BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:	Inspection No.
SANTA BARBARA CENTER FOR THE PERFORMING ARTS, INC. dba GRANADA THEATRE **1214 State Street** **Santa Barbara, CA 93101** **Employer**	**1311884** **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 Santa Barbara Center for the Performing Arts, Inc. dba Granada Theatre (Employer).

JURISDICTION

Employer is a non-profit organization engaged in theatrical productions. Following an accident investigation at Employer's worksite in Santa Barbara, California, the Division of Occupational Safety and Health (Division) issued Employer four citations alleging violations of California Code of Regulations, title 8[1]. Employer timely appealed.

Employer entered into settlement negotiations with the Division. Paul K. Wilcox, of Mullen & Henzell LLP, represented Employer. Melissa Viramontes, Staff Counsel, represented the Division. On April 8, 2022, Employer accepted a settlement offer from the Division. Administrative Law Judge (ALJ) for the Board Reeah Yoo Avelar issued a Settlement Order (Order) on April 11, 2022.

Employer filed a Petition for Reconsideration (Petition), moving to rescind the Order, on May 11, 2022. The Division did not file a response.

ISSUES

1. Did the ALJ act without or in excess of the Board's authority in issuing the Order?

2. Did Employer enter into the Order on the basis of misrepresentation or mutual mistake of fact?

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

3. Is rescission of the Order proper under California's contract laws?

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. 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 have taken no new evidence.

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.

DISCUSSION

Factual Background:

On January 9, 2018, an employee was seriously injured when a piece of heavy equipment was struck by a moving stage lift platform at Employer's work site, causing the equipment to tip over onto the employee. Following its inspection, the Division cited Employer for failure to implement and maintain an effective Injury and Illness Prevention Program (IIPP); failure to protect employees from falling objects below elevated working areas; failure to protect employees from a shear hazard around a stage lift platform installed in a pit; and failure to guard a permanently installed stage lift to prevent transported material from striking either the moving machinery parts or employees in their work areas.

Employer, represented by Mr. Wilcox, entered into settlement negotiations with the Division. Employer proposed the following settlement terms, with penalties to be reduced in accordance with the reductions in classification:

- Citation 1: Reduce from General citation to notice in lieu of citation;
- Citation 2: Reduce classification from Serious to General;
- Citation 3: Reduce classification from Serious to General;
- Citation 4: Withdraw citation.

A status conference was set for May 23, 2022. Upon receiving notice of the conference, on April 5, 2022, Mr. Wilcox emailed the Division's representative, Ms. Viramontes, stating that Employer would be willing to accept a reduction in the classification of Citation 4 from "Serious, Accident-Related" to "Serious," and "general citations on the others." (Petition, p. 2.) Ms. Viramontes responded by email on April 7, 2022, and attached the following chart containing the Division's proposed settlement terms.

Cit No,	T8CCR	Class	Penaltv	ER offer	Div. counter
1-1	3203(a)(5)	General	$110	Notice in lieu of citation.	**Affirm.** **$110**
2-1	3273(e)(1)	Serious	$8,100	Reduce to General and reduce Penalty.	**Affirm.** **$8,100**
3-1	3273(j)	Serious	$10,125	Reduce to General and reduce Penalty.	**Affirm.** **$10,125**
4-1	3273 (h)	Serious Accident-related-	$22,500	Withdraw Citation.	**Reduce to General,** **$560**
TOTAL			**$40,835**	$Unkown. [sic]	**$18,895**

Employer's Executive Director and President, Caren Rager, and Mr. Wilcox reviewed these proposed terms, and concluded that, by using the word "Affirm," in column six, titled "Div. Counter," "Ms. Viramontes was affirming (i.e., agreeing to) [Employer's] proposed reductions in severity with respect to" Citations 1 through 3. (Petition, p. 3.) Regarding Citation 4, Mr. Wilcox and Employer believed the Division was "counteroffering with a reduction of this citation to a general citation." (*Id*.)

Based on this interpretation, Employer authorized Mr. Wilcox to accept the Division's settlement offer, which Mr. Wilcox did, on April 8, 2022. However, Employer's interpretation was incorrect. By "Affirm," the Division meant that Citations 1 through 3 would be affirmed as issued, with no reduction in classification or penalty. The Order issued on April 11, 2022, reflecting the Division's proposed terms.

Employer's timely Petition followed. Employer states that its counsel mistakenly accepted the settlement offer due to its misunderstanding of the settlement terms. Employer asserts it is entitled to relief on several bases: the ALJ acted outside the Board's authority in issuing the Order (Labor Code section 6617, subdivision (a)); misrepresentation and/or mutual mistake of fact in the

formation of the Order (section 364.2, subdivision (f)); and lack of mutual consent and the doctrine of unilateral mistake under California's contract laws. However, the underlying facts do not support any of the asserted bases upon which relief may be granted.

