

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

In the Matter of the Appeal of:

COFFMAN SPECIALTIES, INC.
9685 Via Excelencia, Suite 200
San Diego, CA 92126

Employer

Docket No. 10-R3D2-3532

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by Coffman Specialties, Inc. (Employer) matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on September 23, 2010, the Division of Occupational Safety and Health (Division) conducted an accident inspection at a place of employment in Brawley, California maintained by Employer. On October 20, 2010, the Division issued one citation to Employer alleging a violation of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.¹

The citation alleged a General violation of section 3395(d) [insufficient access to shade].

Employer filed timely appeals of the citation.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on January 25, 2012. The Decision denied Employer's appeal and upheld the General classification, imposing a civil penalty of \$420.

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division did not file an answer to the petition.

ISSUE

Did the ALJ's decision correctly find that Employer failed to provide shade as required by section 3395(d)?

EVIDENCE

The Decision summarizes the evidence adduced at hearing in detail. We summarize that evidence briefly below, focusing on the portions relevant to the issue presented.

Associate Safety Engineer Kasthuri Ramesh (Ramesh) conducted an investigation at Employer's construction site on September 23, 2010. An opening conference was held with Project Manager Todd Huckstein (Huckstein) and Safety Manager Jack Bouchet (Bouchet). Bouchet drove Ramesh through the construction site, a 200 yard wide, 4.7 mile long railroad spur. Ramesh testified that he was able to view 6 to 7 groups of employees working at different points along the line, and estimated he saw 30 employees in total. During the course of the visit, Ramesh observed heavy earth moving equipment out at the site, as well as foremen driving 3 or 4 pickup trucks. He spoke with one employee, Jose Diaz (Diaz), and took several photographs.

The parties agreed that the weather on the day of the inspection was hot, with temperatures in the low 90 degree Fahrenheit range from 11 a.m. to 2 p.m. on the day of Ramesh's visit. Employer's witness, Stephen Rodgers (Rodgers), testified that the office trailer, available to employees with an air conditioned break room, was located 3 miles from the end of the project, and 2.3 miles from the start of the project. He also testified that each crew foreman had a truck as well as a two-way radio to call for help, and all employees worked in a crew, never alone, so that they would always be able to call for help if needed. Rodgers also noted that each crew truck had air conditioning, as well as a generator or air compressor with a 100 foot extension cord; the trucks would need to be near the work site of the crew, so that they could access the power generator or air compressor.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered Employer's petition for reconsideration and the Division's answer to it.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e).

Section 3395(d) states in full:

Access to Shade. Employees suffering from heat illness or believing a preventative recovery period is needed, shall be provided access to an area with shade that is either open to the air or provided with ventilation or cooling for a period of no less than five minutes. Such access to shade shall be permitted at all times. Except for employers in the agricultural industry, cooling measures other than shade (e.g., use of misting machines) may be provided in lieu of shade if the employer can demonstrate that these measures are at least as effective as shade in allowing employees to cool.²

In its petition for reconsideration, Employer argues that shade is only required when an employee asks for a preventative recovery period, or has an actual heat illness, and that there is no testimony in the record showing any employee was suffering from heat illness or was in need of a preventative rest period on the day of the Division's investigation. The Board has rejected this interpretation of the heat illness standard as contrary to the purpose and intent of the safety order. In *Preston Pipelines, Inc.*, Cal/OSHA App. 09-3345, Denial of Petition for Consideration, (Aug. 30, 2012), the Board addressed access to shade under section 3395(d); it found that the most reasonable construction of the safety order, when reading the section as a whole, is to allow employee access to shade "at all times." (Section 3395(d)). The Division need not demonstrate that an employee was suffering heat illness or in need of a preventative period for a violation to be found. (*Martin J. Solis dba Solis Farm*

² Section 3395 was amended in October 2010, with changes going into effect on November 4, 2010. This decision addresses the regulation as it existed at the time of the citation at issue.

Labor Contractor, Cal/OSHA App. 08-3414 Decision After Reconsideration (Dec. 30, 2013)).

Employer argues that through provision of trucks at the worksite, one for each foreman who lead a crew of 2 to 8 workers, it was able to effectively provide shade under the safety order. Members of each crew could access the truck and turn it on, starting up the air conditioning to cool off, according to Employer's witness, Rodgers. Several definitions of terms are provided at section 3395(b), including a definition of shade:

"Shade" means blockage of direct sunlight. Canopies, umbrellas and other temporary structures or devices may be used to provide shade. One indicator that blockage is sufficient is when objects do not cast a shadow in the area of blocked sunlight. 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.

Employer also argues that the trucks were available to drive to the air conditioned trailer which was equipped with first aid materials, as well as cold water, ice, and other amenities, or to a shipping container located on a hill on the jobsite, which was also air conditioned. However, Employer's sole witness was not present on the day of the Division's inspection, making his testimony regarding provision of trucks on site less persuasive than the Division's eye-witness account. The documents Rodger's referred to during the course of his testimony, which allegedly showed the assignment of trucks to crews, were not entered into the record. Contrary to Rodger's assertions, Ramesh testified that during his tour of the 4.5 mile site, he saw work crews, as well as heavy machinery, but did not see more than one or two trucks parked near those crews, although he did see several trucks driving along the site. The photographs entered into evidence by the Division bore out his testimony, while photographs entered by Employer did not contradict his statements. (Ex.s 2, A). Even assuming there had been a truck parked at every crew, the Board has rejected the use of a non-running truck to provide shade as not in keeping with the language and intent of the safety order. On a hot day, the cab of a truck parked in the sun will be hot, meaning that "even though the system would start to produce cold air in relatively few seconds, the air in the cab would take minutes to cool down." (*Preston Pipelines*, supra).

Shade must be in existence at all times, should the contingency arise that an employee need a break from the heat, as the ALJ correctly found. (Decision, p. 7). For this same reason, a vehicle available to take employees to an on-site trailer that is too far to quickly access by foot is also not a substitute for ready access to shade, which should be available at the location where employees are working.

Therefore, we affirm the result of Decision sustaining the citation.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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