BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection Number
SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT **300 Lakeside Drive** **Oakland, CA 94612** **Employer**	**1531603** **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 the California Division of Occupational Safety and Health (Division).

JURISDICTION

On October 21, 2021, the Division issued two citations to the San Francisco Bay Area Rapid Transit District (BART or Employer) alleging two violations of California Code of Regulations, title 8.[1] Citation 1, Item 1 alleged a Serious violation of section 3203, subdivisions (a)(4) and (a)(6) [Injury and Illness Prevention Program (IIPP) – failure to identify, evaluate and correct workplace hazard]; Citation 2, Item 1 alleged a Serious violation of section 3203, subdivision (a)(7) [IIPP – failure to train employees regarding workplace hazard].

Employer timely appealed. Administrative proceedings were held including a contested evidentiary hearing before an administrative law judge (ALJ) of the Board. On June 19, 2026, the ALJ issued a decision (Decision) granting Employer's appeals of the two citations. The Division timely petitioned for reconsideration and Employer filed an answer.

ISSUE

Was the ALJ correct in granting Employer's appeal of the citations?

FINDINGS OF FACT

1. Employer's Injury and Illness Prevention Program (IIPP) includes procedures for identifying and evaluating hazards and for correcting unsafe conditions.
2. Power washing train platforms during revenue hours is not a new process or procedure for Employer.
3. Employer provided training and instruction to employees under its IIPP.
4. Employer operates a rail transit system in the greater San Francisco Bay Area.

[1] Unless otherwise specified, all references are to California Code of Regulations, title 8.

5. The event at issue occurred at about 10:50 a.m. on April 21, 2021.
6. April 21, 2021, occurred during the COVID-19 pandemic.
7. Ridership on BART was greatly reduced during the pandemic.
8. 10:50 a.m. is a non-commute time on the BART system.
9. At the time of the accident at issue there were few BART patrons on the San Bruno station platform.

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

The Board has fully reviewed the record in this case, including the arguments presented in the petition for reconsideration and the answer. We have taken no new evidence.

BART calls the time its trains carry paying patrons [roughly 5 a.m. to midnight] "revenue hours." Peak hours or commute hours are the morning and evening rush hours, when patron traffic is heaviest. As noted above, the accident at issue occurred during a non-commute time.

The record shows that two BART System Service Workers were engaged in power washing the San Bruno station platform, i.e. the portion of the station where trains arrive and depart and where passengers get on and off the trains. Because of both the time of day and significantly reduced ridership due to the COVID-19 pandemic, there were few BART patrons on the platform at the time.

The two workers performing the cleaning were Josh Brown (Brown) and Heather Oliver (Oliver). They were using an industrial power washer known as a HOTSY.[2] Brown was operating the HOTSY as he had extensive experience using it; Oliver was receiving on-the-job training on using the HOTSY at the time of the accident. Brown and Oliver had used a HOTSY together to wash stairs at BART stations for a couple of days prior to the day of the accident. At the time in question, Oliver's role in the operation was to monitor the water hose and electric cord connected to the HOTSY to keep them untangled and clear of the trains and tracks.

Brown was washing the platform from its center, that is, he was well away from the platform edges where the trains entered and departed the station. While he was doing so the hose or electric cord moved into the track area on one side the platform. An arriving train caught the hose or cord and dragged it, the HOTSY, and Brown, along the platform. That accident led to the Division's investigation and citation of Employer.

We address each citation below.

Citation 1.

Citation 1 alleged that Employer had failed to comply with the requirements of section 3203, subdivisions (a)(4) and (a)(6) which provide:

[2] It appears from the record that the HOTSY used an electric motor or pump to pressurize water, and a diesel-fueled heater to heat the water to make it more effective in cleaning surfaces. The water was supplied through a hose connected to a spigot at the station. An electric cord connected to an outlet supplied electricity.

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

[. . .]

(4) Include procedures for identifying and evaluating workplace hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:

(A) When the Program is first established;

Exception: Those employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with previously existing section 3203.

(B) Whenever new substances, processes, procedures, or equipment are introduced to the workplace that represent a new occupational safety and health hazard; and

(C) Whenever the employer is made aware of a new or previously unrecognized hazard.

[. . .]

(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.

The Decision analyzed the alleged violations of subdivisions (a)(4) and (a)(6) separately, as shall we.

Section 3203, subdivision (a)(4).

As seen in the quotation above, Section 3203, subdivision (a)(4), requires Employer to identify and evaluate hazards involved in power washing station platforms. The evidence established that Employer had recognized and evaluated the hazards involved and trained its employees, including Brown and Oliver, accordingly. For example, BART's platform safety training module and other trainings addressed the hazards associated with the electrified third rail. Oliver testified that she was familiar with the hazards associated with cleaning stations during revenue hours. Employer's witnesses' testimony established, in essence, that Employer had complied with Section 3203, subdivision (a)(4). The evidence the Division offered in its attempt to prove the violation was, in constrast, based on inadmissible hearsay. We therefore agree with the ALJ that the Division did not meet its burden of proof. (Decision, p. 5.)

Section 3203, subdivision (a)(6).

