

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

In the Matter of the Appeal of:

BAY AREA RAPID TRANSIT DISTRICT  
300 Lakeshore Drive, 18<sup>th</sup> Floor  
Oakland, CA 94612

Employer

Dockets. 09-R2D2-1219 & 1221

**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 Bay Area Rapid Transit District (BART or Employer).

**JURISDICTION**

Commencing on October 14, 2008, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On April 1, 2009, the Division issued four citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer timely appealed.

Thereafter administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board, including a duly-noticed evidentiary hearing.

On April 14, 2011, ALJ of the Board issued a Decision granting Employer's appeal of Citation 1 and upholding the violations alleged in Citations 2, 3 and 4.

The Board ordered reconsideration of the Decision on its own motion on May 5, 2011, to determine whether the ALJ should amend Citations 2 and 4 to reclassify the violations to willful and increase the civil penalties for those violations accordingly.

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<sup>1</sup> References are to California Code of Regulations, Title 8 unless specified otherwise.

Employer and the Division each timely filed petitions for reconsideration, which petitions the Board took under submission.

On September 6, 2012, the Board issued a Decision After Reconsideration and Order of Remand (DAR) which, as pertinent here, held that the record supported finding that Employer's violations of the safety orders cited in Citation 2 and Citation 4 were "willful" and remanding the matter for further proceedings to determine whether the classifications of Citations 2 and 4 should be amended to willful.

The ALJ conducted further proceedings and on April 11, 2013, issued a Decision After Remand which amended the classification of Citations 2 and 4 to "willful serious" and increased the civil penalties accordingly.

On May 14, 2013, Employer timely filed a petition for reconsideration of the Decision After Remand.

The Division filed an Answer to the petition.

### **ISSUES**

Does the record support finding that the violations alleged in Citations 2 and 4 were willful serious?

Does the Board have the authority so to amend the Citations?

### **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.

Employer's petition maintains that the Board acted in excess of its authority in amending the classifications of Citations 2 and 4 to "willful serious."

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 After Remand was based on substantial evidence in the record as a whole and appropriate under the circumstances.

BART operates and maintains a commuter rail mass transportation system in several San Francisco Bay area counties. The evidence established that along one of the BART tracks running between Concord and Pleasant Hill, shrubbery had overgrown a walkway (referred to as a “toe path”) paralleling the tracks such that it was not usable by workers on foot. Employer had been made aware of that condition by various employee reports, but did not correct it. One of its employees was struck and killed by a train as a result.

Citation 2 as issued alleged a Serious violation of section 3203(a)(6) [failure to implement procedures to correct unsafe work conditions] and Citation 4 alleged a Serious violation of section 3332(b) [lack of controls to safeguard workers during railcar movement]. After reconsideration of the ALJ’s initial Decision, the Board remanded for proceedings to determine whether those two Citations’ classifications should be amended to Willful Serious.

Section 3203(a)(6) provides:

[E]very employer shall establish, implement and maintain an effective Illness and Injury Prevention Program (Program). The Program shall be in writing and shall, at a minimum: [¶¶]

(6) Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner based on the severity of the hazard (A) When observed or discovered; and (B) When an imminent hazard exists which cannot be immediately abated without endangering employee(s) and/or property, remove all exposed personnel from the area except those necessary to correct the existing condition. Employees necessary to correct the hazardous condition shall be provided the necessary safeguards.

In view of the evidence showing that Employer was aware that the toe path was unusable due to its being overgrown by shrubbery, yet had failed to clear it, the Board remanded the matter for further proceedings to determine whether the violation was willful.

Section 3332(b) provides: “Controls to safeguard personnel during railcar movement shall be instituted.”

