

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

In the Matter of the Appeal of:

AC TRANSIT
1600 Franklin Street
Oakland, CA 94612-2008

Employer

Docket 08-R1D4-0135

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board, acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission hereby renders the following decision after reconsideration.

JURISDICTION

AC Transit (Employer) is a public transportation agency that operates passenger buses throughout Alameda County. On August 1, 2007, the Division of Occupational Safety and Health (Division) commenced a heat illness investigation regarding Employer's bus routes. On November 5, 2007, the Division issued a citation to Employer alleging three violations of Title 8, Cal. Code of Regulations, section 3395 [Heat Illness Prevention in Outdoor Places of Employment].¹

Employer filed a timely appeal and an evidentiary hearing was held before an Administrative Law Judge (ALJ) of the Board on July 22 and September 8-9, 2008. On February 10, 2009, the ALJ issued his decision granting Employer's appeal of all three violations.

The Division timely petitioned the Board for reconsideration. Employer filed a response.

ISSUE

Does section 3395 [heat illness prevention in outdoor places of employment] apply to the interior of transit buses?

¹ All references are to Title 8, California Code of Regulations, unless otherwise noted.

EVIDENCE

The summary of evidence from the ALJ Decision is incorporated herein. At the time of the inspection, Employer operated 695 public transportation buses, the vast majority of which (608) were not air conditioned. The Division cited Employer under section 3395 because it believed that the interior of Employer's transit buses constituted "outdoor places of employment." Specifically, the Division cited Employer for the following violations:

- (1) 3395(c): adequate amount of drinking water was not provided for bus drivers operating non-air conditioned buses;
- (2) 3395(d) "shade" (as defined in the regulation) was not made continuously available for bus drivers of non-air conditioned buses;
- (3) 3395(e): failure to train employees on heat illness and no written heat illness plan.

REASONS FOR DECISION AFTER RECONSIDERATION

The Occupational Safety and Health Standards Board (Standards Board) adopted section 3395 in order to address the risk of heat illness. The regulation only applies to "outdoor places of employment," however the Standards Board chose not to define that term in the regulation.² (Section 3395(a).)

The Division contends that the interiors of Employer's non-air conditioned transit buses qualify as "outdoor places of employment." (Decision, pp. 1-2.) For the following reasons, we disagree.

- 1.) The Plain Meaning of the Regulation Confirms That Bus Interiors are not Outdoor Places of Employment.

Whether interpreting statutes or administrative regulations, the same principles are used. (*County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal. App. 4th 1579, 1586; *California Highway Patrol*, Cal/OSHA App. 09-3762, Decision After Reconsideration (Aug. 16, 2012).) We first look at the words of the regulation, giving them a "plain and commonsense meaning." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 577.) We then evaluate the regulation as a whole; if the regulation is clear and unambiguous, we presume

² Section 3395 was originally issued as an emergency regulation in 2005, and was permanently adopted in 2006, the version applicable to this appeal. During the public comment period, members of the regulated community requested that the Standards Board include a definition for "outdoor places of employment," which the Board found to be unnecessary. (Ex. 12, FSOR, pp. 27-28, Response to Comment 1.) The regulation has since been amended in 2010, but "outdoor places of employment" remains undefined.

that the adopting agency meant what it said and the plain language controls. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [“When the language of a statute is clear, we need go no further.”]; see *People v. Johnson* (2002) 28 Cal.4th 240, 244 [when plain language of the statute is clear and unambiguous, our inquiry ends].)

“Outdoor” is defined as something “not enclosed: having no roof.” (Merriam Webster’s Collegiate Dictionary (10th Ed. 2001), p. 823.) Under this definition, the interior cabin of a bus – with its sides, bottom, and roof – would not qualify as an “outdoor” place of employment. Another definition is something “performed outdoors.” (Merriam Webster’s Collegiate Dictionary (10th Ed. 2001), p. 823.) The example provided by the dictionary is “outdoor sports,” which illustrates how the word “outdoor” is used to describe activities that are performed outside of an enclosed, roofed area. (*Ibid.*) For instance fishing or hunting, or outdoor football or soccer (clearly outdoor sporting activities), would hardly be considered outdoor sporting activities if they took place within an enclosed, roofed area. Analogously, if one took an outdoor activity and then placed that activity within the heated and/or air-conditioned interior of a bus,³ it would no longer be considered an outdoor activity. This definition therefore directly supports a finding that the interior of a bus – with its sides, bottom and roof – is not an outdoor place of employment.

