BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1332715**
APTCO, LLC. **1998 ROAD 152** **DELANO, CA 93215** **Employer**	**DECISION**

Statement of the Case

Aptco LLC (Employer) manufactures foam packing boxes in its facility located at 31381 Pond Road in McFarland, California (Employer's yard). Beginning July 25, 2018, the Division of Occupational Safety and Health (the Division), through Associate Safety Engineer Daniel Pulido, conducted an inspection of Employer's yard after a report of an employee illness that occurred on June 27, 2018.

On December 21, 2018, the Division cited Employer for one violation of California Code of Regulations, title 8, alleging that Employer failed to implement its emergency procedures in response to signs of a possible heat-related illness.

Employer filed a timely appeal of the citation. Employer contests the existence of the violation, the classification of the citation, and the reasonableness of the proposed penalty. Employer also asserted a series of affirmative defenses.[1]

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 June 13, 2019, and March 10 and 11, 2020. Manuel Melgoza, attorney at Donnell, Melgoza and Scates, LLP, represented Employer. Kathryn Woods, Staff Counsel, represented the Division. The matter was submitted on July 30, 2020.

[1] Except where discussed in this Decision, Employer did not present evidence in support of its affirmative defenses, and said defenses are therefore deemed waived. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Denial of Petition for Reconsideration (May 26, 2017).)

Issues

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

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

3. Did Employer rebut the presumption that the violation 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?

4. Is the proposed penalty reasonable?

Findings of Fact

1. Hector Villalobos (Villalobos) started working for Employer on June 26, 2018.

2. Beginning at approximately 1:00 p.m. on June 27, 2018, Villalobos was performing strenuous work outdoors loading foam boxes in the back of a truck.

3. On June 27, 2018, the temperature was approximately 101 degrees Fahrenheit in the afternoon.

4. Aron Flores (Flores) was Employer's Yard Supervisor and was Villalobos's direct supervisor.

5. Flores observed Villalobos experiencing two episodes of cramping: one while loading boxes into the truck at Employer's yard, and one while at an off-site facility (Bidart) where the boxes were being unloaded. Flores told Villalobos to rest in the shade and drink water before he returned to work on both occasions.

6. Even after observing Villalobos cramping for a second time, Flores left Bidart to return to Employer's yard, leaving Villalobos and two coworkers unsupervised.

7. Villalobos vomited shortly after Flores left Bidart, but Flores did not call emergency services or return to Bidart to attend to Villalobos. Villalobos vomited a second time on the side of the road as he and the two coworkers returned to Employer's yard.

8. Later in the evening on June 27, 2018, Villalobos was taken to the emergency room, where he was diagnosed with an acute kidney injury unrelated to his employment with Employer.

9. Villalobos had been experiencing symptoms such as nausea, vomiting, and other symptoms for three weeks prior to working for Employer.

10. At the time that Villalobos was displaying signs of heat illness at the job site, Employer was unaware that he had been ill or injured prior to June 27, 2018.

11. Employer's Heat Illness Prevention Plan (HIPP) did not contain specific emergency response procedures when an employee was displaying signs or symptoms of heat illness.

12. Employer's Injury and Illness Prevention Plan (IIPP) and an informational poster used by Employer to train employees regarding heat illness advised employees that an ambulance should be called when, among other things, an employee vomited.

13. Employer's HIPP contains an acclimatization provision that requires that new employees must be closely observed for the first two weeks of their employment.

14. Failure to implement emergency response procedures, including calling emergency medical services, when an employee is exhibiting signs of severe heat illness may result in exacerbation of heat illness, including death.

15. Villalobos was the only employee exhibiting signs of possible heat illness for which emergency response procedures were not implemented during the course of the Division's inspection.

Analysis

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

The Division cited Employer for a violation of California Code of Regulations, title 8, section 3395, subdivision (f)(2), which provides:[2]

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

(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.

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 possible severe heat illness exhibited by an employee loading foam boxes on or about June 27, 2018, in temperatures exceeding 95 degrees Fahrenheit.

a. Applicability of the Safety Order

Employer argues that it should not have been cited for a violation of the heat illness safety order because it did not expose Villalobos to a condition or hazard that the safety order addresses, i.e., heat illness. Villalobos had an underlying condition when he started working for Employer on June 26, 2018. Employer was unaware of the underlying condition. After Villalobos went to the hospital on the night of June 27, 2018, he informed hospital personnel that he had been experiencing nausea, vomiting, and other symptoms for three weeks. Villalobos was ultimately diagnosed with acute kidney injury that was unrelated to his brief employment with Employer. As such, Employer asserts that the symptoms were not caused by heat illness, so the heat illness safety order is inapplicable.

