

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

In the Matter of the Appeal of:

MASTER ROOFING SYSTEMS, INC
553 Wilson Avenue
Novato, CA 94947

Employer

Dockets. 14-R1D1-3618 and 3619

**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 Master Roofing Systems (Employer).

JURISDICTION

Commencing on April 14, 2014, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On October 13, 2014, the Division issued two citations 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 two duly-noticed pre-hearing conferences. At the second such conference the parties informed the ALJ that they had reached agreement to settle the underlying matter.

On July 2, 2015, the ALJ issued an Order (Order) which memorialized the terms of the parties' agreement, which included a reduction in the penalties proposed in the citations and an eleven-month period in which Employer is to pay the penalties in monthly installments.

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

Employer timely filed a petition for reconsideration contesting the “willful” classification of the violation alleged in Citation 2 only.

The Division filed an answer to the petition.

ISSUE

Does the record support a finding that the violation alleged in Citation 2 was “willful”?

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 does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616 [petition must set forth in detail grounds for petition], 6617; *UPS*, Cal/OSHA App. 08-2049, Denial of Petition for Reconsideration (Jun. 25, 2009), citing, *Bengard Ranch, Inc.*, Cal/OSHA App. 07-4596, Denial of Petition for Reconsideration (Oct. 24, 2008).) Liberally construed in the light most favorable to Employer, the petition may be deemed to assert that the findings of fact do not support the Order.

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration. The Board has taken no new evidence in this matter. Based on our independent review of the record, we find that the Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

We next address the merits of Employer’s petition.

Very briefly summarized, the Division cited Employer for a willful violation because its employees were observed working on a roof without fall protection. The roof was flat and surrounded by a parapet wall which, however, did not reach the required height to qualify as a fall protection barrier for its entire length. Rather, the parapet wall extended in some places less than two feet above the roof's surface.

As indicated above, Employer and the Division agreed to resolve this matter by stipulating to the violations, a reduced penalty for the "willful" violation, and an eleven-month payment plan. Employer now petitions because, after further thought, it believes the violation was not committed willfully but out of ignorance that fall protection was required.

Employer bases its argument on the definition of "willful" in the regulations. (Section 334, subdivision (e).) Employer's view is that the definition does not apply.

A willful violation is defined in section 334, subdivision (e) as:

[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.

The Board in interpreting the first test of section 334(e) has consistently not required a showing of actual intent and knowledge to do harm to support classifying a violation as willful. (*PCL Civil Constructors, Inc.*, OSHAB 93-2373, Decision After Reconsideration (Mar. 4, 1999); *MCM Construction, Inc.*, OSHAB 92-436, Decision After Reconsideration (May 23, 1995).) The appropriate standard of intent to support classifying a violation as willful requires the Division to prove by a preponderance of the evidence that the employer committed a voluntary and volitional, as opposed to inadvertent, act, or, in other words, that the act itself was the desired consequence of the actor's intent, and that the employer was conscious that its act violated a safety order. (*Rick's Electric, Inc. v. California Occupational Safety and Health Appeals Board*, (2000) 80 Cal. App. 4th 1023, 1037.)

Employer contends that it did not know that having its employees working on the roof without fall protection was a violation, further contending that no industry participant uses fall protection when there is a parapet wall. Leaving aside the question of the credibility of those assertions, and the principle that ignorance of the law is not an excuse, at a minimum Employer has violated the second test of "willful" in section 334, subdivision (e). Employer cannot be unaware that working from or on a roof is hazardous, and

it admitted that it furnished no fall protection to its employees for the work at issue, thus Employer made no effort to eliminate a known hazard. The second test of “willful” was thus satisfied.

The further failing of this petition is that it appears to be a case of after-the-fact regret over the bargain struck with the Division. The Board has declined to grant reconsideration when a party to a settlement has second thoughts about the settlement. (*Paul Davis Restoration of San Diego Inc.*, Cal/OSHA App. 14-3848, Denial of Petition for Reconsideration (Jun. 29, 2015).) If Employer wished to dispute the willful classification of Citation 2 the time to have done so was before agreeing to the settlement, either by declining the settlement offered and negotiating further or by litigating the issue before the ALJ.

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: SEP 21, 2015