BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1256643**
GIUMARRA VINEYARDS CORPORATION **11220 EDISON HIGHWAY** **BAKERSFIELD, CA 93307** **Employer**	**DECISION**

Statement of the Case

Giumarra Vineyards Corporation (Employer) is in the produce industry. On August 18, 2017, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido, commenced an inspection of a work site located one mile east of David Road and Wheeler Ridge Road in Arvin, California (job site), after a report of a possible heat-related illness on July 10, 2017.

On January 8, 2018, the Division cited Employer for four alleged violations, two of which remain at issue: failure to report to the Division a serious illness occurring at the work site; and failure to implement effective emergency procedures when an employee exhibited signs and symptoms of heat illness.

Employer filed timely appeals of the citations. The appeal of Citation 1, Item 1, asserts that the safety order was not violated. Employer's motion to amend the appeal for Citation 2 was granted during the hearing. The appeal for Citation 2 now asserts that the safety order was not violated, the classification is incorrect, and the penalty is unreasonable. In exchange for a waiver of fees and costs, the Division withdrew Citation 1, Items 2 and 3, at the commencement of the hearing.

This matter was heard by Kerry Lewis, Administrative Law Judge for the California Occupational Safety and Health Appeals Board (Appeals Board), in Bakersfield, California, on January 7 and 8, 2020. Daniel Klingenberger, Attorney, of LeBeau Thelen, LLP, represented Employer. Carl Paganelli, Staff Counsel, represented the Division. The matter was submitted on March 1, 2020.

Issues

1. Did Employer fail to report to the Division a serious illness occurring at the job site?

2. Did Employer fail to implement effective emergency procedures when an employee exhibited signs and symptoms of possible heat illness?

3. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

4. Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

5. Was Citation 2 properly classified as a "Repeat Violation"?

6. Was the proposed penalty for Citation 2 reasonable?

Findings of Fact

1. On July 10, 2017, Employer's crews were picking grapes in a vineyard located approximately 30 miles south of Bakersfield and approximately 40 minutes from the occupational medicine clinic where Employer takes its sick or injured employees for treatment.

2. The temperature at 10:15 a.m. on July 10, 2017, was between 93 and 97 degrees.

3. At approximately 10:15 a.m., Employer's employee Rocio Arias de Jauregui (Rocio) began saying things that worried her sisters Monica Arias de Salazar (Monica) and Olivia Salazar (Olivia), including announcing that her daughters, who were not at the job site, were present, then saying that she did not have daughters and did not know her husband.

4. In addition to being confused about her family, Rocio was dizzy and had a headache.

5. When Monica and Olivia brought Rocio to Eliseo Salazar Bravo (Eliseo), the crew foreman, to report that Rocio was behaving strangely and experiencing other symptoms, Eliseo instructed them to have her sit in the shade, where she was given fluids, her clothing was loosened, and ice was applied to cool her down. Eliseo called Senen Duran (Duran), Farm Labor Supervisor, to report that he had a sick employee, but neither Eliseo nor Duran called an ambulance for her.

6. Duran arranged for an office employee, Ana Gonzalez (Gonzalez), to pick up Rocio and take her to the occupational medicine clinic. It took Gonzalez approximately 30 minutes to get to the designated location to pick up Rocio.

7. Employer's Heat Illness Prevention Plan (HIPP) requires that emergency service providers must be called immediately for employees displaying signs or symptoms of heat illness.

8. Employer's HIPP indicates that disorientation is a symptom of heat illness that requires immediate summoning of emergency service providers.

9. Eliseo and Duran were aware that disorientation, headaches, and dizziness are symptoms of heat illness and that Rocio was experiencing all of them.

10. Rocio was hospitalized for approximately nine months after she was transported from the job site and she ultimately passed away after having been diagnosed with autoimmune encephalitis. Her illness was not heat-related.

11. Rocio's illness, although undiagnosed, began the week before her incident at the job site.

12. Employer did not report to the Division that Rocio had fallen ill at the job site and was subsequently hospitalized for more than 24 hours.