Employer's argument does not address the fact that, although Villalobos did not ultimately suffer from heat illness, the conditions to which he was exposed are indisputably the types of circumstances that give rise to heat illness concerns. Villalobos was new to the job and had not yet acclimated to working in the heat. Additionally, Villalobos was performing strenuous activity outdoors while the ambient temperature was approximately 101 degrees Fahrenheit. These are precisely the conditions that necessitate compliance with the heat illness safety order to ensure against the possibility of employees experiencing varying degrees of heat illness.

Where an employee is exhibiting signs or symptoms that are attributable to heat illness while working in conditions that can cause heat illness, it is unreasonable to excuse an employer for inaction based on a later discovery that the ultimate injury or illness is not heat illness. To hold otherwise would allow employers to gamble with the health and safety of employees where information is insufficient to determine whether signs or symptoms of an illness are heat-related or not. The Appeals Board recently addressed this identical situation:

> Although it was later determined that the victim was suffering not from heat illness but another condition, that ultimate diagnosis was made much later and is not relevant in light of the standard's command that employers "must" implement emergency response procedures when an employee displays signs or symptoms of possible heat illness. The intent of the standard is to get an affected employee medical attention as soon as possible rather than require employers to make medical diagnoses in the work environment. We believe there are at least two reasons for that intent. First, employers are generally not qualified to make medical diagnoses, and second, time is of the essence to prevent or minimize harm to affected employees.

(*Giumarra Vineyards Corporation*, Cal/OSHA App. 1256643, Denial of Petition for Reconsideration (May 26, 2020).)

As such, Employer was required to comply with section 3395. The paramount issue is whether the actions taken by Employer were in compliance with the safety order.

b. Violation of the Safety Order

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 a performance standard intentionally lacks specificity, as it "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).) Section 3395, subdivision (f)(2), 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.

In order to comply with section 3395, subdivision (f)(2), an employer's own procedures must have been followed in response to signs and symptoms of potential heat illness. Determining what Employer's HIPP procedures were is the first step in the analysis of an alleged violation.

1) What were Employer's emergency response procedures when an employee displayed signs or symptoms of possible heat illness?

The safety order requires that the HIPP must have procedures in writing. (§3395, subd. (i).) Employer's HIPP contained a section purporting to set forth emergency procedures for dealing with heat illness. However, in addition to saying that supervisors would carry cell phones and employees would be reminded of the address where they were working, the "Emergency Response/First Aid" section of Employer's HIPP contained only the following sentence:

> Emergency response procedures include effective communication, response to signs and symptoms of heat illness and procedures for contacting emergency responders to help stricken workers.

(Ex. 7, p. 4.)

Section 3395 explicitly permits employers to integrate emergency response procedures into their IIPP or a separate document. (§3395, subd. (a), Note No. 1, and subd. (i).) There were no specific provisions in either Employer's HIPP or IIPP that pertain to the procedures the employees were supposed to follow in response to signs and symptoms of heat illness. However, Employer's IIPP included generally-applicable emergency response procedures that stated:

> It is not always easy to determine whether an incident requires the assistance of an ambulance. As a guideline, you should call an ambulance if a victim's condition is life threatening, such as:
>
> […]
>
> j. Is vomiting or passing blood.
>
> […]

(Ex. 8, p. 14.)

In addition to the HIPP and IIPP, Employer trained its employees by reviewing an informational poster (Poster) regarding heat illness. (Ex. 11.) The Poster, provided to employers by the Division, listed cramps and vomiting as symptoms of heat exhaustion. Flores testified that the employees reviewed the Poster in the mornings by passing it around and "talking about the pictures." The Poster informed employees to be prepared for an emergency with the following instructions:

> If someone in your crew has symptoms:
> 1) Tell the person who has a radio/phone and can call the supervisor—you need medical help.
> 2) Start providing first aid while you wait for the ambulance to arrive.
> […]

(Ex. 11, p. 3.)

Given the dearth of information provided to employees in the HIPP with regard to how to handle emergencies involving possible heat illness, it is a reasonable inference that Employer's emergency response procedures were integrated into the HIPP from the IIPP and Poster. That is, Employer's procedures provided that vomiting and cramping were signs of heat illness that necessitated calling an ambulance.

2) Did Employer implement its emergency response procedures?

In *Giumarra Vineyards Corporation,* the Appeals Board found that an employer had procedures which required the summoning of emergency medical services, but the supervisor failed to do so when presented with an employee exhibiting signs of illness that could have been heat-related. "The employee is to be 'provided with emergency medical services *in accordance with employer's procedures*.' (§3395, subd. (f)(2)(C) [emphasis added].) Employer here failed to adhere to its own plan." (*Giumarra Vineyards Corporation*, *supra*, Cal/OSHA App. 1256643.)

