

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

In the Matter of the Appeal of:

UNITED BARK PRODUCTS INC.  
3717 Old Highway 99 West  
Orland, CA 95407

Employer

Docket. 12-R2D3-3252

**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 Gilberto Acevez (Third Party).

**JURISDICTION**

Commencing on August 8, 2012, the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer, United Bark Products, Inc.

On October 11, 2012, the Division issued a citation to Employer alleging a violation of occupational safety and health standards codified in California Code of Regulations, Title 8.<sup>1</sup>

Employer timely appealed.

Gilberto Acevez, the employee of Employer involved in the incident giving rise to the citation, moved for and was granted party status in the proceeding.

After Employer's appeal was filed administrative proceedings were held before an Administrative Law Judge (ALJ) of the Board. Third Party participated in those proceedings after becoming a party to the action.

Employer and the Division stipulated to a resolution of the matter, and on September 10, 2014 the ALJ issued her Order (Order) which embodied the terms of that stipulation.

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

Third Party timely filed a petition for reconsideration of the Order with the Board

Employer timely filed an answer to the petition.

The Division did not answer the petition.

### **ISSUE**

Was it correct for the ALJ to issue the Order in view of Third Party's objections to the stipulation?

### **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.

Third Party's petition maintains that the Order was issued in excess of the ALJ's authority, the evidence does not justify the findings of fact, the findings of fact do not support the Order, and the Third Party's due process rights were violated by not allowing a finding of facts to either support or reject the stipulation.

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 Order was based on a preponderance of the evidence in the record as a whole and appropriate under the circumstances.

We note that violation of one's due process rights is not among the grounds for reconsideration listed in Labor Code section 6617, but for present purposes we will assume without so holding that it is subsumed within the scope of section 6617, subdivision (a).

Third Party participated in the negotiations which led to the stipulation between the Division and Employer, and made its opposition and alternative view of the facts known. Nonetheless, the Division exercised its prosecutorial discretion to settle the matter on the basis submitted to the ALJ. When the affected employee, here Third Party, has had the opportunity to participate and provide his views in the settlement discussions, the Board has reasoned that the employee may not by objection prevent the Division and the cited employer from settling. (*Westech Industries, Inc.*, Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012), citing *California State Department of Forestry*, Cal/OSHA App. 85-1378, Denial of Petition for Reconsideration (Aug. 28, 1986).)

The petition states that the Division and Employer “were put on notice of witnesses that were willing to testify” to facts contradicting information in declarations Employer had provided to the Division. Obviously this means the Division was on notice that different points of view existed and nonetheless elected to settle. It is presumed the Division appropriately considered the evidence both in support of its citation as originally issued and in favor of other interpretations of the facts. (See Evidence Code § 664.)

And, even assuming Third Party’s alternative representations were true, the Division, as a [civil] prosecuting authority has “the sole discretion to determine whom to charge with public offenses and what charges to bring.” (*People v. Birks* (1998) 19 Cal.4th 108, 134.) Such “authority is founded, among other things, on the principle of separation of powers[.]” (*Id.*) (Citations omitted from both quotes.)

The enforcement agency’s discretion to drop or settle a case has been upheld by the courts consistently, although there is academic disagreement about whether such decisions are absolutely unreviewable. (*Chao v. Occupational Safety and Health Review Comm.* (2007) 480 F.3d 320, 324; *Couch v. Sec. of Labor* (1999) 1999 US App. Lexis 32690; *Chao v. Symms Fruit Ranch, Inc.* (2001) 242 F.3d 894.) In *Symms Fruit Ranch, supra*, the federal Ninth Circuit Court of Appeals stated: “We read *Cuyahoga* [*Valley Ry. v. United Transp. Union*, (1985) 474 U.S. 3 (*per curiam*)] as holding that the Secretary [of Labor], like a prosecutor or any civil plaintiff, can decide to drop her claim or dismiss her suit. The case is consistent with the unremarkable general proposition that if a plaintiff no longer wishes to prosecute a case, the court cannot require him to continue. *Cuyahoga* strikes us as analogous to the storied IBM antitrust case, where the government decided it wanted to drop the case, and had some trouble persuading the district court that the case was over. See *In re Int’l Bus. Machs. Corp.*, 687 F.2d 591 (2d Cir. 1982).”

In other matters we have also reasoned that absent fraud, misrepresentation, or violation of law we must respect the Division’s

prosecutorial discretion to pursue or settle its cases. (*Westech Industries, supra.*) We follow that reasoning here.

**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: NOVEMBER 24, 2014