BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: COAST WASTE MANAGEMENT, INC. 830 Blue Water Road Carlsbad, CA 92008 Employer	Dockets No. 11-R3D2-2385 and 2386 **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 by Coast Waste Management, Inc. (Employer) under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on March 21, 2011, the Division conducted an accident inspection at 803 Blue Water Road, Carlsbad, California (the site). On September 12, 2011, the Division issued two citations to Employer alleging violations of workplace safety and health standards codified in California Code of Regulations, Title 8, and proposing civil penalties.[1]

Citation 1 alleges a general violation of section 3203, subsection (a) [failure to implement IIPP]. Citation 2 alleges a willful, accident-related, and serious violation of section 3702, subsection (q) [use of a chain or cable across entrance/exit of transit vehicle in lieu of door]].

Employer filed timely appeals of the citations.

Administrative proceedings were held, including a contested evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a Decision on February 5, 2016. The Decision affirmed the Division's citations.

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

The Employer timely filed a petition for reconsideration of the ALJ's Decision. The Division filed an answer to the Employer's petition.

ISSUES

1. Has the Division established that Employer failed to meet the requirements of section 3203, subsection (a), by not effectively implementing the four required sections of the regulation?

2. Did the Division demonstrate the applicability of section 3702, subsection (q) to the alleged violative condition by a preponderance of the evidence?

FINDINGS OF FACT

1. Coast Waste Management, Inc. employee Pablo Virgin Hernandez was killed in an accident at or near 803 Blue Water Road, Carlsbad, California 92008 on March 21, 2011.

2. At the time of the accident, Hernandez was operating a 1998 Volvo Trash Disposal vehicle; it was a 'Dual/Right Side Truck'. Hernandez was operating the vehicle via the right side controls.

3. The cause of death was crushing injuries as a result of being run over by the 1998 Volvo Trash Disposal vehicle.

4. Hernandez was engaged in what is called stop-to-stop, residential trash collection at the time of the accident.

5. At the time of the accident, the work practice of Employer was to not require using the safety chain when drivers were in secondary position—the collection mode.

DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed the Employer's petition for reconsideration, and considered the Division's answer to it.

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.

The Employer petitioned for reconsideration on the basis of Labor Code sections 6617, subsections (a), (c) and (e).[2]

Has the Division established that Employer failed to meet the requirements of section 3203, subsection (a), by not effectively implementing the four required sections of the regulation?

Citation 1 alleges a violation of section 3203, subsection (a), for failure to implement the Employer's Illness and Injury Prevention Program (IIPP). The alleged violative description is as follows:

> On March 21, 2011 an employee belonging to Waste Management was fatally injured when he was run over by the VOLVO trash collection vehicle he was operating. As a result of the accident investigation Cal/OSHA determined that the employer failed to meet the requirements of the regulation 3203(a) by not effectively implementing four required sections of the regulation.

The Citation also includes language from section 3203, subsections (a)(2), (a)(4)(C), (a)(6), and (a)(7). (Decision, p. 4-5.) We will address the four sections in turn.

Section 3203, subsection (a)(2)

Section 3203, subsection (a)(2) requires every employer to have a system in place for "ensuring that employees comply with safe and healthy work practices." (*Marine Terminals Corp. dba Evergreen Terminals*, Cal/OSHA App. 09-1920, Decision After Reconsideration (Mar. 5, 2013).) As cited by the ALJ, in *Marine Terminals Corp.*, *supra*, the Board explained that section 3203 subsection (a)(2) describes

> [F]our methods that can be used by an employer to ensure that its employees comply with safe work practices: recognition of employees, training and retraining programs, disciplinary actions, or any other

[2] Employer also argues in its Petition for Reconsideration that the Decision was not rendered within 30 days after the case was submitted, "as required by Labor Code section 6608." However, the Board has consistently held the time period stated in Labor Code section 6608 for issuing a decision is directory, not mandatory. (*Treasure Island Media, Inc.*, Cal/OSHA App. 10-1093 through 1095, Decision After Reconsideration (Aug. 13, 2015); *CA Prison Industry Authority*, Cal/OSHA App. 08-3426, Denial of Petition for Reconsideration (Nov. 08, 2013) citing *California Correctional Peace Officers' Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1145; *Irby Construction*, Cal/OSHA App. 03-2728, Decision After Reconsideration (Jun. 08, 2007).)

> such means that ensures compliance. The listed methods are written with the disjunctive 'or,' and the final method allows for, 'any other such means that ensures compliance,' indicating that any one (or more) of the previous three methods are sufficient to ensure compliance.

In order to show a violation of subsection (a)(2), the Division must demonstrate that the Employer had violated one of the listed methods, and to rebut the Division's showing, the Employer may show compliance by establishing it had implemented any one of the four listed methods. The ALJ found, and we agree, that the Employer has demonstrated compliance with at least one of the four listed methods. Employer has a robust IIPP, and also shown that it has a system of health and safety training and retraining, a working disciplinary program, and means of recognition for employees who comply with good safety practices. As the ALJ stated, "The Division has not established that Employer failed to comply with any of the methods described in section 3203, subdivision (a)(2), and Employer has shown compliance with at least one of the listed methods." (Decision, p. 11.)