While working in triple-digit temperatures, Flores observed Villalobos experiencing visibly painful cramping while he was loading foam boxes into a truck in Employer's yard and again when he was at the Bidart off-site cold storage facility unloading the boxes from the truck. Villalobos insisted that he was fine after resting and drinking water. However, approximately ten minutes after Flores left the workers at Bidart, truck driver Rafael Fernandez (Fernandez) called Flores to inform him that Villalobos had vomited. Flores turned his vehicle around to return to Bidart, but Fernandez called him shortly thereafter to report that Villalobos said he was fine and would return to the yard with the truck.

Flores testified that he was returning to Bidart to check on Villalobos and get him medical attention if needed. Flores ultimately did not go back to Bidart and Villalobos did not receive medical treatment until he went to the emergency room later that night.

While Flores may have provided Villalobos with first aid by telling him to rest in the shade and drink water when he observed the cramping episodes, Flores chose to leave Bidart rather than stay and monitor Villalobos after the second episode of cramping. Although Villalobos told Flores that he was alright after both cramping episodes, it was incumbent upon Flores to supervise this employee who was exhibiting symptoms of illness, whether heat-related or otherwise. Indeed, Employer's HIPP provides that "[n]ew employees must be closely observed for their first two weeks on the job" in order to ensure they are acclimated to heat. Instead, Flores left Bidart, leaving three workers, including new employee Villalobos, unsupervised.

Further, Flores failed to take effective action when he learned that, in addition to experiencing cramping, Villalobos had vomited at Bidart. Employer argued that Flores should not have been required to take any additional action because Villalobos insisted that he was fine. However, the Appeals Board has held that an employer should not assess an employee's condition when faced with signs and symptoms of severe heat illness, and should act to get that employee treatment immediately: "The intent of the standard is to get an affected employee medical attention as soon as possible rather than require employers to make medical diagnoses in the work environment. We believe … employers are generally not qualified to make medical diagnoses… ." (*Giumarra Vineyards Corporation, supra*, Cal/OSHA App. 1256643.)

In the instant matter, Employer's procedures advised that an ambulance, i.e. emergency medical services, should be called for employees exhibiting signs of heat illness. Employer failed to do so.

Employer argued that it is unreasonable to require an employer to call an ambulance every time an employee vomits. For example, an employee may have morning sickness or may have consumed too much alcohol the previous night. While Employer's argument may be reasonable under some circumstances, those circumstances are not present when an employer or supervisor observes an employee with signs or symptoms of heat illness who then has an objective decline in health. In the instant matter, Villalobos had significant cramps which led to vomiting on two occasions. Although Villalobos took brief periods of rest, Employer did not stop Villalobos from working despite his worsening condition. While an employer may not be able to force medical treatment upon an employee, an employer may also not allow an employee to continue to labor to the detriment of that employee's health.

As set forth above, Villalobos was a new employee who was performing strenuous physical activity outdoors in triple-digit heat and had obvious signs of a declining condition, beginning with cramping and escalating to vomiting. Despite multiple factors that should have raised concerns about heat illness, Flores did not follow Employer's procedures in his handling of Villalobos. Accordingly, Citation 1 is affirmed.

2. Did the Division establish a rebuttable presumption that the citation 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. (*Sacramento County Water Agency Department of Water Resources*, Cal/OSHA App. 1237932, Decision After Reconsideration (May 21, 2020).)

The violation at issue is the failure to implement emergency response procedures by calling emergency medical services when an employee was exhibiting signs of possible severe heat illness. The Division's expert on occupational health, Mary Kochie, (Kochie), testified that a person who is dehydrated from heat illness and is vomiting will not be able to keep fluids in his system, leading to exacerbation of the illness. Kochie testified that it is necessary to call an ambulance to prevent worsening of heat illness, which can lead to death. Therefore, there is a realistic possibility that an HIPP that is not effectively implemented can result in serious physical harm or death.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 1 was properly classified as Serious.

3. Did Employer rebut the presumption that the violation 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." (*Sacramento County Water Agency Department of Water Resources*, *supra*, Cal/OSHA App. 1237932).) Employer's foreman, Flores, had knowledge of Employer's HIPP procedures, including that an ambulance should be called for employees exhibiting signs of heat illness such as vomiting. He did not call an ambulance. Additionally, Flores did not monitor a new employee despite seeing that he was experiencing escalating signs of heat illness.

Accordingly, Employer, through Flores, had knowledge that its HIPP emergency procedures were not implemented or were ineffective to the extent that the supervisor allowed an employee to continue working despite objective worsening signs of potential heat illness. Employer did not rebut the presumption that Citation 1 was properly classified as Serious.

4. Is the proposed penalty reasonable?

The Appeals Board has held that "while there is a presumption of reasonableness to the penalties proposed by the Division in accordance with the Director's regulations, the presumption does not immunize the Division's proposal from effective review by the Board... ." (*DPS Plastering, Inc*., Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003).)