“Outdoor” is also defined as “of or relating to the outdoor(s),” with “outdoor(s)” being defined as “outside a building: in or into the open air.” (Merriam Webster’s Collegiate Dictionary (10th Ed. 2001), p. 823.) Since the interior of a bus is not “in or into the open air,” this definition also supports a finding that a bus interior is not an outdoor work environment. Dictionary examples illustrating how “outdoors” is used further solidify our analysis. For instance, consider the example, “The game is meant to be played outdoors.” ([http://www.merriam-webster.com/dictionary/outdoors.](http://www.merriam-webster.com/dictionary/outdoors)) If a bus interior was substituted for one of the outdoor places where the game was to be played, it would totally change the meaning of the sentence to something played not outdoors. Similarly, the dictionary example, “I went outdoors for some fresh air,” would not make any sense if one considered the “outdoors” referred to in the sentence to be a bus interior. (*Ibid.*) In other words, one would not venture to the inside of a bus cabin to get some fresh air, but would rather go, literally, “out of doors” to get some fresh air.

³ The Division’s position is that only *non-air conditioned* buses qualify as outdoor places of employment. (Petition, pp. 1-2; Decision, p. 1, fn. 1.) However, the Division does not provide any legal authority or analysis in support of this position. We do not find any support in the rulemaking record or the regulation’s text itself that would support that the meaning of the word “outdoor” turned on the existence or non-existence of a cooling device. In fact, the regulation itself directly authorizes the use of cooling devices (“misting machines”) in outdoor places of employment. (Section 3395(d).)

Accordingly, since the Division does not provide any authority in support of its position that only non-air conditioned buses qualify as “outdoor places of employment,” that limitation is void. (See *Carmona v. Division of Industrial Safety* (1975) 13 Cal.3d 303 [arbitrary and unsupported interpretations of a regulation not allowed].)

We therefore conclude, based on the above substantial evidence, that the ordinary and commonsense meaning of the word “outdoor” means literally to be “out of doors,” or in an open air environment. Our finding is also supported by the Oxford English Dictionary – noted by the U.S. Supreme Court as “one of the most authoritative” (*Taniguchi v. Kan P. Saipan, Ltd.* (2012) __ U.S. __ [132 S.Ct. 1997, 1999]) – which defines “outdoors” as a location that is “out of doors; in the open air.” (Oxford English Dictionary (2nd Ed. 1989), p. 1011.)

The interior cabins of Employer’s transit buses are therefore not “outdoor places of employment.” Employer’s appeal is granted.⁴

2.) The Division’s Arguments

The Division cites to the Merriam-Webster’s dictionary, stating that it defines “outdoor” as “of or relating to the outdoor(s),” and then goes on to define “outdoor(s)” as being “outside a building.” (Petition, p. 3, fn. 4, referencing Post-Hearing Brief, pp. 17-18.) Thus, the Division’s theory is that the interior of Employer’s buses qualify as outdoor work environments simply because they are driven outside a building. (*Ibid.*)

We are not persuaded by this argument. To begin with, the Division does not account for two (of the three) definitions that are accorded to the word “outdoor,” all of which are contained within the cited dictionary reference.⁵ (Petition, p. 3, referencing Post-Hearing Brief, pp. 17-18.) As we have explained, these definitions support our finding that a bus interior is *not* considered an outdoor work environment.⁶ Furthermore, that dictionary defines “outdoor(s)” not only as being “outside a building,” but as being “outside a building: *in or into the open air.*” (Merriam Webster’s Collegiate Dictionary (10th Ed. 2001), p. 823 [emphasis added].) Here, the interior of a bus is not “in or into the open air,” and examples illustrating how the word

⁴ The Division refers to *Carmona, supra*, for the general proposition that the regulation must be liberally interpreted to maximize employee safety. (Petition, pp. 4-8.) First and foremost, *Carmona* does not supplant the well-established rules of statutory interpretation, but rather instructs that we apply that scheme. Second, the facts of this case are easily distinguished from those in *Carmona*.

In *Carmona*, an agency equivalent to the present-day Standards Board narrowly interpreted what qualified as an “unsafe hand tool.” (*Carmona* at p. 306.) It ruled that there was nothing unsafe in the inherent design of a “short-handled hoe,” and the potential dangerous nature of the tool only became apparent when the tool was in actual, prolonged use by the worker. (*Ibid.*) The agency therefore chose not to declare it as an unsafe tool, despite the fact that the safety order had a simple mandate: “Unsafe hand tools shall not be used.” (*Ibid.*) The Supreme Court found this to be an arbitrary exclusion of one class of unsafe tools over another, as there was nothing in the regulation or its history to support such a narrow interpretation. (*Id.* at pp. 311-312.)