Section 3203, subsection (a)(4)(C)

Section 3203, subsection (a)(4)(C) requires the Employer to:

> (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards:
> […]
> (C) Whenever the employer is made aware of a new or previously unrecognized hazard.

In this instance, the Division alleges that the Employer failed to identify and evaluate a workplace hazard—specifically, the hazard associated with failure to use a vehicle safety chain when engaged in right side stop-to-stop trash collection. The Division's inspector testified that there was confusion regarding terminology, and some managers and employees could not identify the difference between a safety restraint system and a safety chain. While this appears to be true, testimony from several management officials, including William Martin (Martin), Senior Director of Safety Operations for Waste Management, Kenneth Ryan (Ryan), Division Manager for Waste Management, and Stella Lopez (Lopez), former Environmental Health and Safety Director and VPP Coordinator, also establishes that Employer had identified the hazard of stop-to-stop trash collection, and had promulgated a rule in its safety program designed to address the hazard. This rule was in effect during the period that Employer was engaged in soliciting feedback on its safety program from both employees and outside entities. Employer took part in several voluntary

inspections as part of Employer's application for the VPP program, and made changes as a result of feedback it received. Employer also hired outside safety consultants to review its facility, and had experts ride along with collection drivers. According to testimony, no employee or outside safety expert identified the Employer's safety chain policy as inadequate. Employer believed that it had identified the hazard, and created a policy that effectively mitigated the hazard to drivers. While the Division may dispute this, Employer's conclusion was not unreasonable, given these unusual circumstances and the efforts Employer had put forth to improve its program and solicit expert advice. No section 3203, subsection (a)(4)(C) violation is found.

Section 3203, subsection (a)(6)

The Division also alleges a section 3203, subsection (a)(6) violation, for failure to implement appropriate methods and/or procedures to correct unsafe or unhealthy conditions in the workplace. (*National Distribution Center, LP/Tri-State Staffing*, Cal/OSHA App. 12-0391, Decision After Reconsideration (Oct. 5, 2015).) In this instance, the Division alleges that while Employer had a rule in its IIPP regarding the use of the safety chains, it did not effectively implement that method or procedure to correct the unsafe condition.

For its part, Employer argues that the Division is incorrectly interpreting the Employer's safety rules. The two rules at issue are 18.1 "Dual Drive Operating Requirements" and 18.4 "Restraint Systems", as found in the Employer's Health and Safety Rule Book. (Ex. 11.) Employer's rule 18.4 states "Ensure restraint system is working properly before leaving the yard. Always use the restraint system provided (bar and safety chains) when driving from the right-side position." According to the Division, this rule was not enforced, as employees routinely did not use the safety chain. However, Employer counters that right-side operation is only allowed when the driver is traveling distances of one-fourth a mile or less between stops (residential 'stop-to-stop' trash collection) and at speeds of 20 miles an hour or less. (See, Ex. 11, rule 18.1.) The Employer refers to this status as "operating". It describes any other status as "driving", and contends that all "driving" is prohibited from the right side, meaning that rule 18.4 is overridden by 18.1.

Martin conceded that the two rules could be confusing, as terms are not defined in rules 18.1 and 18.4, but credibly testified that in the industry, there is a difference between "operating" and "driving", and that the Employer reads and enforces the rules with those definitions in mind. The Division provided no witness or other evidence to rebut the Employer's testimony regarding the terms used in the rule book. Employees understood that during stop-to-stop collection, trash trucks with right side controls were not to be operated at a speed higher than 20 miles per hour, or driven for distances greater than one-fourth a mile. Employer made no error in its implementation of its own IIPP, but created and interpreted a rule that it believed to be sufficient to correct the hazards of stop-to-stop trash collection. The Division has failed to demonstrate a violation of this subsection.

Section 3203, subsection (a)(7)

Finally, the Division alleges a section 3203, subsection (a)(7), failure to implement the training and instruction provisions of Employer's IIPP regarding a new assignment, new substances, processes or procedures constituting a new hazard, or a previously unrecognized hazard. Hernandez, the employee who was killed in the accident at issue, was a nine-year veteran of Coast Waste, and no evidence presented by either party suggests that either the work assignment or procedures were changed, or were at all new to him. As the ALJ found, it is the purpose of section 3203 subsection (a)(7) to provide employees with training and skills that will enable them to understand and avoid any potential hazards that may arise in a new work assignment. (*Kelly Global Services*, Cal/OSHA App. 12-0012, Decision After Reconsideration (Sep. 4, 2014).) The Division did not establish that the hazards of this assignment were new, or previously unrecognized by the Employer.

As the Division failed to establish a lack of compliance with any of the four cited sections of section 3203, subdivision (a), no violation is found. Citation 1 is vacated.

Did the Division demonstrate the applicability of section 3702, subsection (q) to the alleged violative condition by a preponderance of the evidence?

