

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

In the Matter of the Appeal of:

BLATTNER ENERGY INC.
392 County Road 50
Avon, Minnesota 56310

Employer

Docket No. 12-R2D2-0911

**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 Blattner Energy Inc. (Employer).

JURISDICTION

Commencing on August 29, 2011, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On February 24, 2012, the Division issued a citation to Employer alleging violations of occupational safety and health standards codified in California Code of Regulations, Title 8.¹

Employer timely appealed.

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

On May 22, 2013, an ALJ of the Board issued a Decision (Decision) sustaining the citation and imposing a \$600 civil penalty.

Employer timely filed a petition for reconsideration.

The Division answered the petition.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

ISSUES

Was the alleged violation proved?

Did Employer prove its affirmative defense, as alleged?

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 contends the ALJ acted in excess of his power, the evidence does not justify the findings of fact, and the findings of fact do not support the Decision.

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

Briefly summarized, the facts are as follows. Additional details will be discussed when Employer's arguments are addressed.

Employer was constructing platforms on which electricity-generating windmills were to be erected at a rural location in Byron, California. On August 29, 2011 Fred Telford was working for Employer as a bulldozer operator. That day Telford was assigned the task of cutting an access road on steeply sloped, rough and rocky terrain; that road was to be a new one, as no other roadway had been constructed along its intended path. During that operation Telford was fatally injured when the bulldozer rolled over, ejecting him from the cab and rolling on to him as it tumbled down slope.

The parties stipulated that section 1596(a) applied to the bulldozer involved, and required the operator to use a seat belt.

Section 1596 provides in pertinent part:

ROPs [Roll-Over Protective Structures] and seat belt shall be installed and used on all equipment specific in this section in accordance with the following effective dates for each type or use of equipment listed below:

(1) Scrapers, tractors . . .bulldozers . . .[.]

It was undisputed that the bulldozer was equipped with a working seat belt.

Employer makes two main contentions in support of its claim that the Decision should be reversed and its appeal granted. They are addressed individually below.

1. There was sufficient evidence to support a finding that Telford was not wearing his seat belt at the time of the accident.

We review the ALJ's Decision independently, considering all the evidence and matters of law brought before the ALJ or which appear during our review, based on the record. (See *Best Roofing & Waterproofing*, Cal/OSHA App. 01-2695, Decision After Reconsideration (Mar. 17, 2003).)

Employer argues there was insufficient evidence in the record to support finding the requirement to use seat belts in section 1596 was violated. We disagree.

Employer has a policy that seat belts are to be worn by equipment operators at all times. Violation of the policy is grounds for termination of employment. Also, Employer had erected or caused to be erected a sign on the road into the project area enjoining its employees to use their seat belts. Telford's supervisor, Mr. Logsdon (Logsdon), typically gave daily safety briefings ("job hazard analyses") to his crew before work began. The one held on August 12, 2011 included the topic "seat belts," among other items. The list of items discussed on August 29, 2011, the day of the fatal accident, however, did not include seat belt use.

Logsdon was aware that during one such safety briefing when the topic of seat belt use was raised, Telford and some of the other operators had a discussion among themselves during which Telford was apparently expressing his view in opposition to wearing seat belts. (Decision, pp. 3- 4.) Logsdon did not confront Telford on that occasion or later about wearing a seat belt.

On the day of the accident Logsdon assigned the task of cutting the new road to Telford because he believed Telford was the best operator for the risky job, but Logsdon did not discuss seat belt use with Telford. When Telford was in the cab of the bulldozer and Logsdon was on the ground, Logsdon could not see whether Telford was wearing his seat belt due to the height of the cab and the men's relative positions.

The ALJ found that Telford was not wearing his seat belt when the accident occurred. Several facts and inferences led to that finding. Those included, among other points, testimony by one of the Division's witnesses that based on his experience equipment operators were not ejected from their vehicles if they were wearing a seat belt when an accident occurred. Also, the bulldozer was relatively new and its seat belt was examined after the accident and found to be undamaged and operational. There was no indication of stress to the webbing or metal buckle components, as might be expected if Telford had been ejected while wearing the seat belt. Moreover, Telford had publicly expressed opposition to wearing a seat belt, and he was ejected from the cab during the accident. Given the above and other factors, the ALJ concluded the preponderance of the evidence showed that Telford was not wearing his seat belt as required at the time of the accident.

We hold that the preponderance of the evidence supports the Decision. "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence." (*Leslie G v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) Telford's ejection from the bulldozer is circumstantial evidence that he was not wearing his seat belt, in part because, as noted, the testimony was that operators were not ejected when wearing their seat belts.

"Circumstantial evidence is that which is applied to the principal fact, indirectly, or through the medium of other facts, from which the principal fact is inferred. The characteristics of circumstantial evidence, as distinguished from that which is direct, are, first, the existence and presentation of one or more evidentiary facts; and, second, a process of inference, by which these facts are so connected with the fact sought, as to tend to produce a persuasion of its truth.

(Witkin, 1 California Evidence, Circumstantial Evidence § 1 (2008) quoting *People v. Goldstein* (1956) 139 Cal.App.2d 146, 152.) Circumstantial evidence may be as persuasive and convincing as direct evidence. (See *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548.) We find it to be persuasive here given the totality of circumstances and evidence.

2. Blattner did not prove the third element of the “independent employee action defense.”

The independent employee action defense (or IEAD) is an affirmative defense established by the Board in *Mercury Service, Inc.*, Cal/OSHA App.77-1133, Decision After Reconsideration (Oct. 16, 1980). To prevail under the IEAD an employer must prove by a preponderance of the evidence all five of the following elements: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program which includes training employees in matters of safety respecting their particular job assignments; (3) employer effectively enforces the safety program; (4) employer has a policy which it enforces of sanctions against employees who violate the safety program; and (5) the employee caused a safety infraction which he or she knew was against employer’s safety requirement. (*Id.*)

In this proceeding the parties stipulated that Employer satisfied elements 1, 2, 4, and 5, leaving only element 3 at issue.

As to whether Employer effectively enforced its safety program in this instance, after a detailed review of what the evidence showed and what it did not, the Decision found Employer did not do so. (Decision, pp. 16 – 17.) The ALJ reasoned that in view of the difficult terrain and technical challenges of cutting the new road, the accentuated risk of the work, the inability to determine by sight from the ground whether Telford was wearing a seat belt, and Telford’s known antagonism toward using seat belts, supervisor Logsdon did not do enough to see to it that Telford complied with Employer’s seat belt policy. We agree.

Employer argues that Logsdon testified that he conducted seat belt audits “quite frequently.” (Pet. Recon., p. 11.) The last specific day the seat belt policy was discussed during a job hazard analysis was August 12, 2011, and there is no evidence that Logsdon discussed seat belt use with the operators collectively on the day of the accident, August 29, 2011, or specifically and individually with Telford, particularly in light of the risky assignment Telford was given. Logsdon testified that he walked the route of the new road with Telford before the work began, and warned Telford about workers on foot in the area (as required by section 1592(e); see *Teichert Construction v. California Occupational Safety and Health Appeals Bd.* (2006) 140 Cal.App.4th 883.) But there is no evidence in the record that Logsdon admonished Telford to wear his seat belt on that day, even though Logsdon selected Telford to perform the specific risky task to be accomplished. In light of the totality of circumstances, we concur with the Decision and hold that Employer did not satisfy element 3 of the IEAD.

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: August 22, 2013