

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

In the Matter of the Appeal of:

ART'S TRENCH PLATE & K-RAIL  
7292 Mission Gorge Road  
San Diego, CA 92120

Employer

Docket No. 01-R3D2-3734

**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 in the above-entitled matter by Art's Trench Plate & K-Rail [Employer] under submission, makes the following decision after reconsideration.

**JURISDICTION**

From May 21, 2001 through August 20, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an accident investigation at a place of employment maintained by Employer at 805 Freeway and Telegraph Canyon Road, Chula Vista, California (the site). On August 28, 2001, the Division issued a citation to Employer alleging a serious violation of section<sup>1</sup> 4999(a) [load size], with a proposed civil penalty of \$10,800.

Employer filed a timely appeal contesting the existence of the violation and raised the affirmative defense of independent employee act [IEAD].

On August 29, 2002, a hearing was held before Barbara J. Ferguson, Administrative Law Judge (ALJ), in San Diego, California. John P. Murphy, Attorney, represented Employer. Luis Mireles, District Manager, represented the Division.

On October 28, 2002, the ALJ issued a decision denying Employer's appeal.

---

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

On November 28, 2002, Employer filed a petition for reconsideration. The Division filed an answer on January 9, 2003. The Board took Employer's petition under submission on January 15, 2003.

## **BACKGROUND**

Employer provides K-rails<sup>2</sup> for freeway construction projects. They are delivered on a flatbed truck with a knuckle boom crane mounted at the rear of the flatbed. On April 23, 2001, while attempting to move a K-rail at the site, the crane tipped seriously injuring employee Francis Coy.

## **ISSUES**

1. Did Employer prove the Independent Employee Act Defense?
2. Was the hearing before the ALJ properly conducted?
3. Was the ALJ's decision timely issued?
4. Was Employer's motion for continuance properly denied?

## **FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION**

At this time, the Board has reviewed Employer's petition for reconsideration, the ALJ's decision, and the record of the proceeding including the tape recordings of the hearing. We find that the ALJ did not exceed her authority, that the evidence supports the findings of fact, and that the findings of fact support the decision. We further find that the ALJ fairly and fully considered the evidence and arguments presented by the parties in deciding the issues. Accordingly, we affirm and adopt the ALJ's decision, attached as Exhibit A, including the summary of evidence, rulings, findings, conclusions and the reasons for deciding to deny Employer's appeal.<sup>3</sup>

### **1. Employer Failed to Meet its Burden to Prove the Affirmative Independent Employee Act Defense.**

Employer's petition for reconsideration asserts that it met its burden to prove the independent employee act defense. It alleges: "[i]f the Board had received a complete statement of the testimony and description of all exhibits than [sic] it would overturn the ALJ conclusion that the employer had not met his burden to show independent employee act."

The Board *has* the complete record in this case, including the tape recordings of the hearing and all exhibits admitted into evidence. The Board's independent review of the record, including the official record of the hearing

---

<sup>2</sup> K-rails are cement barriers 20 feet in length that weigh 8,000 pounds.

<sup>3</sup> Employer's petition for reconsideration failed to raise challenges to Citation 1, Items 1 and 2 and they are thus waived. Labor Code section 6618.

made by means of an electronic device,<sup>4</sup> supports the ALJ's finding that the evidence does not support a finding that Coy's action was an independent act for purposes of relieving Employer of responsibility.

We conclude, as did the ALJ, that Coy's experience in the job being performed—operating a crane—was insufficient to satisfy the first element of the independent employee act defense [IEAD]; in addition, we concur in the ALJ's findings that Employer failed to establish the second and third elements of the IEAD and therefore Employer failed to establish this affirmative defense.

## **2. The Hearing Before the ALJ was Properly Conducted.**

Employer's petition for reconsideration asserts that "the ALJ failed to follow the instructions by the Board to hear testimony, accept exhibits, stenographically record the proceedings, and issue a proposed decision pursuant to Government Code Sections 11507 et seq. And the Labor Code 6616 et seq." It goes on to contend that "[t]he decision does not comply with the government Code, nor the Labor Code and has produced a decision that is unintelligible and possibility [sic] renders Board incapable of making an informed decision re the Petition for Reconsideration."

The Board is making an informed decision regarding the petition for reconsideration because, as stated *supra*, the Board has reviewed the complete record in this case including the tape recordings of the hearing and all exhibits admitted into evidence.

The Board is authorized by Labor Code section 148.7 to adopt its own rules of practice and procedure independently of the Administrative Procedure Act<sup>5</sup> [APA] except for those sections referred to in Labor Code section 6603(a).<sup>6</sup> The Board's Rules of Practice and Procedure are contained in Title 8 California Code of Regulations [CCR] section 345 *et seq.* and "shall govern all appeals, contests, motions, hearings, petitions, and proceedings before the Appeals Board and an Administrative Law Judge of the Appeals Board, arising from actions by the Division of Occupational Safety and Health taken pursuant to ... section 6300 ... of the Labor Code or Section 2950 of the Health and Safety Code ...."