13. Associate Safety Engineer Daniel Pulido (Pulido) was current on his Division-mandated training at the time of the hearing. He had performed approximately 58 suspected heat illness investigations, two of which were confirmed heat illnesses that resulted in fatalities.

14. Failure to adequately implement emergency response procedures when an employee is exhibiting signs or symptoms of heat illness may result in a worsening of the heat illness or in death.

15. Employer was issued a citation in 2015 for failure to train its supervisors how to properly implement its emergency response procedures when an employee was exhibiting signs and symptoms of heat illness.

16. The circumstances surrounding the citation issued in 2015 involved an employee who had a headache, dizziness, and vomiting. The supervisors, Eliseo and Duran, did not call an ambulance.

17. The hazard of not training supervisors to implement emergency response procedures when an employee is exhibiting signs or symptoms of heat illness is that the employee may suffer more severe illness or even die.

18. The hazard of not properly implementing emergency response procedures is the same as that of not providing training to supervisors to implement them.

19. The penalty for Citation 2 was calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to report to the Division a serious illness occurring at the job site?

California Code of Regulations, title 8, section 342, subdivision (a),[1] provides: under "Reporting Work-Connected Fatalities and Serious Injuries," provides:

> 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.

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

> Serious injury or illness is defined in section 330(h), Title 8, California Administrative Code.
>
> In Citation 1, Item 1, the Division alleges:
>
> Employer did not report to the Division a serious illness suffered by an employee at the worksite on or about July 10, 2017.
>
> Section 330, subdivision (h), provides, in relevant part:
>
> "Serious injury or illness" means any injury or illness 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 […] .

The definition of "serious injury or illness" in section 330, subdivision (h), uses the language "occurring in a place or employment or in connection with any employment." The definition does not refer to the cause of the injury or illness.

The Appeals Board has repeatedly held that the cause of the injury or illness is not a determining factor with regard to the reporting requirements of section 342, subdivision (a). The Appeals Board has stated that section 342, subdivision (a), "requires reporting of employee injuries, illnesses and deaths which occur on an employer's premises, even if they are not work related." (*Honeybaked Hams*, Cal/OSHA App. 13-0941, Denial of Petition for Reconsideration (Jun. 25, 2014) [employee suffered fatal heart attack on his lunch break while relaxing outdoors on the employer's premises].) "Requiring reports of illnesses, injuries and deaths occurring at work, or that have a tangible connection to work, even if not ostensibly work related, provides the Division with the opportunity to acquire data that may allow it to recognize patterns indicating workplace hazards, which employers might not have sufficient expertise or experience to recognize on their own." (*Western Digital Corporation*, Cal/OSHA App. 1200858, Decision After Reconsideration and Order of Remand (May 16, 2019).)

Despite Employer's attempt to differentiate the instant situation with the Appeals Board's decision in *Western Digital Corporation, supra*, Cal/OSHA App. 1200858, the circumstances are substantially similar. In *Western Digital Corporation*, the employee was transported to the hospital after vomiting blood in the restroom at the workplace and he died shortly thereafter. The cause of death was deemed to have been unrelated to the employee's working conditions, but the Appeals Board held that the employer was required to report it nonetheless. "To warrant a report, the connection between the workplace and the employee's death need not necessarily be causal. Here, a sufficient connection exists because [the employee] threw up blood in the workplace, his

employer called paramedics to transport him to the hospital, and he died approximately an hour later in the hospital." (*Id.*) In comparison, in the instant matter, Rocio was working outdoors in temperatures exceeding 93 degrees, began acting confused and having delusions, was transported to a medical facility where she remained for several months, and she died on a later date.

It is undisputed that Rocio's death was not caused by heat illness or any other work-related condition. However, when Rocio had been hospitalized for 24 hours, triggering the obligation to report her illness, Employer did not know that she had autoimmune encephalitis. Indeed, the doctors did not even have a definitive diagnosis until exhaustive tests were conducted over the course of several days.