The Division cited Employer for a serious, accident-related and willful violation of section 3702, subsection (q)—failure to use the chain at the door opening of the truck. The cited section states, "Where chains or cables are used in lieu of doors on regular means of entrance or exit, the chains or cables shall be securely attached on each side of opening[.]" (Section 3702, subsection (q).) The ALJ found the cited section applicable to the Employer and a violation of the safety order was established.

To establish a violation of the safety order, the Division must demonstrate the applicability of the safety order to the facts of the case. (*Dish Network California Service Corporation*, Cal/OSHA App. 12-0455 (Aug. 28, 2014); *C.A. Rasmussen*, Cal/OSHA App. 95-943, Decision After Reconsideration (Aug. 26, 1997).) In determining applicability of a safety order, the Board applies the principles of statutory construction to determine intent of the regulation's drafters.[3] If the language of the regulation is unambiguous, the plain meaning of the language controls because it is presumed "the legislature meant what it said." (*Dish Network, supra; Michels Corp, dba Miches Pipeline Construction,* Cal/App. 07-4274, Denial of Petition for Reconsideration (Jul. 20,

[3] The parties in the instant case introduced numerous witness testimonies regarding the meaning of a particular section of a safety order or regulation. However, it is a well-established principle that an expert witness may not testify on interpretation of a statute. (*California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 67; *Communication Satellite Corp. v. Franchise Tax Bd.* (1984) 156 Cal. App. 3d 726, 747; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal. App. 3d 650, 664.) We would advise the parties and the ALJ to consider the relevance and utility of lengthy opinion testimony on legal issues reserved for the ALJ to decide, particularly when that testimony becomes cumulative as it did here.

2012).) Furthermore, plain meaning of the statute must be assessed in light of the statutory scheme as a whole. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1333; *Blythe v. Ayres* (1892) 96 Cal. 532, 557.)

Based on the title of section 3702—Transporting Employees—Employer argues the Division's application of section 3702, subsection (q) ignores the title of the regulation. (Petition, p. 12.) However, it is a general rule of statutory construction that title of a regulation may not be used for interpreting the meaning of the regulation. (*Central Coast Pipeline Construction Company, Inc.,* Cal/OSHA App. 76-1342, 1343, Grant of Petition for Reconsideration and Decision After Reconsideration (Jul. 16, 1980).) Legislative intent must be assessed according to the language of the whole regulation. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 18; *Cal. State Psychological Ass'n v. County of San Diego* (1983) 148 Cal.App.3d 849, 855 [holding "legislative intent should be gathered from the whole statute or act rather than from isolated parts or words."].)

Looking at the statute as a whole, the language used in many subsections of section 3702 include either 'for transportation of employees' or 'passenger' to signal the intent to apply the regulation to vehicles that are primarily used for transporting workers or passengers. (section 3702, subsections (a) through (m), (p), and (r).) Although subsection (q) does not contain words such as 'transportation' or 'passenger', we do not read the subsection on its own; instead, we read subsection (q) in context with the other subsections. As mentioned above, the majority of the subsections apply to vehicles that are used primarily for transporting workers or employees. Therefore, subsection (q) is deemed to apply to vehicles intended for transporting employees as well. Thus, reading the statute as a whole, the safety order on its face does not apply to the facts of this case and the Division has failed to meet its initial burden to show section 3702, subsection (q) applies to the instant case.

In addition to the inapplicability of the safety order, Employer raises another affirmative defense. Although the Board has reached the conclusion that the safety order was not applicable to the facts of the instant case, we will still address the Employer's second defense as another basis to demonstrate inapplicability of section 3702, subsection (q). Employer argues a more specific safety order applies to the instant case—General Industry Safety Orders Articles 60 and 61. (Petition p. 12.) The Board will find a specific safety order is controlling where there is an actual conflict between the two safety orders. (*Devcon Construction, Inc.,* Cal/OSHA App. 09-3398, Denial of Petition for Reconsideration (February 16, 2012), *Cabrillo Economic Development Corp.,* Cal/OSHA App. 11-3185, Decision After Reconsideration and Remand (October 16, 2014).) If the two safety orders can be harmonized with one another, the Board will reject the defense and read the standards in this way. (*Pacific Gas and Electric Company,* Cal/OSHA App. 82-1102 through 1104, Decision After Reconsideration (December 24, 1983).) This defense does not alleviate the

Division's burden of proving the cited safety order applies to the condition(s) established by evidence. (*Devcon Construction, supra*.)

Employer asserted that refuse and trash collection equipment is regulated by Articles 60 and 61 and Employer specifically complied with section 4355. At the time of this incident, section 4354 did not include subsections (i) and (j), which address the specific hazard at issue in the instant case. The amended regulation requires using safety chain(s) while driving at the secondary position; however, such a requirement was not in place at the time this incident occurred. (Section 4352, subsection (i)(4).) We conclude that at the time of this incident, a 'gap' in the safety orders existed, which has since been filled with the above-referenced safety order. Thus, according to the pre-amended safety order, Employer did not have to require using the safety chain while its drivers were on secondary position. Such an act was not out of compliance with any applicable safety order at the time of the accident. No violation is found. Citation 2 is vacated.

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: October 7, 2016