1. Did the ALJ act without or in excess of the Board's authority in issuing the Order?

Labor Code section 6617 provides that a petition for reconsideration of an ALJ's order or decision may be based upon the grounds that the Board, through the ALJ, "acted without or in excess of its powers." (Lab. Code, § 6617, subd. (a).) Section 350.1 of the Board's regulations further provides that an ALJ has the authority "to approve a stipulation voluntarily entered into by the parties." (§ 350.1, subd. (a).)

Employer asserts that it did not "voluntarily" stipulate to the terms of the Order, because it misunderstood the terms proposed by the Division, and mistakenly believed it was accepting settlement terms other than those the Division had actually offered. Employer argues that because it did not voluntarily accept the Division's actual proposed terms, the ALJ acted without or in excess of the Board's powers in issuing the Order.

Resolving appealed citations by settlement is an authorized exercise of the Division's prosecutorial discretion. (*Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 09-2351, Denial of Petition for Reconsideration (Jun. 1, 2010); *Westech Industries, Inc*., Cal/OSHA App. 08-3717, Denial of Petition for Reconsideration (Oct. 25, 2012).) It is well-established that the Board "will not interfere with the Division's exercise of prosecutorial discretion, except in rare cases involving fraud or misrepresentation or other grounds, such as a violation of Board regulation or public policy." (*Lineage Logistics, LLC*, Cal/OSHA App. 1423464, Denial of Petition for Reconsideration (Dec. 21, 2021); *California State Department of Forestry*, Cal/OSHA App. 85-1378, Order Granting Party Status and Denying Petition for Reconsideration (Aug. 28, 1986).)

Accordingly, the Board has held that a voluntary settlement agreement will not be reconsidered by the Board, absent an allegation of fraud, misrepresentation, or other grounds to void the agreement between the employer and the Division. (*Westech Industries, Inc*., *supra*, Cal/OSHA App. 08-3717.) Furthermore, the Board has held that, "Section 350.1 details the authority of the Board's ALJs and includes an ALJ's ability to accept a stipulation. It does not, and is not intended to, address specifics pertaining to settlement agreements." (*Northern California Paper Recyclers, Inc*., *supra*, Cal/OSHA App. 09-2351.)

Employer does raise allegations of misrepresentation by the Division, which will be addressed below. Preliminarily, however, Employer argues that the settlement agreement was not "voluntary," and thus was outside of the ALJ's power to approve, because Employer thought it was agreeing to terms other than those actually offered by the Division.

The proposed settlement chart set forth the Division's proposed terms, affirming Citations 1 through 3, showing no reduction in penalty. For Citation 4, where the Division agreed to a

reduction in classification and penalty, those terms were also clearly stated. If Mr. Wilcox was uncertain or confused about the terms of the Division's offer, Employer was free to request clarification, or decline the terms. Rather than seeking clarification, Employer voluntarily accepted the terms. Employer does not allege coercion or fraud by the Division. The ALJ thus acted within the Board's authority when she issued the instant Order according to the stipulation into which Employer voluntarily entered.

2. Did Employer enter into the Order on the basis of misrepresentation or mutual mistake of fact?

Section 364.2, subdivision (f) provides the following grounds for reconsideration of a settlement order:

> Within 30 days of the date of the Notice of Acceptance of Settlement Order, any party, intervenor, or obligor aggrieved may file a petition for reconsideration of the Settlement Order on the basis of fraud, misrepresentation, mutual mistake of fact, or undue influence in the formation of the Settlement Order.

Employer argues, first, that the Division's use of the term "Affirm" in the proposed settlement terms for Citations 1 through 3 constituted misrepresentation by the Division; second, that there was a mutual mistake of fact regarding the Division's use of the term "Affirm" as applied to Citations 1 through 3.

A misrepresentation is a false or misleading statement, or a material omission which renders other statements misleading, made with intent to deceive. (See *Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 974.) Here, the evidence shows that the Division did not make any intentionally false or misleading statement intended to induce Employer's assent to the settlement. The Division merely conveyed a settlement offer, which Employer accepted. (*Industrial Masonry, Inc*., Cal/OSHA App. 07-0735, Decision After Reconsideration (Dec. 29, 2011).)

As shown above, the proposed settlement chart set forth the Division's proposed terms affirming the first three citations, showing no reduction in penalty. For the fourth citation, by contrast, where the Division agreed to a reduction in classification and penalty, those terms were clearly stated. This distinction alone should have provided reasonable notice to Employer of the settlement terms.