Section 3203, subdivision (a)(6) requires employers to include means of correcting hazards in a timely manner. Employer's IIPP, which the Division introduced into evidence, contains provisions which comply with that requirement. The Division's theory was that Employer failed to implement the IIPP, relying on Board precedent holding that an IIPP may be in compliance as written but not acted upon or implemented. (*National Distribution Center, LP, Tri-State Staffing*, Cal/OSHA App.12-0391, Decision After Reconsideration (Oct. 5, 2015).) The Division also argued that Employer failed to inspect the HOTSY prior to its use. The ALJ held that there was no reliable evidence proving that the inspections were not performed, and that even if it were assumed there were no inspections, there was no demonstrated connection between the assumed failure to inspect and Employer's hazard detection and corrections procedures. We agree that the Division's evdience was insufficient. The Division did not present any evidence showing how Employer failed to comply. In contrast, Employer offered testimony showing that it established and utilized procedures for directing information about hazards to the appropriate departments within BART for correction, including the hazards associated with power washing on platforms. (See, Decision, pp. 6, 7.)

Citation 2.

Citation 2, Item 1, alleges that Employer violated section 3203, subdivision (a)(7), by failing to provide training and instruction to its employees. Section 3203, subdivision (a)(7), provides:

> (a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:
> [. . .]
> (7) Provide training and instruction:
> (A) When the program is first established;
> Exception: Employers having in place on July 1, 1991, a written Injury and Illness Prevention Program complying with the previously existing Accident Prevention Program in Section 3203.
> (B) To all new employees;
> (C) To all employees given new job assignments for which training has not previously been received;
> (D) Whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard;
> (E) Whenever the employer is made aware of a new or previously unrecognized hazard; and,
> (F) For supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

The Division alleged that Employer failed to train Brown and Oliver on using the HOTSY.

Testimony established that Brown was trained on using the HOTSY. The evidence also established that both Brown and Oliver had received training on cleaning stations, training which included avoiding the trackways, being aware of trains coming into stations, the presence of patrons, and emergency procedures. Further, Oliver and Brown had prviously worked together using a HOTSY to clean stairs at stations as part of Oliver's HOTSY training, and the safety order does not prohibit the on-the-job training Oliver was engaged in at the time of the accident. As the Decision found, the evidence shows that Brown and Oliver were trained, leading to the conclusion that section 3203, subdivision (a)(6) was not violated. (Decision, p. 7.) We agree.

Division's Petition for Reconsideration.

The Division's Petition for Reconsideration (Petition) argues that the evidence does not justify the following findings: that power washing during revenue hours is not a new process and that BART employees were trained. In sum the Petition argues that the facts do not support the ALJ's decision to vacate both citations. (Petition, p. 2.) But the record shows that station cleaning during revenue hours was not new and that the employees were properly trained. The record does support the Decision.

The Petition makes several assertions not supported by the record. For example, the Petition argues that a watchperson is required when work is done near the platform edge. (Petition, p. 3.) While that may be true in the abstract, because Brown was working from the center of the platform and did not approach its edges, the watchperson requirements did not apply in this instance. Also, contrary to the argument in the Petition that BART's platform safety training did not cover the dangers associated with the electrified third rail (Petition, p. 4), the evidence showed that BART's training does address that hazard. Oliver, one of the Division's two witnesses, testified she was familiar with those hazards and received training on them.

Other points raised in the Petition rely on uncorroborated hearsay testimony of the Division's Inspector and Oliver. For example, Oliver testified, based on what she said other System Service Workers told her, that power washing platforms should only occur during graveyard shift. Another example was the assertion, based on hearsay, that Brown was not trained in using the power washer. Board regulation section 376.2 states, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The hearsay evidence the Division seeks to rely on does not supplement or explain other evidence and would not be admissible over Employer's timely objection in a civil action. Further, some of the hearsay evidence offered by the Division's inspector involved his interviews with Brown. The Division could have called Brown to testify, as it did Oliver, and did not. When a party who has the power to produce stronger and more satisfactory evidence instead offers weaker evidence, the weaker evidence should be viewed with distrust. (Evid. Code § 412; *Clark Pacific Precast, LLC, et al*., Cal/OSHA App. 08-0027, Denial of Petition for Reconsideration (July 26, 2010).)

The Division's assertion that the cited employer must offer substantial evidence contradicting the Division's case is misplaced. (Petition, p. 10.) That rule applies when the Division has met its initial burden of proof and therefore shifts the burden to offer contrary substantial evidence to the cited employer. (*Shea Kenny JV*, Cal/OSHA App. 07-3218, Denial of Petition for Reconsideration (June 24, 2008); *BHC Fremont Hospital, Inc*., Cal/OSHA App. 13-0204, Denial of Petition for Reconsideration (May 30, 2014).) In any event, the issue here is whether there is proof by a preponderance of the evidence that the alleged violations occurred. (*Howard J. White, Inc., Howard J. White Construction, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) Here the Division did not make a prima facie case.

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

/s/ Ed Lowry, Chairman
/s/ Judith S. Freyman, Board Member
/s/ Marvin Kropke, Board Member

FILED ON: 09/21/2026