Here, in contrast, the regulation is already specifically limited to only “outdoor places of employment.” (See Division’s Petition, p. 3.) And, in making our decision today, we are not arbitrarily limiting that regulation further (as the agency in *Carmona* would have done), but rather apply the rules of statutory construction.

⁵ The Division’s petition refers to the online version of Merriam-Webster’s dictionary. Both the hardcopy and online version contain the same definitions.

⁶ By failing to address two of the three definitions, the Division does not provide any substantive argument as to why the one definition it presents should apply over the other two.

“outdoors” is used does not support a finding that the interior of a bus is outdoors. (See above discussion.)

The Division also refers to another dictionary (Webster’s Online), stating that it defines “outdoors” as simply “outside a building.” (Petition, p. 3, incorporating Post-Hearing Brief, pp.17-18.) However, that is not entirely accurate, as that dictionary also defines “outdoors” as “where the air is unconfined.” ([http://www.websters-online-dictionary.org/definition/outdoors.](http://www.websters-online-dictionary.org/definition/outdoors)) Tellingly, the dictionary provides as an example the phrase, “He wanted to get outdoors a little.” (*Ibid.*) Therefore, this dictionary further supports our finding that the interior of a bus is not an outdoor work environment, since one would not go inside of a bus to “get outdoors a little.”

The Division also refers to several items in the rulemaking file, arguing that the Standards Board intended for section 3395 to apply to bus interiors. We do not find merit in these arguments.

The Division quotes the following from the Initial Statement of Reasons:

The specific purpose of the proposed subsection is to limit the requirements of the proposed standard to employers with employees *having significant exposure to outdoor work*, with the *intended effect of protecting employees performing such work* from the increased risk of heat illness that can result from working without the environmental protections indoor working environments can provide.

(Petition, p. 8 [emphasis added].)

Thus, the Division argues that the Standards Board “*plainly stated* that the provisions of section 3395 were intended to apply to workplaces where the ‘protections indoor working environments can provide’ do not exist...” (Petition, p. 8 [emphasis added].)

However, this is not an accurate paraphrase of the statement. The Standards Board did not “plainly state” that it intended section 3395 to apply to places where indoor protection did not exist. Rather, the Standards Board declared that the regulation was limited to “outdoor work,” and stated that the *intended effect* of the regulation is to protect employees who are “performing such (outdoor) work from the increased risk of heat illness that can result from working without the environmental protections indoor working environments can provide.” (Ex. 13, ISOR, p. 2.) Thus, the Standards Board declared the “intended effect” of the regulation was to protect employees performing “outdoor work”; it did not, however, in any way define what that outdoor work was. Accordingly, the Division’s argument fails.

Next, the Division refers to the following statement made by the Standards Board in response to a comment by the California Rural Legal Assistance Foundation:

Comment #8 (from California Rural Assistance Foundation): During periods of extreme heat, work vehicles used for extended travel should be required to have working air conditioning systems.

Response: The proposed standard would apply to non-air conditioned work vehicles used for extended travel during periods of extreme heat. **Employees traveling in these conditions are entitled to all of the protections provided by the standard including access to shade.** The standard specifically states, “Shade is not adequate when heat in the area of shade defeats the purpose of shade, which is to allow the body to cool. For example, a car sitting in the sun does not provide acceptable shade to a person inside it, unless the car is running with air conditioning.” **The [Standards] Board is not aware of any scientific evidence that passengers riding in a work vehicle, in compliance with motor vehicle and other applicable standards, are exposed to a greater risk of heat illness than workers at other outdoor workplaces, which are not required to be air-conditioned.**

(Petition, pp. 9-10 [boldface emphasis by Division], citing Ex. 12, FSOR, p. 30.)

The Division contends that Employer’s transit buses qualify as “work vehicles”; therefore, since the Standards Board equated “riding in a work vehicle” to “other outdoor workplaces,” Employer’s bus drivers are entitled to the protections of section 3395. (Petition, pp. 9-10.)

We do not agree. First, the Division does not explain how Employer’s transit buses would qualify as a “work vehicle,” a term that was used (but not defined) by the Standards Board.⁷ Next, given that the Standards Board was responding to a comment made by the California Rural Legal Assistance Foundation concerning “work vehicles,” it would be reasonable to infer that the response, directed to a rural organization, would be within a rural, versus a city mass transit context. This supports that the work vehicles referred to by the Standards Board did not include mass transit bus companies like

⁷ We could not find a definition for “work vehicle” in the dictionary, nor does the Division provide a dictionary definition.