There is no evidence that the Division intended to deceive Employer. In common legal usage, to "affirm" means "[t]o ratify or confirm a former law or judgment."[2] The Division here used the term in conformity with that meaning, to indicate its intention to confirm its former

[2] The Law Dictionary < https://thelawdictionary.org/affirm/ > (accessed May 17, 2022).

judgment in issuing the citations. The use of the term "Affirm" was not a deliberately false or misleading representation by the Division.

Rather, Employer failed to exercise reasonable diligence in making sure the settlement terms were correctly understood. If he was uncertain or confused by the chart, Mr. Wilcox could, and should, have asked the Division's representative for clarification. He did not. Instead, he accepted the terms and only realized his error after the Order had issued.

Nor was this a mutual mistake of fact; it was Employer's mistake. The Division was not mistaken as to the terms of its counter-offer. A unilateral mistake of fact by an employer is not grounds for rescinding a settlement order under section 364.2. (*Eco-Bay Services*, Cal/OSHA App. 1443556, Denial of Petition for Reconsideration (Apr. 11, 2022).)

The Board has long held that employers must handle their appeals with the degree of care a reasonably prudent person would undertake in the conduct of its most important legal affairs. (*Timothy J. Kock*, Cal/OSHA App. 01-9135. Denial of Petition for Reconsideration (Nov. 20, 2001).) Board precedent further holds that errors made by an employer's representative or attorney in handling an employer's appeal are attributable to the employer. (*Kitagawa & Sons, Inc., dba Golden Acre Farms*, Cal/OSHA App. 03-9446, Decision After Reconsideration (Aug. 27, 2004); *EDCO Waste and Recycling Services, Inc.,* Cal/OSHA App. 12-0163, Denial of Petition for Reconsideration (Mar. 7, 2013).)

Employer's counsel failed to exercise reasonable care in making certain to understand the terms of the Division's settlement offer before accepting it.

3. Is rescission of the Order proper under California's contract laws?

The Board reviews settlement agreements using the same rules of construction that are applied to any contract. (*Vaillette v. Fireman's Fund Ins. Co*. (1993) 18 Cal.App.4th 680, 686; *Lion Raisins*, Cal/OSHA App. 08-2253 Decision After Reconsideration (Nov. 26, 2013).) Thus, Employer "may not avoid the settlement absent proof of fraud, misrepresentation, or other recognized basis for avoiding or rescinding a contract." (*WF Hayward Co*., Cal/OSHA App. 10-2021, Denial of Petition for Reconsideration (Feb. 15, 2012).)

Employer argues that the Order is invalid because all parties did not agree to the terms of the contract; and that the Order is void under the doctrine of unilateral mistake, because the term "Affirm" was deliberately ambiguous, and because enforcement of the Order would be unconscionable.

Is the Order void for lack of mutual consent?

A valid contract requires the consent of all parties to its terms. Civil Code section 1580 provides: "Consent is not mutual, unless the parties all agree upon the same thing in the same

sense." Employer argues that there was no mutual consent here, because Employer and the Division did not "agree upon the same thing." (Petition, p. 6.)

Employer relies upon *Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793 (*Weddington*) in support of its argument. Several factors distinguish that case from the instant matter. In *Weddington*, the parties attempted to conclude a licensing agreement, but failed to agree on material terms. The missing material terms were created by a private judge without the defendant's participation, and a superior court judge then specifically enforced those terms as a judgment, as if the parties had agreed to them. (*Weddington*, *supra*, 60 Cal.App.4th at 818.) The Court of Appeals reversed the trial court, finding that, "The facts clearly show that 'mutual consent' to the 'same thing' never occurred." (*Id.* at 815.)

The Court noted that it was "undisputed that there was no 'writing signed by the parties' setting forth the terms of the licensing agreement." (*Id*. at 819.) Specifically, "the parties never objectively manifested agreement, and certainly not in writing, to such material terms as the scope of the license, permitted uses … etc." (*Id*. at 815.)

The Court further pointed out that, "In order for acceptance of a proposal to result in the formation of a contract, the proposal must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain." (*Id*. at 811.) "If, by contrast, a supposed 'contract' does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract." (*Id*.)

Here, by contrast, the Division presented Employer with a written chart outlining its proposed settlement terms. The Division's proposed terms were specific and definite, and provided Employer with notice of its obligations in the form of proposed penalties for each Citation. Employer agreed to these terms in writing. It was Employer's responsibility to be certain it understood those terms before doing so. Even if one interprets the chart in the light most favorable to Employer's position, the Division's use of "affirm" in column six remains, at most, potentially ambiguous. In other words, Employer could not reasonably construe "affirm" as an unambiguous concession by the Division as to the citations' classifications, and the Division did nothing to encourage such an interpretation. If Employer believed the Division's counter was ambiguous, it could have sought clarification before agreeing to those terms. Employer's failure to make that inquiry does not void the Order for lack of consent.

