

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

*In the Matter of the Appeal of:*

**DARYL THOMAS MEDIA**  
4008 Maris Court  
Bakersfield, CA 93313

Employer

**DOCKET 15-R4D7-0120**

**DECISION**

**Statement of the Case**

Daryl Thomas Media (Appellant) is an advertising business. Beginning June 12, 2014, the Division of Occupational Safety and Health (the Division) through Associate Safety Engineer Beverly Brentwood (Brentwood), conducted an accident inspection at a place of employment maintained by Appellant at 8040 White Lane, Bakersfield, California (the site). On December 5, 2014, the Division cited Appellant for six violations of California Code of Regulations, title 8.<sup>1</sup>

Appellant filed a timely appeal contesting the existence of the alleged violations, and their classifications. Appellant also alleged the affirmative defense of lack of jurisdiction based on no employer-employee relationship.

This matter came regularly for hearing before Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Bakersfield, California on November 3, 2015. Daryl W. Thomas (Thomas), represented Appellant. Efren Gomez, District Manager, represented the Division. The matter was submitted on November 3, 2015. The ALJ extended the submission date to November 23, 2015, on his own motion.

During a prehearing conference held on May 11, 2015, the parties stipulated to amend the Alleged Violation Description for Citation 1, item 1,

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

replacing “but not limited to June 6, 2014” with “but not limited to June 12, 2014”, to correct a typographical error.

### **Issue**

1. Was Appellant Maurice Sneed’s (Sneed) employer on June 8, 2014, for purposes of jurisdiction under California Code of Regulations, title 8?
2. Did Appellant violate section 342, subdivision (a), by failing to report Sneed’s death, even though his body was located near the site, in his car?
3. Did Appellant violate section 3203, subdivision (b), by not maintaining or providing records, of scheduled and periodic inspections of the site, to the Division?
4. Did Appellant violate section 3203, subdivision (a), by failing to establish an Injury and Illness Prevention Program (IIPP)?
5. Did Appellant violate section 3395, subdivision (f)(3), by failing to establish a written Heat Illness Prevention Program (HIPP)?
6. Did Appellant violate section 3395, subdivision (f)(1) by failing to effectively train Sneed in heat illness prevention prior to commencing work?
7. Did Appellant violate section 3395, subdivision (c), by failing to provide sufficient potable drinking water or maintain procedures for replenishment during Sneed’s shift?
8. Did the Division correctly classify each of the alleged violations?

### **Findings of Fact**

1. Appellant directly hired Sneed as a sign twirler to advertise on a busy intersection near Appellant’s client, a local Little Caesar’s restaurant.
2. Appellant provided the terms of Sneed’s employment.
3. Appellant is in the business of providing labor for advertisements, including sign twirlers. Sign twirling is a component of Appellant’s regular business.
3. Appellant controlled the hours during which Sneed could work by indicating appropriate blocks of time. Appellant did not pay Sneed for working outside of the approved time blocks.
4. Sneed was required to clock in and clock out every shift.
4. Sign twirling does not require special skills, training, education or tools.
5. Appellant provided the sign that Sneed twirled.
6. Appellant directed Sneed to twirl the sign at a particular intersection, although Sneed could choose the corner he stood on.
7. Sneed worked for Appellant by the hour, between March 3, 2014 and June 8, 2014. Appellant paid Sneed in cash.
8. Sneed passed away on June 8, 2014, during his regular work hours. His body was located in his car near the site.

9. Appellant knew on June 8, 2014, that Sneed had died at or near the site during his regular work hours, but failed to report the death to the Division.
10. Appellant had not established an IIPP on June 8, 2014, because Appellant believed it was not Sneed's employer.
11. Appellant had not established an HIPP on June 8, 2014, because Appellant believed it was not Sneed's employer.
12. Appellant did not maintain or provide to the Division, records of site inspections performed at the site on or prior to June 8, 2014, because Appellant believed it was not Sneed's employer.
13. Appellant did not effectively train Sneed in heat illness prevention. Appellant only told Sneed not to work if the temperature exceeded 100 degrees Fahrenheit.
14. Appellant did not provide drinking water to Sneed on June 8, 2014, nor did Appellant establish procedures for replenishment to ensure Sneed drank enough water. Sneed had to walk approximately 1 block from the site to the Little Caesar's restaurant to fill his water bottle.
15. The failure to establish an IIPP indicates that Appellant did not address identifiable occupational safety and health risks.
16. The failure to establish an HIPP indicates that Appellant did not address the risk of heat illness in the workplace.
17. The failure to effectively train employees in the prevention of heat illness indicates that Appellant did not ensure that employees recognize the symptoms of heat illness, know when and how to report it, how to properly hydrate and how to seek appropriate refuge from heat.
18. Appellant's failure to provide sufficient quantity of potable drinking water to employees, or to establish effective procedures for replenishment during the employee's shift, exposed employees to the risk of heat illness from dehydration.