Employer's, who operate in urban settings. (Decision, pp. 1-2; Petition, pp. 1-2.)

Additionally, a comment by the Division reveals a key distinction that convinces us that Employer's transit buses are not the "work vehicles" referred to by the Standards Board. The Division argues that, "[T]he Standards Board equated *workers* riding in a [non-air conditioned] work vehicle with workers at other outdoor workplaces." (Petition, p. 10 [emphasis added].) However, this is not an accurate characterization of what the Standards Board said. The Standards Board did not refer to workers riding in a work vehicle, but rather referred to "*passengers* riding in a work vehicle." (See Petition, p. 9, [original emphasis by Division].) The distinction here is that the Standards Board specifically referred to "passengers," who were "riding in a work vehicle," and then equated those "passengers" to "workers at other outdoor workplaces," who would then be covered under the regulation should the other qualifying conditions be present. (Ex. 12, FSOR, p. 30, Comment 8.) Point being, the passengers in a work vehicle are employees of the employer.

The work vehicle referred to by the Standards Board is easily distinguished from Employer's transit buses. Employer's buses pick up and transport passengers, passengers who are not employees of Employer, as they would be in the work vehicles referred to by the Standards Board. And, even if one of the passengers in a transit bus worked for Employer, they still would not be subject to the regulation, as the Division admits in its petition that the "sole issue on reconsideration" is whether the driver, not the passengers, is subject to the regulation. (See Petition, pp. 1, 2; Division's Reply to Post-Hearing Brief, p. 2 [Division stating, "It is undisputed that all of [Employer's] drivers of its non-air conditioned buses (the *only ones to whom the citations apply*)...." (Emphasis added).]) Based on the above substantial evidence, we therefore find that Employer's transit buses do not qualify as "work vehicles."

The Division also argues that section 3395 was meant to "supplement" other safety orders that already exist within Title 8 which are relevant to heat illness.⁸ (Petition, p. 7, bottom – p. 8, top.) The Division posits that because these existing standards apply to Employer, then section 3395's reference to such existing standards serves as a "supplement," and therefore section 3395 itself should also apply to Employer. (*Ibid.*)

We do not find any merit in this argument. To begin with, the Division misquotes the text of section 3395(a), arguing that "Section 3395(a) *states* that it is intended to supplement these and other provisions which apply to transit buses...."⁹ (Petition, p. 8 [emphasis added].) However section 3395(a) does not

⁸ Referenced sections include sections 3203 (Injury and Illness Prevention), 3363 (water supply), and 3400 (medical service and first aid), among others. (Section 3395(a).)

⁹ We assume this was unintentional. (See *Bus. & Prof. Code*, § 6068, *subd. (d)* [duty of attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"]; *Rules Prof. Conduct*, rule

contain any such declaration, and merely provides that “This [section] is not intended to exclude the application of other sections of Title 8 [that may be relevant to the prevention of heat illness].” (Section 3395(a); Ex. 13, ISOR, p. 2.) The Standards Board, therefore, was simply referring to existing Title 8 standards (IIPP, drinking water, first aid, etc.) and pointing out to the public that these standards “may have application to the prevention of heat illness under certain circumstances,” and to make it clear that employers “must continue to comply with these [already existing] standards to the extent they apply after the [new heat illness regulation] takes effect.” (Ex. 13, ISOR, p. 2.) Therefore, contrary to the Division, section 3395 does not anywhere “state that it is intended to supplement” these other existing regulations. (Petition, p. 8.)

Furthermore, even if section 3395 did supplement the referenced Title 8 standards, the Division’s argument would still fail as the Division does not explain how this “supplementation” would help. (Petition, p. 8.) In other words, just because section 3395 mentions other standards that apply to Employer does not answer the specific question before us: whether Employer’s transit buses are considered outdoor places of employment under section 3395. Here, section 3395 contains a reference to other standards related to heat-illness, standards which apply regardless of indoor or outdoor status. However, that reference does not get over the fact that section 3395, itself, is still specifically limited to “outdoor places of employment.” (Section 3395(a); Ex. 13, ISOR, p. 2.)

Decision

For the above reasons, we find that the interior of a transit bus is not an “outdoor place of employment.” Section 3395 therefore does not apply to the facts of this case. Employer’s appeal is granted.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: June 12, 2013

5-200(C) [a member of the State Bar “[s]hall not intentionally misquote to a tribunal the language of a book, statute, or decision”].)