The Appeals Board has stated that the legislature's intent in requiring employers to report serious injuries or illnesses to the Division "shows a strong policy interest in thus providing the Division the opportunity to investigate such events shortly after they occur. … It would defeat or frustrate that legislative intent to allow employers ... to preempt the Division's investigation by deciding that the illness, injury or death was not work-related and thus need not be reported." (*Orange County Fire Authority*, Cal/OSHA App. 10-3667, Decision After Reconsideration (Jan. 3, 2013).)

Rocio had been sick the week prior to her incident at the job site. She had seen a doctor and was given medication, although no one testified about her diagnosis after that initial doctor visit. Based on the existence of an illness prior to the July 10, 2017, incident, Employer argues that the illness did not "occur" at the place of employment because it did not "come into existence" at work. In support of its position, Employer uses the example of an employee with a heart condition that feels faint at work and decides to check himself into the hospital as a precaution. Employer asserts that this scenario does not require that the employer report the hospitalization as a serious illness. Employer's example is an incomplete hypothetical. Indeed, if the employee was checked into the hospital for nothing more than observation, that would not require reporting. However, if the employee had a heart-related episode at work that required treatment at a hospital for a period of more than 24 hours, it would be reportable regardless of the existence of the preexisting heart condition. An employer cannot presume that it was the preexisting condition that caused the incident, rather than a dangerous work condition. That illness must be reported to the Division so the Division can initiate its investigation in order to prevent potential safety issues for the other employees.

Employer failed to report Rocio's illness as required by section 342, subdivision (a), and now attempts to justify that failure to report based on a later determination that the illness was not heat illness and had been in existence prior to the date of the incident. The Division's function of protecting employees from imminent dangers at the workplace would be seriously

hampered if an employer could fail to report an illness or injury and then wait for a definitive diagnosis about the condition.

Accordingly, Employer violated section 342, subdivision (a), by failing to report Rocio's illness to the Division. Citation 1, Item 1, is affirmed.

2. Did Employer fail to implement effective emergency procedures when an employee exhibited signs and symptoms of possible heat illness?

Section 3395, subdivision (f), provides, in relevant part:

(f) Emergency Response Procedures. The Employer shall implement effective emergency response procedures including:

[…]

(2) Responding to signs and symptoms of possible heat illness, including but not limited to first aid measures and how emergency medical services will be provided.

(A) If a supervisor observes, or any employee reports, any signs or symptoms of heat illness in any employee, the supervisor shall take immediate action commensurate with the severity of the illness.

(B) If the signs or symptoms are indicators of severe heat illness (such as, but not limited to, decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior or convulsions), the employer must implement emergency response procedures.

(C) An employee exhibiting signs or symptoms of heat illness shall be monitored and shall not be left alone or sent home without being offered onsite first aid and/or being provided with emergency medical services in accordance with the employer's procedures.

In Citation 2, the Division alleges:

Prior to and during the course of the inspection, the employer did not implement effective and immediate emergency response procedures commensurate with the signs and symptoms of severe heat illness exhibited by an employee harvesting table grapes on or about July 10, 2017, in temperatures exceeding 95 degrees Fahrenheit.

a. Was Employer aware that Rocio was exhibiting signs and symptoms of potential heat illness?

"Heat Illness" is defined in section 3395, subdivision (b), as "a serious medical condition resulting from the body's inability to cope with a particular heat load, and includes heat cramps, heat exhaustion, heat syncope and heat stroke." In *National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015), the Appeals Board set forth heat illness symptoms, including swelling, thirst, weakness, headache, dizziness, irritability, and vomiting.

Pulido, who has attended heat illness trainings from the Division yearly for more than ten years and has conducted approximately 58 outdoor heat illness inspections, testified that an employee exhibiting signs of confusion when working in extremely hot weather may be suffering from severe heat illness requiring emergency medical attention.

Duran testified that Employer's heat illness training includes identifying signs and symptoms of heat illness, including headache, nausea, dizziness, confusion, disorientation, and excessive sweating. Eliseo's testimony about the signs of heat illness was less succinct than Duran's, but Eliseo eventually listed possible symptoms including dizziness, vomiting, nausea, blurry vision, and "not having their bearings."