Employer utilized a procedure called “Simple Approval” to protect employees who were working on or near the train tracks. On the day of the accident, an employee was working near a track and called Employer’s operations center to obtain such a “Simple Approval.” Employer gave the approval, however it did not inform the employee that trains would be operating in both directions along the track, and Employer similarly did not inform its train operators that a worker on foot was working along the track. We noted in our DAR that Employer’s “Simple Approval” process states, in part, that “NO PROTECTION IS PROVIDED WITH A SIMPLE APPROVAL,” and held that a safety procedure which by its own terms does not provide protection for employees exposed to a hazard does not satisfy section 3332(b). (Original capitalization.) Here too, we remanded the matter to the ALJ to determine whether Employer’s use of a procedure which provided exposed employees with “no protection” warranted a willful violation of section 3332(b).

Section 334(e) provides a willful violation “is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.”

Section 334(e) establishes two alternate tests for determining whether a violation is willful. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034. (*Rick's Electric*.) Under the first alternative, the Division must show the employer committed an intentional and knowing, rather than inadvertent violation, and is conscious that his behavior constitutes a violation of a safety law. (*Id.*) Under the second alternative, the Division is required to prove the employer, even though not consciously violating a safety law, was aware of the unsafe or hazardous condition and made no reasonable effort to eliminate the condition. (*Id.*) The record established, at a minimum, that Employer had committed willful violations of section 3203(a)(6) and 3332(b) under the second of section 334(e)’s tests.

Employer’s petition for reconsideration of the Decision After Remand makes several arguments in support of its position. We address them in their order of presentation below.

1. *The Board Acted as Prosecutor in Amending the Citations’ Classification.*

Employer argues that by changing the classifications of Citations 2 and 4, the Board was not acting as a neutral adjudicator but as a prosecutor. We do not agree.

The Board considered the evidence in the record and concluded it showed that the two violations at issue were willful as defined in section 334(e), and as that definition was applied in *Rick’s Electric, supra*. In addition, Labor Code

section 6609 authorizes the Board to “confirm, adopt, modify or set aside the findings, order or decision [of an ALJ] with or without further proceedings” based on the record. Similarly, Labor Code section 6620 provides, in pertinent part, that “Upon . . . having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter or amend [an ALJ’s decision] on the basis of the evidence previously submitted in the case[.]” Labor Code section 6602 also provides that the Board shall, after affording an appealing employer an opportunity for a hearing, “issue a decision based on findings of fact, affirming, modifying or vacating the division’s citation, order or proposed penalty, or directing other appropriate relief.” Therefore, the Board acted within its authority when it based its decision on the evidence in the record and applicable law; it was not usurping the Division’s role as the enforcement agency.

*2. The Citations’ Classifications Were not the Subject of the Proceeding.*

Although the violations alleged in Citations 2 and 4 were not classified as Willful Serious, Employer appealed both the existence and classification of the violations. Classification was thus at issue. (*North Fork Springs Construction*, Cal/OSHA App. 02-199, Decision After Reconsideration (May 31, 2007).) Furthermore, even if the Willful classification was not the “subject” of the proceeding, the Board is allowed, under section 386, to amend the issues on appeal after a proceeding is submitted in order to address an issue litigated by the parties. (Section 386(a)(2).) Here, evidence was presented to show the Employer knew of the violative condition and took no steps to correct it. Thus, the parties actually litigated whether a willful classification was shown, and the Board may order the amendment of the Division action via section 386(a)(2).

*3. The Board’s September 6, 2012 DAR was Final under Labor Code § 6627.*

We note, first, that Labor Code section 148.5 acknowledges that Board decisions calling for “rehearing” are not final. Thus, the Legislature contemplated that the Board from time to time would direct a rehearing of a matter after itself considering the record, and classified such actions as non-final. Since the Board’s September 6, 2012 Decision After Reconsideration ordered this matter remanded for further proceedings, it did not conclude all aspects of the matter and therefore was not a final decision. (See Labor Code § 148.5.)

