

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

*In the Matter of the Appeal of:*

**JOSEPH J. ALBANESE INC.  
851 Martin Avenue  
Santa Clara, CA 95050**

*Employer*

**DOCKET 14-R1D3-2499**

**DECISION**

**Statement of the Case**

**JOSEPH J. ALBANESE INC.** (Employer) is a construction contractor. Beginning June 2, 2014, the Division of Occupational Safety and Health (Division) through Associate Safety Engineer Paul Guiriba (Guiriba) conducted an inspection at a place of employment maintained by Employer at 1711 Borregas Avenue, Sunnyvale, California (the site). On June 23, 2014, the Division cited Employer for one violation of the California Code of Regulations, title 8: failure to ensure that the written heat illness prevention program contained all required elements.<sup>1</sup>

Employer filed a timely appeal contesting the existence of the alleged violation.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on February 9, 2016. Daniel S. Nagle, Esq., represented the Employer. Paul Guiriba represented the Division. The matter was submitted on February 28, 2016.

**Issues**

- A. Did Employer violate section 3395, subdivision (f)(3) by failing to ensure that the written heat illness prevention program contained all required elements?

**Findings of Fact**

- 1) Employer's written Heat Illness Prevention Program (HIPP) required shade at all temperature levels and therefore satisfied the requirement that it contain procedures for providing access to shade when the temperature does not exceed 85 degrees Fahrenheit.

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

- 2) Employer's supervisors were not trained on how to monitor weather reports and how to respond to hot weather advisories at the time of the inspection.
- 3) Employer's heat illness prevention procedures did not have clear and precise directions to the work site to be provided to emergency responders in case of emergency.

### Analysis

#### **A. Did Employer violate section 3395, subdivision (f)(3) by failing to ensure that the written heat illness prevention program contained all required elements?**

The Division cited Employer for a violation of section 3395, subdivision (f)(3),<sup>2</sup> which requires:

The employer's procedures for complying with each requirement of this standard required by subsections (f)(1)(B), (G), (H), and (I) shall be in writing and shall be made available to employees and to representatives of the Division upon request.

Section 3395, subdivision (f)(1) provides, in relevant parts:

(B) The employer's procedures for complying with the requirements of this standard.

(G) The employer's procedures for responding to symptoms of possible heat illness, including how emergency medical services will be provided should they become necessary.

(H) The employer's procedures for contacting emergency medical services, and if necessary, for transporting employees to a point where they can be reached by an emergency medical service provider.

(I) The employer's procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders. These procedures shall include designating a person to be available to ensure that emergency procedures are invoked when appropriate.

Citation 1, Item 1 alleges as follows:

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<sup>2</sup> Heat Illness Prevention regulations set forth in Section 3395 were amended, effective May 1, 2015. The version of Section 3395 in effect at the time of the inspection will be referred to in this decision (ALJ Exhibit I), not the current version.

On or about the time of this inspection, the employer failed to ensure that the minimum required elements were in their written Heat Illness Prevention Program. The following elements were missing:

- 1) The employer's procedures for providing access to shade when the temperature does not exceed 85 degrees Fahrenheit.
- 2) The requirement for supervisors to be trained on how to monitor weather reports and how to respond to hot weather advisories.
- 3) The employer's procedures for ensuring clear and precise directions to the work site are provided to emergency responders.

The Division has the burden of proving a violation by a preponderance of the evidence, including the applicability of the safety order. (*Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (Mar. 27, 2006); *Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).)

To establish a violation of section 3395, subdivision (f)(3), it was incumbent upon the Division to prove by a preponderance of the evidence that 1) Employer was subject to the requirements of section 3395, 2) Employer did not have written Heat Illness Prevention Procedures (HIPP) which meet the requirements of subdivisions (f)(1)(B), (G), (H), and (I) available to its employees and to the Division upon request, and 3) Employer exposed its employee to heat illness. (*Rosendin Electric, Inc.*, Cal/OSHA App. 12-3028, Decision After Reconsideration (Nov. 21, 2014); *AC Transit*, Cal/OSHA App. 08-0135, Decision After Reconsideration (June 12, 2013); *CA Forestry & Fire Protection*, Cal/OSHA App. 10-0728, Denial of Petition for Reconsideration (Aug. 10, 2012).)

Guiriba testified that he conducted the opening conference with Employer's Safety Manager Garrett Thomas (Thomas) on June 2, 2014. They walked the job site and he observed that the Employer's employees were engaged in an excavation, which involved doing construction work in an outdoor place of employment. The first prong of the violation was established, in that employer was engaged in construction and was subject to the provisions of the safety order.

Secondly, the Division must establish that the written HIPP failed to meet all of the requirements of subdivisions (f)(1)(B), (G), (H), and (I). During the inspection, Guiriba requested a copy of Employer's Injury and Illness Prevention Program (IIPP) and HIPP from Thomas and was provided with copies. (Exhibits 3 and 4.) He noted the receipt of these documents on the Document Request sheet, Exhibit 5.

