

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

In the Matter of the Appeal of:

SUNRISE GROWERS FROZSUN FOODS  
701 West Kimberly Avenue, Suite 210  
Placentia, CA 92870

Employer

Docket. 09-R4D3-2850

**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 petitions for reconsideration filed by Sunrise Growers Frosun Foods (Employer) and the Division of Occupational Safety and Health (Division) under submission, renders the following decision after reconsideration.

**JURISDICTION**

Beginning on April 22, 2009, the Division conducted an accident inspection at a place of employment in Santa Maria, California maintained by Employer. On July 28, 2009, 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.<sup>1</sup>

The citation alleged one Serious violation of section 3395(d)<sup>2</sup> [failure to provide access to shade for agricultural employees].

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 June 21, 2010. The Decision denied Employer's appeal in

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

<sup>2</sup> The citation and decision reference 3395(d) as in effect on April 22, 2009. Section 3395 was subsequently amended in 2010, with amendments going into effect on November 4, 2010. We apply the regulation as in effect at the time of the citation.

part and found a General violation of the safety order, imposing a civil penalty of \$375.

Employer and Division timely filed petitions for reconsideration of the ALJ's Decision. The Division also filed an answer to the petition. Employer requested oral argument, which the Board denied under its authority pursuant to Labor Code section 6620.

### **ISSUES**

1. Did the citation as written describe with particularity the nature of the violation?
2. Is section 3395(d) unconstitutionally vague?
3. Did Employer fail to provide access to shade on April 21, 2009 to employees where the weather temperature was 91 to 95 degrees Fahrenheit?

### **EVIDENCE**

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

On April 22, 2009, Associate Safety Engineer for the Division, Rene Garcia-Caraballo, conducted an inspection at a field in which employees of Employer were harvesting strawberries. There is no dispute that Wednesday, April 22 was a comfortable temperature, but April 21, the date of the citation, was hot, with temperatures in the low 90s by 11 am. (Div. Ex. 4).

Field manager, Rigo Barejas, testified for Employer. On the day of the inspection, Barejas told Garcia-Caraballo that Employer had about 30 employees harvesting that day. Barejas explained to Garcia-Caraballo that Employer generally had a shade canopy for employees, along with the chairs and water it provided for employees. However, on Monday, April 20, windy weather had destroyed the canopy. To compensate, Barejas called foreman Angel Salazar the same Monday and told him to unload a flatbed trailer which was used to haul berry packing supplies. He explained to Salazar that the trailer, which had a roof and wooden floor but no side-length walls, would be used as a temporary shade structure until he bought a new canopy tent. (Div. Ex. 2). Salazar testified that Barejas bought a new tent on April 22, and it was in use on April 23, 2009.

Salazar testified that he believed the trailer could hold over 10 people inside, and the trailer would continue to cast at least some shadow on the ground by the trailer even at midday. He did not think it was difficult for men

to climb in, although there were no steps, and women could sit in chairs or stand outside the trailer. Santiago, Barejas and Salazar all testified that Employer has a truck with chairs for employees to use at breaks and lunch, so that employees do not have to sit on the ground. Garcia-Caraballo noted that the ground can be conductive of heat.

Marcelina Santiago, one of the employees Garcia-Caraballo interviewed during his visit, was called to testify by the Division. She explained that the trailer bed was the height of her waist, and she had never tried to climb into it.<sup>3</sup> On April 21, 2009, she had a headache and was nauseous due to the heat. She went to the trailer, where the water cooler was kept, and got a drink. After resting for about 20 minutes, she told Salazar that she was leaving for the rest of the day. She also gave a ride home to another employee, Justina, who felt ill from the hot weather. Salazar recalled also letting Justina go home that day. Field manager Barejas testified to stopping by the worksite after 9 am, where he saw Santiago standing at the trailer and her husband lying on the trailer bed. He asked them how they were doing, and they responded that it was hot.

### **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 both Employer and Division's petitions for reconsideration and the Division's answer to Employer's petition.