### **Analysis**

**1. Was Appellant Maurice Sneed's (Sneed) employer on June 8, 2014, for purposes of jurisdiction California Code of Regulations, title 8?**

Appellant challenges the Division's jurisdiction to issue the appealed citations, on the grounds that there was no employer-employee relationship between Appellant and Sneed on June 8, 2014. In order to sustain the citations the Division has the burden of proving that, as a threshold matter, the relationship between Appellant and Sneed was that of employer-employee. (*Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).)

Labor Code section 6300 establishes the California Occupational Safety and Health Act of 1973 (the Act) "for the purpose of assuring safe and healthful working conditions for all California working men and women..."

Section 6304 specifies that “Employer” is to have the same meaning as it has pursuant to section 3300, subdivision (c), which states an employer is “every person including any public service corporation, which has any natural person in service.”

Labor Code section 6304.1, subdivision (a) provides:

“Employee” means every person who is required and directed by any employer to engage in any employment to go to work or be at any time in any place of employment.

Labor Code section 6303, subdivision (a) provides:

"Place of employment" is any place and the premises appurtenant thereto, where employment is carried on except a place where the health and safety jurisdiction is vested by law in, and actively exercised by, any state or federal agency other than the division.

Labor Code section 6303, subdivision (b) provides:

"Employment" includes the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, demolition, and construction work, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, except household domestic service.

Appellant admitted during the hearing that it had Sneed in its service to perform work, specifically to twirl a sign at the site, on the day Sneed died. The Division offered substantial evidence that the site was a place of employment that fell under its jurisdiction for purposes of enforcing the Occupational Safety and Health Act. . (Testimony of Brentwood, Thomas, see Exhibits 3 and 4.) The Division thus produced sufficient evidence demonstrating a statutory employer-employee relationship existed between Appellant and Sneed on the day Sneed died.

In addition to the statutory definitions, the California Supreme Court has stated that “the principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” (*S. G. Borello & Sons, Inc. [Borello] v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350.) It is the existence of the right to control, and not the extent to which control is

exercised, that gives rise to the employer-employee relationship. (*Borello, supra*, at pp. 366-367 (Kaufman, J. dissenting).) The Court stated, however, that a mechanical application of the test is “often of little use in evaluating the infinite variety of service arrangements.” (*Id.*, at p. 350.) While the Court held that control was the most important consideration, it also provided a list of factors to consider when determining whether an employer-employee relationship exists. These factors include:

(a) The right to discharge at will (which the Court deemed “strong evidence in support of an employment relationship”);

(b) whether the one performing services is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the services are to be performed;

(g) the method of payment, whether by the time or by the job;

(h) whether the work is part of the regular business of the principal; and

(i) whether the parties believe they are creating the relationship of employer-employee.

“The factors cannot be applied mechanically as separate tests, they are intertwined and their weight depends often on particular combinations.” (*Id.*, pp. 350-351.)

With regard to the first factor, Thomas testified that there was only an oral contract between Appellant and Sneed, and that Sneed knew that he only got paid if he performed the work as specified by Appellant, at a certain location and during specified times. That is sufficiently similar in nature to the right to discharge at will, such that this evidence weighs in favor of finding an employer-employee relationship.

With regard to the second factor, Thomas admitted to Brentwood and testified at hearing to the fact that Appellant is in the business of providing advertising services, in particular sign twirling,<sup>2</sup> to local businesses. Appellant admitted that it hired Sneed to twirl a sign at a busy intersection for the benefit of Appellant's client. Thus, the activity that Sneed was performing is the very activity that Appellant exists to provide. This factor, therefore, weighs heavily in favor of finding an employer-employee relationship.

With regard to the third factor, it was undisputed that Appellant did not physically supervise Sneed at the site during his shift. Nonetheless, the undisputed evidence at hearing also showed that Appellant directed the times and locations where Sneed could perform his work, and limited Sneed to advertising Appellant's client(s). Essentially, Sneed acted under direction of Appellant at all times, and Appellant exercised pervasive control over Sneed's work, even though Appellant was not physically present to observe him. (See *Yellow Cab Cooperative v. Workers Compensation Appeals Board* (1991) 226 Cal.App.3d 1288 [employer-employee relationship found even when there is an absence of control over work details, where the principal retains "pervasive control" over the operation as a whole, the worker's duties are an integral part of the business, and the nature of the work makes detailed control unnecessary].) Therefore, this factor weighs heavily in favor of finding an employer-employee relationship.

As to the fourth factor, Appellant provided no evidence at hearing that special skills are required to twirl a sign. (Testimony of Brentwood.) Thomas acknowledged during his testimony that no particular license, certification, or education was necessary to perform the role of a sign twirler. Based on the undisputed evidence offered by both parties concerning the work for which Sneed was hired – standing on a street corner while holding or twirling a sign – the evidence strongly supports a conclusion that no particular skill was required to perform the work. This factor weighs heavily in favor of finding an employer-employee relationship.

