BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No. **1334740**
OLAM WEST COAST, INC. **dba OLAM SPICES AND VEGETABLE INGREDIENTS** **205 E. RIVER PARK CIRCLE, SUITE 310** **FRESNO, CA 93720** **Employer**	**DECISION**

Statement of the Case

Olam West Coast, Inc. (Employer or Olam) processes tomatoes at its facility located at 6229 Myers Road in Williams, California. Beginning July 31, 2018, the Division of Occupational Safety and Health (the Division), through Assistant Safety Engineer Omar Castillo,[1] conducted an inspection of Employer's yard after a report of an employee illness that occurred on July 24, 2018.

On January 16, 2019, the Division cited Employer for three violations of California Code of Regulations, title 8, alleging: 1) Employer failed to provide effective heat illness training to each supervisory employee; 2) Employer failed to observe employees newly assigned to a high heat area for signs or symptoms of heat illness during the first 14 days; and 3) Employer failed to provide effective heat illness training to each non-supervisory employee before they began work reasonably anticipated to result in heat illness.

Employer filed timely appeals of the citations. Employer contests the existence of each alleged violation, the classifications of Citations 2 and 3, the reasonableness of abatement requirements, and the reasonableness of the proposed penalties for the alleged violations. Employer also asserted a series of affirmative defenses for each alleged violation.[2]

This matter was heard by Kevin J. Reedy, Presiding Administrative Law Judge for the California Occupational Safety and Health Appeals Board (Appeals Board), on December 8, 9,

[1] Omar Castillo promoted to Associate Safety Engineer in January, 2019

[2] 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).)

and 10, 2020, and January 9 and 29, 2021. The parties attended the hearing remotely via the Zoom video platform. Andrew J. Sommer and Megan S. Shaked, attorneys at Conn Maciel Carey, LLP, represented Employer. Deborah Bialosky, Staff Counsel, represented the Division. The matter was submitted on March 19, 2021.

Issues

1. Did Employer fail to provide effective heat illness training to each supervisory employee?

2. Did Employer fail to observe employees newly assigned to a high heat area for signs or symptoms of heat illness during the first 14 days of the employee's employment?

3. Did Employer fail to provide effective heat illness training to each non-supervisory employee before they began work reasonably anticipated to result in heat illness?

4. Did the Division establish rebuttable presumptions that Citations 2 and 3 were properly classified as Serious?

5. Did Employer rebut the presumptions in Citations 2 and 3 that the violations were Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

6. Was Citation 2 properly characterized as accident-related?

7. Are the abatement requirements reasonable?

8. Are the proposed penalties reasonable?

Findings of Fact

1. Employer's employee training lacked information related to the employer's responsibility to provide water, shade, cool-down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation. The training lacked information related to the concept, importance, and methods of acclimatization pursuant to the employer's procedures under section 3395, subdivision (i)(4). The training failed to address 1) lack of acclimatization by lessening the intensity and/or shift length of the newly-hired

employees' work during a two or more week break-in period, and 2) by modifying work schedules or by rescheduling non-essential duties during hot summer months.

2. Employer's supervisor training failed to include training on how to monitor weather reports and how to respond to hot weather advisories.

3. Employer had no acclimatization methods and procedures in its written Heat Illness Prevention Program.

4. On July 24, 2018, Timothy Garcia (Garcia) was newly assigned to an outdoor high heat area. Garcia, on his first day on the job, worked in the outdoor bin assembly area, where he performed strenuous work assembling large boxes, each weighing 250 pounds. The place where the boxes are assembled is identified as the aseptic area.

5. On July 24, 2018, Garcia started his shift at 2:00 p.m. The outdoor temperature peaked at 104 degrees between 3:00 to 4:00 p.m. Garcia took his first break at approximately 4:00 p.m., when he was exhibiting the signs and symptoms of heat illness.

6. When Garcia came back from his 4:00 p.m. break, his supervisor, Juan Ornelas (Ornelas), did not check in with him. Garcia did not see Ornelas between the time he returned from his break and when he was taken to the safety room after the onset of heat illness symptoms.