On July 10, 2017, while working outdoors in temperatures exceeding 93 degrees, Monica observed her sister, Rocio, behaving strangely. Rocio made comments regarding her daughters being at the job site, although the daughters were not there, and then denied knowledge that she had daughters or a husband. Monica and her other sister, Olivia, immediately brought Rocio to sit in the shade and informed their supervisor, Eliseo, that Rocio was confused and making nonsensical statements. Eliseo and Monica implemented first aid procedures by loosening Rocio's clothing, giving her liquids, and applying ice and wet bandanas to cool her.

Duran and Eliseo testified that they had knowledge of the following information about Rocio's condition on July 10, 2017: Monica told Eliseo that Rocio was not feeling well, was saying "nonsense things," and was saying she does not have daughters and does not know her husband. Duran testified that Eliseo told him that Rocio had a headache and was feeling dizzy. Although Eliseo denied telling Duran that Rocio was dizzy, Duran's testimony is credited because he was not present at the site to speak with Monica or Rocio, it is more likely than not that he obtained that information from Eliseo.

Eliseo claimed that he asked Rocio how she was feeling and she repeatedly told him she was "fine." Based on Eliseo's claims that he observed no symptoms of heat illness, Employer

argues that it implemented first aid as required by the safety order and there were no emergency procedures necessary.

Eliseo's testimony regarding his awareness of Rocio's symptoms was not credible. Despite Eliseo's testimony that the only information he obtained from Monica was that Rocio was making nonsensical comments, he reported to Duran that she was experiencing dizziness and a headache. Whether Eliseo's denial of this report was a legitimate memory lapse or intentional omission by Eliseo, this information could only have been provided to him by either Rocio, Monica, or Olivia and contradicts the claim that Eliseo was not aware of any other symptoms.

Additionally, it was unreasonable for Eliseo to rely on Rocio's claim that she was "fine." He had information from both of Rocio's sisters that she was exhibiting signs of confusion and making incoherent statements about her family. This altered mental state should have alerted Eliseo that Rocio may not have been fully in control of her mental faculties and her representations were unreliable.

Furthermore, in response to the signs and symptoms observed by Eliseo and reported by Monica, Eliseo called Duran, who arranged for transportation to bring Rocio to an occupational medicine facility. The transportation was provided by Gonzalez, an employee who was regularly tasked with driving employees to medical appointments. In Employer's response to the Division's Notice of Intent to Classify Citation as Serious (1BY), Gonzalez stated that she had been informed that Rocio's situation was heat-related prior to transporting Rocio to the clinic.[2] These facts provide further evidence that, at the time action was being taken to get Rocio to a doctor, Duran had identified her symptoms as possibly heat-related.

In further support of its argument that there was no knowledge that Rocio was exhibiting signs or symptoms of heat illness, Employer focused on Pulido's assertion that "confusion" was the primary symptom that should have raised alarm for the supervisors. Employer asserted that confusion is not a recognized symptom of heat illness listed in any Appeals Board decisions or safety orders. "The more reasonable interpretation of the safety order is that confusion alone does not establish a violation of paragraph (f)(2) … ." (Employer's Post-Hearing Brief, p. 5, ln. 16.) First, Rocio was not exhibiting only confusion. She was working outdoors in heat exceeding 93 degrees, was making nonsensical statements, and was dizzy and had a headache. Further, "confusion" and "disorientation" are synonyms. (https: //www.merriam-webster.com/thesaurus/disoriented <accessed Mar. 4, 2020>.) In fact, the definition of "confused" incorporates the word "disoriented": "Confused: adj. … 1b: disoriented with regard to one's sense of time, place, or identity. *The patient became confused.*" (https://www.merriam-

[2] Although Gonzalez's statement does not indicate from whom she obtained the information, the inference is that Duran reported this after talking to Eliseo because Duran is the only person who contacted the office to arrange for transportation.

webster.com/ dictionary/confused <accessed Mar. 4, 2020>. Italics in original.) Employer's argument discounting the Division's use of the word "confusion" is unpersuasive because it is interchangeable with the term "disorientation," which is specifically listed as a symptom requiring emergency response procedures in section 3395, subdivision (f)(2)(B), and in Employer's own HIPP, as discussed below.