As to the fifth factor, Appellant admitted during the investigation and at hearing that Sneed was required to twirl a sign picked up from Appellant and selected by Appellant's client. Appellant chose the intersection where Sneed worked, as well as the time blocks during which he would be paid to work. Although Sneed had the ability to choose which corner of the intersection to stand on, nonetheless he was not free to work at any other intersection than the one that Appellant assigned him to work at. Similarly, although Sneed provided his own gloves and possibly his own hat (Testimony of Thomas), there was no evidence that either item was necessary to perform the assigned

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<sup>2</sup> Sign twirling was described at hearing as essentially holding a sign advertising a business or service on a street and twirling or otherwise gesturing with the sign to attract attention of passerby.

work. Appellant provided Sneed with everything that he needed to perform the work for which he was hired. Therefore, this factor weighs heavily in favor of finding an employer-employee relationship.

As to the sixth factor, the undisputed evidence was that Sneed performed work for Appellant on a weekly basis between March 3, 2014 and June 8, 2014. Sneed worked substantially less than 40 hours per week on average for Appellant (See Exhibit 4). Although the evidence only shows that Sneed performed work for Appellant over a three month period, the regularity of the work performed, as opposed to its duration, and the fact that Appellant paid Sneed by the hour as opposed to by the project, weighs slightly in favor of finding an employer-employee relationship. (See *Azrate v. Bridge Terminal Transport, Inc.* (2011) 192 Cal.App.4<sup>th</sup> 419, at p. 427 [employer-employee relationship found where, among other factors, defendant paid plaintiff drives hourly rates for some parts of plaintiffs' workday].)

As to the seventh factor, it is undisputed that Appellant paid Sneed in cash. It is not clear whether taxes were withheld or benefits paid. In *Lara v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4<sup>th</sup> 393, 400-401, the Court found a principal-independent contractor relationship existed between a gardener and his hirer, due to the fact that taxes were not taken out of a gardener's pay by the party to whom he rendered services, and the fact that he instead paid his own taxes. Here, the fact that Appellant paid Sneed in cash on a weekly basis and the lack of evidence that Appellant paid Sneed benefits or withheld taxes on his behalf, weighs slightly in favor of finding an independent contractor relationship.

With regard to the eighth factor, it was undisputed that Appellant is in the business of providing advertising services to clients, which services include providing sign twirlers to twirl signs advertising clients' businesses. The work that Appellant does is identical to what it hired Sneed to do. Sneed's work was, therefore, integral to Appellant's business. This factor therefore weighs very heavily in favor of finding an employer-employee relationship.

Finally, the ninth factor looks at the subjective intent of the parties. "The parties' use of a label to describe their relationship does not control and will be ignored where the evidence of their actual conduct establishes a different relationship exists." (*Futrell v. Payday California, Inc.* (2010) 190 Cal.App.4<sup>th</sup> 1419, 1434; citing *Borello, supra*, 48 Cal.3d at p. 349.) Appellant had the opportunity, but failed to present any evidence of actual conduct demonstrating that Sneed was anything other than Appellant's employee. Appellant merely relied on the fact that the parties "understood" the relationship to be that of principal and independent contractor, even though Appellant could not articulate any facts showing that their conduct matched that label. Thus, although Appellant maintained throughout the investigation

and hearing that its relationship with Sneed was that of a principal and an independent contractor, nonetheless, this only weighs slightly in favor of finding an independent contractor relationship.

To summarize, Appellant exercised almost total control over the means and manner of the work Sneed performed, which was work that was identical and integral to the services provided by Appellant to its clients. The weight of the evidence strongly supports the conclusion that the relationship between Appellant and Sneed was that of employer-employee. Therefore, the preponderance of the evidence demonstrates that Appellant was Sneed's employer, and therefore, the Division exercised lawful jurisdiction to investigate and cite Appellant for violations of title 8 of the California Code of Regulations.

**2. Did Appellant violate section 342, subdivision (a), by failing to report Sneed's death, even though his body was located near the site, in his car?**

Section 342, subdivision (a), states in relevant part:

(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.

In citing Appellant, the Division alleged:

Prior to and during the course of the course of the investigation including, but not limited to June 12, 2014<sup>3</sup>, employer did not report by telephone or telegraph to the nearest district office of the Division of Occupational Safety and health a serious injury of an employee occurring in a place of employment or in

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<sup>3</sup> By stipulation, the parties amended the Alleged Violation Description to reflect the correct date of the inspection.

connection with employment on June 8, 2014 in Bakersfield, CA.

The Division has the burden of proving a violation, including the applicability of the safety order, by a preponderance of the evidence. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted 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. (*Lone Pine Nurseries*, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing *Leslie G. v. Perry & Associates* (1996) 43 Cal.App. 4th 472, 483.)

The elements of the violation are: (1) the employer has actual or constructive knowledge of an employee's serious injury or illness or death; (2) the employer fails to immediately report the employee's serious injury, illness or death to the Division of Occupational Safety and Health, (3) the serious injury, illness or death occurred in a place of employment or in connection with any employment.

With regard to the first and second elements, the parties offered undisputed evidence at hearing that Appellant learned of Sneed's death on the same day it occurred, but did not report Sneed's death to the Division. Appellant's admission that it knew that Sneed had died, is sufficient evidence to prove the first element by a preponderance of the evidence. Similarly, Appellant's admission that it did not report the death to the Division is sufficient evidence to prove the second element by a preponderance of the evidence.