7. Garcia was not being closely observed by a supervisor when he developed symptoms of heat illness.

8. Garcia was transported to the hospital on July 24, 2018, where he spent three days receiving treatment for heat illness.

9. There is a realistic possibility that death or serious physical illness could result from heat illness.

10. Employer failed to provide effective training to supervisory employees in topics related to heat illness. Employer failed to effectively communicate to its employee and his supervisors the dangers associated with heat illness.

11. Garcia was not properly acclimatized when he developed heat illness on July 24, 2018.

12. Requiring an employer to correct a deficient heat illness program and to develop a heat illness prevention program with all the essential elements is not unreasonable.

13. The penalty calculations for Citations 1 and 3, as modified, and Citation 2, were calculated in accordance with the Division's policies and procedures.

Analysis

1. Did Employer fail to provide effective heat illness training to each supervisory employee?

The Division cited Employer for a violation of California Code of Regulations, title 8, section 3395, subdivision (h)(2). Section 3395, subdivision (h), provides:[3]

> (h) Training.
>
> (1) Employee training. Effective training in the following topics shall be provided to each supervisory and non-supervisory employee before the employee begins work that should reasonably be anticipated to result in exposure to the risk of heat illness:
>
> (A) The environmental and personal risk factors for heat illness, as well as the added burden of heat load on the body caused by exertion, clothing, and personal protective equipment.
>
> (B) The employer's procedures for complying with the requirements of this standard, including, but not limited to, the employer's responsibility to provide water, shade, cool- down rests, and access to first aid as well as the employees' right to exercise their rights under this standard without retaliation.
>
> (C) The importance of frequent consumption of small quantities of water, up to 4 cups per hour, when the work environment is hot and employees are likely to be sweating more than usual in the performance of their duties.

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

(D) The concept, importance, and methods of acclimatization pursuant to the employer's procedures under subsection (i)(4).

(E) The different types of heat illness, the common signs and symptoms of heat illness, and appropriate first aid and/or emergency responses to the different types of heat illness, and in addition, that heat illness may progress quickly from mild symptoms and signs to serious and life threatening illness.

(F) The importance to employees of immediately reporting to the employer, directly or through the employee's supervisor, symptoms or signs of heat illness in themselves, or in co-workers.

(G) The employer's procedures for responding to signs or 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.

(2) 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:

(A) The information required to be provided by section (h)(1) above.

(B) The procedures the supervisor is to follow to implement the applicable provisions in this section.

(C) The procedures the supervisor is to follow when an employee exhibits signs or reports symptoms consistent with possible heat illness, including emergency response procedures.

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

In Citation 1, Item 1, the Division alleges:

Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to provide effective training to each supervisory employee before they began work reasonably anticipated to result in heat illness.

Associate Safety Engineer Omar Castillo (Castillo) testified that Employer's employee training lacked information related to the employer's responsibility to provide water, shade, cool-down rests, and access to first aid, as well as the employees' right to exercise their rights under this standard without retaliation. The training lacked information related to the concept, importance, and methods of acclimatization pursuant to the employer's procedures under section 3395, subdivision (i)(4). The training failed to address 1) lack of acclimatization by lessening the intensity and/or shift length of the newly-hired employees' work during a two or more week break-in period, and 2) by modifying work schedules or by rescheduling non-essential duties during hot summer months.

Castillo testified that Employer's supervisor training failed to include training on how to monitor weather reports and how to respond to hot weather advisories. Employer had no acclimatization methods and procedures in its written Heat Illness Prevention Program.

In its closing brief, Employer argues that after viewing a Cal/OSHA heat safety training video (Exhibit D), the trainer, Lacey Gimple (Gimple), Continuous Improvement Manager and Environmental Health and Safety Manager, showed a slide presentation and "read through the slide presentation line by line and elaborated beyond the content of the slides as necessary to explain the subject matter." (Exhibit 22.) Employer provided no written materials to support this claim of "elaboration." At the hearing, Gimple reviewed Olam's PowerPoint slideshow on heat illness prevention and testified that the new training information required by the 2015 amendment to section 3395 was not included in the written training content of the slides. (See Exhibit S.)