Accordingly, it is unreasonable for Employer to assert that there was no evidence of potential heat illness when Eliseo was aware that Rocio was experiencing disorientation, dizziness, and a headache, which are all symptoms that Eliseo and Duran acknowledged they have been trained to identify as symptoms of heat illness.

b. Did Employer implement its HIPP emergency procedures?

Section 3395, subdivision (f)(2), is a performance standard. California Government Code section 11342.570 defines "performance standard" as "a regulation that describes an objective with the criteria stated for achieving the objective." The Appeals Board has held that performance standards intentionally lack specificity, which "establishes a goal or requirement while leaving it to employers to design appropriate means of compliance under various working conditions." (*Contra Costa Electric, Inc*., Cal/OSHA App. 09-3271, Decision After Reconsideration (May 13, 2014), citing *Davey Tree Service*, Cal/OSHA App. 08-2708, Decision After Reconsideration (Nov. 15, 2012).) The safety order does not dictate the specific requirements for an employer's HIPP emergency procedures. It only provides that there must be emergency procedures and they must be implemented when circumstances warrant.

As such, in order to comply with section 3395, subdivision (f)(2), Employer's own procedures must have been followed in response to the circumstances of the potential heat illness. The Division did not cite Employer for having an incomplete or insufficient HIPP. As such, the emergency procedures contained in Employer's HIPP are presumed to be adequate and the issue is whether those procedures were implemented in a manner that comports with section 3395, subdivision (f)(2). "While an employer's plan as written may be adequate, proof of failure to respond to a known hazard in the workplace when it arises establishes a violation of the section through failure to implement the plan." (*BHC Fremont Hospital, Inc.*, Cal/OSHA App. 13-0204, Decision After Reconsideration (May 30, 2014) [Appeals Board analyzing implementation of written Injury and Illness Prevention Program regarding correction of identified hazards].)

Employer's HIPP contains the following instructions:

> Procedures for Handling a Sick Employee
>
> When an employee displays possible signs or symptoms of heat illness, a trained first aid worker or supervisor will check the sick employee and determine whether resting in the shade and drinking cool water will suffice or if emergency service providers will need to be called.
>
> […]
>
> Emergency service providers will be called immediately if an employee displays signs or symptoms of heat illness (decreased level of consciousness, staggering, vomiting, disorientation, irrational behavior, incoherent speech, convulsions, red and hot face, etc.), does not look OK or does not get better after drinking cool water and resting in the shade. While the ambulance is in route, first aid will be initiated (cool the worker: place the worker in the shade, remove excess layers of clothing, place ice pack in the armpits and groin area and fan the victim). Do not let a sick worker leave the site, as they can get lost or die before reaching a hospital!

(Ex. 5, p. 6.)

> Procedures for Emergency Response
>
> […]
>
> When an employee is showing signs of possible heat illness, steps will be taken immediately to keep the stricken employee cool and comfortable once emergency service responders have been called (to reduce the progression to more serious illness). Under no circumstances will the affected employee be left unattended.

(Ex. 5, p. 5.)

According to Employer's HIPP, the first step in handling an employee with possible signs and symptoms of heat illness is to determine whether emergency services are needed or if water and shade are sufficient to resolve the issue. In the instant matter, Eliseo and Duran made the decision that Rocio required more than just water and shade. The next step in Employer's HIPP for handling an employee with signs or symptoms of heat illness is to call emergency service providers immediately. The emergency response procedures section of the HIPP adds that, after

the emergency service providers have been called, the sick employee should be kept cool and comfortable.

Employer's HIPP contains no intermediate step between first aid and calling an ambulance. If first aid is inadequate, the next option set forth in the HIPP is to initiate emergency procedures. Instead of doing this, Duran arranged for Gonzalez to drive from the northern side of Bakersfield down to the ranch, which was approximately 30 miles south of Bakersfield, in order to take Rocio back up to the occupational medicine clinic in Bakersfield. It took Gonzalez approximately 30 minutes to reach the spot where Monica and Rocio met her and testimony supports that the drive from the ranch to the clinic would have taken between 30 and 40 minutes.