With regard to the third element, Appellant argued at hearing that it was relieved of the reporting requirement because Sneed's body was found near the site in his car, and the cause was either unknown or unrelated to the work Sneed was performing that day. The language of the safety order states that it applies to any death of an employee "occurring in a place of employment" or "in connection with any employment". "Section 342, subdivision (a), does not except injuries, illness, or deaths from the reporting requirement merely because they are not work related." (*Honeybaked Hams*, Cal/OSHA App. 13-0941, Denial of Petition For Reconsideration (June 25, 2014); see *YNT Harvesting*, Cal/OSHA App. 08-5010, Denial of Petition For Reconsideration (Mar. 14, 2013) [employer's contention that illness may have been food poisoning or heart trouble, rather than heat illness, "miss[ed] the point."]; see also *Pacific Gas and Electric Company*, Cal/OSHA App. 76-966, Decision After Reconsideration (July 31, 1979) ["Sound public policy requires every death to be reported irrespective of whether death is a result of an

industrial accident or other cause.”) Thus, the actual cause of the serious reportable injury, illness or death is not relevant to whether an employer has a duty to report it to the Division.

Appellant’s contention that it is relieved from the reporting requirement because Sneed’s body was found in his car near the intersection where he was working, is similarly unavailing. The Appeals Board has previously refused to excuse the failure to report an otherwise reportable serious injury, illness or death, even where the employer could not confirm that the injury occurred at work. (*Lakeside Veterinary Hospital*, Cal/OSHA App. 97-1410, Decision After Reconsideration (Nov. 22, 2000).) There, the Appeals Board stated:

Employer had at least substantial reason to believe that the cat bite occurred at its facility, and that the injury had led to hospitalization after the hospital called concerning workers' compensation information relating to Brick. Where an employer is uncertain about whether the injury warrants a call to the Division, the Board has long held the employer can resolve the uncertainty, and any risk of citation for failure to report, by calling the Division. (Citations omitted.)

The Appeals Board arrived at a similar result in *Phil’s Food Market, Inc.*, Cal/OSHA App. 78-806, Decision After Reconsideration (Feb. 6, 1979), holding that doubts about whether eventual hospitalization or death is related to a workplace injury must be resolved in favor of requiring reporting.

Here, the uncontroverted evidence at hearing established that Sneed had been working for Appellant at the site prior to when his body was found in his car, not far from where he was working. Appellant found out that same day that Sneed had died. Any doubt Appellant had as to whether Sneed’s death was connected in any way to his employment should have been resolved in favor of reporting, as the Appeals Board has reiterated numerous times. Therefore, Appellant’s failure to report is not excused by the mere fact that doubt exists as to exactly where and how Sneed died, because there was a sufficient nexus established between when and where Sneed had been working and when and where his body was found, to put Appellant on inquiry notice that a reportable death had occurred. Thus, the Division met its burden of establishing by a preponderance of the evidence that Sneed’s death occurred at work or in connection with work, and therefore proved the third element of section 342, subdivision (a).

For the foregoing reasons, the Division established a violation of section 342, subdivision (a), by a preponderance of the evidence.

**3. Did Appellant violate section 3203, subdivision (b), by not maintaining or providing records of scheduled and periodic inspections of the site to the Division?**

Section 3203, subdivision (b), states in relevant part:

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

(1) Records of scheduled and periodic inspections required by subsection (a)(4) to identify unsafe conditions and work practices, including person(s) conducting the inspection, the unsafe conditions and work practices that have been identified and action taken to correct the identified unsafe conditions and work practices. These records shall be maintained for at least one (1) year

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Exception: Employers with fewer than 10 employees may elect to maintain the inspection records only until the hazard is corrected.<sup>4</sup>

In citing Appellant, the Division alleged:

Prior to and during the course of the investigation including, but not limited to June 6, 2014, the employer did not maintain and/or provide to the Division upon request scheduled and periodic inspections to identify unsafe conditions and work practices as per this section.

Here, Brentwood testified that she requested such records from Appellant but did not receive any. Appellant had the opportunity to provide evidence of inspection records but failed to at hearing. (See *Kaiser Steel*

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<sup>4</sup> The Appeals Board “considers exceptions to safety orders as affirmative defenses; the employer advancing the defense must prove in met the conditions or elements of the exception.” (*CGK Inc. dba Premier Steel Fabrication*, Cal/OSHA App. 13-0518-0519, Denial of Petition for Reconsideration (Oct. 30, 2015), citing *Guardsmark*, Cal/OSHA App. 10-2675, Denial of Petition for Reconsideration (Sep. 22, 2011), writ denied Orange County superior court, 2015.) Appellant did not plead the application of the exception, nor did Appellant sufficient evidence to establish the exception should apply to this case. Although Exhibit 4 suggests Appellant may have only employed six employees, Appellant failed to prove that it conducted any inspections or kept any records of them. Accordingly, even if Appellant had raised the exception, there was insufficient evidence to warrant its application here.