Three elements were deemed missing from the written HIPP: 1) procedures for providing access to shade when the temperature does not

exceed 85 degrees Fahrenheit, 2) the requirement for supervisors to be trained on how to monitor weather reports and how to respond to hot weather advisories, and 3) the employer's procedures for ensuring clear and precise directions to the work site are provided to emergency responders.

I.

Section 3395 subdivision (d) provides:

Access to shade.

- (1) Shade required to be present when the temperature exceeds 85 degrees Fahrenheit. When the outdoor temperature in the work area exceeds 85 degrees Fahrenheit, the employer shall have and maintain one or more areas with shade at all times while employees are present that are either open to the air or provided with ventilation or cooling. The amount of shade present shall be at least enough to accommodate 25% of the employees on the shift at any time, so that they can sit in a normal posture fully in the shade without having to be in physical contact with each other. The shaded area shall be located as close as practicable to the areas where employees are working.
- (2) Shade required to be available when the temperature does not exceed 85 degrees Fahrenheit. When the outdoor temperature in the work area does not exceed 85 degrees Fahrenheit employer shall either provide shade as per subsection (d)(1) or provide timely access to shade upon an employee's request.

Guiriba maintained that the HIPP did not satisfy the requirement that the HIPP contain provision for shade when the temperature does not exceed 85 degrees Fahrenheit because no trigger temperature was mentioned. Thomas explained that the HIPP did provide for shade at all temperature levels, and therefore did not need to specify that shade be made available at a specific temperature. The HIPP provided on page 1<sup>3</sup>:

**Shade:** shall be provided for workers to use for "preventive cool down" rests. Portable canopies, more permanent structures, or building shade can be used. This shade needs to be near where the work is being performed and must accommodate 25% of work crew.

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<sup>3</sup> The HIPP (Exhibit H) was updated after the inspection and provides:

Employees shall be allowed and encouraged to take a cool-down rest in the shade for a period of [5 minutes] at a time when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times.

The HIPP which was in effect at the time of the inspection provides for shade at temperature levels at both above and below 85 degrees Fahrenheit. The safety order does not specify that the temperature level must be specified in the HIPP. Since the clear language of the Employer's HIPP satisfies the safety order, this instance was not established.

2.

The second deficiency identified by the Division involved the requirement for supervisors to be trained on how to monitor weather reports and how to respond to hot weather advisories, as required by section 3395, subdivision (f)(2)(d).<sup>4</sup> Subdivision (f)(3) requires:

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.

During the inspection, Guiriba asked Thomas to provide information on the training given to supervisors concerning monitoring weather reports and responding to hot weather advisories. The two page brochure, Exhibit D was provided to him in response. However, the topics listed on that brochure do not include monitoring weather reports or responding to hot weather advisories and do not specifically mention what training was provided to supervisors. Guiriba and Dan Nagle discussed the fact that the supervisors were not trained to monitor weather reports and respond to hot weather advisories. In an email to Guiriba, Dan Nagle told him the "JJA supervisors are provided with a great deal of training that is not, and cannot practicably be, listed within the HIPP in its entirety." (Exhibit 6, page 4.)

The preponderance of evidence establishes that the supervisors were not given training concerning monitoring weather reports and responding to hot weather advisories. This instance was in violation of the safety order.

3.

The third instance concerned whether the HIPP included procedures for ensuring clear and precise directions to the work site are provided to emergency responders, as required by section 3395, subdivision (f)(1)(H). *Rosendin Electric, Inc., supra*, affirmed a violation of section 3395 where

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<sup>4</sup> Section 3395, subdivision (f)(2)(D) provides:

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:

(D) How to monitor weather reports and how to respond to hot weather advisories.

Employer's procedures for complying with each element were not in writing, nor made available to employees and to representatives of the Division upon request.

Thomas testified that typically, a map to the worksite is included in some copies of the binder which contains the IIPP and HIPP.<sup>5</sup> However, the page containing the directions to the work site at issue here was not provided to the Division.

In an email from Dan Nagle to Kelly Tatum, dated October 15, 2015, Employer stated:

JJA's HIPP was at the time, and now, contained within a larger binder kept at each jobsite which contains the entire Injury and Illness Prevention Program (IIPP). JJA's "procedures for ensuring clear and precise direction to the worksite are provided to emergency responders" are provided within the overall IIPP, and are the same for heat illness related emergencies as they are for all other emergencies.

Guiriba testified that the safety order requires the employer to have written instructions on how to get to the worksite, in case of an emergency. This information was not provided to him at the time of the inspection and was not contained in either the HIPP or IIPP provided in response to the request for documents. (Exhibits 3 and 4.)