Despite provisions in its own HIPP, Employer did not contact emergency service providers. The fact that Rocio was not actually suffering from heat illness is immaterial. Whether emergency service providers would have made a difference in any treatment provided to Rocio is also irrelevant. Pursuant to the foregoing, Employer's HIPP was not implemented when an employee displayed signs or symptoms of heat illness because emergency service providers were not contacted immediately.

Accordingly, the Division established that Employer violated section 3395, subdivision (f)(2). Citation 2 is affirmed.

3. Did the Division establish a rebuttable presumption that Citation 2 was properly classified as Serious?

Labor Code section 6432, subdivision (a), provides, in relevant part:

> (a) There shall be a rebuttable presumption that a "serious violation" exists in a place of employment if the division demonstrates that there is a realistic possibility that death or serious physical harm could result from the actual hazard created by the violation. The actual hazard may consist of, among other things:
> […]
>
> (2) The existence in the place of employment of one or more unsafe or unhealthful practices that have been adopted or are in use.

The Appeals Board has defined the term "realistic possibility" to mean a prediction that is within the bounds of human reason, not pure speculation. (*A. Teichert & Son, Inc. dba Teichert Aggregates*, Cal/OSHA App. 11-1895, Decision After Reconsideration (Aug. 21, 2015), citing *Janco Corporation*, Cal/OSHA App. 99-565, Decision After Reconsideration (Sep. 27, 2001).)

"Serious physical harm" is defined as an injury or illness occurring in the place of employment that results in, among other possible factors, "inpatient hospitalization for purposes other than medical observation." (Lab. Code §6432, subd. (e).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate, at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Pulido testified that he is current on his Division-mandated training. He has performed approximately 508 investigations, 58 of which involved a possible heat illness. Pulido testified that two of the deaths he investigated were confirmed as heat illness or heat stroke. Since at least 2008, Pulido has attended annual training on heat illness, which involves two separate classes: one advising the Division employees how to protect themselves from heat illness and the other training them on the enforcement of the Division's heat illness regulations.

The circumstances in the instant matter were not heat-related, and the citation was not issued as an Accident-Related violation. Nonetheless, Pulido's testified that if an employee was displaying the types of symptoms Rocio was experiencing, which could very easily have been symptoms of heat illness, the failure to implement emergency response procedures could result in serious physical harm or death. Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

4. Did Employer rebut the presumption that the violation cited in Citation 2 was Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violation?

Labor Code section 6432, subdivision (c), provides that an employer may rebut the presumption that a serious violation exists by demonstrating that the employer did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation. In order to satisfactorily rebut the presumption, the employer must demonstrate both:

> (1) The employer took all the steps a reasonable and responsible employer in like circumstances should be expected to take, before the violation occurred, to anticipate and prevent the violation, taking into consideration the severity of the harm that could be expected to occur and the likelihood of that harm

occurring in connection with the work activity during which the violation occurred. Factors relevant to this determination include, but are not limited to, those listed in subdivision (b) [; and]

(2) The employer took effective action to eliminate employee exposure to the hazard created by the violation as soon as the violation was discovered.

Labor Code section 6432, subdivision (b), provides that the following factors may be taken into account:

(A) Training for employees and supervisors relevant to preventing employee exposure to the hazard or to similar hazards; (B) Procedures for discovering, controlling access to, and correcting the hazard or similar hazards; (C) Supervision of employees exposed or potentially exposed to the hazard; and (D) Procedures for communicating to employees about the employer's health and safety rules and programs.