*Corporation*, Cal/OSHA App 75,-1135, Decision After Reconsideration (June 21, 1982) [the Appeals Board may consider an employer's failure to explain or deny adverse evidence or facts]; see Evid. Code, § 413; see also *Shehtanian v. Kenny* (1958) 156 Cal.App.2d 576 [failure to offer any evidence on a certain issue, though production of such evidence was clearly within the defendant's power, raised an inference that the evidence, if produced, would have been adverse].) More to the point, Thomas admitted during his testimony that he did not inspect work location or supervise his sign twirlers as they worked. The fact that Appellant did not perform inspections explains, but does not excuse, the fact that Appellant did not maintain records of inspections, because an employer may not benefit from the violation of a safety order to excuse the violation of a related safety order. The Division's evidence that it requested records but did not receive them, coupled with Thomas's failure to explain the lack of records, and his admissions at hearing, constitute sufficient evidence to support an inference that no inspections took place.

For the foregoing reasons, the Division established by a preponderance of the evidence that Appellant violated section 3203, subdivision (b).

**4. Did Appellant violate section 3203, subdivision (a), by failing to establish an Injury and Illness Prevention Program (IIPP)?**

Section 3203, subdivision (a), states in relevant part:

- (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program).

In citing Appellant, the Division alleged:

Prior to and during the course of the investigation including, but not limited to June 6, 2014, the employer did not establish, implement, and maintain a written injury and illness prevention program consistent with this section, nor was a written program available upon request.

Brentwood testified that after she opened her inspection, she sent a document request to Appellant requesting a copy of Appellant's IIPP, but did not receive one. Brentwood also testified she did not receive any explanation from Appellant for why it did not provide an IIPP in response to her request. As noted in part (3), above, Appellant had the opportunity throughout the hearing to present evidence to explain or deny the Division's evidence, but did not do so. The only reasonable inference that can be drawn from the evidence is that Appellant did not have an IIPP as of the date of the incident or the inspection, which evidence is sufficient for a finding that a violation occurred.

For the foregoing reasons, the Division established by a preponderance of the evidence that Appellant violated section 3203, subdivision (a).

**5. Did Appellant violate section 3395, subdivision (f)(3), by failing to establish a written Heat Illness Prevention Program?**

Section 3395, subdivision (f)(3), at the time of the inspection, stated<sup>5</sup>:

(f) Training

(3) 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.

In citing Appellant, the Division alleged:

Prior to and during the course of the inspection, including, but not limited to June 12, 2014, a written Heat Illness Prevention Program had not been established, nor available upon request.

Section 3395, subdivision (a), states that the safety order applies to all outdoor places of employment. To sustain a violation, the Division has the burden of establishing by a preponderance of the evidence (1) that the employer maintained an outdoor place of employment; and, either (2) the employer failed to establish a compliant written Heat Illness Prevention Program (HIPP), or (3) the employer failed to make its HIPP available to the Division upon request.

There was no dispute at hearing that the intersection where Sneed was working was an outdoor place of employment. Furthermore, Brentwood gave uncontroverted testimony at hearing that she requested a copy of Appellant's HIPP, but did not receive one. She also testified that Thomas told her that Appellant did not have an HIPP because it considered its sign twirlers to be independent contractors. Thomas had the opportunity to give testimony to clarify or dispute the statements attributed to him, but he did not. The logical conclusion that can be drawn from the evidence is that Appellant did not in fact have an HIPP.

For the foregoing reasons, the Division established by a preponderance of the evidence that Appellant violated section 3395, subdivision (f)(3).

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<sup>5</sup> Section 3395 was subsequently amended and relettered. For purposes of this appeal and this decision, however, the undersigned relies on the language that was in effect at the time of the inspection.

**6. Did Appellant violate section 3395, subdivision (f)(1) by failing to effectively train Sneed in heat illness prevention prior to commencing work?**

Section 3395, subdivision (f)(1), at the time of the inspection, stated<sup>6</sup>:

(f) Training.

(1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated result in exposure to the risk of heat illness:<sup>7</sup>

In citing Appellant, the Division alleged:

Prior to and during the course of the inspection, including, but not limited to June 8, 2014, employees required to work outside twirling a sign were not effectively trained in heat illness prevention prior to commencing work.

To sustain a violation, the Division has the burden of establishing that (1) Appellant should reasonably have anticipated that Sneed was exposed to the risk of heat illness; and, (2) Appellant failed to provide effective training in one or more of the enumerated topics prior to Sneed beginning work.

Here, the parties did not dispute that Sneed's work could expose him to heat illness. Brentwood testified that it was close to 100 degrees Fahrenheit on the date Sneed died, and Thomas admitted that the scope of Appellant's heat illness training was that he warned Sneed not to work if temperatures exceeded 100 degrees Fahrenheit. The evidence therefore establishes that Appellant reasonably anticipated that Sneed could be exposed to risk of heat illness. Moreover, Appellant failed to offer any evidence of that it implemented training in any of the topics required by the safety order. The evidence at hearing, therefore, was sufficient to establish that Appellant was required to, and did not, provide effective heat illness prevention training prior to Sneed beginning work

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<sup>6</sup> Section 3395 was subsequently amended and relettered. For purposes of this appeal and this decision, however, the undersigned relies on the language that was in effect at the time of the inspection.