Employer's heat illness training is found to be insufficient and incomplete. The Division established that Employer failed to provide effective training to each supervisory employee

before they began work reasonably anticipated to result in heat illness. Accordingly, Citation 1, Item 1, is sustained.

2. Did Employer fail to observe employees newly assigned to a high heat area for signs or symptoms of heat illness during the first 14 days of the employee's employment?

The Division cited Employer for a violation of section 3395, subdivision (g)(2), which provides:

> (g) Acclimatization.
>
> (2) An employee who has been newly assigned to a high heat area shall be closely observed by a supervisor or designee for the first 14 days of the employee's employment.

The Division, in the amended Citation 2, Item 1,[4] alleges:

> Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to closely observe employees newly assigned to a high heat area, for signs or symptoms of heat illness during the first 14 days. As a result, on July 24, 2018, an employee suffered a serious illness.

On July 24, 2018, Garcia was newly assigned to an outdoor high heat area. Garcia worked in the outdoor bin assembly area, where he performed work assembling large boxes, each weighing 250 pounds. Garcia testified that this work is "very, very hard when you're squatting down, and you're lifting heavy boxes up." Castillo testified that task is "strenuous."

On July 24, 2018, Garcia started his shift at 2:00 p.m. The outdoor temperature peaked at 104 degrees between 3:00 to 4:00 p.m. (Exhibit 13.) Garcia testified that he took his first break at approximately 4:00 p.m., when he was already sweating badly and feeling tired because he "was working in the heat." Garcia took a 10-minute break and returned to work. Garcia testified that, when came back from break, his supervisor did not check in with him. Garcia did not remember seeing his supervisor between the time he returned from his break and when he was taken to the safety room.

Garcia testified that for the next one and one-half hours he started feeling more and more tired. He felt dizzy, and he felt like he wanted to throw up. Garcia felt exhausted and was having difficulty breathing. He kept drinking water and was sweating profusely. Garcia testified that he then sat down on the floor because he started to feel panicky, because he was sweating so much

[4] Citation amended prior to hearing pursuant to the Division's motion.

and feeling so hot. Garcia's symptoms continued to worsen whereupon he asked a co-worker to call "safety." Garcia experienced symptoms of heat illness, including fatigue, excessive sweating, dizziness, nausea, and feeling hot. These signs and symptoms could have been detected by close observation. Garcia was escorted to the safety room at approximately 6:45 p.m. Garcia was transported to the hospital on July 24, 2018, where he spent three days receiving treatment for heat illness.

Supervisor Ornelas testified that he first learned that Garcia was feeling sick while he was filling in for a forklift driver who was on his half hour lunch period. Ornelas could not observe Garcia from the areas where he was operating the forklift. When Ornelas took his lunch, rest break, or was filling in for another employee, Israel Gomez (Gomez) assisted with supervisor duties. Ornelas testified that he did not inform Gomez that he was Ornelas's designee for the purpose of closely observing Garcia while Ornelas was away. Ornelas and Gomez did not discuss that it was Garcia's first day working in high heat. Ornelas gave Gomez general instructions to keep an eye on everybody. Ornelas testified that he did not designate an individual to closely observe Garcia while Ornelas was away.

Gomez testified that no manager at Olam ever told him that, when Ornelas was not in the aseptic area, it was the responsibility of Gomez to step into the shoes of the supervisor and assume the responsibilities for overseeing a new employee, and observing employees for heat illness. Gomez also testified that, other than Employer's general training, he received no additional supervisor training on how to closely observe employees for heat illness.

In effect, Garcia was not being closely observed by a supervisor or a supervisor's designee when he developed symptoms of heat illness.

Employer failed to observe an employee, newly assigned to a high heat area, for signs or symptoms of heat illness during his first 14 days on the job. Accordingly, the Division has met its burden, and Citation 2, Item 1, is sustained.

3. Did Employer fail to provide effective heat illness training to each non-supervisory employee before they began work reasonably anticipated to result in heat illness?

The Division cited Employer for a violation of section 3395, subdivision (h)(1), which is set forth in Section 1 above.