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.

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<sup>3</sup> Santiago testified that she did not believe the trailer was there as a shade structure because it was full of boxes. Generally speaking, that would have been true, however, as the ALJ found, Santiago's memory seems to be confused on this point, as other witnesses testified to, and the Division's photos from April 22, 2009 show, the trailer to be empty of boxes.

Employer petitioned for reconsideration on the basis of Labor Code section 6617(a), (c) and (e). Employer objects to the decision on the basis of due process and lack of particularity in the citation. The Division petitioned for reconsideration on the basis of Labor Code section (a) and (c). The Division argues the Decision is in error by failing to find a serious violation of the alleged safety order.

1. The citation as written did not describe with particularity the nature of the violation found to have been violated by the Decision of the ALJ.

The citation issued to Employer reads as follows:

Title 8 CCR 3395(d) Heat Illness Prevention- 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.

Agricultural Field- Where employees were working on April 21, 2009 in agricultural fields harvesting strawberries, the employer did not provide access to shade where the weather temperature was 91-95 deg. Fahrenheit.

Employer argues that the parties did not litigate the issue of absence of shade on the early morning of April 21, 2009, as the citation as written was for failure to provide shade, due to the alleged inadequacy of Employer's shade structure, during the peak hot hours of the day, when it was 91 to 95 degrees Fahrenheit.

The Board has found that a Division's citation must provide sufficient notice to employers of what safety order was breached, as well as the nature and the substance of the alleged violation. (*Rex Moore Electrical Contractors and Engineers*, Cal/OSHA App. 07-4314, Denial of Petition for Reconsideration (Nov. 4, 2009).) This information is required under Labor Code section 6317; administrative proceedings are not bound by strict rules of pleading, and the substance of the violation and citation is all that is required, so as to give the employer fair notice and enable it to prepare a defense. (*DSS Engineering Contractors*, Cal/OSHA App. 99-1023, Decision After Reconsideration (Jun. 3, 2002), citing *Gaehwiler Construction Co.*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan 7, 1985).)

Section 386 authorizes the Board to amend the issues on appeal:

(a) The Appeals Board may amend the issues on appeal or the Division action after a proceeding is submitted for decision in order to:

- (1) Correct a clerical error;
- (2) Address an issue litigated by the parties;
- (3) Amend the section number cited in the citation if the same set of facts apply to both the cited and proposed sections; or
- (4) Amend any part of the Division action to conform it to a statutory requirement.

(b) Each party shall be given notice of the intended amendment and the opportunity to show that the party will be prejudiced thereby. If such prejudice is shown, the amendment shall not be made.<sup>4</sup>

In this instance, the ALJ exercised her discretion to amend the issues on appeal prior to issuing the decision, but failed to give the parties notice and opportunity to demonstrate prejudice per section 386(b).

Neither the Employer nor the Division actively litigated the factual or legal issues related to the issue of shade being available in the one or two early hours of the day. (See, *Kenko, Inc.*, Cal/OSHA App. 00-672, Decision After Reconsideration (Oct. 16, 2002).) Rather, both parties put forth testimony and evidence regarding the issue of whether Employer's shade structure provided shade to employees during the hot hours of the day, under section 3395(d). The limited testimony, an unsure remark from one of Employer's foremen, made during direct examination by Employer regarding when the shade structure arrived at the worksite, was not the focus of either Employer nor the Division's presentation, presumably because neither party believed the arrival time to be pertinent to the issue at hand.

The Board finds the failure to provide notice and opportunity to show prejudice under section 386(b), ultimately resulted in prejudice to Employer. The decision dated June 21, 2010, finding a general violation of section 3395(d) and assessing a civil penalty of \$375, is vacated.