<sup>7</sup> Section 3395, subdivision (f)(1) lists 9 topics that must be covered by an employer. Here, as discussed below, substantial evidence at hearing demonstrated that Appellant did not train Sneed regarding any of the topics.

For the foregoing reasons, the Division established by a preponderance of the evidence that Appellant violated section 3395, subdivision (f)(1).

**7. Did Appellant violate section 3395, subdivision (c), by failing to provide sufficient potable drinking water or maintain procedures for replenishment during Sneed's shift?**

Section 3395, subdivision (c), at the time of the inspection, stated<sup>8</sup>:

Provision of water. Employees shall have access to potable drinking water meeting the requirements of Sections 1524, 3363, and 3457, as applicable. Where drinking water is not plumbed or otherwise continuously supplied, it shall be provided in sufficient quantity at the beginning of the work shift to provide one quart per employee per hour for drinking for the entire shift. Employers may begin the shift with smaller quantities of water if they have effective procedures for replenishment during the shift as needed to allow employees to drink one quart or more per hour. The frequent drinking of water, as described in subsection (h)(1)(C), shall be encouraged.

In citing Appellant, the Division alleged:

Prior to and during the course of the inspection, including, but not limited to June 08, 2014, employees did not have potable drinking water or sufficient water supply close to work area where employee was required to work outdoors as a sign twirler. No established effective replenishment procedures were in place.

To sustain a violation of this standard, the Division has the burden of establishing that Appellant failed to provide access to potable drinking water meeting the requirements of California Code of Regulations, title 8. The California Supreme Court has previously held the use of the word "provide" to mean that the employer must pay for the item. (*Bendix Forrest Products v. Division of Occupational Safety and Health* (1979) 25 Cal.3d 465.) Thus, the Appeals Board has found a violation where, for instance, the employer provided its employee bus driver with a list of locations where water could be

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<sup>8</sup> Section 3395 was subsequently amended and relettered. For purposes of this appeal and this decision, however, the undersigned relies on the language that was in effect at the time of the inspection.

purchased or otherwise obtained, in lieu of the employer itself purchasing and locating the water in a readily available location. (See *A C Transit*, Cal/OSHA App. 08-4611, Denial of Petition for Reconsideration (June 10, 2011).)

In addition, where said water is not plumbed or otherwise continuously supplied, the Division has the burden of proving either a) the employer failed to provide sufficient quantity at the beginning of the work shift to provide one quart per hour per employee for the entire shift; or, b) if smaller quantities were provided at the beginning of the shift, the employer failed to have effective procedures for replenishment. Finally, the Division may establish a violation by proving by a preponderance of the evidence that the employer failed to encourage frequent drinking of water as required by the safety order.<sup>9</sup>

Although the safety order incorporates the requirements of several other sections, they are not all pertinent to discussion of this alleged violation. For instance, section 1524 is inapplicable as its plain language restricts its application to construction sites. Similarly, section 3457 is inapplicable as it only applies to agricultural employers. Section 3363, however, is relevant to the discussion of this alleged violation, and states in pertinent part:

(a) Potable water in adequate supply shall be provided in all places of employment for drinking...

Here, Thomas admitted to Brentwood that Sneed was required to provide his own water, although Little Caesar's permitted Sneed to fill his water bottle up at its establishment, approximately one block from the site. Appellant failed to offer evidence that it directly provided water to Sneed, or that it had any procedures in place to replenish Sneed's water or ensure he was drinking enough. The safety order defines "heat illness" 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

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<sup>9</sup> In this case, both parties offered evidence that Sneed was twirling a sign advertising a Little Caesar's restaurant that is located approximately one block from the site. Furthermore, Brentwood testified that the Division investigated Little Caesar's after learning about Sneed's death from the county coroner. A primary employer is the employer who loans or leases one or a number of employees to another (secondary) employer. (*Staffchex*, Cal/OSHA App. 10-2456-2458, Decision After Reconsideration (Aug. 28, 2014), citing *Sully-Miller Contracting Company v. CA Occupational Safety and Health Appeals Board* (2006) 138 Cal. App. 4<sup>th</sup> 684, 693-694.) Here, the parties offered evidence that Sneed worked directly for Appellant, but his efforts benefited not only Appellant but also Appellant's client, Little Caesar's. Under the limited facts offered at hearing, then, Sneed could be seen as having two employers on the date of the incident: a primary employer (Appellant), and a secondary employer (Little Caesar's). Regardless, the Appeals Board has previously held that "all employers are obligated to provide a safe and healthful workplace for their employees." (*Kelly Services*, Cal/OSHA App. 06-1024, Decision After Reconsideration (Jun. 15, 2011), citing Cal. Lab. Code, § 6400.) This duty is non-delegable. (*Labor Ready, Inc.*, Cal/OSHA App. 99-3350, Decision After Reconsideration (May 11, 2001).)

stroke.” (Cal. Code Regs., tit. 8, § 3395, subd. (d).) Given the dangers posed by heat illness, requiring an employee to continuously walk a block to obtain potable drinking water meeting the requirements of the safety order is unreasonable. Brentwood offered some evidence that it was hot on the day of the incident. Putting the burden on the employee to walk a block in hot conditions in order to obtain drinking water fails to further the Legislature’s intent of providing for a safe and healthful workplace. Coupled with the fact that Appellant offered no evidence of replenishment procedures, there was sufficient evidence offered at hearing to establish that Appellant violated the cited safety order.