In Citation 3, the Division alleges:

> Prior to and during the course of the investigation, including, but not limited to on July 24, 2018, the employer failed to provide effective training to each non-

supervisory employee before they began work reasonably anticipated to result in heat illness.

Castillo testified that Employer's employee training lacked information related to the employer's responsibility to provide water, shade, cool-down rests, and access to first aid, as well as the employees' right to exercise their rights under this standard without retaliation. The training lacked information related to the concept, importance, and methods of acclimatization pursuant to the employer's procedures under section 3395, subdivision (i)(4). The training failed to address 1) lack of acclimatization by lessening the intensity and/or shift length of the newly-hired employees' work during a two or more week break-in period, and 2) by modifying work schedules or by rescheduling non-essential duties during hot summer months.

Castillo testified that Employer had no acclimatization methods and procedures in its written Heat Illness Prevention Program.

Employer failed to provide effective training to each non-supervisory employee before they began work reasonably anticipated to result in heat illness. As in Citation 1 above, Employer's claim of "elaboration" by the trainer during training slide presentations is unsupported by any written training documents, and is hereby rejected. The Division has met its burden and Citation 3, Item 1, is sustained.

4. Did the Division establish rebuttable presumptions that Citations 2 and 3 were 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).)

Labor Code section 6432, subdivision (g), provides:

> A division safety engineer or industrial hygienist who can demonstrate at the time of the hearing, that his or her division-mandated training is current shall be deemed competent to offer testimony to establish each element of a serious violation, and may offer evidence on the custom and practice of injury and illness prevention in the workplace that is relevant to the issue of whether the violation is a serious violation.

Citation 2:

The Division demonstrated that failure to closely observe an employee newly assigned to a high heat area creates a realistic possibility of serious physical illness or death. Dr. James Seward (Dr. Seward) was offered by the Division as an expert in area of heat illness. He testified that he has reviewed approximately 50 cases for the Division involving suspected heat illness. Of those cases, a quarter to a third of the cases involved employees who developed heat illness during their first day of work due to heat or workload or a combination of both. Dr. Seward testified that there are a variety of illnesses associated with heat accumulation including heat cramps, heat syncope, heat exhaustion, and heat stroke, which is life threatening. According to Dr. Seward, it is critically important that risks to un-acclimatized workers be minimized.

Castillo is current with his Division-mandated training. Castillo testified that the hazard associated with failure to closely observe an employee newly assigned to a high heat area under strenuous work conditions is that it allows for rapid and unchecked progression of heat illness from mild symptoms to serious symptoms to heat exhaustion and then to potentially life-threatening heat stroke. Castillo testified that he investigated 30 to 35 heat cases and five to eight of them resulted in heat exhaustion and dehydration. Castillo also reviewed a 2005 Cal/OSHA study that showed that 46 percent of heat illness cases occurred on the first day of employment and 80 percent occurred within the first four days. Additionally, the fact that Garcia actually experienced a serious illness is further evidence that failure to closely observe employees newly assigned to work in high heat creates a realistic possibility of serious physical illness or death.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 2 was properly classified as Serious.

Citation 3:

Castillo testified there was a realistic possibility that an employee could develop a serious heat illness because of lack of adequate and effective training. He opined that if employees do not understand the importance of adequate consumption of water during high heat and strenuous activity, they could become dehydrated. If employees do not understand their rights to take a cool down break without fear of retaliation, they will not ask for a break. Because they do not want to lose their job, employees may feel pressured to work too hard or too fast. If employees are not trained in the importance of methods and procedures for acclimatization, they will not understand they are at high risk during their first day of work in high heat because of lack of acclimatization. They will not understand that it is legal to take more breaks, work more slowly, and drink more water. This lack of effective training created a realistic possibility that Garcia would develop a serious heat illness.

Accordingly, the Division established a rebuttable presumption that the violation cited in Citation 3 was properly classified as Serious.

5. Did Employer rebut the presumptions in Citations 2 and 3 that the violations were Serious by demonstrating that it did not know and could not, with the exercise of reasonable diligence, have known of the existence of the violations?

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.