The Division established the HIPP failed to include procedures for ensuring clear and precise directions to the work site to be provided to emergency responders in case of an emergency. Subdivision (f)(1)(I) requires that procedures for ensuring that, in the event of an emergency, clear and precise directions to the work site can and will be provided as needed to emergency responders.

Employer's HIPP does not contain the elements required in subsections (f)(1)(B), (G), (H), and (I), and is not in compliance with Section 3395, subdivision (f)(3).

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<sup>5</sup> Employer maintains that it did not violate subdivision (f)(1)(I) because the general contractor on the job site posted a notice which had directions to the work site on the water cooler. It is unclear from the photo of the water cooler depicted in Exhibit G that the notice constituted compliance with subdivision (f)(1)(I). Moreover, the subcontractor had a separate duty to comply with the safety order. If an employer has Cal/OSHA responsibility for the safety or health of an employee or employees, it cannot absolve itself of that responsibility by delegating the duty to comply to another. (Cal-Cut Pipe & Supply Co., Cal/OSHA App. 76-955, Decision After Reconsideration (Aug. 26, 1980) and Gaehwiler Construction Co., Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1995).)

### **Conclusion**

Based on the foregoing, employer failed to ensure that the written heat illness prevention program contained all required elements in violation of section 3395, subdivision (f)(3). The penalty for Citation 1, Item 1 of \$250, is reasonable and is assessed.

### **Decision**

It is hereby ordered that Employer's appeal of Citation 1, Item 1 is denied.

| DATED: March ~~29~~, 2016  
MD:sp

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**MARY DRYOVAGE**  
**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 Section 6616, 6617, 6618 and 6619, and with Title 8, California Code of Regulations, Section 390.1.

**For further information, call: (916) 274-5751.**

**APPENDIX A**

**SUMMARY OF EVIDENTIARY RECORD  
JOSEPH J. ALBANESE INC.**

**DOCKET 14-R1D3-2499**

**Date of Hearing: February 9, 2016**

**Division's Exhibits**

<b>Exhibit Number</b>	<b>Exhibit Description</b>	<b>Admitted</b>
1	Jurisdictional Documents	Yes
2	Proposed Penalty Worksheet	Yes
3	Heat Illness Prevention Program (HIPP) (4 pages)	Yes
4	Joseph J. Albanese Inc. Injury and Illness Prevention Program (IIPP) Revision: Feb. 2014 (49 pages)	Yes
5	Document Request Sheet, 6/2/2014	Yes
6	Email from Dan Nagle to District Manager Kelly Tatum, dated 10/15/2015	Yes

### Employer's Exhibits

<b>Exhibit Letter</b>	<b>Exhibit Description</b>	<b>Admitted</b>
A	OSHA 1 Inspection Report, Inspection No. 315777417, 6/23/2014 (3 pages)	Yes
B	OSHA -1-B Worksheet (5 pages)	Yes
C	Joseph J. Albanese Inc. Injury and Illness Prevention Program (IIPP) (53 pages)	Yes
D	Joseph J. Albanese Inc. Heat Illness Prevention brochure (in English and Spanish) (2 pages)	Yes
E	Safety Meeting Attendance record, 5/5/2014	Yes
F	Photo [withdrawn]	No
G	Photo of water cooler taken by Guiriba, 6/2/2014	Yes
H	Employer's Signed Statement of Abatement, 10/13/2015; updated HIPP and Heat Illness Prevention brochure (9 pages)	Yes

**Witnesses Testifying at Hearing**

1. Paul Guiriba
2. Gary Thomas

**CERTIFICATION OF RECORDING**

*I, Mary Dryovage, 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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**MARY DRYOVAGE**

DATE: March 29, 2016

# SUMMARY TABLE DECISION

*In the Matter of the Appeal of:*  
**JOSEPH J. ALBANESE INC.**  
**DOCKET 14-R1D3-2499**

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

Site: 1711 Borregas Avenue, Sunnyvale, CA 94089

IMIS No. 315777417

Date of Inspection: 06/02/2014 – 06/23/2014    Date of Citation: 06/23/2014

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT PRE- HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R1D3-2499	1	1	3395(f)(3)	G	[Failure to ensure that the Heat Illness Prevention Program contained the minimum requirements.] ALJ affirmed violation.	X		\$250	\$250	<b>\$250</b>
<b>Sub-Total</b>								\$250	\$250	<b>\$250</b>
<b>Total Amount Due*</b>										<b>\$250</b>

(INCLUDES APPEALED CITATIONS ONLY)

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

Accounting Office (OSH)  
Department of Industrial Relations  
PO Box 420603  
San Francisco, CA 94142  
(415) 703-4291, (415) 703-4308 (payment plans)

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

**ALJ:MD**  
**POS: 03/ ~~29~~ /16**