

A RECENT OSHA APPEALS BOARD DECISION CLARIFIES HEAT ILLNESS PREVENTION REQUIREMENTS

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A recent Cal OSHA Appeals Board decision in the case of *Big Valley Labor* clarifies the requirement of OSHA's heat illness prevention regulations. On May 18, 2010, Administrative Law Judge Martin Fassler issued his decision in a citation issued to a labor contractor in Hollister, California. Because of predictions of unseasonable heat, OSHA inspectors fanned out throughout the Gilroy-Hollister area. At 9:00 a.m. the OSHA inspector took a reading of 87° F in the field, and higher temperatures were recorded later in the day in the area.

In his pick-up truck bed, the foreman kept a beach umbrella about 6 feet in radius, but he had not yet deployed it when the inspectors came. Employees also had access to the shade of a large bush and to the comfort of their vehicles. It was not yet hot enough for employees to feel the need to start the engines and cool the interiors of their vehicles.

Even though the heat illness prevention regulation currently fails to quantify how much shade is needed, the administrative law judge made several rulings to clarify the obligation to provide shade: (1) a 6 foot diameter umbrella does not provide sufficient shade for a crew of 30; (2) the shade must be deployed and not merely available; (3) the large bush did not provide suitable shade because when the sun rises to its zenith, it would cast very little shadow; (4) the employer could not rely on the air conditioned cars in which the employees came to work in car pools; and (5) no vehicle will count as shade unless the air conditioning is actually running.

The Standards Board has proposed revisions in the regulations that would require employers to provide enough shade to accommodate a quarter of the employees at any one time, and to require that seating be provided for employees under the shade, and other details lacking in the current regulation. Even in the absence of the new regulation, Judge Fassler's decision shows the Appeals Board's willingness to require employers to take reasonable steps to protect employees from heat illness.

On the other hand, Judge Fassler reduced the citation from the Serious to General, greatly reducing the penalty. He held that the Division failed to prove that the lack of adequate shade was likely to lead to serious injury on the day of the inspection. This issue turned on the Heat Index materials from the National Oceanic and Atmospheric Administration ("NOAA"). NOAA's heat index chart calculates an "apparent temperature" based on ambient temperature and humidity. It then identifies the risks of various types of heat illness based on the apparent temperature. Serious illness such as sunstroke is shown as "possible" at apparent temperatures over 90° F, and "likely" at apparent temperatures over 105° F. "Possible" injury does not meet the definition of a Serious violation, which requires a "substantial probability" of serious injury for the Serious classification.

The Division relied on a provision in the NOAA materials that when workers work in the direct sunlight, the apparent temperature should be increased by 15° F. This would have raised the apparent temperature well over 100° F and would have supported a Serious Classification. However, the employer presented expert testimony from Jan Null, the former lead forecaster for the National Weather Service for Northern California that a 15° adjustment was not appropriate. Mr. Null testified that the 15° adjustment resulted from studies in the deserts of Australia, where the sun rises higher in the sky and is more punishing than in the moderate latitudes of northern California. Mr. Null stated that the appropriate adjustment for Hollister would be no more than 5°. In that fashion, the evidence indicated that sunstroke was “possible” on that day in Hollister, but not likely.

In fact, no employees suffered any symptoms on the day of the inspection, due to their ready access to air-conditioned cars. Because employers cannot rely on their employees' vehicles, they should have 10' by 10' awnings and seats deployed in advance whenever a warm day is inspected. In that way they can avoid both employee injuries and the attention of the Cal OSHA inspectors. In addition, employers should prepare and present a heat illness prevention program conforming to OSHA regulations. If you need any assistance with this issue, please contact Jim Sullivan at (831) 754-2444.