Is the Order void under the doctrine of unilateral mistake?

Employer next asserts that "the purported agreement underlying the Settlement Order is void under the doctrine of unilateral mistake." (Petition, p. 7.) Employer proposes two arguments in support of this assertion. First, Employer argues that the Division's use of the term "Affirm" in its proposed offer was deliberately ambiguous. Second, Employer argues that enforcement of the Order would be unconscionable.

Was the term "Affirm" deliberately ambiguous as used by the Division?

Employer asserts that the Division deliberately used the ambiguous term "Affirm" in its offer, without explaining the term to Employer. Employer therefore concludes that Employer's mistake as to the settlement terms was the fault of the Division, and the Order must be voided on that basis. (Petition, p. 7.) This argument is without merit.

In a recent case, the Ninth Circuit explained: "California law allows rescission of contract for a unilateral mistake only when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party." (*Wallens v. Milliman Fin. Risk Mgmt. LLC* (9th Cir., 2020) 509 F.Supp.3d 1204, 1212, citing *Brookwood v. Bank of Am.* (1996) 45 Cal.App.4th 1667, 1673-74.) Further, "No law requires that parties dealing at arm's length have a duty to explain to each other the terms of a written contract … Reliance on an alleged misrepresentation is not reasonable when plaintiff could have ascertained the truth through the exercise of reasonable diligence." (*Id*. (internal citations omitted).) These principles apply directly to this matter.

First, Employer failed to exercise reasonable diligence in ascertaining the truth of the Division's terms. As discussed above, to "affirm" is commonly understood to mean "To ratify or confirm a former law or judgment." The Board has held that, "the words of a settlement document are given their plain meaning and the parties' expressed objective intent … governs." (*Primary Steel*, Cal/OSHA App. 04-4105, Denial of Petition for Reconsideration (Mar. 14, 2007).) Where the terms of the settlement are clear and unambiguous, the Board will not disturb the Order. (*Id*.)

Employer interpreted "affirm" to mean the Division's agreement to Employer's proposed terms. This interpretation was objectively less reasonable than the meaning intended by the Division, particularly in light of the chart showing the proposed penalties for each Citation. It was Mr. Wilcox's responsibility to confirm his interpretation was correct.

Second, Employer's claim that the Division deliberately and knowingly used an ambiguous term, based solely on the fact that the Division was aware of the details of Employer's proposed settlement, is without merit. (Petition, p. 7.) There is no evidence that the Division knew Employer had incorrectly interpreted its terms when Employer accepted the Division's offer, or encouraged Employer to do so.

Would enforcement of the order be unconscionable?

Finally, Employer asserts that even if the Division was not aware of Employer's mistaken interpretation, enforcement of the Order would be unconscionable. Employer argues that "it would be unconscionable to hold Employer to a settlement that it did not intend to enter into." (Petition, p. 8.)

Employer here relies upon *Donovan v. RRL Corp*. (2001) 26 Cal.4th 261. In that case, the California Supreme Court set forth a four-part test for rescission of a contract due to unilateral mistake:

> Where the plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the following facts to obtain rescission of the contract: (1) the defendant made a mistake regarding a basic assumption upon which the defendant made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable.

(*Donovan v. RRL Corp*, *supra*, 26 Cal.4th at 282.)

Even if, assuming for argument, Employer was able to establish the first three elements, which is questionable, Employer's argument here fails because it cannot establish the final, crucial, element of unconscionability.

As the California Supreme Court explained in *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, "unconscionability" "refers to 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911 (internal citations omitted).) "The unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as 'overly harsh' or 'unfairly one-sided.'" (*Id*.) At its core, the "unconscionability doctrine is concerned not with 'a simple old-fashioned bad bargain' but with terms that are 'unreasonably favorable to the more powerful party.'" (*Id*.) Finally, because unconscionability is a contract defense, the party asserting the defense bears the burden of proof. (*Id*.)

Employer here had equal bargaining power in its settlement negotiations with the Division. The Order can hardly be said to be "unfairly one-sided" given that Employer was free to accept or reject the Division's terms. It should also be noted that the final penalty as set forth in the Order was $18,895, reduced from $40,835. Employer does not assert financial hardship or present any evidence that payment of this penalty would be "overly harsh." Indeed, Employer does not challenge the penalty amounts set forth in both the Order and the Division's counter. Employer therefore cannot establish that enforcement of the Order would be unconscionable.

DECISION

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

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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

FILED ON: 06/06/2022