, if any.

The Division's post-hearing brief also relies on Exhibits 4, 5, and 6, and asserts that those exhibits establish facts for consideration. Wendland testified that Exhibits 4, 5, and 6, appeared to be notes taken by Panos, the investigator assigned to the investigation. Wendland conceded

that he was not present for the interviews and he was not certain as to the source and accuracy of the notes. Further, Wendland testified that he was not certain that the three individuals referenced in the exhibits were individuals involved in the incident that gave rise to the citation. Moreover, Wendland testified that he was not certain as to the number of individuals involved in the incident. Employer's post-hearing brief references Exhibits 4, 5, and 6, but Employer did not provide testimony or other evidence regarding the accuracy or credibility of the statements contained in those exhibits. Therefore, the probative values of Exhibits 4, 5, and 6, are deemed to be low, if any.

It is additionally noted that, due to the lack of testimony and authentication, conflicts in the various documents are not readily resolved. By way of example, although Exhibit 9 asserts that two firefighters received minor burns in the incident, Wendland testified that he reviewed medical records indicating that a firefighter involved received second degree burns.[3] However, Exhibit 4, the purported statement of, or related to, Travis Bowersox (Bowersox), asserts, "Him & one of the other FF were sent to the Oroville Hospital since they suffered burns. The other was not burnt & was reassigned. At Oroville Hospital he was treated for 1st & 2nd degree burns to the neck & face area. Seen and released the same day." This statement makes it unclear whether two firefighters were burned or just one and it also draws into question the severity of the burns involved. Further, Exhibit 11 provides a narrative summary which indicates, "The Fire Captain and one firefighter involved suffered minor burns to the face and neck. … The crew was hit by burning debris from the explosion causing minor burn injuries to the face and neck of the Fire Captain and one firefighter. The Fire Captain stated that he did not have his shroud deployed and suffered 1st and 2nd degree burns to his face and neck area." No clarification was provided to indicate whether second degree burns would constitute minor burns. The parties did not submit evidence that readily reconciles or clarifies these documents.

As an additional example, the Division, in its post-hearing brief, references Exhibits 4, 5, 6, and 11 to indicate that Bowersox and Kyle Iwan (Iwan) were injured employees. However, Exhibit 4's asserts that one individual was determined to be not burned. Further, Exhibit 11 indicates only one hospitalized individual, zero non-hospitalized individuals, and zero unaccounted individuals. Exhibit 11 also lists Bowersox as an injured individual and lists Iwan as only a witness. However, the narrative summary in Exhibit 11, as noted above, also indicates that Bowersox and one other firefighter were injured and transported to the hospital for treatment. The series of documents described makes it unclear which employees were injured and what the authors of the various documents were relying upon in the creation of the documents. Due to conflicts and confusion between the exhibits, such as the two examples described above, the probative value of the exhibits submitted without authentication is severely diminished.

[3] The Division elected not to submit the medical records reviewed by Wendland.

It is also noted that numerous photographs were offered by the Division without any testimony or other evidence establishing the location pictured. The probative value of these photographs is determined to be low, if any.

Having addressed the evidentiary shortcomings of several of the exhibits relied upon heavily in briefing by the parties, it is now necessary to examine whether the Division met its initial burden of proof to establish a violation of the cited regulation.

Violation Analysis

As noted above, in order to establish a violation of section 3410, subdivision (c), the Division must prove by a preponderance of the evidence that (1) firefighters or emergency pick-up labor[4] were (2) exposed to injurious heat and flame (3) while engaged in wildland fire fighting and that (4) employer failed to provide protection against ear and neck burns (5) pursuant to the means contemplated by the safety order. Employer's appeal form directly contests that the area involved in the incident was wildlands and states "…the individuals were in an urban interface as opposed to the wildland." Therefore, the threshold inquiry in the instant matter is whether the geographical area involved was established to be wildlands.

Section 3402 defines "Wildlands" as "[s]parsely populated geographical areas covered primarily by grass, brush, trees, crops, or combination thereof."