Employer's petition complains that no stenographic reporter was present at the hearing. A stenographic reporter is not required. Board rules provide: "[t]he record shall be made *by means of an electronic device* or by a court

---

<sup>4</sup> Section 376.7.

<sup>5</sup> Government Code section 11400 *et seq.*

<sup>6</sup> The rules of practice and procedure adopted by the appeals board shall be consistent with ... section 11435.05 ... and sections 11507, 11507.6, 11507.7, 11513, 11514, 11515, and 11516 of the Government Code ... . Labor Code section 6603.

reporter.”<sup>7</sup> [Emphasis added] “A party desiring the presence of a court reporter must make its own arrangements.”<sup>8</sup>

The petition also complains that no proposed decision was issued as required by Government Code section 11512(b) and that the Board is the only body with the authority to issue a decision in this matter. We disagree. Government Code section 11512(b) is inapplicable to Appeals Board proceedings as it is not referenced in Labor Code section 6603(a). Pursuant to Labor Code section 6604(a), the Appeals Board is authorized by statute to direct and order a hearing officer to try the issues of fact or law in any proceeding before it, and to make and file a finding, order, or *decision* based thereon. Pursuant to Board regulation the Board may assign Administrative Law Judges to conduct hearings and issue decisions.<sup>9</sup> The instant case was assigned to an ALJ for hearing and decision.<sup>10</sup> The decision of the ALJ is subject to reconsideration by the Board pursuant to Labor Code section 6614. In this case, the Board granted reconsideration based upon Employer’s petition and this decision after reconsideration is based upon the entire record of the case.<sup>11</sup>

### **3. The ALJ’s Decision was Timely Issued.**

Employer’s petition complains that the decision was not timely because it was not issued within 30 days of the hearing as required by Government Code section 11517(b). Government Code section 11517(b) is inapplicable to Appeals Board proceedings as it is not referenced in Labor Code section 6603(a). The ALJ may extend the submission date<sup>12</sup> and did so in this case. On September 27, 2002, the ALJ issued an Order Extending Resubmission Date, served on Employer that declared: This matter will be deemed submitted on September, 29, 2002.

The rule of the Appeals Board requires that a decision be issued within 30 days of the submission date, and that is satisfied if the decision is issued within 30 days of the submission date as extended.<sup>13</sup> The ALJ’s decision was issued October 28, 2002 and therefore was timely issued.

### **3. Employer’s Motion for Continuance was Properly Denied.**

---

<sup>7</sup> Section 376.7

<sup>8</sup> *Id.*

<sup>9</sup> Section 375.1.

<sup>10</sup> The Board also may refer a proceeding to an ALJ for hearing and preparation of a proposed order or decision in a such form that it may be adopted as the order or decision in the case and the Board may confirm, adopt or modify or set aside the proposed order or decision of the ALJ. Sections 375.1, 384. However, this procedure was not used in this case.

<sup>11</sup> Labor Code section 6621; section 390.1(c).

<sup>12</sup> Section 385

<sup>13</sup> *Novo-Rados Enterprises, Cal/OSHA App. 76-305, Decision After Reconsideration* (Feb. 23, 1983) citing *Roof Structures, Inc., Cal/OSHA App. 78-478, Decision After Reconsideration* (Jun. 30, 1981).

Under Board rules a proper motion concerning a continuance shall be granted<sup>14</sup> if an emergency arises, including, but not limited to, death or illness of a party, witness, or representative; or any other reason constituting good cause, if the motion is made no later than 15 days after service of the hearing notice. The following shall not constitute good cause:<sup>15</sup> (1) Failure to obtain representation, unless a substitution is required through no fault of the party; and, (2) Failure of another party to comply with a request for discovery, unless the Appeals Board orders a continuance of the hearing after a motion to compel discovery has been filed pursuant to Section 372.6.

On August 23, 2002, Employer's attorney requested a continuance in writing, sent by mail and fax, stating that he was retained that day to represent Employer at the scheduled hearing. He also indicated that discovery had not been received. The request for continuance was denied on August 26, 2002; Employer, the Division and the ALJ were notified.

At hearing, Employer moved for a continuance on the same grounds. The ALJ denied the motion. Once a motion for continuance has been ruled on by the Appeals Board, a motion for continuance based on the same grounds shall not be entertained at the hearing.<sup>16</sup>

Based on the foregoing, we find that the motion for continuance was properly denied.

### **DECISION AFTER RECONSIDERATION**

The Board affirms the ALJ's decision denying Employer's appeal and assessing a civil penalty of \$10,800.

MARCY V. SAUNDERS, Member  
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: October 10, 2003

---

<sup>14</sup> Section 371.1(d).

<sup>15</sup> Section 371.1(e).

<sup>16</sup> Section 371.1(f)