

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

In the Matter of the Appeal of:

**RIVERSIDE CITY FIRE DEPARTMENT
3401 University Avenue
Riverside, CA 92501**

Employer

Inspection No.
1231720

**DENIAL OF PETITION FOR
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above-entitled matter by the California Division of Occupational Safety and Health (Division).

JURISDICTION

On May 11, 2017, following an accident report, the Division began an inspection of a worksite maintained by the Riverside City Fire Department (Employer). Subsequently the Division timely issued two citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, title 8.¹ Employer timely appealed the citations and administrative proceedings followed.

A contested evidentiary hearing was duly noticed and convened on November 12 and 13, 2019 before an administrative law judge (ALJ) of the Board. At hearing the parties announced a settlement of Citation 1, which was recorded by the ALJ, and the hearing then proceeded on Employer's appeal of Citation 2.

The ALJ issued a decision (Decision) granting Employer's appeal of Citation 2 on February 25, 2020.

The Division timely filed a petition for reconsideration.

Employer filed an answer to the petition.

ISSUE

Was the Decision correct in granting Employer's appeal?

¹ References are to California Code of Regulations, title 8 unless specified otherwise.

**REASON FOR DENIAL
OF
PETITION FOR RECONSIDERATION**

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.

The Division bases its petition on three grounds, that the Decision was issued in excess of the ALJ's powers, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. Based on our independent review of the record, we find that the Decision was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

On May 5, 2017, Employer conducted a mini-introductory fire academy, which included physical fitness circuit training. Each of the five probationary firefighters involved in the academy engaged in various activities, including two 10-to-12 minute rounds of physical activities, separated by a rest break, that firefighters would likely be called upon to perform in actual practice, some time after 4 p.m. The temperature was in the low 70s.

One probationary firefighter, Joseph Camarillo (Camarillo), was the first of the probationary firefighters to complete the first round of physical training, took the ten minute rest break, and said he was ready to go through the circuit the second time. As Camarillo was engaged in the last activity of the second circuit he went down on one knee, and exhibited symptoms of heat illness. Camarillo had not requested a break prior to that time. Although Employer rendered appropriate first aid followed by appropriate medical intervention, Camarillo suffered heat illness.

The citation at issue alleged Employer violated section 3395, subdivision (d)(3), which states:

(d) Access to shade.

[¶s]

(3) Employees shall be allowed and encouraged to take a preventative cool-down rest in the shade when they feel the need to do so to protect themselves from overheating. Such access to shade shall be permitted at all times. An individual employee who takes a preventative cool-down rest (A) shall be monitored and

asked if he or she is experiencing symptoms of heat illness; (B) shall be encouraged to remain in the shade; and (C) shall not be ordered back to work until any signs or symptoms of heat illness have abated, but in no event less than 5 minutes in addition to the time needed to access the shade.

The Division's evidence at the hearing consisted of Camarillo's testimony. He admitted there was a rest break between the two physical activity circuits. And he not only was the first person to complete the first circuit, he volunteered to go first on the second round. During the last activity of the circuit, a hose pull, Camarillo went down on on knee, popped back up, but shortly thereafter stumbled again. The senior firefighter monitoring Camarillo then intervened.

The evidence showed that shade was available in the area where the physical training exercises or circuits were conducted, and the Division's petition does not argue otherwise. The Division contends that Camarillo was not permitted or encouraged to use the available shade.

Testimony by other witnesses at the hearing established that the probationary firefighters, including Camarillo, were trained on heat illness awareness, the importance of taking rest breaks, and to communicate if they felt unwell.

The ALJ's decision explicitly credited such testimony. It is well established that the credibility findings of an ALJ are not to be overturned absent substantial evidence to the contrary, which is absent here. (*Ekdal Concrete, Inc.*, Cal/OSHA App. 13-0131, Decision After Reconsideration (Mar. 28, 2016), citing *Garza v. Workmen's Compensation Appeals Bd.* (1970) 3 Cal.3d 312, 318-319.) The Decision also notes that the Division offered no evidence to rebut the evidence the ALJ relied on. And, in view of the record as a whole, we hold that the weight of the evidence supports the ALJ's decision.

The Division's petition also explicitly challenges findings of fact 6 and 7 as unsupported by the evidence. The petition takes issue more with the semantics of those findings than their substance. Whether Camarillo "intentionally" went to one knee or did so from exhaustion or heat illness, the fact remains that until that time he had not asked for rest or a break, even though he testified he was aware he was tiring by then. And, in light of the other testimony that all the probationary firefighters were instructed in heat illness awareness and prevention, and encouraged to take a break if needed, we see no need to reverse the Decision. In our view the preponderance of the evidence shows that Employer satisfied the requirements of section 3395, subdivision (d)(3).

DECISION

For the reasons stated above, the petition for reconsideration is denied. The ALJ's Decision and penalties are affirmed.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry

Ed Lowry, Chair

Judith S. Freyman

Judith S. Freyman, Board Member

Marvin P. Kropke

Marvin P. Kropke, Board Member

FILED ON: **05/13/2020**