The record is devoid of reliable evidence that the area involved in the incident that gave rise to the citation was appropriately considered wildlands. Wendland did not testify as to the geographical area involved. While the Division offered pictures into evidence, there was no testimony regarding the pictures and it is uncertain what is being depicted or whether it depicts the area involved in the alleged incident. Moreover, the pictures do not provide sufficient evidence to establish facts about the geographical area involved. Indeed, even Exhibit 9, which is relied upon heavily in the Division's brief, fails to provide a sufficient description of the geographical area involved. Moreover, the account set forth in Exhibit 9 that appears to relate to the allegations in the citation, by way of reference to Ponderosa Way and Chestnut Circle, discusses an area with multiple structures and a "wildland urban interface (WUI) bracket." The reference to a WUI bracket does not, in absence of details about the area, establish that the geographical area was urban or wildland and the reference to multiple structures does not support a finding that the area is sparsely populated and primarily covered in grass, brush, trees, crops, or a combination thereof. As such, there is not sufficient evidence to conclude that the geographical area involved was wildlands.

[4] Section 3402 defines "Emergency Pick-Up Labor" as "[p]ersonnel consisting of National Guard, military forces, forest product workers, farm workers, ranchers, and other persons who may be recruited from time to time to help contain and control wildland fires."

As discussed above, there is a dearth of reliable evidence presented in the instant matter. The Division's counsel acknowledged during Wendland's cross examination that Wendland was unable to testify as to what happened that gave rise to the citation at issue or to the multitude of exhibits put forth in support of that citation. It is noted that the manner in which the Division elected to present its case causes significant uncertainty within the evidentiary record.

Parties were repeatedly offered the opportunity to stipulate to those facts not in dispute, both prior to and during the hearing, because the parties indicated there was no factual dispute in this matter. However, the Division refused to agree to stipulations despite claiming that the facts in the matter were not in dispute. The parties elected to present only limited testimony and numerous unauthenticated documents.

To rely on numerous unauthenticated documents deprives the Appeals Board of the opportunity to assess the credibility of the statements contained in those documents. While it may have not been considered by the parties at the time of hearing, each document has an author that is making a statement by virtue of creation of the document. Where the out-of-hearing statement is offered for the truth of the matter asserted with no indication as to the author and the author's knowledge of the facts regarding the incident that gave rise to the dispute, relying on such a document would contravene the policy behind Evidence Code section 702. Although the formal rules of evidence do not apply strictly to Appeals Board proceedings, the method of presenting the case employed by the parties does little to establish that the documents submitted are of the sort that responsible persons are accustomed to rely upon in the conduct of serious affairs. The Division failed to establish that it was more likely than not that Employer violated the safety order. Therefore, the citation is dismissed.

Employer's Arguments

Although the citation cannot be upheld, it is notable that Employer's brief argues that "provided," within the context of section 3410, subdivision (c), does not mean "use." Labor Code section 6401 provides:

> Every employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees.

Labor Code section 6403 provides:

> No employer shall fail or neglect to do any of the following:

(a) To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.
(b) To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.
(c) To do every other thing reasonably necessary to protect the life, safety, and health of employees.

A plain reading of Labor Code sections 6401 and 6403 necessitates the use of protective equipment that employers are required to provide employees. (See generally *Bendix Forest Products Corp v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465; see also *UPS Ground Freight Inc. DBA UPS Freight*, Cal/OSHA App. 1111325, Denial of Petition for Reconsideration (Nov. 22, 2017).) Therefore, Employer's argument that "provided" is not construed to mean "use" within the context of section 3410, subdivision (c), would be rejected had the Division put on sufficient evidence to establish the violation.[5] Although the Division did not meet its burden of proof, Employer's closing argument plead for clarification on the issue and Employer's interpretation of the regulation is sufficiently incongruent with the purposes of the California Occupational Safety and Health Act that it is necessary to note that the term "provide" must contemplate "use" because to hold otherwise would render providing protective equipment to employees meaningless in hazardous situations where employees did not elect to use the equipment.

Conclusion

The evidence does not support a finding that Employer violated section 3410, subdivision (c), by failing to provide protection against burns to the ears and necks of firefighters engaged in wildland fire fighting who were exposed to injurious heat and flame by way of flared neck shields attached to the brim of helmets, hoods, shrouds, snoods, or high collars with throat straps or other equivalent methods.

ORDER

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

Dated: 03/30/2022

Christopher Jessup
Administrative Law Judge

[5] In *Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932, citing *City of Sacramento Fire Dept.*, Cal/OSHA App. 88-004, Decision After Reconsideration (Mar. 22, 1989), the Appeals Board explained that "[i]f an Employer feels a safety order is unreasonable it should apply to the Standards Board for a variance or to have the safety order repealed or amended."

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.**