

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

In the Matter of the Appeal of:

CNL ROOFING COMPANY
246 B Center Avenue
Aptos, CA 95003

Employer

Docket Nos. 08-R1D2 1692 and 1693

**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 this matter under reconsideration on its own motion, renders the following decision after reconsideration.

JURISDICTION

On April 2, 2008, the Division of Occupational Safety and Health (the Division) issued two citations, alleging five violations of occupational safety and health standards codified in Title 8 California Code of Regulations. Citation 1 contained four Items, each alleging a General violation. Citation 2 contained one Item, alleging a Serious violation.

Employer timely filed its appeals, contesting the existence of the violations.

A pre-hearing conference was held on January 26, 2009 where a settlement could not be reached. A hearing was scheduled for June 23, 2009. On May 26, 2009, the parties held an informal conference reached a resolution in this matter. The parties communicated the terms of the settlement to the Administrative Law Judge (ALJ) of the Board by way of emails. By letter, the Division provided the ALJ with the reasons for the various modifications of the citations. The ALJ accepted the terms of the settlement and issued an Order on July 28, 2009.

On August 26, 2009, the Board order reconsideration of this matter on its own motion, stating the issue as whether good cause existed for the withdrawal of Citation 1, Item 1, and Citation 2, item 1, as well as for the penalty reductions for Citation 1, items 2, 3, and 4.

On September 29, 2009, the Division filed an Answer to the Order of Reconsideration. The Division clarified that all modifications contained in the settlement agreement that vary from the Citations were based on new information provided by Employer after the issuance of the various Citations.

ISSUES

1. Whether good cause was stated for withdrawal of Citation 1, Item 1 and Citation 2, Item 1.
2. Whether good case was stated for the penalty reductions for Citation 1, Items 2, 3 and 4.

REASONS FOR DECISION AFTER RECONSIDERATION

Board regulation 364.2 states “(a) Upon a showing of good cause, the Appeals Board may dispose of the issues on appeal by granting a written motion of the parties made at any time, or an oral motion of the parties made on the hearing record or in the prehearing conference.” Absent allegations or indications of fraud, the Board has recognized the Division’s prosecutorial discretion to withdraw citations as part of negotiated settlements. (*Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 09-2352, Denial of Petition for Reconsideration (Jun. 1, 2010); *California Dept. of Forestry*, Cal/OSHA App. 85-1379, Denial of Petition for Reconsideration (Aug. 28, 1986).) Here, withdrawal of Citation 1, Item 1, and Citation 2, Item 1, were the result of the Employer providing additional evidence regarding the alleged violations. It appears the Division appropriately exercised its prosecutorial discretion and chose to withdraw the Citations based on new evidence provided by Employer.

Also, the Employer did not appeal the penalties on Citation 1, items 2, 3, and 4. Although we have held that failing to appeal penalties precludes the Board from exercising its discretion to reduce penalties, it does not remove the requirement that good cause underlie any disposition. (*Long Beach City College*, Cal/OSHA App. 03-2747, Decision After Reconsideration (Aug. 8, 2008); Board regulations sections 361.3 and 361.2.) The reduction in penalties proposed by the Division for Citation 1, Items 2, 3, and 4, were part of the global settlement agreement between the parties, which was based on new evidence provided by the Employer. Good cause having been shown by the addition of this new evidence, it is appropriate to accept the entire agreement

and stipulation of the parties. (*E & H 126 Investment Inc.*, Cal/OSHA App. 08-3994, Denial of Petition for Reconsideration (Jul. 30, 2009); see also *County of Sacramento v. Workers' Comp. Appeals Bd.* (3rd Dist. 2000) 77 Cal.App.4th 1114.)

Therefore, the ALJ's Order resolving the matter is affirmed and the terms of the settlement as set forth in the summary table are reinstated, with the additional statement that Citation 2, Item 1 was withdrawn based on new evidence provided by Employer.

CANDICE A. TRAEGER, Chairwoman
ART R. CARTER, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JANUARY 27, 2011