Section 336, subdivision (b), provides that a Base Penalty will be set initially based on the Severity of the violation and thereafter adjusted based on the Extent and Likelihood. Section 335, subdivision (a), provides that Serious violations are considered to be High Severity. Thus, Serious violations have a Base Penalty of $18,000. (§336, subd. (c)(1).)

Section 336 further defines the relevant factors to assess the Gravity of a violation:

> (1) Extent.
>
> i. When the safety order violated pertains to employee illness or disease, Extent shall be based upon the number of employees exposed:
>
> LOW-- 1 to 5 employees.
>
> MEDIUM-- 6 to 25 employees.
>
> HIGH-- 26 or more employees.
>
> (2) Likelihood is the probability that injury, illness or disease will occur as a result of the violation. Thus, Likelihood is based on (i) the number of employees exposed to the hazard created by the violation, and (ii) the extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records. Depending on the above two criteria, Likelihood is rated as:
>
> LOW, MODERATE OR HIGH

In determining the Extent factor, the consideration is the number of employees exposed to illness as a result of the violation. Again, the violation at issue is the failure to implement emergency procedures by calling an ambulance when an employee exhibited signs of possible severe heat illness. The citation was issued because one employee, Villalobos, exhibited signs of possible heat illness. Thus, only one employee was exposed to Employer's failure to call for emergency medical services. Accordingly, the violation is assigned an Extent of Low, which results in a 25 percent reduction in the Base Penalty. (§336, subd. (b).)

Associate Safety Engineer Daniel Pulido (Pulido) testified that he assigned a Likelihood of Moderate based on the temperature on the date of the incident. This does not directly address the probability that illness would occur as a result of the violation. Additionally, there was no evidence presented about the "extent to which the violation has in the past resulted in injury, illness or disease to the employees of the firm and/or industry in general, as shown by experience, available statistics or records." The Appeals Board has held that when the Division does not provide evidence to support its proposed penalty, it is appropriate that an employer be given the maximum credits and adjustments provided under the penalty-setting regulations such that the minimum penalty provided under the regulations for the violation is assessed. (*RII Plastering, Inc*, Cal/OSHA App. 00-4250, Decision After Reconsideration (Oct. 21, 2003).) Accordingly, Likelihood is rated as Low, which results in a 25 percent reduction in the Base Penalty. (§336, subd. (b).)

Therefore, the violation is determined to be High Severity with a Low Extent and Likelihood. The Base Penalty of $18,000 is reduced by 50 percent, for a Gravity-Based Penalty of $9,000.

Section 335 provides for further adjustment to the Gravity-Based penalty for Good Faith, Size, and History. Employer was granted a 15 percent adjustment for Good Faith, a 10 percent adjustment for History and no other adjustment for Size.

Section 335, subdivision (c), provides:

> Good Faith of the Employer – is based upon the quality and extent of the safety program the employer has in effect and operating. It includes the employer's awareness of Cal/OSHA, and any indications of the employer's desire to comply with the Act, by specific displays of accomplishments. Depending on such safety programs and the efforts of the employer to comply with the Act, Good Faith is rated as: GOOD—Effective safety program; FAIR—Average safety program; POOR—No effective safety program.

Pulido testified that he assigned a 15 percent adjustment factor for Good Faith because Employer was cooperative and had an IIPP. Employer was not issued an IIPP-related citation,

leading to an inference that the Division was satisfied that the safety program was satisfactory. Without more evidence, it would be more appropriate to assign the maximum credit for Good Faith. However, an employer's safety program encompasses its heat illness program. The written programs submitted at the hearing evidence that Employer's HIPP was lacking, even when the IIPP and Poster were incorporated. As such, a rating of Fair is appropriate and will not be modified herein.

Pulido testified that Employer had approximately 125 employees. Employer did not provide any evidence to refute this testimony. As such, no adjustment factor for Size was applied in accordance with section 336, subdivision (d)(1).

Pulido testified that he assigned the maximum factor of 10 percent for History. This is in accordance with section 336, subdivision (d)(3), and will not be modified herein.

The application of adjustment factors for Good Faith and History in the amount of 25 percent of the Gravity-Based Penalty results in an Adjusted Penalty of $6,750. No further reductions are appropriate because there was no evidence that the violation had been abated.

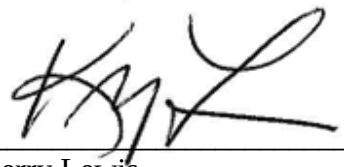
Accordingly, the penalty for Citation 1 is modified to $6,750.

Conclusion

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

Order

It is hereby ordered that Citation 1 is affirmed and the penalty of $6,750 is assessed, as set forth in the attached Summary Table.



Dated: 08/03/2020

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.**