

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, 18th Floor
Oakland, CA 94612

Employer

Dockets. 2010-R1D1-3056
through 3058

**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 Service Employees International Union, Local 1021 (Union)¹ under submission hereby renders the following decision after reconsideration.

JURISDICTION

Commencing on June 3, 2010, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by the Bay Area Rapid Transit District (BART or Employer).

On September 16, 2010, the California Division of Occupational Safety and Health (Division) issued three citations to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.²

Employer timely appealed. After the appeal was filed the Union moved for and was granted third-party status in the administrative proceeding. Also, Citation 1, which alleged a "Serious" violation of section 2940.6(a) [failure to provide insulating equipment] was resolved by agreement of the parties and is therefore no longer at issue.

¹ The California Division of Occupational Safety and Health (Division) also filed a petition for reconsideration, which is addressed in a separate, contemporaneous Denial of Petition for Reconsideration.

² References are to California Code of Regulations, Title 8 unless specified otherwise.

The administrative proceedings which were held before an Administrative Law Judge (ALJ) of the Board included a contested evidentiary hearing.

On July 25, 2013, an ALJ of the Board issued her Decision (Decision) granting Employer's appeal of Citations 2 and 3.

The Union timely filed a petition for reconsideration.

Employer filed an Answer to the petition.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration and Employer's Answer. 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.

ISSUE

Whether the evidence established the two alleged violations.

EVIDENCE

To begin, we review the background and explain some of the nomenclature which appears in the record.

BART is a public agency which operates a commuter heavy rail system in the San Francisco Bay Area. BART trains are powered by electricity and run on two rails (called running rails) while an electrified third rail parallel to the running rails and located to one side or the other³ provides the electricity used to power the trains. The third rail operates at a nominal 1,000 volts.

Employer had assigned a team of welders to perform welding on the "near" running rail during the early morning hours when the BART system is shut down for maintenance and power to the third rail is turned off. The "near" running rail was the one closer to the electric third rail at the work location.

The two citations at issue alleged violations of two "high-voltage electrical safety orders," because the third rail operates at a nominal 1,000 volts. Citation 2 alleged a Willful Serious violation of section 2940(c), which provides in pertinent that "Only qualified electrical workers ["QEWs"] shall work on

³ At any given location the third rail is either to the left or right side of the running rails. It does not appear that the third rail is between the two running rails. There may be locations where there is a third rail on both sides of the running rails for short distances to provide continuous power during a transition.

energized conductors or equipment connected to energized high-voltage systems.” Citation 3 alleged a Willful Serious violation of section 2944(c)(1), which states, “No person other than a qualified electrical worker shall perform work or take any conducting object within the area where there is a hazard of contact with energized conductors unless directly under the observation of a qualified person.” The key term in both safety orders is “energized.” Although “energized” is not defined, *per se*, in the high voltage electrical safety orders (§ 2700 and following), section 2700 does contain a definition of the term “Energized Parts (Live Parts)” as “Parts which are of a potential different from that of the earth, or some conducting body which serves in place of the earth.” Although Employer argued that the welders were QEWS and were working under each other’s direct observation, for purposes of our analysis below we assume without deciding that they were not QEWS.

During the time the welding work in question was being performed BART had turned off power to the third rail throughout the system. In addition, by means of computer commands from its central control location BART also opened three circuit breakers controlling electric power to the section of the third rail adjacent to the welding operation, thus further isolating the third rail from receiving power. The evidence was that the computer commands resulted in the circuit breakers physically opening the circuit so as to disconnect it from the power source.

The Union contends that the question to be decided is whether the third rail was “properly de-energized⁴ – that is, did Employer go through *the proper steps* to ensure that there was no electricity running through the third rail at the time the violation is alleged to have occurred. We believe that the question they pose is different from the one we must actually consider: Does the evidence preponderate in favor of a finding that the third rail was in fact energized? (See *Chamberlain v. Ventura County Civil Service Commission* (1977) 69 Cal.App.3d 362, 369, citing *People v. Miller* 171 Cal. 649, 652-653. [preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force].)

The Division has the burden of proving each element of its case, including the applicability of each cited Safety Order, by a preponderance of the evidence. (See, e.g., *Travenol Laboratories, Hyland Division*, CAL/OSHA App. 76-1073, Decision After Reconsideration (Oct. 16, 1980); *Howard J. White, Inc., Howard White Construction, Inc.*, CAL/OSHA App. 78-741, Decision After Reconsideration (Jun. 16, 1983); and *Cambro Manufacturing Co.*, CAL/OSHA App. 84-923, Decision After Reconsideration (Dec. 31, 1986).) The Division's

⁴ The term “de-energized” does not appear in the cited safety orders. Accordingly, we focus on whether the third rail was “energized” within the meaning of the safety orders.

burden includes proving that employees were exposed to the hazard addressed by the cited Safety Orders. (See, e.g., *Rudolph & Sletten, Inc.*, Cal/OSHA App. 80-602, Decision After Reconsideration (Mar. 5, 1981); and *Moran Constructors, Inc.*, Cal/OSHA App. 74-381, Decision After Reconsideration (Jan. 28, 1975).)