For the foregoing reasons, the Division established by a preponderance of the evidence that Appellant violated section 3395, subdivision (c).

## **8. Did the Division correctly classify each of the alleged violations?**

Besides contesting the existence of the alleged violations, Appellant also contested the classifications of the appealed citations. The Division bears the burden of establishing by a preponderance of the evidence that it correctly classified the alleged violations.

A regulatory violation is defined as “a violation, other than one defined as Serious or General that pertains to permit, posting, recordkeeping, and reporting requirements as established by regulation or statute. For example, failure to obtain permit; failure to post citation, poster; failure to keep required records; failure to report industrial accidents, etc.” (Cal. Code Regs., tit. 8, § 334, subd. (a).)

A general violation is defined as “a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees.” (Cal. Code Regs., tit. 8, § 334, subd. (b).)

The Division classified Citation 1, item 1 [alleged violation of section 342, subdivision (a)] as regulatory. Specifically, Brentwood found that it pertained to an alleged violation of a reporting requirement. The Division presented sufficient evidence that it correctly classified the violation as regulatory as opposed to general or serious, and Appellant failed to offer any evidence in opposition. Thus, the Division met its burden with respect to Citation 1, item 1.

The Division classified Citation 1, item 2 [alleged violation of section 3203, subdivision (b)(1)] as regulatory. Specifically, Brentwood stated that the alleged violation pertained to record keeping. The Division presented sufficient evidence that it correctly classified the violation as regulatory as opposed to

general or serious, and Appellant failed to offer any evidence in opposition. Thus, the Division met its burden with respect to Citation 1, item 2.

The Division classified Citation 1, item 3 [alleged violation of section 3203, subdivision (a)] as general. Specifically, Brentwood testified that not having an IIPP relates to employee safety and health, particularly in situations where employees work outside in potentially high temperatures. Furthermore, it is axiomatic that the failure to create a written safety program bears a relationship to occupational safety and health, and there was sufficient evidence from the Division to establish that twirling a sign posed identifiable risks to employees that could and should have been addressed via a written program. The Division presented sufficient evidence that it correctly classified the violation as general as opposed to regulatory or serious, and Appellant failed to offer any evidence in opposition. Thus, the Division met its burden with respect to Citation 1, item 3.

The Division classified Citation 1, item 4 [alleged violation of section 3395, subdivision (f)(3)] as general. Specifically, Brentwood testified that the lack of a written HIPP made it likely that Appellant was not providing adequate heat illness training to its employees and therefore its employees were exposed to the increased risk of serious injury or illness caused by heat exposure. Thus, the Division presented sufficient evidence that it correctly determined that the failure to put procedures for complying with the heat illness standard in writing bore a direct relationship to safety and health. Appellant failed to offer any opposing evidence. Thus, the Division met its burden with respect to Citation 1, item 4.

The Division classified Citation 1, item 5 [alleged violation of section 3395, subdivision (f)(1)] as general. Specifically, Brentwood testified that the failure to implement employee training on the required heat illness prevention topics bore a direct relationship to employee safety and health because employees twirling signs could be exposed to high temperatures putting them at risk of heat illness, and training is important to help employees recognize the symptoms of heat illness, know when and how to report it, how to properly hydrate and how to seek appropriate refuge from heat. The Division presented sufficient evidence that it correctly classified the violation as general as opposed to regulatory or serious, and Appellant failed to offer any evidence in opposition. Thus, the Division met its burden with respect to Citation 1, item 5.

The Division classified Citation 1, item 6 [alleged violation of section 3395, subdivision (c)] as general. Specifically, Brentwood testified that Appellant failed to provide Sneed with water and lacked procedures for ensuring proper hydration, which bore a direct relationship to his safety and health because it increased the likelihood that Sneed could become dehydrated and consequently increased the likelihood that Sneed could suffer

serious illness, injury or death. The Division presented sufficient evidence that it correctly classified the violation as general as opposed to regulatory or serious, and Appellant failed to offer any evidence in opposition. Thus, the Division met its burden with respect to Citation 1, item 6.