The knowledge of a supervisor is imputed to an employer, who cannot argue pursuant to Labor Code section 6432, subdivision (c), that it "did not know and could not, with the exercise of reasonable diligence, have known of the presence of the violation." (*Mountain F. Enterprises*, Cal/OSHA App. 1113595, Decision After Reconsideration (Feb. 14, 2018).) Employer's foreman, Eliseo, and Farm Labor Supervisor, Duran, had knowledge of Employer's HIPP procedures, the training they received included identification of heat illness symptoms, and they both had the authority to call an ambulance if it was necessary. However, they opted not to do so.

Additionally, Employer's Director of Human Resources, David Aquino, testified that if employees are exhibiting signs of heat illness, the supervisor is supposed to call Gonzalez to pick them up, not an emergency service provider. This is in direct contradiction of the plain language in Employer's HIPP.

Accordingly, Employer had knowledge that its HIPP emergency procedures were not being implemented and cannot rebut the presumption that Citation 2 was properly classified as Serious.

5. Was Citation 2 properly classified as a "Repeat Violation"?

Section 334, subdivision (d), provides that a "Repeat Violation" is:

[A] violation where the employer has abated or indicated abatement of an earlier violation occurring within the state for which a citation was issued, and upon a

later inspection, the Division finds a violation of a substantially similar regulatory requirement and issues a citation within a period of five years immediately following the latest of: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; or (2) the date on which the underlying citation became final by operation of law. For violations other than those classified as repeat regulatory, the subsequent violation must involve essentially similar conditions or hazards.

The Division classified Citation 2 as a Repeat Violation based on the issuance of a citation on January 15, 2015, for a violation of the heat illness regulations as they existed at that time (the 2015 Citation). The 2015 Citation became final through a Settlement Order issued by the Appeals Board on February 24, 2016.

Section 3395 was amended effective May 1, 2015, and significant changes have been made to the content, including renumbering of various subdivisions. The 2015 Citation was issued for a violation of section 3395, subdivision (f), which was the section on training when that citation was issued in January of 2015. The current citation (the 2018 Citation) was issued for a violation of section 3395, subdivision (f)(2), which is no longer the training section. The substantial amendments of section 3395 resulted in the training section being moved to subdivision (h) and subdivision (f) now regulates the emergency response procedures, as discussed above.

Section 334, subdivision (d), does not require that the repeat citation allege a violation of the identical regulation. It defines Repeat Violation using the phrases "substantially similar regulatory requirement" and "essentially similar conditions or hazards." As such, the circumstances surrounding the 2015 Citation must be reviewed and compared to the current citation.

a. The 2015 Citation

According to the Alleged Violation Description (AVD) and testimony at the hearing, the facts that resulted in the issuance of the 2015 Citation are undisputed. On July 30, 2014, in a temperature of approximately 97 degrees, an employee working outdoors picking grapes in the Bakersfield area experienced headache, dizziness, and vomiting. The employee worked in the crew supervised by Duran, and Eliseo was the foreman. The supervisors did not contact emergency response providers even though the employee was vomiting and unable to hold down water for three hours. A relative of the employee ultimately called an ambulance and the employee was later diagnosed as having food poisoning.

The Division cited Employer for failing to ensure that its supervisors were "adequately trained in procedures to follow when an employee exhibits symptoms consistent with heat illness, including emergency response procedures." (Ex. 6, 2015 Citation, AVD.) Specifically, the subdivision of 3395 for which Employer was cited provided:

> (f) Training.
> …
> (2) Supervisor training. Prior to supervising employees performing work that should reasonably be anticipated to result in exposure to the risk of heat illness[,] effective training on the following topics shall be provided to the supervisor:
> …
> (C) The procedures the supervisor is to follow when an employee exhibits symptoms consistent with possible heat illness, including emergency response procedures.

b. The 2018 Citation

As set forth above, the circumstances that led to the issuance of the 2018 Citation are remarkably similar to the 2015 Citation. An employee picking grapes near Bakersfield when the temperature was between 93 and 97 degrees experienced dizziness, headache, and disorientation. Her supervisors were Duran and Eliseo. The supervisors did not call an ambulance. Rocio ultimately received medical treatment and her diagnosis was unrelated to heat illness.