## 2. Constitutionality of Section 3395(d)

Employer alleges that section 3395(d) is unconstitutionally vague, as interpreted by the ALJ. Specifically, the ALJ found that under section 3395(d), access to shade must be provided at all times to employees who work outdoors. Based on the temperature in the morning, as well as testimony that heat

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<sup>4</sup> Section 386 has been amended, with changes going into effect July 1, 2013. We apply the regulation as in effect at the time the ALJ rendered her decision in this matter.

illness can occur at temperatures as low as 75 degrees, the ALJ found that a violation of section 3395(d) was established, due to an absence of shade on April 21, 2009 from the beginning of the shift at 7 am to approximately 9 am, at which point the shade trailer was brought to the worksite.

The Board has found this lack of a specific temperature threshold (or “triggering provisions”) in section 3395 did not render the regulation unconstitutional, as it can be given a reasonable and practical interpretation. (*Mascon, Inc.*, Cal/OSHA App. 08-4278, Denial of Petition for Reconsideration (Mar. 4, 2011), See also, *Martin J. Solis dba Solis Farm Labor Contractor*, Cal/OSHA App. 08-3414, Decision After Reconsideration (Dec. 30, 2013).) It is the responsibility of an employer to apply the provisions of section 3395 “at those times when the environment risk factors for heat illness, as defined in (b), are present.”

The ALJ’s interpretation of the section 3395(d) access to shade standard is consistent with recent Board decisions on the matter. In *Preston Pipelines, Inc.*, Cal/OSHA App. 09-3345, Denial of Petition for Reconsideration (Aug. 30, 2012) the Board found “[t]he text of the safety order stating ‘Such access to shade shall be permitted at all times[,]’ means that shade must [already] be in existence at all times.” The Board explained that if an employer were only to put up the canopy or umbrella (for example) when requested by an already overheated employee, the shaded area would not be cool. In order to ensure the shade is readily available, having it up throughout the course of a day in which there are working conditions that create the possibility of heat illness is most congruous with the language and intent of the regulation. As the Board has previously recognized, the standard is not unconstitutionally vague.

3. The Division has failed to show that Employer violated section 3395(d) by a preponderance of the evidence.

As the Board has held the citation was not sufficiently particularized, the issue of whether the Division met its burden of proof to uphold the citation is moot. Despite the issue being mooted, the Board will address the Division’s contention on the burden of proof issue.

At hearing, the Division argued that the trailer provided by Employer on April 21, 2009 failed to provide shade for a crew of 30 persons. The Division has the burden of proving a violation of the safety order by a preponderance of the evidence. (*Howard J. White, Inc., Howard White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983).) In its petition for reconsideration, the Division cites photographs as evidence of the trailer’s inadequacy as a shade structure, including Division’s Exhibit 2, and Employer’s Exhibit A-4, which illustrate the shadow cast by the trailer from

different angles and times in April and May.<sup>5</sup> Under section 3395(b), shade is defined as follows:

"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.

The Division argues that the trailer structure provided by the Employer is inadequate for several reasons: height, which made the trailer bed difficult for individuals to access, the size of the shadow cast by the trailer on the ground outside the trailer bed, which would not accommodate a crew of 30 employees, and Employer's failure to inform employees of the availability of the trailer for use as shade.

Testimony and evidence regarding the accessibility of the trailer was offered by both parties. Santiago, called by the Division, testified that the trailer bed came up to her waist. Garcia-Caraballo testified that he estimated the trailer to be about three feet, or waist high, off the ground, with no stairs or other means of ingress. (Div. Ex. 2). Due to the lack of access to the trailer bed, Garcia-Caraballo testified that he did not consider the trailer bed to be a shaded area available to employees. Salazar testified that it was not difficult for men to access the trailer bed, and it was unnecessary for the women to access it, since there was shade outside the trailer, and chairs to sit in.

In several photographs, the shadow the trailer casts onto the ground can be seen to shrink from a fairly large shadow along the length of the trailer to a smaller area behind the trailer. (Emp. Ex. A). Neither party provided firm evidence as to the size of the shadows at any point in the day; there is no testimony regarding the time of day when photos were taken, or measurements of structures seen in the photographs. As is noted by the ALJ, while it is true that the length of shadows change as the sun's position changes over the course of the day, it is incorrect to state that on April 21, 2009 there would be a point in a day where an object would not cast a shadow outside itself, which the Division suggested in its questioning of witnesses. (Decision, p, 6).