Employer failed to provide effective training to its supervisory and non-supervisory employees. Employer's training on acclimatization was deficient. This lack of training exposed an employee newly assigned to work during a period of high heat to the hazard of heat illness. Employer failed to effectively communicate to its employee and his supervisors the dangers associated with heat illness.

A reasonably diligent employer would have implemented procedures to ensure that an employee, newly assigned during a period of high heat, was closely observed, and that its employees were provided with necessary heat illness training. Employer did neither. Accordingly, the Serious classifications of Citations 2 and 3 are sustained.

6. Was Citation 2 properly characterized as accident-related?

In order for a citation to be classified as accident-related, there must be a showing by the Division of a "causal nexus between the violation and the serious injury." (*Webcor Construction*, Cal/OSHA App. 317176766, Denial of Petition for Reconsideration (Jan. 20, 2017).) The violation need not be the only cause of the accident, but the Division must make a "showing [that] the violation more likely than not was a cause of the injury." (*Id.*, citing *MCM Construction, Inc*., Cal/OSHA App. 13-3851, Decision After Reconsideration (Feb. 22, 2016).)

Castillo testified that there was a nexus between the failure to closely observe Garcia, the lack of acclimatization, his progression to heat exhaustion, and his subsequent hospitalization. Accordingly, the Division established a nexus between the violation and the serious illness. Therefore, the accident-related character of Citation 2 is sustained.

7. Are the abatement requirements reasonable?

The Division's requirement that an employer immediately abate a condition which could expose a worker to death is not unreasonable. (*Paul E. McCollum, Sr.*, Cal/OSHA App. 74-083, Decision After Reconsideration (Nov. 19, 1974).) The Division did not mandate any specific means of abatement. The Division has only required compliance with the minimum requirements of the safety order. Employer may choose the least burdensome. (*The Daily Californian/Calgraphics*, Cal/OSHA App. 90-929, Decision After Reconsideration (Aug. 28,

1991).) Employer did not offer any argument, testimony, or other evidence, regarding why the abatement requirements were unreasonable. Accordingly, abatement requirements for Citations 1, 2, and 3 are found to be reasonable.

8. Are the proposed penalties reasonable?

Penalties calculated in accordance with the penalty setting regulations set forth in sections 333 through 336 are presumptively reasonable and will not be reduced absent evidence that the amount of the proposed civil penalty was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (*RNR Construction, Inc.*, Cal/OSHA App. 1092600, Decision After Reconsideration (May 26, 2017), citing *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

Castillo provided testimony to support the penalty calculations for the three citations as reflected in Exhibit 2, the "Penalty Calculation Worksheet." (Record Transcript, pgs. 527-542, and pgs. 634-637.) The Division presented Exhibit 7 to demonstrate Olam's history of inspections and violations. Castillo testified that the dispositions of the inspections listed on Exhibit 7 are not included on that document. Accordingly, the Division did not provide sufficient evidence to establish a basis for the penalty adjustment factor of History. Because the Division did not meet its burden, the adjustment factor for History is established at the maximum of 10 percent, in accordance with section 336, subdivision (d)(3), and is applied to Citations 1 and 3. Employer did not provide evidence sufficient to otherwise refute the penalty calculations for the three citations.

Accordingly, the penalty for Citation 1 is modified to $600, and the penalty for Citation 3 is modified to $5,400. The $22,500 penalty for Citation 2 is sustained.

Conclusions

In Citation 1, Item 1, the Division established that Employer violated section 3395, subdivision (h)(2). The proposed penalty is reasonable as modified herein.

In Citation 2, Item 1, the Division established that Employer violated section 3395, subdivision (g)(2). The Division established the Serious classification and the accident-related character. The proposed penalty is found reasonable.

In Citation 3, Item 1, the Division established that Employer violated section 3395, subdivision (h)(1). The Division established the Serious classification. The proposed penalty is reasonable as modified herein.

Order

It is hereby ordered that Citation 1 is affirmed and the penalty of $600 is assessed, Citation 2 is affirmed and the penalty of $22,500 is assessed, and Citation 3 is affirmed and the $5,400 penalty is assessed, all as set forth in the attached Summary Table.

Dated: 04/14/2021

Kevin J. Reedy
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.**