As in 2015, Employer was cited in 2018 because its supervisors did not contact emergency service providers when an employee was exhibiting signs that could have been heat illness.

c. Comparison of the 2015 and 2018 Citations

1. A Substantially Similar Regulatory Requirement

Prior to the amendment of section 3395 in 2015, there was no separately denoted subdivision regarding the performance standards for an employer's emergency response procedures. The requirement of having emergency response procedures was incorporated into the section regarding topics on which the employer was required to train its employees: "(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… ." (See Ex. C, 2010 CA REG TEXT [Pre-2015 version of section 3395].

The amendment in 2015 created a separate, more comprehensive emergency response procedures section. The regulatory requirement in both iterations of section 3395 was that an employer must have emergency response procedures and those procedures must be implemented, which is achieved through training the employees and supervisors about it.

As such, both versions of section 3395, subdivision (f), contained a substantially similar regulatory requirement: having emergency response procedures and implementing them appropriately.

2. Involving Essentially Similar Conditions or Hazards

As set forth above, the conditions that resulted in the issuance of both citations were strikingly similar. Both employees had to stop working due to feeling sick while picking grapes in temperatures exceeding 93 degrees, both employees experienced dizziness and headaches, Eliseo was the foreman of the crew on which each employee worked, Duran was the supervisor overseeing both employees' crews, and Eliseo and Duran failed to call emergency service providers in response to the symptoms each of the employees was exhibiting.

The hazards were also similar in that not training supervisors on emergency response procedures and not implementing emergency response procedures may both result in an employee that is exhibiting signs of heat illness dying or suffering a more severe illness.

Accordingly, the Division properly classified Citation 2 as a Repeat Violation because the 2015 Citation and the 2018 Citation were cited for substantially similar regulatory requirements and the conditions and hazards involved in both were similar.

6. Was the proposed penalty for Citation 2 reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Employer did not present any evidence or argument to rebut the presumption that the penalty was calculated in accordance with the Division's policies and procedures.

Pulido testified that the Base Penalty for a Serious violation is $18,000. Pulido assessed the Extent of the violation as Medium based on the number of employees exposed to the hazard.

There were 64 employees in Eliseo's crew, supporting a rating of Medium. Additionally, for the Likelihood rating, Pulido testified that the extent to which a violation of section 3395, subdivision (f), has resulted in injury or illness in his experience is approximately 50 percent of the time. As such, Pulido rated Likelihood as Medium. Pursuant to section 336, subdivision (b), there is no increase or decrease for Medium Extent and Likelihood, resulting in a Gravity-Based Penalty of $18,000.

Section 336, subdivision (d)(12), provides that the only adjustment factor permitted for Repeat violations is for Size. There was testimony that Employer has more than 100 employees, which results in no adjustment to the Gravity-Based Penalty. (§336, subd. (d).)

Section 336, subdivision (g), provides, in relevant part:

(g) Repeat Violation –

> (1) In General - If a … Serious violation is repeated (as provided under section 334(d) of this article) the Proposed Penalty is adjusted upward as follows:
>
> 1st repeat - the Proposed Penalty is multiplied by two.
> […]

The Adjusted Penalty of $18,000 is multiplied by two based on the determination that it was properly classified as a Repeat Violation. Accordingly, the penalty of $36,000 for Citation 2 is reasonable.

Conclusions

For Citation 1, Item 1, the Division established that Employer violated section 342, subdivision (a). The proposed penalty was not appealed and is reasonable.

For Citation 2, the Division established that Employer violated section 3395, subdivision (f)(2). The citation was properly classified as Repeat Serious and the proposed penalty is reasonable.

ORDER

It is hereby ordered that Citation 1, Item 1, is affirmed and the penalty of $5,000 is sustained.

It is hereby ordered that Citation 1, Items 2 and 3, are dismissed and the penalties are vacated pursuant to the parties' stipulation.

It is hereby ordered that Citation 2 is affirmed and the penalty of $36,000 is sustained.

It is further ordered that the penalties are assessed as set forth in the attached Summary Table.

Dated: 03/16/2020

Kerry Lewis
Administrative Law Judge

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.**