The evidence here does not show the third rail was energized at the time of the work at issue; instead it shows the contrary. First, electric power to the third rail was turned off system-wide. Second, as an additional precaution, three circuit breakers which controlled the flow of electricity to the portion of the third rail at issue were also physically opened by remote command. That procedure further prevented power from flowing into the subject portion of the third rail, even if power to the overall system were to have been restored. The effect, in household terms, was analogous to both turning off electric power to one's home at the main (utility) connection – equivalent to the system-wide shut-off here – *and* opening the circuit breaker which controls an individual circuit in the house's circuit breaker panel before one works on that circuit. The contention that it was necessary to manually “rack out” – pull out – the three circuit breakers ignores the evidence that they were caused to open physically by the remote computer command. Continuing our household analogy, the argument, in effect, is that the circuit breaker was required to be physically removed, not just opened (put in the “off” position), for the work to be done.

Regarding the language of the safety orders, we observe that the term “de-energized,” though defined in section 2700, does not appear in either section 2940(c) or section 2944(c)(1), the cited safety orders.⁵ Reading a term into a safety order is not permitted (*E. L. Yeager Construction Company, Inc.*, Cal/OSHA App. 01-3261, Decision After Reconsideration (Nov. 2, 2007)), and the Decision required the Division prove, as required by the terms of the safety orders, that the third rail was energized. The Union bases its argument on a term not found in either of the cited safety orders. It was not BART's burden to show that the third rail was “de-energized.” Rather it was the Division's burden to prove the third rail *was* “energized,” and the preponderance of the evidence shows it was not.

The Union also argues that a decision by the Occupational Safety and Health Standards Board to deny a variance application by BART is dispositive and entitled to collateral estoppel effect. (See Labor Code § 143.) We disagree. The elements of collateral estoppel are not satisfied, nor is there good reason here to rely on this equitable doctrine. The elements of collateral estoppel are: 1) the issue sought to be re-litigated must be identical to that decided in the

⁵ Of course, the Standards Board may choose to amend the safety order(s) at issue here to further promote worker protection.

former proceeding, 2) actual litigation of the issue in the former proceeding, 3) the issue was necessary to the prior determination, 4) the prior decision must be final and on the merits, and 5) the party against whom preclusion is sought must be the same as the party in the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.)

The issues are not identical among the proceedings. Here we need only determine whether the rail on the day of the alleged violation was energized. This is what the safety order prohibits. By contrast, the Standards Board determined that the process used here did not satisfy the definition of “de-energized” in section 2700. The meaning of the term “de-energized” is not before us.

Additional information from the variance decision supports the conclusion that the issues were not identical. The Standards Board appeared to presume the third rail was energized for purposes of the variance application. Here, we need to determine whether it was energized. In the variance proceeding, Employer had the burden of showing its proposed work process would be as safe or safer than the procedures required by the applicable standard(s), which burden the Standards Board found Employer did not meet. This issue is not before us. Also, it appears the work which was the subject of the variance application was different from that at issue here. The variance matter involved work of removing or replacing the covers or shields over the third rail, not welding on a running rail. We must decide the instant matter on the record before us, not a portion of the record from a different proceeding. (Labor Code §§ 6609, 6629.) For these reasons, the doctrine of collateral estoppel is not operative here. [

In not giving controlling effect to the Standards Board’s ruling on the variance application, we are respectful of that Board’s expertise and authority. Although the full record of the variance application is not before us, it is apparent from what was introduced that the Standards Board assumed that the third rail was energized, but declined approve the method proposed by BART to de-energize the rail. We have assumed for sake of discussion that the procedure proposed by Employer to that Board in its variance application was the one followed here. It may be that the procedure followed by Employer in this case, and proposed to the Standards Board to be used in all cases, is neither the wisest, the safest, nor most appropriate.⁶ Nevertheless, in this case, the preponderance of the evidence is that it worked on the day in question.

⁶ The Standards Board may wish to promulgate a standard detailing the procedure(s) to be followed. Alternatively, if the Standards Board intended the safety order to say that only a QEW may work on or near the third rail unless certain steps are taken to de-energize it, it may wish to amend the safety order accordingly.

The Union also argues that the circuit breakers had to be physically removed (“racked out”) by a QEW to properly isolate the circuit. That requirement is not found in the language of either safety order at issue, and ignores the fact that the circuits in question are physically opened by the remote command, thus breaking the connection and isolating the segment of the third rail involved from electrical power. That the circuit breaker receives power (low voltage) to enable it to operate remotely does not mean that when it opens the circuit involving the third rail the rail itself is receiving power. By definition, if the third rail circuit is open, it is receiving no power through the circuit breaker; the connection is broken and power to the third rail stops at the breaker, going no farther until the breaker is closed again.

The welders concern was that they could have been exposed to the hazard of working on or near an energized third rail, and that *if* the third rail were to be inadvertently energized harm could result. The preponderance of the evidence, however, showed that the third rail was not energized and would not be inadvertently energized. The concerns expressed by the workers, though understandable, were based on speculation, not evidence. The Decision correctly did not rely on them.

Finally the Union argues that the third rail had to be grounded and bonded in order to ensure it did not have a potential different from the earth. Again, bonding and grounding are not required by the safety orders at issue, and the evidence was that the third rail did not and was not shown to have a potential different from the earth after power was shut off. Since the part was not shown to be energized, there is no violation of the cited safety orders.

DECISION AFTER RECONSIDERATION

For the reasons stated above, we affirm the ALJ’s Decision.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: JANUARY 31, 2014