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<sup>5</sup> Garcia-Caraballo testified to taking the photo in Division's Exhibit 2 during his site visit on April 22, 2009. Rigo Barejas testified to taking the photos in Employer's Exhibit A, approximately three weeks after the Division's April 22 visit to Employer's premises. Barejas testified that the trailer is the same in both Employer and Division exhibits.

The Division, in its petition, states that the trailer would cast a shadow of less than two feet in length; a calculation based on an estimated height of the trailer that is not supported by any testimony in the record, and a date that is admittedly inaccurate by two months when the sun would be higher in the sky and cast shorter shadows. (Div. Petition, fn., p. 13). The Division produced no other evidence regarding the size of the trailer shadows for the date and time in question. Employer's photographs, which only miss the mark by three weeks, appear to show a shadow that appears to be two or three feet long and several feet wide, at its smallest.<sup>6</sup> The Division questioned Salazar on the size of the shadow cast by the trailer during afternoon, or the time of day when the sun is directly overhead; Salazar's answer was that there is always a shadow of some kind that can be used.

According to testimony from Garcia-Caraballo, he was informed by foreman Salazar that employees had never been told that the empty trailer was being used temporarily to replace the canopy as a shade structure. Salazar denied this, and stated he informed employees during the 9 am break on April 21 that the trailer was available for shade, and that some did use it at the first break, but not all, since it was not very hot at 9 am. Salazar estimated that employees did not mention the heat until around 11 am, when Santiago and her husband asked for a break. Salazar also testified that the only water jug was at the trailer. Employee Santiago's testimony on the trailer was difficult to follow, as she mainly recalled the trailer when it was in its normal use hauling boxes, and did not seem to recall the trailer when it was empty. She did testify that on April 21, 2009, the date she went home early due to illness from the heat, she had rested for twenty minutes in the shade of the trailer, because the water jug was sitting on the trailer bed.

When viewed in its totality, the preponderance of the evidence does not establish that employees working on April 21, 2009 in Employer's agricultural fields did not have access to shade where the temperature was 91 to 95 degrees Fahrenheit. "Preponderance of the evidence' is usually defined in terms of probability of truth, or of evidence that when weighed 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.4<sup>th</sup> 472, 483, rev. denied). The evidence in the record does not establish that the shade outside of the trailer was inadequate when it was used by Santiago and her husband for a break. Santiago's testimony established that she was able to utilize the shade for its intended

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<sup>6</sup> Salazar testified that the trailer was no wider than a parking stall, or 9 feet, but did not testify to the height. There is no other testimony in the record regarding the trailer's size, excepting testimony on the height of the trailer bed, discussed elsewhere.

purpose; she had a recuperative break to rehydrate and rest, as did her spouse.<sup>7</sup>

The Division's evidence shows the temperature at about 79 degrees at 9 am, peaking around noon at approximately 94 degrees, and was at 80 degrees by 2 pm. While we may assume the shadow of the trailer did ebb and flow over the course of this period, no evidence in the record demonstrates that it was, around noon, too sparse to fulfill the needs of thirty employees. There is no requirement in section 3395(d) that the shade accommodate all employees at one time; Employer's witnesses testified that at any one time at least several people would be able to use the shaded area. The Division did not provide any evidence to rebut this assertion. Having so found, the Board need not reach the arguments regarding the serious classification of the citation raised by the Division in its petition.

Employer's appeal is granted.

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

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<sup>7</sup> We will assume, without deciding, that the trailer bed itself is not a shaded area under the regulation due to its height. An employee in the early stages of a heat illness may not easily hop onto a trailer bed at 3 feet in height, although the trailer bed was usable for Santiago's husband, and presumably others, over the course of two days.