For the foregoing reasons, the Division met its burden of establishing by a preponderance of the evidence that it correctly classified Citation 1, items 1 through 6.<sup>10</sup>

### **Conclusion**

For the foregoing reasons, Appellant's appeal is denied. The Division established the existence of an employer-employee relationship between Appellant and Sneed by a preponderance of the evidence; therefore, the Division possessed the necessary jurisdiction to investigate and cite Appellant for violations of safety orders found under title 8 of the California Code of Regulations. Furthermore, the Division established the existence of the alleged violations found in Citation 1, items 1 through 6, by a preponderance of the evidence. Finally, the Division established by a preponderance of the evidence that it correctly classified the violations described in Citation 1, items 1 through 6.

### **Order**

It is hereby ordered that Citation 1, items 1 through 6 are affirmed, and the penalties are assessed as set forth in the attached Summary Table. Total penalties are assessed in the amount of \$6,420, payable in 36 monthly installments, in exchange for Appellant having waived at hearing the statute of limitations for collection found under Labor Code section 6651, subdivision (a), and as further described in the attached Summary Table.

Dated: December 16, 2015  
HIC:ml

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**HOWARD I. CHERNIN**  
Administrative Law Judge

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<sup>10</sup> Appellant did not raise the reasonableness of any of the proposed penalties as part of its appeal. An issue not properly raised on appeal is deemed waived. (See § 361.3 ["Issues on Appeal"]; *Bourgeois, Inc.*, Cal/OSHA App. 99-1705, Denial of Petition for Reconsideration (Apr. 26, 2000); *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) Regardless, Brentwood's uncontroverted testimony and the Division's C-10 Proposed Penalty Worksheet (Exhibit 5) established the reasonableness of the penalties the Division proposed for each alleged violation, by a preponderance of the evidence.

**APPENDIX A**  
**SUMMARY OF EVIDENTIARY RECORD**

**Name: Daryl Thomas Media**  
**Docket 15-R4D7-0120**

**Date of Hearing: November 3, 2015**

**Division's Exhibits**

<b>Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	X
2	Cal/OSHA Accident Report	X
3	Time Card dated June 9, 2014	X
4	Invoices from Appellant to Little Caesar's Pizza, dated March 5, 2014 through June 4, 2014	X
5	Division's Proposed Penalty Worksheet	X

**Appellant's Exhibits**

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
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**None**

**Witnesses Testifying at Hearing**

Beverly Brentwood  
Daryl Thomas

**CERTIFICATION OF RECORDING**

*I, HOWARD I. CHERNIN, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above 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.*

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**HOWARD I. CHERNIN**

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Date

## SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**DARYL THOMAS MEDIA  
DOCKET 15-R4D7-0120**

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

IMIS No. 316982461

DOCKET	CITATION	ITEM	SECTION	TYPE	MODIFICATION OR WITHDRAWAL	APPEAL	VACATED	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
15-R4D7-0120	1	1	342(a)	R	AVD amended and citation affirmed as set forth in Decision	X		\$5,000	\$5,000	<b>\$5,000</b>
		2	3203(b)(1)	R	Affirmed as set forth in Decision	X		\$175	\$175	<b>\$175</b>
		3	3203(a)	G	Affirmed as set forth in Decision	X		\$195	\$195	<b>\$195</b>
		4	3395(f)(3)	G	Affirmed as set forth in Decision	X		\$350	\$350	<b>\$350</b>
		5	3395(f)(1)	G	Affirmed as set forth in Decision	X		\$350	\$350	<b>\$350</b>
		6	3395(c)	G	Affirmed as set forth in Decision	X		\$350	\$350	<b>\$350</b>
<b>Sub-Total</b>								\$6,420	\$6,420	<b>\$6,420</b>
<b>Total Amount Due*</b>										<b>**\$6,420</b>

NOTE: Please do not send payments to the Appeals Board. **All penalty payments should be made to:**

Accounting Office (OSH)  
Department of Industrial Relations  
P.O. Box 420603  
San Francisco, CA 94142

(INCLUDES APPEALED CITATIONS ONLY)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties.

**\*\* The total penalty of \$6,420 shown on the Summary Table is payable in 36 monthly installments. The first installment of \$178.45 is due on February 1, 2016 and the remaining payments of \$178.33 are due on the first of each month thereafter. Failure to make an installment by the first day of the month shall cause the remaining balance to become payable immediately without further order.**

**ALJ: HIC/ml  
POS: 12/16/15**

**DECLARATION OF SERVICE BY MAIL**

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is Occupational Safety and Health Appeals Board, 100 North Barranca Street, Suite 410, West Covina, California, 91791.

On December 16, 2015, I served the attached **DECISION** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at West Covina, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

Daryl Thomas, President  
DARYL THOMAS MEDIA  
4008 Maris Court  
Bakersfield, CA 93313

District Manager  
DOSH – Bakersfield  
7718 Meany Avenue  
Bakersfield, CA 93308

DOSH LEGAL UNIT  
ATTN: Amy Martin, Chief Counsel  
1515 Clay Street, 19<sup>th</sup> Floor  
Oakland, CA 94612

DOSH LEGAL UNIT  
320 West Fourth Street, Suite 400  
Los Angeles, CA 90013

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 2015, at West Covina, California.

\_\_\_\_\_  
Declarant