BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: YNT HARVESTING P.O. Box 846 Kingsburg, CA 93631 Employer	Docket 08-R2D5-5010 **DENIAL OF PETITION FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by YNT Harvesting (Employer).

JURISDICTION

Commencing on August 13, 2008, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On December 3, 2008, the Division issued a citation to Employer alleging two violations of occupational safety and health standards codified in California Code of Regulations, Title 8.[1] Citation 1, Item 1 alleged a violation of section 342(a) [failure to report serious injury of illness]; Citation 1, Item 2 alleged a violation of section 3395(e)(3) [failure to provide copy of heat illness prevent procedures to Division].

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including two duly-noticed evidentiary hearing.

On December 26, 2012, the ALJ issued a Decision (Decision) sustaining the alleged violation of section 342(a) and granting Employer's appeal as to the alleged violation of section 3395(e)(3).

[1] References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer timely filed a petition for reconsideration of the Decision with respect to the section 342(a) violation, i.e. Citation 1, Item 1.

The Division filed an answer to the petition.

ISSUE

Did Employer violate section 342(a)?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

(a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
(b) That the order or decision was procured by fraud.
(c) That the evidence does not justify the findings of fact.
(d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
(e) That the findings of fact do not support the order or decision.

Employer's petition maintains that the evidence does not justify the findings of fact and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Order was based on the preponderance of the evidence in the record as a whole and appropriate under the circumstances. We incorporate by reference the detailed factual and evidentiary summary provided in the Decision into this Denial of Petition for Reconsideration. For context we provide a summary of some of the evidence.

YNT Harvesting is a crop harvesting company. One of its employees became ill while harvesting nectarines. Initially it was thought he might be suffering from heat illness, although the weather was in the 70s and the employee was acclimated to working in hot weather.

The employee was first taken to a clinic, where a physician, Dr. Verma, examined him, provided treatment, and then referred him to a hospital emergency room for further testing, diagnosis and treatment. Dr. Verma

testified at the hearing that he would defer to the judgment of the emergency room physician concerning the employee's diagnosis and treatment.

The employee was admitted to the hospital for more than 24 hours during which time additional testing and treatment were rendered. The employee may or may not have incurred heat illness. One of his symptoms or conditions upon admission to the clinic and the hospital was atrial fibrillation, which is a possible consequence of heat illness, but could also have resulted from other causes, such as a heart condition. Food poisoning was another possible cause of his illness.

Employer failed to report the illness to the Division. It was cited for violating section 342(a), which provides:

> § 342. Reporting Work-Connected Fatalities and Serious Injuries.
>
> (a) Every employer shall report immediately by telephone or telegraph to the nearest District Office of the Division of Occupational Safety and Health any serious injury or illness, or death, of an employee occurring in a place of employment or in connection with any employment.
>
> Immediately means as soon as practically possible but not longer than 8 hours after the employer knows or with diligent inquiry would have known of the death or serious injury or illness. If the employer can demonstrate that exigent circumstances exist, the time frame for the report may be made no longer than 24 hours after the incident.
>
> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.

Section 330(h), in pertinent part, defines serious illness as one "occurring in a place of employment or in connection with any employment which requires inpatient hospitalization for a period in excess of 24 hours for other than medical observation[.]"

Employer's petition makes a series of arguments, many in the form of questions, none of which persuade us that the Decision was in error.

Employer asks rhetorically why the hospital physician prescribed various medications, apparently attempting to call her medical decisions into question, or to suggest the ALJ did not consider the implications of possible inconsistencies or errors in the diagnosis made or the treatment rendered. Employer misunderstands our function in appeal proceedings. The Board's role is not to second guess a treating physician nor is it qualified to do so. That

the doctor chose a certain course of treatment rather than some alternative is not the issue. Rather, the questions before us are whether the employee suffered a serious injury or illness while at work, and, if so, whether Employer reported the injury or illness to the Division within the required time. The evidence establishes that the employee suffered a serious illness while working for Employer, was hospitalized for more than 24 hours as a result, and that during the period of hospitalization he received treatment for his condition. Those facts establish a violation of section 342(a).

Employer also contends that the cause of the employee's illness may have been food poisoning, not heat illness, or heart trouble (specifically, atrial fibrillation). Employer misses the point that whatever the specific illness, it "occur[ed] in a place of employment" and resulted in "inpatient hospitalization for a period in excess of 24 hours for other than medical observation[.]" (§§ 342(a) and 330(h) respectively.) Therefore, whether the employee was suffering from food poisoning, heat illness, heart disease, or a combination or sequence of any of them, the illness was reportable under section 342(a).

Employer also argues that the period of hospitalization did not involve treatment for more than 24 hours, but included long periods of observation. This argument misapplies the language of section 330(h). If an employee is hospitalized for more than 24 hours during which time he receives treatment for the condition which arose at work, the illness is reportable. Section 330(h)'s definition of serious illness does not require reporting only if the treatment itself lasts more than 24 hours. The pertinent language is, "inpatient hospitalization for a period in excess of 24 hours for other than medical observation[.]" The plain wording means that the hospitalization lasts more than 24 hours, not the actual treatment time. Had the intent been to require reporting only after 24 hours of treatment *per se*, the wording would have been "*inpatient hospitalization for more than 24 hours of treatment*" or a similar change in word order. Moreover, to so interpret section 330(h) as it is written would lead to absurd results, which are to be avoided in interpreting statutes and regulations. (*National Steel and Shipbuilding Company (NASSCO)*, Cal/OSHA App. 10-3793, Denial of Petition for Reconsideration (Sep. 20, 2012), citing *Barnes v. Chamberlain* (1983) 147 Cal. App. 3d 762). For example, if an injury to an employee required surgery, but the surgery itself lasted only one hour, the event would not be reportable under Employer's view even if the total time of hospitalization exceeded 24 hours. We do not understand that to be the intent of the regulation and the underlying statute, Labor Code section 6302(h).

Employer also contends that atrial fibrillation is not a serious illness. Whether it is generally or was in this instance is not relevant. The fact remains that due to an illness arising while on the job the employee was hospitalized for more than 24 hours and received treatment during that time.

Employer finally argues that the time to report began to run only after its employee had been hospitalized for more than 24 hours and it had actual or constructive knowledge of the hospitalization, correctly citing precedent to that effect. (*Welltech Incorporated*, Cal/OSHA App. 90-784, Decision After Reconsideration (Aug. 22, 1991).) The evidence shows that Employer knew of the hospitalization and its duration and nature. Since Employer never reported the illness, it is moot when the reporting period commenced to run, as it expired without Employer making the necessary report.

DECISION

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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