Our holding is supported by the courts, which have long recognized that Code of Civil Procedure section 1094.5 permits review of only a final decision, which is a decision on the merits of the *entire* controversy. (*Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1055.) A party must proceed through the full administrative process in order to obtain a final decision on the merits. (*Alta Loma School Dist. v. San Bernardino County Com. On School Dist. Reorganization* (1981) 124 Cal.App.3d 542, 554–555 [administrative remedies must be exhausted before resorting to the courts; exhaustion doctrine precludes review of intermediate or interlocutory actions].) As to Employer’s

argument, it contends that the Decision After Reconsideration issued September 6, 2012, had become a final decision of the Board and is therefore not subject to further action or judicial review under the provisions of Labor Code section 6627. However, as explained, the Board's Decision After Reconsideration/Order of Remand was not a final decision of the Board since it remanded the matter back to the ALJ for further proceedings. (See Labor Code § 148.5; *Kumar v. National Medical Enterprises*, *supra*, 218 Cal.App.3d 1055.)

Further support is found in the California Occupational Safety and Health Act, Labor Code section 6300 and following. In pertinent part Labor Code section 6627 states that an application for writ of mandate "must be made within 30 days after the filing of the [Board's] order or decision following reconsideration." Although no published decision of a Court of Appeal or the California Supreme Court has interpreted Labor Code section 6627, we understand it to mean that if a writ application is not filed within the 30-day period specified our decision or order is final. We further believe, however, that Labor Code section 6627 applies only to a final order or decision, where "final" means an order or decision which concludes the proceeding in question. (*Kumar, supra*, and *Alta Loma, supra*.) Cases arising from provisions of the Worker's Compensation Act (Labor Code section 3300 and following) analogous to the "appeal proceedings" chapter of the California Occupational Safety and Health Act (Labor Code section 6600 and following) support our interpretation. (*Maranian v. Worker's Compensation Appeals Bd.* (2000) 81 Cal.App.4th 1068.)

4. *The Board May not Interfere with the Division's Prosecutorial Discretion.*

While Employer correctly points out that the Board is reluctant to second guess the Division's discretion or interfere in its exercise, particularly with respect to settlement proposals made jointly by the Division and a cited employer, it remains the Board's statutory obligation to fairly and neutrally adjudicate employer appeals. (See Labor Code section 6602 [Board shall afford opportunity for hearing of contested Division action].) Here, the record contains evidence which supports a willful serious, versus a serious, classification. The Board thus has the authority to change the classification after providing notice of the proposed change and opportunity for the parties to be heard. (Labor Code sections 6602, 6609, 6620; Gov. Code section 11516; Board regulation section 386.)

5. *There Was no Evidence of Willful Violations.*

Employer also argues that there is no evidence that the violations were willful. As the Decision After Remand points out in detail, there was ample evidence in the record to satisfy at least the second test of willfulness established in section 334(e). The evidence showed that Employer had actual knowledge of the existence of the hazardous condition, the overgrown toe path, and took no steps to cure the condition or to protect its employees from it. Indeed, it was the evidence as summarized in the ALJ's initial Decision which caused the Board to

further review the evidence and, upon completion of that review, remand for proceedings regarding the apparent willful nature of the violations. Further, Employer did not take advantage of the opportunity afforded by the hearing after remand to dispute that evidence or introduce additional evidence which might tend to support a different conclusion. We therefore conclude that substantial evidence in the record supports a finding that Employer committed willful violations.

*6. Employer Was Prejudiced by the Amendments.*

Despite its contention of prejudice, Employer has made no showing of actual prejudice to it by the reclassification to Willful Serious of Citations 2 and 4 as a result of the proceedings after remand. Although Employer is now obligated to pay a larger penalty, the outcome of the remand proceeding is appropriate based on the administrative record, and Employer was afforded due process and the opportunity to dispute and defend against the proposed amendments. It did not do so. A party is not denied due process when it has, but chooses not to exercise, the opportunity to dispute issues or allegations made against it. (*Jack Barcewski dba Sunshine Construction*, Cal/OSHA App. 06-1257, Denial of Petition for Reconsideration (Apr. 16, 2007).)

**DECISION**

For the reasons stated above, the petition for reconsideration is denied.

ART R. CARTER, Chairman  
ED LOWRY, Member  
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: June 28, 2013